NOTE

Bruen Leads to Ruin: Taking Aim at Second Amendment Confusion Through a Principle–Driven Lens

*Elya Nassaj**

ABSTRACT

This Note analyzes the Supreme Court's decisions in New York State Rifle & Pistol Ass'n v. Bruen *and* United States v. Rahimi*, highlighting its problematic reliance on historical analogues to assess firearm regulations under the Second Amendment. Under the* Bruen *framework, firearm regulations are constitutional only if they have a "relevantly similar" historical analogue—meaning the modern regulation must align closely in both purpose and means with a historical law.*

Using the circuit split surrounding the constitutionality of 18 U.S.C. § 922(g)(1) as a vehicle to examine Bruen*'s effectiveness, this Note identifies three core shortcomings of the* Bruen *test: (1) an inconsistent and undefined historical reference point for determining the Second Amendment's scope, (2) inadequate guidance for resolving conflicting historical analogues, and (3) the impractical rigidity of* Bruen's *analogy-based reasoning. In response, this Note proposes a refined analytical framework that (1) establishes 2010, following recent transformative decisions, as the fixed historical benchmark; (2) provides explicit guidelines for weighing conflicting historical evidence; and (3) transitions the test toward a principle-based approach emphasizing historical legislative intent (the "why") over historical method (the "how"). This proposed framework balances constitutional fidelity with contemporary public safety needs, offering courts clear guidance and enhanced consistency in Second Amendment jurisprudence.*

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TABLE OF CONTENTS

INTRODUCTION

Firearms are now the leading cause of death for children and teens in the United States.[1] In 2023, 43,163 people across the nation died from gun-related injuries, a near forty-three percent increase from 2010.[2] Despite

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[1] Jason E. Goldstick, Rebecca M. Cunningham & Patrick M. Carter, *Current Causes of Death in Children and Adolescents in the United States*, 386 NEW ENG. J. MED. 1955, 1955 (2022), https://www.nejm.org/doi/full/10.1056/NEJMc2201761 [https://perma.cc/V6X4-4ZE6].

[2] Kaitlin Washburn, *Nearly 43,000 People Died from Gun Violence in 2023: How to Tell the Story*, ASS'N OF HEALTH CARE JOURNALISTS (Feb. 14, 2024),

widespread public support for modern gun control measures like universal background checks, national red flag laws, mandatory licensing, bans on high-capacity magazines, and sales of semiautomatic weapons,[3] legislatures have faced growing challenges in enacting laws that withstand judicial scrutiny, particularly following the Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*.[4]

Bruen considered the constitutionality of a New York law that limited concealed carry permits to individuals who demonstrated a special need for self-defense.[5] In a six-to-three decision along ideological lines, Justice Thomas, writing for the Court, struck down the law.[6] *Bruen* found that contemporary firearm regulations must be "consistent with this Nation's historical tradition of firearm regulation" to survive constitutional scrutiny.[7] This new "history and tradition" standard means that a modern gun law is only constitutional if a "historical analogue" (i.e., a past law) is sufficiently similar to it in both its purpose and means.[8] Courts[9] and scholars have widely criticized *Bruen* for being too unclear and practically unworkable for lower courts.[10] Specifically, confusion has centered around interpreting "historical analogue[s]"—namely, which historical period courts should reference to

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https://healthjournalism.org/blog/2024/02/nearly-43000-people-died-from-gun-violence-in-2023-how-to-tell-the-story/ [https://perma.cc/ZAM5-WPGY].

3 Laura Santhanam, *Most Americans Support These 4 Types of Gun Legislation*, PBS (Sep. 10, 2019, at 14:02 ET), https://www.pbs.org/newshour/politics/most-americans-support-stricter-gun-laws-new-poll-says [https://perma.cc/7MTL-A7JV]; *Guns*, GALLUP, https://news.gallup.com/poll/1645/guns.aspx [https://perma.cc/DKA9-LM3X] (last visited May 12, 2026).

4 597 U.S. 1 (2022). *See also* Jacob Charles, *By the Numbers: How Disruptive has* Bruen *Been?*, DUKE CTR. FOR FIREARMS L. (Mar. 27, 2023), https://firearmslaw.duke.edu/2023/03/by-the-numbers-how-disruptive-has-bruen-been [https://perma.cc/LV6A-R7WZ] ("[T]he decision has been extremely disruptive, with courts declaring more laws invalid under the Second Amendment in the eight months after *Bruen* than they did in the first few *years* after *Heller*.").

5 *Bruen*, 597 U.S. at 11–12.

6 *Id.* at 7, 11.

7 *Id.* at 17.

8 *See id.* at 26–31; *see also id.* at 111–12 (Breyer, J., dissenting) ("[T]he Court believes that the most relevant metrics of comparison are a regulation's means (how) and ends (why).").

9 *See, e.g.*, State v. Wilson, 543 P.3d 440, 453 (Haw. 2024) ("*Bruen* unravels durable law. . . . [I]t dismantles workable methods to interpret firearms laws."); United States v. Bartucci, 658 F. Supp. 3d 794, 800 (E.D. Cal. 2023) ("*Bruen* does not provide lower courts with clear guidance as to how analogous modern laws must be. . . . [T]his has caused disarray among the lower courts when applying the new framework.").

10 *See, e.g.*, Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 154 (2023) ("Without significant refinement by the courts of appeals and a uniformity among them that seems elusive, *Bruen*'s method will continue proving unworkable in practice.").

find these analogues and what levels of generality (how broadly or narrowly) courts should construe historical evidence against modern or other historical laws.[11]

Subsequent lower court attempts to apply *Bruen*'s test yielded conflicting decisions and further confusion, ultimately leading to the Court's effort to clarify *Bruen* in *United States v. Rahimi*.[12] In *Rahimi*, the Court applied *Bruen*'s test for the first time and determined that prohibiting firearm possession by individuals under domestic violence restraining orders does not violate the Second Amendment.[13] *Rahimi* clarified a few, but not all, points of confusion that *Bruen* created.[14] For example, although the Court provided further guidance on levels of generality, that guidance was ambiguous and left questions about historical periods or conflicting historical laws unresolved.[15] As a result, lower courts remain confused and split on these key issues, leading judges to substitute their own interpretations of the *Bruen* standard in their decision-making.[16]

A circuit split pertaining to the constitutionality of 18 U.S.C. § 922(g)(1) has emerged following *Rahimi* and the questions it left unresolved.[17] Section 922(g)(1) prohibits any felon—including nonviolent offenders—from possessing firearms following a conviction of a crime carrying a sentence of at least one year of imprisonment.[18] This Note does not focus on resolving the current circuit split. Instead, this Note uses the circuit split as a touchstone to demonstrate the shortcomings of *Bruen* and *Rahimi* and to recommend improvements to the test overall. *Bruen* and *Rahimi* are on point

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11 *See id.* at 101–03, 122–137.

12 602 U.S. 680 (2024). *See also id.* at 741, 745 (Jackson, J., concurring) (noting the *Rahimi* majority left countless "unresolved questions" with its decision, but that "[t]hese clarifying efforts are welcome, given the many questions *Bruen* left unanswered.").

13 *See id.* at 684, 698 (majority opinion).

14 *See id.* at 740–46 (Jackson, J. concurring). As a result of the few changes made by *Rahimi*, this Note refers to the test resulting from *Bruen* and modified by *Rahimi* as the *Bruen* test and will distinguish areas that *Rahimi* clarified or on which the Court provided further comment.

15 *See* Jimmy Donlon, Comment, United States v. Rahimi*: "We Do Not Resolve Any of Those Questions Because We Cannot*,*"* 111 VA. L. REV. ONLINE 27, 27–33 (2025) (accounting for many issues *Rahimi* left unresolved or ambiguous).

16 *See id.* at 27, 34–36 (analyzing how judges apply *Bruen* differently in an empirically significant way according to age and the political party of the President that appointed them).

17 *See id.*15 at 34–35; Mike Vilensky, *Federal Ban on Felons Having a Gun Faces Appeals Court Scrutiny*, BLOOMBERG L. (July 23, 2024, at 12:55 PM ET), https://news.bloomberglaw.com/litigation/federal-ban-on-felons-having-a-gun-faces-appeals-court-scrutiny [https://perma.cc/N752-FGVE].

18 The text of the statute states it is "unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. 18 U.S.C. § 922(g)(1).

for § 922(g)(1) challenges because these cases set forth the "historical tradition" standard that courts must apply to all Second Amendment challenges.[19] Consequently, courts across the country have struggled to consistently apply the historical-tradition standard to § 922(g)(1), resulting in conflicting decisions about whether barring nonviolent felons from firearm possession aligns with America's historical tradition of firearm regulation.[20] Thus, the resulting circuit split on § 922(g)(1) is well situated as a case study for highlighting *Bruen* and *Rahimi*'s ineffectiveness and to suggest a novel analytical framework to resolve the historical-tradition test's tension points.

An analysis of the 18 U.S.C. § 922(g)(1) circuit split reveals three primary flaws. First, the *Bruen* test does not identify a consistent historical window for assessing the scope of the Second Amendment; instead, it identifies multiple eras without defining their respective analytical values. Second, the *Bruen* test provides very little guidance for resolving conflicting applications of historical analogues, leaving ambiguous which past laws carry the most weight. Third, the *Bruen* test limits modern legislatures to past remedies because it takes a rigid, or strict, approach to historical analogues that requires modern solutions to be highly similar to past ones to survive judicial scrutiny.

To address these issues, the Court should create a refined analytical framework that sets clear and practical guidelines for lower courts. This Note proposes three such guidelines: *first*, establishing a fixed historical benchmark for understanding the Second Amendment's scope under the Supreme Court's 2010 interpretation; *second*, a structured method for resolving conflicts in historical evidence; and *third*, a shift toward broad principle-based reasoning that focuses on historical analogues with similar legislative intent rather than narrowly requiring nearly identical historical laws that parallel modern ones in both purpose and means.

This Note proceeds in four Parts. Part I provides a historical overview of Second Amendment jurisprudence, beginning with *United States v. Miller*[21] and tracing its evolution through landmark cases such as *District of*

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19 *See Bruen*, 597 U.S. at 16, 25 (holding challenges to the constitutionality of a statute under the Second Amendment are subject to a historical analysis); *see, e.g.*, Range v. Att'y Gen., 124 F.4th 218, 225 (3d Cir. 2024) (finding the historical tradition test on point for its § 922(g)(1) analysis).

20 *Compare Range*, 124 F.4th at 232 enjoining enforcement of the statute as applied) *with* United States v. Jackson, 110 F.4th 1120, 1125 (8th Cir. 2024) (finding the statute constitutional).

21 307 U.S. 174 (1939).

Columbia v. Heller,[22] *McDonald v. City of Chicago*,[23] *New York State Rifle & Pistol Ass'n v. Bruen*, and *United States v. Rahimi*. Part II explores the existing circuit split concerning 18 U.S.C. § 922(g)(1) and analyzes how various courts have inconsistently applied *Bruen*'s history and tradition framework to reach divergent outcomes. Part III identifies the three major shortcomings of *Bruen* as illustrated by the circuit split. Part IV proposes concrete doctrinal solutions designed to enhance clarity and consistency in Second Amendment analysis.

I. SECOND AMENDMENT JURISPRUDENCE AND RELEVANT HISTORY

The Second Amendment to the United States Constitution reads: "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."[24] For much of American history, the precise scope of the Second Amendment remained largely unsettled[25] and unaddressed[26] until *District of Columbia v. Heller*. However, the Court did briefly consider the Second Amendment's meaning and application before the *Heller* decision in *United States v. Miller*.

*A. Pre-*Heller*:* United States v. Miller *Provides Insight on Second Amendment Analysis*

The *Miller* Court held, in relevant part, that the Second Amendment did not protect an individual's right to own all types of firearms, reasoning that a sawed-off shotgun lacked "some reasonable relationship to the preservation or efficiency of a well regulated militia."[27] *Miller* undertook a historical analysis of the Second Amendment, attempting to uncover and apply its meaning and intent, to support its holding.[28] *Miller* arguably found a collectivist intent; the Court reasoned that Second Amendment rights are

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22 554 U.S. 570 (2008).

23 561 U.S. 742 (2010).

24 U.S. CONST. amend. II.

25 DAVE S. SIDHU, CONG. RSCH. SERV., LSB11170, COURTS DISAGREE AS TO WHETHER THE FEDERAL FELON-IN-POSSESSION FIREARM PROHIBITION VIOLATES THE SECOND AMENDMENT 1 (2024).

26 *See* ROBERT J. COTTROL & BRANNON P. DENNING, TO TRUST THE PEOPLE WITH ARMS: THE SUPREME COURT AND THE SECOND AMENDMENT 1–2 (2023) ("Prior to the Court's decision to hear *Heller*, the constitutional provision had only had rather limited contact with the nation's highest court.").

27 United States v. Miller, 307 U.S. 174, 178 (1939) (reasoning that a short-barreled shotgun was not part of the "ordinary military equipment" or that its use would contribute to the "common defense").

28 *See id.* at 178–82.

connected to militia service.[29] The Court, however, fell short of defining specific boundaries or providing a clear test for legal challenges under the Amendment.[30]

Miller's methodology supports this Note's proposed solution of using a principle-driven approach.[31] The *Miller* Court prioritized the purpose (the "why") of the Second Amendment rather than different historical applications or specific methods of firearm regulation (the "how").[32] Additionally, *Miller*'s methodology of resolving constitutional ambiguity by referencing the intent behind the Second Amendment lends credibility to the argument that the Court should also resolve conflicting historical evidence by giving greater weight to legislative purposes rather than specific historical analogues.[33] As *Miller* remains a foundational Second Amendment case, the Court should not overlook or rewrite its jurisprudential significance, but should instead incorporate its prioritization of purpose-driven reasoning into any future modification of the *Bruen* test.[34]

B. Heller *and* McDonald *Depart from* Miller*: Rebirthing Second Amendment Law*

Writing for a five-to-four majority in 2008, Justice Scalia rebirthed the nation's understanding of the Second Amendment in *District of Columbia v. Heller*,[35] striking down a D.C. law prohibiting handguns in the home.[36] Two

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29 *See* COTTROL & DENNING, *supra* note 26, at 80 ("But the *Miller* Court's discussion of the militia indicates that the Court saw a clear relationship between the individual right and the maintenance of the militia."); *cf.* Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U. J.L. & LIBERTY 48, 69–71, 75–82 (2008) (finding that *Miller*'s ultimate viewpoint still remains debated among scholars, but a strong argument remains that it endorsed a collectivist view due to its reliance on militia membership to support its conclusion that some weapons, but not others, are not protected by the Second Amendment).

30 *See Miller*, 307 U.S. at 178 ("The Constitution as originally adopted granted to the Congress power—'To provide for calling forth the Militia to execute the Laws of the Union. . . .' With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. *It must be interpreted and applied with that end in view*." (emphasis added)).

31 *See infra* Part IV.

32 *See supra* notes 27–30 and accompanying text.

33 *See supra* notes 27–30 and accompanying text.

34 *Contra* District of Columbia v. Heller, 554 U.S. 570, 623 (2008) (declining to explicitly overturn *Miller*, *Heller* considers the case useful virtually only for its holding that not all weapons are protected by the Second Amendment); *see id.* at 638 n.2 (Breyer, J., dissenting) (Until 2001, "every Court of Appeals to consider the [Second Amendment] had understood *Miller* to hold that the Second Amendment does not protect the right to possess and use guns for purely private, civilian purposes.").

35 *See* COTTROL & DENNING, *supra* note 26, at 247.

36 *See Heller*, 554 U.S. at 628, 635.

years later, the Court incorporated the Second Amendment against the states in *McDonald v. City of Chicago*.

In *Heller*, the Supreme Court ruled for the first time that the Second Amendment explicitly protects the individual's right to possess and carry firearms, distinct from militia-related service.[37] Justice Scalia found an individual, not collectivist, right to bear arms by performing a textual analysis with an originalist approach.[38] By splitting apart and dissecting the Second Amendment's prefatory clause[39] from its operative clause,[40] Justice Scalia found that the Second Amendment's text and history are the sources of the individual right.[41] Justice Scalia backed using an originalist-textualist analysis to understand the Second Amendment's scope in *Heller* by supporting the analysis with historical findings.[42] This served as the basis for *Heller* replacing the Second Amendment jurisprudential tradition following *Miller* (which assessed Second Amendment challenges through a mostly deferential, reasonableness-based interest-balancing test)[43] with an undefined "historical tradition" evaluation.[44]

Heller's textual analysis is important because it serves as *Bruen*'s backbone since the *Bruen* Court declared it did not create a new test but rather articulated the one already described in *Heller*.[45] However, this is not really the case because *Bruen* effectively set forth a new framework; thus, this unsteady precedential foundation permits the Court to correct *Bruen* in subsequent holdings.[46] *Heller*'s textual analysis supports a principle-driven analytical framework because while the prefatory clause, as interpreted by *Heller*, is merely the Second Amendment's purpose, this purpose and context should not be ignored.[47] Instead, an originalist interpretation would

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37 *See id.* at 581, 595, 635.

38 *See* COTTROL & DENNING, *supra* note 26, at 235 ("Scalia used an originalist methodology to craft his opinion.").

39 *See Heller*, 554 U.S. at 577, 595 (ascertaining the Second Amendment is divided into two clauses, with the prefatory clause reading "[a] well regulated Militia, being necessary to the security of a free State" (quoting U.S. CONST. amend. II) (internal quotations omitted)).

40 *See id.* at 576–77, 579 (ascertaining the Second Amendment's operative clause as "the right of the people to keep and bear Arms, shall not be infringed" (quoting U.S. CONST. amend. II) (internal quotations omitted)).

41 *See id.* at 578–80.

42 *See id.*

43 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 1–4, 8 (2022).

44 *See Heller*, 554 U.S. at 626–34 (noting the Court will not "undertake an exhaustive historical analysis," and proceeding by recognizing some non-exhaustive limitations).

45 *See Bruen*, 597 U.S. 1, 9–15 (2022).

46 *See infra* Part IV.

47 *See Heller*, 554 U.S. at 570, 578 ("The Amendment's prefatory clause announces a purpose . . But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause."). *But see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174

appreciate that the prefatory clause provides insight into what the test for constitutionality ought to be; a test that protects an individual right to bear arms in light of—not in spite of—the purpose enshrined in the Constitution by the Framers.[48]

1. Justice Scalia's Originalist Textual Analysis

Heller's textual analysis begins by emphasizing that the phrase "right of the people," found elsewhere in the Constitution, explicitly protects individual rather than collective rights.[49] Justice Scalia argues that interpreting the Second Amendment solely as a collective militia right contradicts its broader textual application.[50] The Court cites the eighteenth-century definitions of "keep" and "bear,"[51] concluding these words broadly referred to possessing and carrying weapons for self-defense rather than exclusively military purposes.[52]

Crucially, Justice Scalia explicitly dismissed the prefatory clause's relevance beyond its explanatory context.[53] Instead of prioritizing the text, the Court grounded its individual rights reading in various Founding and pre-Founding-era sources—such as state constitutions explicitly protecting an individual right to arms for self-defense and the 1689 English Bill of Rights.[54] Scalia acknowledged that the Framers feared eliminating state militias[55] and recognized certain longstanding firearm restrictions—including historical prohibitions on particular weapons or specific groups—as permissible.[56] However, the Court explicitly declined to define its

(1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect."); Holmes v. Jennison, 39 U.S. 540, 571–72 (1840) ("In expounding the Constitution . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.").

48 *See* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 102–11 (2023) (describing how the kind of originalism used in *Bruen*, which relies on *Heller*, is different than the traditional approach to originalism); *cf. Heller*, 554 U.S. at 577, 600–05 (severing the prefatory clause from the operative clause and instead justifying an individual right to bear arms unconnected to militia service by citing "analogous arms-bearing rights in state constitutions," while simultaneously characterizing the dissent's reliance on the Amendment's own drafting history as "dubious").

49 *See Heller*, 554 U.S. at 579.

50 *See id.* at 580–81.

51 *See id.* at 582–83.

52 *See id.* at 581–92, 623.

53 *See id.* at 578.

54 *See id.* at 584, 598.

55 *See id.* at 598 (arguing that the Framers' fear and the prefatory clause, however, did not negate an individual's right to bear arms).

56 *See id.* at 626 (holding that "longstanding prohibitions on firearm possession by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such

"historical tradition" framework underpinning its rationale, leading to *Bruen*'s attempt to fill these gaps over a decade later.[57] Ultimately, *Heller* shifted the burden from individuals justifying firearm ownership to the government justifying firearm restrictions.[58]

2. The Second Amendment's Incorporation and the Questions It Raises

McDonald v. City of Chicago extended *Heller*'s individual rights interpretation to state and local governments through selective incorporation,[59] a doctrine applied to nearly all Bill of Rights amendments through the Fourteenth Amendment.[60] In doing so, the Court notably affirmed *Heller*'s proclamation that certain longstanding firearm restrictions—such as historical prohibitions on felons possessing firearms—remain constitutional.[61] *McDonald* relied on *Heller*'s analysis and support to reaffirm that the individual right to bear arms is "deeply rooted in this Nation's history and tradition."[62]

McDonald's significance lies in the ambiguity it helped create regarding the proper historical benchmark courts should apply under *Bruen*. Although the Second Amendment was ratified in 1791, it was not incorporated against the states until 2010 in *McDonald*, through the Fourteenth Amendment,

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as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms" are constitutionally valid).

57 *See id.* at 718 (Breyer, J., dissenting) ("Because [the majority] says little about the standards used . . . , it will leave the Nation without clear standards for resolving [Second Amendment] challenges."); *cf. id.* at 635 (majority opinion) ("But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field.").

58 *See* Brannon P. Denning & Glenn H. Reynolds, Heller, *High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1266 (2009) ("[F]irearms possession is now . . . normal, with the burden shifting from those who would possess firearms to those who would deny their possession.").

59 *See generally* McDonald v. City of Chicago, 561 U.S. 742 (2010) (holding that through the Fourteenth Amendment's incorporation doctrine, Second Amendment jurisprudence applies to state and local governments).

60 The Court has held that the Due Process Clause incorporates all substantive rights. *See, e.g.*, Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897) (takings); Gitlow v. New York, 268 U.S. 652 (1925) (speech); Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise); Wolf v. Colorado, 338 U.S. 25 (1949) (warrant requirement); Everson v. Board of Education, 330 U.S. 1 (1947) (establishment); Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment); Gideon v. Wainwright, 372 U.S. 335 (1963) (counsel); Irvin v. Dowd, 366 U.S. 717 (1961) (impartial jury); Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy); *McDonald*, 561 U.S. at 742 (individual right to keep and bear arms); and Timbs v. Indiana, 586 U.S.146 (2019) (excessive fines).

61 *See McDonald*, 561 U.S. at 768.

62 *Id*.

which was ratified in 1868.[63] Not a single case—*Miller*, *Heller*, *McDonald*, or even *Bruen* or *Rahimi*—designates which historical moment(s) should serve as a reference point for determining constitutionality under the Second Amendment.[64] This ambiguity has created confusion and division among lower courts, sparking debate about whether the 1791 or 1868 application should serve as the appropriate reference for assessing modern firearm restrictions (e.g., the impending challenges to § 922(g)(1)).[65]

C. Bruen *Asserts a "New" Second Amendment Framework: The "History and Tradition" Test*

1. The *Bruen* Test

In *Bruen*, Justice Thomas, writing for the Court, introduced an analytical framework for Second Amendment cases that applied *Heller*.[66] Rejecting the two-step approach that circuit courts coalesced behind in the years following *Heller*, *Bruen* established that firearm regulations are constitutional only if the government proves they align with a "historical tradition of firearm regulation."[67] Under this test, the government must identify a "historical analogue"—a past law sufficiently similar in its purpose (its "why") and burden (its "how") to the modern law—and demonstrate that the Framers would have understood it as constitutionally valid.[68] Although the Court stated *Bruen* was "neither a regulatory straightjacket nor a regulatory blank check,"[69] the test's strict historical constraints suggest it operates more

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63 *See generally id.* (holding that the Supreme Court's Second Amendment jurisprudence applies to the states).

64 *See* United States v. Rahimi, 602 U.S.680, 738 (Barrett, J., concurring) (expressing that neither *Bruen* nor *Rahimi* define the historical period "relevant to discerning the Second Amendment's original meaning"); *id.* at 692 n.1 (Jackson, J., concurring) (acknowledging the "ongoing scholarly debate" about which historical time period best defines the Second Amendment's scope against any level of government).

65 *See id.* at 1897 (Jackson, J., concurring).

66 *See generally* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (using the historical tradition framework established in *Heller* for modern Second Amendment analysis).

67 *See id.*at 8, 16–18.

68 *See id.* at 15, 19–21, 28–30.

69 *See id.* at 21.

closely to the former.[70] At the same time, the Court left unanswered which historical window to use when assessing these past laws.[71]

In *Bruen*, two New Yorkers challenged a state law limiting concealed carry licenses to individuals demonstrating a special need for self-defense.[72] In striking the law, the Court rejected the two-step, means-end scrutiny test that lower courts coalesced around.[73] The rejected two-step framework involved first determining if the regulated conduct fell outside the Second Amendment's "original scope";[74] and second, if the evidence was inconclusive, applying strict or intermediate scrutiny based on how significantly the law burdened the "core" right.[75] Notably, the Court defined that right in *Heller* as self-defense in the home and expanded it in *Bruen* to any form of self-defense.[76] *Bruen* discarded the previous test's second prong as "one step too many," holding that Second Amendment precedent inherently rejects balancing tests and instead only requires the government to demonstrate historical support for its regulations.[77]

In its place, Justice Thomas outlined a new test.[78] The new standard first emphasizes an initial presumption and then returns to step one of the pre-*Bruen* test:

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70 *Compare Rahimi*, 602 U.S. 680, 771–74 (2024) (Thomas, J., dissenting) (In criticizing *Rahimi*'s more flexible approach, Justice Thomas states that the majority applies *Bruen* incorrectly as "the Court's contrary approach of mixing and matching historical laws . . . defeats the purpose of a historical inquiry altogether." Further stating *Rahimi*'s approach "is the exact sort of 'regulatory blank check' that *Bruen* warns against." This provides insight into the level of strictness Justice Thomas intended *Bruen* to represent when writing the opinion. (quoting *Bruen*, 977 U.S. at 30)) *with id.* at 705 (Sotomayor, J., concurring) ("If [Thomas's] interpretation of *Bruen* were the law, then *Bruen* really would be the 'one-way ratchet' . . . '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.'" (second and third alterations in original) (quoting *Bruen*, 597 U.S. at 112 (Breyer, J., dissenting))).

71 *See supra* note 64 and accompanying text.

72 *See Bruen*, 597 U.S. at 1–4, 8.

73 *See id*. at 8.

74 *Id.* at 18.

75 *Id.* at 18–19.

76 *See id.* at 32–33. Justice Thomas expands *Heller* yet states he is merely applying *Heller*. *Id.* at 31. This is important because *Bruen* is willing to apply a stricter requirement on states without formally expanding the rationale that justified restrictions in *Heller*. *See* District of Columbia v. Heller, 554 U.S. 570, 628–29, 636 (2008); *Bruen*, 597 U.S. at 24.

77 *Bruen*, 597 U.S. at 19, 22–24.

78 *See id.* at 17; *see also* United States v. Rahimi, 602 U.S. 680, 744 (2024) (Jackson, J., concurring) ("Rejecting that 'two-step approach' as having 'one step too many,' the *Bruen* majority subbed in another two-step evaluation. Courts must, first, determine whether 'the Second Amendment's plain text covers an individual's conduct.' If it does, '[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[79]

The Court based this approach on textual and originalist grounds,[80] while rejecting the dissent's arguments that historical analysis would prove impracticable.[81] Instead, *Bruen* asserted that courts, relying on party-submitted historical records, can competently resolve constitutional challenges.[82] This approach stands despite criticisms that it undermines the protection of rights by making constitutional rights outcome-dependent on advocacy skills rather than their merits.[83]

The Court also provided guidance in the actual application of the *Bruen* test. It explained that when a new law addresses longstanding societal issues, the absence of historical regulations suggests unconstitutionality.[84] Conversely, previous attempts to pass similar regulations that ultimately failed on constitutional grounds can indicate modern unconstitutionality.[85] For unprecedented issues, courts must conduct "reasoning by analogy" to assess if the historical and modern regulations are "relevantly similar"—meaning that they "impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified."[86] *Bruen* offers an important clarification in grounding this test, noting "*Heller* and *McDonald*

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historical tradition of firearm regulation.'" (alteration in original) (citations omitted) (quoting *Bruen*, 597 U.S. at 19, 24)).

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

80 The Court reiterated *Heller*'s textualist points, noting that other areas of the Constitution, like the First Amendment, are analyzed with a similar historical lens as the Second Amendment. *Id.* at 19–22, 24–25. Further, the Court discusses the importance of upholding the Framers' original meaning while tracking the development of Second Amendment law over time. *See id.* at 27–29.

81 *Id.* at 25 n.6.

82 *See id.*

83 *See id*. at 107–08 (Breyer, J., dissenting). Predictably, the assertion that constitutional rights can be won or lost based on how well parties argue their case has received significant blowback as it presents constitutional issues. *See generally* BLOOMBERG LAW, *Gun Law Confusion: The Impact of the Supreme Court's 'History' Test on the Second Amendment*, (YouTube, Jan. 31, 2024), https://www.youtube.com/watch?v=JZFro8_6fh0 (on file with the George Washington Law Review) (outlining the state of Second Amendment jurisprudence after *Bruen*); *cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

84 *Bruen*, 597 U.S. at 26–27.

85 *Id.*

86 *Id.* at 28–29.

point toward at least two metrics: *how* and *why* the regulations burden a law-abiding citizen's right to armed self-defense."[87]

Lastly, *Bruen* explained that the regulations need only a "well-established and representative historical *analogue*, not a historical *twin*."[88] In short, the *Bruen* test requires (1) evaluating whether "the Second Amendment's plain text covers an individual's conduct"; and (2) if it does, "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation" through a historical analogue analysis.[89]

2. Applying *Bruen*

In applying this framework, the Court analyzed historical firearm regulations spanning five eras: "(1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries."[90] The Court acknowledges that the reason for this divide is because "not all history is created equal. 'Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*.'"[91] The Court reviewed the historical laws from each era that the government argued were sufficiently similar to the regulation in *Bruen*,[92] but always found at least one disqualifying flaw that made a historical analogue sufficiently dissimilar to the modern law, leading to the conclusion that the government failed to carry

87 *Id.* at 29 (emphasis added).

88 *Id*. at 30. *Contra id.* at 130 (Breyer, J., dissenting) (Justice Breyer explained that even though there were multiple historical laws that were "[c]losely analogous," or at the very least, "*resembled* New York's law," such examples were rejected by the majority. "In each instance, the Court finds a reason to discount the historical evidence's persuasive force. Some of the laws . . . are too old. But others are too recent. Still others did not last long enough. Some applied to too few people. Some were enacted for the wrong reasons. Some may have been based on a constitutional rationale that is now impossible to identify. Some arose in historically unique circumstances. And some are not sufficiently analogous. *But if the examples discussed above, taken together, do not show a tradition and history of regulation that supports the validity of New York's law, what could?* Sadly, I do not know the answer to that question. What is worse, the Court appears to have no answer either.") (second emphasis added); United States v. Rahimi, 602 U.S. 680, 767–72 (2024) (Thomas, J., dissenting) (Justice Thomas rejected all the government's examples—laws the majority found analogous, including surety and affray regulations—because "mixing and matching . . . defeats the purpose of a historical inquiry altogether." Rather, the presented examples are "worlds—not degrees—apart" due to their failure to singlehandedly align with the challenged law in terms of sharing a "comparable burden and justification.").

89 *Bruen*, 597 U.S. at 24, 30.

90 *See id.* at 34.

91 *Id.* at 34.

92 *See id.* at 39–70.

its burden.[93] Thus, *Bruen*'s conflicting analysis leaves unclear what exactly the test requires for validating past laws as sufficiently similar historical analogues to modern laws.[94]

Bruen's historical approach received significant criticism for purportedly cherry-picking objectionable historical analogues to fit a preferred legal outcome.[95] Justice Breyer dissented, accusing the majority of an overly narrow approach that discounted centuries of foundational regulations, such as early English laws, on which more modern laws were built.[96] Justice Breyer argued that by ignoring the complexities of historical research to cherry-pick history that works for the majority,[97] the Court was leaving it up to lower courts to figure out how to apply *Bruen*,[98] which he contended were ill-equipped to do because "[c]ourts are . . . staffed by lawyers, not historians."[99] Justice Breyer concluded *Bruen*'s "near-exclusive reliance on history" was impractically rigid and unworkable,[100] depriving legislatures of the necessary flexibility to address contemporary firearm violence effectively.[101]

The upshot is that *Bruen* leaves judges with the daunting task of analyzing centuries of historical firearm regulations through an indeterminate test that does not provide clear guidance on how to handle conflicts or historical ambiguities.[102] Although Justice Thomas insisted that the test's approach is balanced,[103] post-*Bruen* decisions—and his own *Rahimi* dissent—reveal that the use of historical analogues yields

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93 *See id.* at 39–41, 46–47, 50–51, 64, 67–69.

94 *See id.* at 130 (Breyer, J., dissenting).

95 *See supra* note 88 and accompanying text; Patrick J. Charles, *The Fugazi Second Amendment:* Bruen*'s Text, History, and Tradition Problem and How to Fix It*, 71 CLEV. ST. L. REV. 623, 667 (2023); *see also* Isaac Chotiner, *The Historical Cherry-Picking at the Heart of the Supreme Court's Gun-Rights Expansion*, NEW YORKER (June 23, 2022), https://www.newyorker.com/news/q-and-a/the-historical-cherry-picking-at-the-heart-of-the-supreme-courts-gun-rights-expansion [https://perma.cc/79M4-7YHT] ("The Court says that only gun laws which have historical precedent are constitutionally permissible, and then the Court dismisses all of the historical precedents for heavy restrictions on concealed-carry laws as outliers.").

96 *See Bruen*, 597 U.S. at 112, 130 (Breyer, J., dissenting).

97 *See id.* at 130.

98 *See id.* at 107, 111–12.

99 *Id.* at 107.

100 *Id.* at 107, 115.

101 *Id.* at 102.

102 *See id.* at 111, 114–15; Charles, *supra* note 10, at 101, 107.

103 *See Bruen*, 597 U.S. at 26 ("It is this balance—struck by the traditions of the American people—that demands our unqualified deference.").

inconsistent outcomes.[104] This ambiguity likely exists because judges do not know the limits or levels of generality necessary for analyzing historical laws, leading them to rely instead on their own discretion and understanding.[105] *Bruen* is particularly significant because these ambiguities directly fuel the ongoing circuit split regarding the constitutionality of 18 U.S.C. § 922(g)(1), even after *Rahimi*'s attempt to clarify the law.[106]

D. Rahimi *Fails to Resolve the Post*-Bruen *Fallout*

Two years after *Bruen*, the Supreme Court revisited the "history and tradition" test in *Rahimi*, aiming to clarify and distinguish the "relevantly similar" analysis.[107] In an eight-to-one ruling, Chief Justice Roberts authored a decision upholding a law prohibiting firearm possession for those under domestic violence orders.[108] Chief Justice Roberts opined that a modern firearm regulation satisfies *Bruen* if it is "relevantly similar" to historical firearm regulations in two regards.[109] First, its purpose or justification for restricting firearm possession (i.e., the "why"); and, second, the scope or degree of burden imposed on the right (i.e., the "how").[110] The Court reaffirmed that an exact "historical twin" is not necessary, indicating that a more flexible level of generality for analysis may be used, as opposed to what was initially articulated in *Bruen*.[111] Thus, *Rahimi* highlighted that so long as the "how" and "why" aligned with historical precedents in a meaningful way, the modern law will be "relevantly similar," even if it is not a precise historical match.[112]

When applying the modified *Bruen* standard in *Rahimi*, the Court found the presumption was met because laws temporarily disarming individuals who present a "credible threat" to others fit within American history and

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104 *See* Rahimi v. United States, 602 U.S. 680, 772 (Thomas, J., dissenting); *id.* at 742–43 (Jackson, J., concurring).

105 *See id.* at 739–40 (Barrett, J., concurring).

106 *See infra* Part II; *see also Rahimi*, 602 U.S. at 742–43 (Jackson, J., concurring) (discussing lower court confusion in implementing *Bruen*).

107 *Rahimi*, 602 U.S. at 691–92 ("[S]ome courts have misunderstood the methodology of our recent Second Amendment cases. . . . The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'" (quoting *Bruen*, 597 U.S. at 30)).

108 *See id.* at 684–85, 693.

109 *See id*. at 692.

110 *See id*. at 691–92.

111 *Id*. at 692, 701; *see also id.* at 739–40 (Barrett, J., concurring) (emphasizing that the modern regulation should be "consistent" with the historical analogue, rather than "an updated model").

112 *See id*. at 700–01 (majority opinion); *see also id.* at 702–06 (Sotomayor, J., concurring) (discussing the ways in which preratification history "can inform interpretation of vague constitutional provisions in the original Constitution and Bill of Rights").

tradition.[113] Further, the Court found historical support for disarming dangerous individuals through surety and going armed laws, which satisfied both the purpose and method requirements of the test.[114] Significantly, *Rahimi* does walk back the *Bruen* test just a bit, clarifying that historical analogues need not perfectly match modern regulations so long as they align meaningfully in purpose and method.[115] This, however, is an insufficient walk back because history and constitutional jurisprudence on other amendments show that the method (the "how") is an unnecessary consideration.[116] Further, *Rahimi*'s slightly more lenient approach to historical analogues still leaves lower courts grappling with ambiguity,[117] notably leaving unclear how to address potential challenges to laws like 18 U.S.C. § 922(g)(1) that contain provisions applying to implicitly dangerous individuals, such as nonviolent felons.[118] *Rahimi* was only a band-aid solution, merely underscoring the fundamental shortcomings of *Bruen*'s approach rather than solving them, as it continued to tether constitutional analysis to ambiguous historical analogues, leaving critical interpretive questions unresolved.[119] This persistent ambiguity is the reason why there is an ongoing circuit split over § 922(g)(1),[120] and why there will be future circuit splits if *Bruen*'s problems—namely its mode of analysis, lack of defined historical window, and lack of guidance on conflicts—are left unresolved.[121] Fortunately, the § 922(g)(1) circuit split provides a vehicle for redressing *Bruen*.

The fallout after *Rahimi*, discussed in the next Part, highlights today's state of play and the urgent need for a revised analytical framework that clearly defines historical benchmarks and prioritizes legislative intent over historical methodology.

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113 *See id.* at 690 (majority opinion).

114 *See id.* at 695–700 ("The dissent does, however, acknowledge that Section 922(g)(8) is within that tradition when it comes to the 'why.' . . . The objection is to the 'how.'").

115 *See id.* at 690–97.

116 *See infra* Part IV.C.

117 *See Rahimi*, 602 U.S. at 697–700; Donlon, *supra* note 15.

118 18 U.S.C. § 922(g)(1).

119 *See Rahimi*, 602 U.S. at 740–747 (Jackson, J. concurring).

120 *See, e.g.*, United States v. Jackson, 110 F.4th 1120, 1122 (8th Cir. 2024) ("*Rahimi* does not change our conclusion in this appeal."); *see also Rahimi*, 602 U.S. at 742 n.1 (Jackson, J. concurring) ("[T]he unique test the Supreme Court announced in *Bruen* does not provide lower courts with clear guidance as to how analogous modern laws must be to founding-era gun laws. In the short time post-*Bruen*, this has caused disarray among the lower courts" (quoting *United States v. Bartucci*, 658 F. Supp. 3d 794, 800 (E.D. Cal. 2023))).

121 *See infra* Part III.

II. CURRENT CIRCUIT SPLIT

Federal circuit courts are currently split on the constitutionality of 18 U.S.C. § 922(g)(1), which prohibits firearm possession by felons convicted of crimes "punishable by imprisonment for a term exceeding one year," under *Bruen*.[122] The courts are split between two camps: those upholding § 922(g)(1)[123] and those rejecting it.[124] This Part's analysis highlights one representative case from each side of the split to underscore *Bruen*'s unworkability, as both sides rely on virtually the same historical accounts to reach contrary conclusions.

Courts upholding § 922(g)(1) rely on historical traditions of disarming potentially dangerous groups.[125] The Eighth Circuit's decision in *United States v. Jackson*[126] exemplifies this approach[127] as it cited early Anglo-American legal traditions in which legislatures barred disfavored or disloyal citizens who threatened the public order from owning weapons.[128] *Jackson* notably rejected arguments for individualized dangerousness assessments,[129] deferring instead to historical legislatures' determinations that felons were credible threats to public safety[130] because that was what the court assessed

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122 *See* 18 U.S.C. § 922(g)(1); Vilensky, *supra* note 17.

123 *See, e.g.*, United States v. Hunt, 123 F.4th 697 (4th Cir. 2024), *cert. denied*, 145 S. Ct. 2756 (2025); United States v. Jackson, 110 F.4th 1120 (8th Cir. 2024), *cert. denied*, 145 S. Ct. 2708 (2025); United States v. Duarte, 137 F.4th 743 (9th Cir. 2025) (en banc), *cert. denied*, No. 25-425, 2026 WL 135692 (U.S. Jan. 20, 2026); Vincent v. Bondi, 127 F.4th 1263 (10th Cir. 2025),*cert. denied*, No. 24-1155, 2026 WL 568283 (U.S. Mar. 2, 2026); United States v. Dubois, 139 F.4th 887 (11th Cir. 2025), *cert. denied*, No. 25-6281, 2026 WL 135685 (U.S. Jan. 20, 2026).

124 Range v. Att'y Gen., 124 F.4th 218 (3d Cir. 2024) (en banc); United States v. Cockerham, 162 F.4th 500 (5th Cir. 2025).

125 *See Jackson*, 110 F.4th at 1126–28; *Vincent*, 80 F.4th at 1201–02; *Dubois*, 139 F.4th at 891–93.

126 110 F.4th 1120 (8th Cir. 2024). *Jackson* serves as a strong representative for arguments in favor of § 922(g)(1)'s constitutionality, particularly because it was one of the first cases remanded and fully adjudicated since *Rahimi*. *See id.*; DAVE S. SIDHU, CONG. RSCH. SERV., LSB11108, THE SECOND AMENDMENT AT THE SUPREME COURT: CHALLENGES TO FEDERAL GUN LAWS 4 (2024).

127 *See Jackson*, 110 F.4th at 1125–26.

128 *See id.* at 1126–28 (pointing to groups like Native Americans and Protestants who refused to participate in the Church of England as evidence of legislatures prohibiting disfavored groups from being armed).

129 *See id.* at 1127–29 ("This history demonstrates that there is no requirement for an individualized determination of dangerousness as to each person in a class of prohibited persons. Not all persons disarmed under historical precedents—not all Protestants or Catholics in England, not all Native Americans, not all Catholics in Maryland, not all early Americans who declined to swear an oath of loyalty—were violent or dangerous persons.").

130 *See id.* at 1128–29 (finding nonviolent felon disarmament laws permissible because they're rooted in a legitimate public safety rationale).

Bruen required.[131] Ultimately, the court found § 922(g)(1), and Jackson's disarmament resulting from a nonviolent felony drug offense, constitutional, citing legislative history that the § 922(g)(1) framers perceived felons as having a high risk of undermining public safety.[132] Other cases similarly affirm a tradition of disarming public safety threats and a tradition of legislatures defining that category.[133]

Conversely, courts rejecting § 922(g)(1)'s constitutionality also rely on the historical traditions around disarming potentially dangerous groups, arguing instead that categorical disarmament lacks historical support.[134] In *Range v. Attorney General*,[135] the Third Circuit repudiated *Jackson*'s approach and invalidated § 922(g)(1) as applied to Range, an individual convicted of food stamp fraud, under a dangerousness inquiry rather than a risk inquiry.[136] *Range* followed *Heller*'s textual approach, emphasizing that the text (that the Second Amendment applies to "the people") broadly protects all individuals, including felons like Range.[137] The court argued the level of generality to assess historical analogues must be narrow and closely match the specific factual contexts, discounting Founding-era disarmament laws as too broad because they sought to disarm violent—not nonviolent—felons.[138] Thus, *Range* found that the government failed to carry its burden of identifying a relevant historical tradition supporting the disarmament of nonviolent groups; so, the statute, as applied to Range, was unconstitutional because the record contained no evidence that people like Range posed a

131 *See id*. at 1126 (finding that neither an individualized nor deferential approach to reading the historical analogues was determinative as both readings were "consistent with the Nation's historical tradition of firearm regulation" (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022))).

132 *See id.* at 1128–29.

133 *See generally* Vincent v. Garland, 80 F.4th 1197 (10th Cir. 2023) (using the Tenth Circuit's own precedent as evidence that the ban on felons possessing firearms was constitutional); United States v. Dubois, 139 F.4th 887 (11th Cir. 2024) (holding the ban on felons possessing firearms valid through the longstanding history of legislatures choosing to define who they perceive as dangerous people).

134 *See, e.g.,* Range v. Att'y Gen., 124 F.4th 218 (3d Cir. 2024).

135 *Id. Range* serves as a strong representative against constitutionality.

136 *See id.* at 222–30 (explaining that Range was convicted under a "Pennsylvania misdemeanor punishable by up to five years' imprisonment"; thus, § 922(g)(1) still prohibited him from possessing a firearm because its safe harbor provision excluding state misdemeanors does not extend to individuals who face over two years imprisonment).

137 *See id.* at 223–24; *supra* note 136 and accompanying text. Since Range's conviction was a felony-equivalent misdemeanor, which permitted the court to categorize Range with felons, this Note will refer to Range as such for the sake of analytical simplicity.

138 *See id*. at 229–32 (finding Founding-era laws spanning disarmament of distrusted groups to practices of "punishing some nonviolent crimes with death" are "not sufficient analogues" when compared to Range).

physical danger.[139] Moreover, *Range* held, narrowly, that de facto status-based lifetime disarmaments are unconstitutional because they are not consistent with this Nation's history and tradition.[140]

The opposing rationales between *Jackson* and *Range* are emblematic of the fundamental ambiguities and inconsistencies within *Bruen*'s framework that should be resolved. Here, courts applied the same standard to similar facts and similar historical analogues and yet reached divergent conclusions. The divergence is the result of three shortcomings: (1) an undefined historical window, (2) little guidance on how to resolve conflicting historical analogues, and (3) the mode of analysis by strict historical analogy rather than principle-based reasoning.[141]

III. ANALYZING THE CIRCUIT SPLIT TO REVEAL *BRUEN*'S SHORTCOMINGS

A. The Inconsistent Historical Window for Defining the Second Amendment

When courts interpret the meaning of the Constitution, they ascertain what the Framers of the text understood its scope to be.[142] The problem is that the Supreme Court, as the final arbiter of the Constitution's meaning, did not define the Second Amendment's scope or provide courts with a historical reference point in *Heller* or subsequent cases.[143] The § 922(g)(1) circuit split exemplifies that courts will continue to reach inconsistent results in similarly situated cases because they are basing decisions on the

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139 *See id.* at 231 ("[I]t's important to remember that Range's crime—making a false statement on an application for food stamps—did not involve a firearm, so there was no criminal instrument to forfeit. And even if there were, government confiscation of the instruments of crime (or a convicted criminal's entire estate) differs from a status-based lifetime ban on firearm possession. The Government has not cited a single statute or case that precludes a convict who has served his sentence from purchasing the same type of object that he used to commit a crime.").

140 *See id.* at 231–32; *id.* at 246 (Phipps, J., concurring) (noting the holding was narrow because "there is no historical analogue for permanently disarming a citizen based on a prior conviction for food-stamp fraud").

141 *See infra* Part III.

142 *See* District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008); *see also* NPR Staff, *Originalism: A Primer On Scalia's Constitutional Philosophy*, NPR (Feb 14, 2016, at 17:41 ET), https://www.npr.org/2016/02/14/466744465/originalism-a-primer-on-scalias-constitutional-philosophy [https://perma.cc/4L8D-EKRK] ("The Constitution that I interpret and apply is not living but dead, or as I prefer to call it, enduring. It means today not what current society, much less the court, thinks it ought to mean, but what it meant when it was adopted.").

143 *See* United States v. Rahimi, 602 U.S. 680, 737–38 (2024) (Barrett, J., concurring); *Id.* at 692 n.1 (Jackson, J., concurring); Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

arguments made by the parties and using their own judgments on the Second Amendment's scope to make findings.[144]

For example, the Eighth Circuit in *Jackson* interpreted historical evidence broadly, asserting "*history shows* that the right to keep and bear arms was subject to restrictions that included prohibitions on possession by certain groups of people."[145] The *Jackson* court cited colonial-era practices of legislatures deeming "categories of persons" dangerous or untrustworthy, arguing that the historical analogue method endorses such deference to modern legislatures to similarly disarm groups of people it deems a risk.[146] Conversely, *Range* relied on many of the same historical practices—but looked more to the Founding era—and read them much more narrowly, concluding that they do not support categorical disarmament of "people like Range."[147] The *Range* court even considered more modern history, but admitted it must ultimately guess and substitute its own discretion for the Supreme Court's, arguing "whatever timeframe the Supreme Court might establish in a future case . . . we are confident that a law passed in 1961 . . . nearly a century after the Fourteenth Amendment's ratification[] falls well short of 'longstanding.'"[148]

Some commentators argue that judicial discretion is necessary when interpreting the law,[149] but overly broad discretion in interpreting the Constitution undermines the Constitution's fundamental promise to guarantee all Americans certain rights.[150] As the ultimate arbiter of the Constitution, the Supreme Court has an interest and duty to provide clear and consistent interpretations that enhance public confidence in the predictability and legitimacy of the rule of law.[151] Excessive judicial discretion,

144 *Compare* United States v. Jackson, 110 F.4th 1120, 1126–29 (8th Cir. 2024) (finding that historical analogues support the constitutional validity of § 922(g)(1)) *with Range*, 124 F.4th at 229–32 (finding no historical support for § 922(g)(1)).

145 *See Jackson*, 110 F.4th at 1126 (emphasis added).

146 *See id.* at 1126–29.

147 *See Range*, 124 F.4th at 229, 232.

148 *See id.* at 229.

149 *Cf.* Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 457–58 (2012) (arguing that judicial discretion in lower court interpretations helps constitutional law evolve and adapt to changes).

150 *Cf.* Warren Grimes, *The Major Questions Doctrine: Judicial Activism That Undermines the Democratic Process*, 54 LOY. U. CHI. L.J. 825, 825–26, 836–38 (2023) (arguing that judicial activism undermines the democratic process and that it is particularly important for there to be strong consensus from the Supreme Court when interpreting constitutional matters as such consensus "maintain[s] the credibility of the Court").

151 *See* THE FEDERALIST NO. 80 (Alexander Hamilton) ("The mere necessity of uniformity in the interpretation of the national laws, decides the question."); *see, e.g.*, United States v. Rahimi, 602 U.S. 680, 741–42 (2024) (Jackson, J., concurring) (discussing the need for clarity in the law).

particularly in matters of constitutional interpretation, risks bias and arbitrary application.[152] As Justice Breyer notably warned in *Bruen*, an undefined historical window invites judges to selectively pick which historical evidence and interpretations to apply.[153] This prediction came to fruition in both *Jackson* and *Range*. In *Jackson*, the court did not provide a reason for its significant reliance on colonial-era laws; instead, it merely justified their use by citing that *Bruen* permits courts to analyze historical analogues.[154] In *Range*, the court took its best guess, noting that using pre-twentieth-century analogues should be sufficient because those laws are surely "longstanding" enough, as opposed to laws passed in the twentieth century.[155]

Empirical data also support concerns of discretion for the historical-window constitutional question. Recent research found that the ambiguity left by *Bruen* significantly increased partisan divides in judicial decision-making, suggesting judicial discretion has increased rather than decreased following *Bruen*.[156] The data indicates that judicial outcomes post-*Bruen* have become heavily related to the appointing president's political affiliation, which may reflect partisan biases rather than principled constitutional analysis.[157] Republican-appointed judges, especially post-*Bruen*, supported gun rights claims at significantly higher rates than their Democratic-appointed counterparts.[158] This data demonstrates that *Bruen*'s shortcomings, such as not providing a historical window, have permitted judicial discretion to insert itself and remain unchecked after *Rahimi*. This shortcoming should be resolved to prevent undermining the uniformity and fairness expected in constitutional adjudication.

Lastly, the absence of a defined historical scope also transfers undue determinative power to the parties' advocacy.[159] Constitutional rights should not be contingent on the quality or persuasiveness of a litigant's

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152 *See* Robert S. Lancaster, *Judge Learned Hand and the Limits of Judicial Discretion*, 9 VAND. L. REV. 427, 445 (1956) ("[T]here is also a danger in free interpretation [of a text]; for it permits the judge to read into the law his own bias and so plays havoc with consistency and certainty, ideas which lie deep in the very concept—law.").

153 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 107–08, 112 (2022) (Breyer, J., dissenting).

154 *See* United States v. Jackson, 110 F.4th 1120, 1126–28 (8th Cir. 2024).

155 *See* Range v. Att'y Gen., 124 F.4th at 218, 229 (3d. Cir. 2024.

156 *See* Rebecca L. Brown, , Lee Epstein & Mitu Gulati, *Guns, Judges, and Trump*, 74 DUKE L.J. ONLINE 81, 84–86, 94–98 (2025); *see also* Charles, *supra* note 4 (data showing how courts have ruled since *Bruen*).

157 *See* Brown et al., *supra* note 156, at 95–101.

158 *See id.* at 95–108.

159 *See* Charles, *supra* note 10, at 147–49.

arguments.[160] Yet *Bruen* does not recognize this as an issue; in fact, it actually endorses the role of litigants in deciphering constitutional rights, believing it will help settle the law.[161] The current ambiguity surrounding the Second Amendment's scope has effectively encouraged and led to the overreliance of attorneys' advocacy skills. Courts cannot possibly go through the seemingly endless amount of historical records on this topic independently, and judges make decisions based on the historical records attorneys provide to them.[162] Although Justice Thomas may have confidence in the adversarial system of American courts, this approach starkly contradicts the principles and ideals of constitutional rights as enduring protections applicable equally and uniformly across all jurisdictions. Therefore, *Bruen*'s undefined historical window for analyzing the Second Amendment's scope offers a variety of problems and should be addressed by the Court.[163]

B. The Problem of Conflicting Historical Analogues

Another significant issue *Bruen* has is its "near-exclusive reliance" on historical analogues without guidance on resolving such conflicts.[164] Analogues frequently conflict—whether in subject matter or through application—and judges are tasked with interpreting what is dispositive and what is not.[165] This subjectivity leads judges to produce differing interpretations of similar historical records.[166]

The circuit split exemplifies this issue. The *Jackson* court, for example, argued that even if it viewed firearm possession under a dangerousness inquiry lens—as opposed to a categorical law-abiding inquiry—the

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160 *Cf.* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (explaining that the right to counsel is a fundamental constitutional right because laypeople are not adequately familiar with the law to sufficiently defend themselves); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (opining that the wealth of a defendant should not be determinative of their rights).

161 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 25 n.6 (2022).

162 *Compare* United States v. Jackson, 110 F.4th 1120, 1127 (8th Cir. 2024) (finding the "historical record suggests" its conclusion), *with* Range v. Att'y Gen., 124 F.4th 218, 248 (3d. Cir. 2024) (Phipps, J., concurring) ("It is against these principles—deeply against them—to flog the historical record until it suggests some analogue or principle justifying disarmament.").

163 *See supra* notes 64–65 and accompanying text (discussing issues in determining the appropriate historical window).

164 *See Bruen*, 597 U.S. at 107 (Breyer, J., dissenting) ("[N]ear-exclusive reliance on history is not only unnecessary, it is deeply impractical. It imposes a task on the lower courts that judges cannot easily accomplish.").

165 *See id.* at 108, 112–13.

166 *See* United States v. Rahimi, 602 U.S. 680, 743 (2024) (Jackson, J., concurring) (citing Brief for Second Amendment Law Scholars, which reported that lower courts applying *Bruen* produced contradictory results).

§ 922(g)(1) prohibition was still constitutional because the conflicting laws reflected a tradition of broad disarmament.[167] This conclusion shows that the *Jackson* court's broad interpretation is one that permits conflicting laws, only requiring that the tradition at least exist for the modern law to be constitutional.[168] In stark contrast, *Range* interpreted conflicting laws on disarmament to suggest that no tradition exists.[169] *Range* interpreted the disarmament laws, like those referred to in *Jackson*, as too vague to be relied upon and criticized high levels of generality for "water[ing] down the right."[170]

Similar to the problem of an inconsistent historical window, the inconsistent method for resolving conflicting historical analogues is problematic because it presents opportunities for bias or personal style. Despite analyzing the same laws, *Bruen*'s framework offered the *Jackson* and *Range* courts little guidance on how to evaluate the relative weight of each historical source. In fact, when faced with having to weigh the value of different sources within the same era, neither court resolved the conflict by citing guidance from *Bruen* or *Rahimi*.[171] Although *Range* disagreed with *Jackson* on vagueness, other judges have found sufficient detail in the historical laws to support decision-making.[172]

The lack of guidance by the Supreme Court in applying the most crucial aspect of its *Bruen* test demonstrates a problematic situation that will lead to future circuit splits because courts are forced to substitute their style of judicial analysis to make up for the little guidance provided to them by the Supreme Court.

C. The Rigidity of Historical Analogy

Finally, *Bruen* requires that modern regulations be "relevantly similar" to historical analogues, and *Rahimi* attempts to clarify the law by reasserting that although "relevantly similar" does not require a twin law, the "why" and

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167 *See Jackson*, 110 F.4th at 1127–29 (summarizing instances where legislatures passed laws to disarm broad classes of people perceived as dangerous).

168 *See id.*

169 *See* Range v. Att'y Gen., 124 F.4th 218, 230–32 (3d Cir. 2024); *id.* at 245 (Matey, J., concurring) (explaining that disarmament during wartime and disarmament of people who had committed a violent crime do not together establish a broad tradition of disarmament).

170 *Id.* at 230 (majority opinion) (quoting *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring)).

171 *Cf. Jackson*, 110 F.4th at 1127–29 (noting that it is merely applying *Bruen* and *Rahimi* without mentioning how it is weighing each historical source); *Range*, 124 F.4th at 229–30 (referring to *Bruen* for levels of generality to approach analysis but not for deciphering between conflicting sources within one era).

172 *See, e.g.*, United States v. Hunt, 123 F.4th 697, 706–08 (4th Cir. 2024), *cert. denied*, 145 S. Ct. 2756 (2025); United States v. Duarte, 137 F.4th 743, 755–59 (9th Cir. 2025).

"how" a law burdens the right to bear arms is still central to the inquiry.[173] Despite *Rahimi*'s clarification efforts, lower courts continue to apply the standard inconsistently because the historical methods—the "how"—employed in past legislative policies often do not translate clearly or logically to modern settings.

For example, *Jackson*, adopting a broad interpretation, argued that *Bruen* and *Rahimi* permitted generalized historical analogues, explicitly stating that banning firearm possession from historically disarmed groups like Native Americans sufficiently justified banning another modern category: felons.[174] *Jackson*'s reasoning demonstrates that it justified a broad interpretation under, not in spite of, *Bruen* and *Rahimi*, as those cases endorse the "how" a law burdens an individual's Second Amendment right was similar enough to reflect an analogous societal risk and legislative response.[175] In fact, the *Jackson* court notes that *Rahimi*'s broadening of the *Bruen* test did not change its position or rationale on remand.[176] This stasis is because the court in *Jackson* purported to have already applied the standard correctly and more narrowly than *Rahimi* left it.[177]

Conversely, *Range* strongly disagreed, interpreting the "how" requirement more narrowly than *Jackson* understood it.[178] Despite acknowledging no "historical twin" was required and that *Rahimi* permitted banning dangerous felons from possessing firearms, *Range* found that possession bans are not "relevantly similar" enough because there is no history of blanket bans for nonviolent groups.[179]

Bruen's rigid requirements for evaluating historical analogues create inconsistency among the courts, despite both courts here claiming fidelity to its standard. The test's rigidity is loosened to an unclear degree in *Rahimi*, but the standard nevertheless remains rigid because courts must still find a past method to compare with a modern regulation. This rigidity is not only problematic in that it supports a narrow level of generality, as seen in *Range*,[180] but also because it tethers courts' understanding of firearm-restriction methods permitted under the Second Amendment to methods of

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173 *See Rahimi*, 602 U.S. at 692.

174 *See Jackson*, 110 F.4th at 1126–28.

175 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 29–30 (2022); *Rahimi*, 602 U.S. at 692 ("[I]f 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.").

176 *See Jackson*, 110 F.4th at 1122.

177 *See id.* at 1122, 1129.

178 *See* Range v. Att'y Gen., 124 F.4th 218, 230–32 (3d Cir. 2024).

179 *See id.* at 228, 230.

180 *See id.* at 230–32.

the past.[181] The rigid framework is also challenging because, as seen in *Jackson*, it can serve as an endorsement mechanism for those past methods without a deeper analysis into the constitutionality of those methods under the Second Amendment.[182] Although the Supreme Court may find this as more of a feature than a bug, the framework must still be refined to avoid future incongruent lower court decisions.

IV. TOWARD NEW BOUNDARIES AND CLEAR BRIGHTLINE RULES

The inconsistencies and confusion coming from *Bruen* and *Rahimi* warrant the Supreme Court granting certiorari on a writ considering the constitutionality of § 922(g)(1)[183] so that it may articulate a more workable Second Amendment framework.[184] This Part proposes a solution that addresses the previously identified shortcomings by establishing (1) a fixed historical window to 2010, (2) a clear method for weighing conflicting historical evidence, and (3) a shift to principle-based reasoning that emphasizes the "why" of legislative enactments over the "how." These recommendations are designed to preserve the Second Amendment's historical roots while empowering legislatures to address modern societal challenges.

A. Fixing the Historical Window for Understanding the Second

181 *See id.* 228–32.

182 *See Jackson*, 110 F.4th at 1126–28 (citing prohibitions on the basis of race, which would be categorically unlawful today after the Fourteenth Amendment, as the underpinning rationale for bans on other categories of people); *see also* United States v. Rahimi, 602 U.S. 680, 744 n.2 (2024) (Jackson, J., concurring) ("[D]utiful legislators are not the only stakeholders who are far outside their depth: *Bruen* also conscripts parties and judges into service as amateur historians, casting about for similar historical circumstances.").

183 *See, e.g.*, Holmes v. United States, No. 23-30096, 2024 WL 3634197 (5th Cir. Aug 2, 2024), *petition for cert.* filed (U.S. Dec. 2, 2024) (No. 24-6082) (also discussing the writ for *Dubois v. United States*, 94 F.4th 1284 (11th Cir. 2024), *petition for cert. filed* (U.S. Oct. 8, 2024) (No. 24-2744)). The writ was denied in *Holmes* but granted in *Dubois*. Holmes v. United States, 145 S. Ct. 1108 (2025); Dubois v. United States, 145 S. Ct. 1041, 1042 (2025) (remanding in light of *Rahimi*).

184 As of the publication of this Note, the Supreme Court has granted certiorari to *Wolford v. Lopez*, 116 F.4th 959 (9th Cir. 2025), *cert. granted in part*, 146 S. Ct. 79 (U.S. Oct 03, 2025) (No. 24-1046) and *United States v. Hemani*, No. 24-40137, 2025 WL 354982 (5th Cir. Jan 31, 2025), *cert. granted*, 146 S. Ct. 326 (U.S. Oct. 20, 2025) (No. 24-1234). The latter case, *Hemani*, pertains to the constitutionality of 18 U.S.C. § 922(g)(3)—a different but related subsection of the statute analyzed in this Note. Thus, the issues and analysis of this Note are highly relevant to both of these ongoing cases as they will assess Second Amendment constitutionality via *Bruen* and *Rahimi*.

Amendment's Scope to 2010

The first key step in resolving *Bruen*'s unworkability is to clearly define a historical window for assessing the Second Amendment's scope.[185] 2010 should be adopted as the primary benchmark because it would harmonize the *Heller* and *McDonald* Courts' reading of individual rights with a broader "living tradition" judicial philosophy, which views the Constitution as an evolving document interpreted in the context of contemporary society.[186] This choice of year is significant because 2010 was only two years after *Heller* reimagined the Second Amendment's 1791 understanding, and was the year in which *McDonald* affirmed this reading and extended it under the Fourteenth Amendment's 1868 understanding by incorporating *Heller*'s holding against the states.[187] By defining a historical window, courts will be able to point to one specific year, 2010, and use the jurisprudential understanding of the Second Amendment's meaning and application from that year as a reference point for analyzing whether past laws fit within American history and tradition.[188] This means courts will have additional, guided flexibility in their analysis as they may interpret the American tradition of possessing arms for self-defense up to the year 2010.

Beyond *McDonald's* relevance, 2010 should be the benchmark because it synthesizes and incorporates various dissenting perspectives from *Bruen* and *Rahimi* into a cohesive and innovative interpretive lens.[189] For example,

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185 *Cf.* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 83 (2022) (Barrett, J., concurring) (reasoning that this decision does not "endorse freewheeling reliance on historical practice from the mid-to-late 19th century").

186 *See* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (describing a living tradition to articulate that the Constitution should be interpreted in context of the evolution of jurisprudence and constitutional law); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 415 (1819) ("[W]e must never forget that it is a *constitution* we are expounding . . . intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."); *cf.* THE FEDERALIST NO. 37 (James Madison) (reasoning that interpretation necessarily involves judgment beyond a single historical snapshot because "no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas").

187 *See* McDonald v. City of Chicago, 561 U.S. 742 (2010) (incorporating the right to bear arms established in *Heller* against the states).

188 *See* United States v. Rahimi, 602 U.S. 680, 737–39 (2024) (Barrett, J., concurring). This defined window will help avoid the ambiguity highlighted in *Range*. *See* Range v. Att'y Gen., 124 F.4th 218, 229 (acknowledging that the Supreme Court has not established any time frame when determining the applicability of modern history).

189 Nearly all concurring Justices from *Rahimi* and the *Bruen* dissent support the notion that the Constitution cannot, and should not, be "trapped in amber." *See Rahimi*, 602 U.S. at 705 (Sotomayor, J., concurring); *id.* at 709 (Gorsuch, J., concurring); *id.* at 739 (Barrett, J., concurring); *id*. at 741 (Jackson, J., concurring); *cf. Heller*, 554 U. S. 570, 722 (2008) (Breyer, J., dissenting) (doubting the Framers "intended future generations to ignore [modern-day] matters").

by setting 2010 as the de facto historical window, the Court has the opportunity to explicitly and clearly state that it is doing so in recognition of both—not just one of—the 1791 and 1868 historical understandings of the Second Amendment.[190] Issuing this clear mandate, which should also have guidelines around which historical window to use in specific instances, will settle the debate and provide lower courts with guidance on how to assess Second Amendment claims.

It is important for the historical benchmark to capture both the 1791 and 1868 understandings of the Second Amendment, as well as the modern context in which the Amendment exists.[191] As scholars have noted, the 1791 benchmark reflects the original intent of the Second Amendment's Framers, while the 1868 benchmark captures how the Fourteenth Amendment's framers understood the structural relationship between the Second and Fourteenth Amendments at the time of the Fourteenth Amendment's ratification.[192] The 1791 Framers did not anticipate the incorporation of the Fourteenth Amendment.[193] Some scholars emphasize 1868 as the only proper benchmark, arguing that it offers an added value that 1791 cannot because the Fourteenth Amendment's framers intended to extend federal constitutional protections to the states.[194] This argument, however, is misguided because although the framers of the Fourteenth Amendment intended to apply certain federal protections against states, it is historically inaccurate to assume they anticipated the expansive modern judicial doctrine of selective incorporation,[195] through which nearly all Bill of Rights

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190 U.S. CONST. amend. II (ratified in 1791); U.S. CONST. amend. XIV (ratified in 1868). Others have also called for a different approach. *See, e.g.*, Jacob D. Charles, *Time and Tradition in Second Amendment Law*, 51 FORDHAM URB. L.J. 259, 274–75 (2023) (discussing the ongoing debate between whether the original 1791 Framers' intent should be upheld or the 1868 framers' intent (due to the relevance of incorporation), or whether a "dynamic" approach should be taken that includes evolving standards of utility).

191 *Cf.* Letter from Thomas Jefferson to Samuel Kercheval (Jul. 12, 1816) https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002 [https://perma.cc/9THY-9EBJ] (warning against treating Founding-era arrangements as untouchable, saying "[s]ome men look at Constitutions with sanctimonious reverence[] . . . too sacred to be touched. . . . [B]ut I know also that laws and institutions must go hand in hand with the progress of the human mind").

192 *See generally* Charles, *supra* note 190 (surveying the contested temporal benchmarks for Second Amendment interpretation, including the Founding-era baseline and the Reconstruction-era understandings tied to the Fourteenth Amendment).

193 *See generally* Barron v. Baltimore, 32 U.S. 243 (1833) (holding the Bill of Rights was intended solely to restrain the federal government, not the states).

194 *See* Kurt Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1453 (2002) (arguing the framers of the Fourteenth Amendment "respoke" the Second Amendment when ratifying the Fourteenth Amendment).

195 *See* Saenz v. Roe*,* 526 U.S. 489, 524, 527 (1999) (Thomas, J., dissenting) ("[A]t the time of the founding, the terms 'privileges' and 'immunities' . . . were understood to refer to

provisions, such as the Second Amendment, have been applied to the states.[196] Thus, adopting only 1868 as the benchmark based purely on originalist principles requires an implicit endorsement of evolving constitutional interpretation—the very approach originalists typically reject.[197] A 2010 approach thereby balances both the 1791 and 1868 readings of the Second Amendment while incorporating the context of modern American life and adjudicative philosophies.

Heller and *McDonald* fundamentally transformed American legal thought on the Second Amendment by clearly recognizing an individual right to bear arms.[198] Establishing 2010 as the central historical reference point does not mean that courts should primarily look for analogous laws enacted around 2010. Rather, it clarifies the analytical starting point from which Second Amendment jurisprudence was officially established, providing special weight to *Heller* and *McDonald* as the seminal cases that decipher the foundational textual meaning of the Second Amendment.[199]

Lastly, adopting 2010 as the historical benchmark would broaden *Bruen*'s account of the Nation's history and tradition to include more modern American traditions—particularly those from the last century[200]—that the Court has often dismissed as too recent.[201] The Court should account for this modern context because the Second Amendment is being applied to weapons that bear little resemblance to those of the past and to contemporary threats unlike those the Framers confronted.[202]

B. Handling Conflicting Historical Evidence by Prioritizing Recency

The second way the Court can improve *Bruen* is by clarifying how lower courts should evaluate conflicting historical evidence, like the kind seen in

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those fundamental rights and liberties specifically enjoyed by English citizens, and more broadly, by all persons. . . . [However,] at the time the Fourteenth Amendment was adopted . . . [it was] understood that 'privileges or immunities of citizens' were fundamental rights." (quoting U.S. CONST. amend. XIV)).

196 *See supra* note 60 and accompanying text.

197 NPR Staff, *supra* note 142.

198 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 175 (2022).

199 *See* Charles, *supra* note 190, at 273–76.

200 *Cf. Bruen*, 597 U.S. at 129 (Breyer, J., dissenting) (criticizing the Court for offering no clear standard for when historical regulations are sufficiently widespread and enduring to count as part of the Nation's tradition).

201 *See Bruen*, 597 U.S. at 66 n.28.

202 *See* United States v. Rahimi, 602 U.S. 680, 706 (2024) (Sotomayor, J., concurring) (noting that *Bruen*'s historical inquiry—rooted in periods excluding women and people of color—hamstrings democracy by discounting contemporary public safety stakes and tailored legislative responses); *see also* Washburn, *supra* note 2 (observing that the number of people killed by firearm violence increased by nearly forty-three percent between 2010 and 2020).

Jackson and *Range*.[203] Conflicts should be resolved by prioritizing recency.[204] Currently, *Bruen* and *Rahimi* do not provide guardrails for assessing historical sources.[205] To address this issue, the Supreme Court should consider implementing a structured analytical framework that explicitly weighs historical periods according to their proximity to the benchmark year of 2010.

In *Bruen*, the Court identifies five historical periods: (1) "medieval to early modern" English history, (2) colonial era, (3) "antebellum America," (4) Reconstruction era, and (5) post-Reconstruction era spanning the late nineteenth to early twentieth century.[206] The Court should introduce a sixth significant period—the *Miller* era—spanning from 1939 to 2010. Including this additional era allows courts to consider more modern regulations that better reflect today's evolving understanding of firearm rights and public safety concerns. Instead of preventing legislatures from passing modern solutions on the account of there not being relevantly similar enough historical analogues, this new era would unfreeze the development of the American tradition for Second Amendment purposes and provide courts with a modern reference point for acceptable regulations grounded in more contemporary American history.[207]

When historical evidence does inevitably conflict, particularly when such historical laws are not ones significantly challenged in court, the Supreme Court should clarify that recent laws have more authority, not less, because they are more applicable to today's social context and technological landscape.[208] Further, the Court should also clarify that laws that have

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203 *Compare* Range v. Att'y Gen., 124 F.4th 218 (3d Cir. 2024) (requiring the government to locate a historical analogue for disarming Range and finding it failed to do so) *with* United States v. Jackson, 110 F.4th 1120 (8th Cir. 2024) (reading history to allow legislatures to disarm broad categories of non-law-abiding persons and rejecting case-by-case challenges to § 922(g)(1)).

204 *Cf.* THE FEDERALIST NO. 78 (Alexander Hamilton) (explaining when the judiciary must reconcile two conflicting yet equal enactments, "[t]he rule which has obtained in the courts for determining their relative validity is, that *the last in order of time shall be preferred to the first*"; this "mere rule of construction" represents the common law canons of interpretation at the Founding, which should also be considered alongside any originalist application or reading of the Constitution (emphasis added)).

205 *See supra* Section III.B.

206 *See Bruen*, 597 U.S. at 34.

207 *See Rahimi*, 602 U.S. at 704–707 (Sotomayor, J., concurring) (highlighting modern gun violence data in the domestic violence context to argue that the law should not hamper legislatures from addressing those harms); *Bruen*, 597 U.S. at 90–91, 131–32 (Breyer, J., dissenting).

208 *See Bruen*, 597 U.S. at 90–91 (Breyer, J., dissenting) (arguing that gun regulation is a context-dependent problem best left to democratically accountable legislatures, and warning that the Court's approach leaves States unable to address the modern dangers of gun violence).

withstood constitutional challenges weigh more heavily.[209] This element is important because it ensures courts are not merely relying on historical examples simply because they existed at some point without exercising judicial scrutiny;[210] instead, courts will rely on regulations that have demonstrably stood the test of judicial evaluation and reflect modern understandings of constitutional law.[211] Thus, the Court should include a new era of historical evidence for the lower courts, and, if any further historical evidence conflicts, the Court should introduce a standard to weigh such evidence according to its recency and success in court challenges.

C. Principle-Based Reasoning: Focusing only on the "Why"

Finally, the most significant improvement the Court should make is explicitly shifting the focus from strict historical analogy to principle-based reasoning. Under this framework, courts would prioritize historic legislative purposes (the "why," or the intent) of constitutionally relevant and valid laws over the specific methods employed to achieve those ends (the "how," or the way the law would be executed).[212] *Rahimi* emphasizes that the "why and how" are still central to the inquiry.[213] The Court should, however, limit the application of the "how" to cases where the past method aligns with the modern method. Further, this limitation should only be informative—it

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209 *See Rahimi*, 602 U.S. at 739 n.* (Barrett, J., concurring) ("In the Second Amendment context, particular gun regulations—even if from the ratification era—do not themselves have the status of constitutional law.").

210 *See id.*

211 *See* Charles, *supra* note 10, at 111 ("This argument from silence points to a deeper confusion in the test the decision employed—and the unwarranted assumptions on which it relies. Under *Bruen*'s test, it appears that if the government cannot point to past legal regulation (that is, enacted laws), it cannot regulate today. That hardly seems justified. To be sure, there is good reason to think that the presence of analogous historical regulations would provide evidence that a modern law is constitutional. After all, courts can presume (absent other evidence) that historical legislatures acted within the scope of their powers when they legislated. But *Bruen* does not stop at making historical laws *sufficient* for a modern law's constitutionality; instead, it makes historical laws *necessary*. And yet, for the absence of evidence (of regulations) to serve as evidence of absence (of regulatory authority), the Court must make assumptions about historical lawmaking that do not seem justified." (footnotes omitted)).

212 *Cf.* Blocher & Ruben, *supra* note 48, at 138–49 (discussing the need for workable principles to be clearly articulated and transparent, whatever level of generality they may be); Michael Ulrich, *Second Amendment Realism*, 43 CARDOZO L. REV. 1379, 1408–20 (2022) (proposing a population-based perspective that is intended to shift the focus of the *Bruen* test from the right's scope to policy interests like addressing gun violence).

213 *See Rahimi*, 602 U.S. at 692.

should serve only as a persuasive argument as to why the past method should be considered constitutional today.[214]

This change would significantly reduce inconsistencies in *Bruen*'s application because judges are not historians; thus, requiring courts and parties to painstakingly work to analyze historical analogues in a never-ending historical record is not sustainable.[215] For example, *Heller* itself undertook forty pages of textual and historical analysis simply to ascertain the Second Amendment's individual rights meaning.[216] *Bruen*'s historical analysis alone was over thirty pages.[217] By removing this extra requirement, the Court leaves less room for lower courts to apply their own discretion or bias.[218]

For example, in the case of § 922(g)(1), the law prohibits felons from possessing weapons. Currently, the Supreme Court would likely hold that unless the State were to present a historical analogue that has a relevantly similar "how" and "why" to § 922(g)(1), then the statute could not stand. To meet this high standard, the historical analogue would first have to be from around 1791 to 1868. Second, it would have to share the same purpose as § 922(g)(1), which is to "keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency."[219] And third, the historical analogue would have to do so through categorical disarmament.[220] In these three steps alone, there is significant room for reasonable minds to differ, as they have been,[221] and to what end? The Second Amendment's text does not prohibit legislatures from upholding its principles in novel ways.[222] Nor is this how other constitutional rights operate: First Amendment jurisprudence does not freeze protected speech to Founding-era forms or vocabulary.[223] Or, as another example,

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214 *See* Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE 30, 35, 44 (2023) (endorsing an abstraction approach that "would condemn the historical application of these laws, but abstract from their specific application a broader principle that might be applied consistently with contemporary values and understandings").

215 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 107 (2022) (Breyer, J., dissenting).

216 *Id.* at 108.

217 *Id.* at 111.

218 *Cf.* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 887–93 (2013) (arguing that limiting courts' avenues for applying discretion limits inconsistencies in the law).

219 Barrett v. United States, 423 U.S. 212, 220 (1976).

220 Courts are divided over the proper level of generality at which to frame the relevant historical analogue. *See supra* Section III.C.

221 *See supra* Part II.

222 *See* U.S. CONST. amend. II.

223 *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971) (reversing a conviction for wearing a jacket with an expletive and rejecting the State's attempt to criminalize a single offensive

consider if the Eighth Amendment prohibited only the punishments considered cruel in 1791, not punishments that are cruel by today's standards.[224] Requiring courts to assess a nearly boundless historical record for laws that are highly similar is therefore not judicially manageable nor in line with how other constitutional rights are understood.[225]

Only the "why" should be determinative of whether a law can stand. That approach tracks *Miller*'s principle-driven analysis, which interpreted the Second Amendment in light of its militia-related principle and applied that principle to the case's facts.[226] Further, this approach also aligns with *Heller*'s reading of the Second Amendment. *Heller* found that the Second Amendment's prefatory clause explicitly referenced militia service, and a genuinely narrow originalist reading would elevate—not disregard—this introductory context.[227] If *Heller* is here to stay, then such principle-based reasoning at least maintains the continuity of the Court's position on the Second Amendment through *Miller* while creating a path for *Heller*'s individual rights reading.[228] At the same time, this principle-based reasoning also permits modern legislatures to regulate firearm possession for safety purposes.[229]

CONCLUSION

The Supreme Court has fundamentally reshaped Second Amendment jurisprudence with *Bruen* and *Heller*. The shortcomings of the *Bruen* framework have left lower courts struggling to apply an unworkable test. By failing to define a clear historical window, provide guidance on how to

word because the censorship principle is "inherently boundless" and invites unprincipled line drawing).

224 *See* Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion) (explaining that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"); Estelle v. Gamble, 429 U.S. 97, 102 (1976) (reasoning touchstone for the Eighth Amendment is whether it involves "evolving standards of decency" in the contemporary world (quoting *Trop*, 356 U.S. at 101)).

225 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 107 (2022) (Breyer, J., dissenting).

226 *See* United States v. Miller, 307 U.S. 174, 178 (1939) (holding that, absent evidence a short-barreled shotgun has a reasonable relationship to preserving or improving a well-regulated militia, the Second Amendment does not protect its possession).

227 *See* District of Columbia v. Heller, 554 U.S. 570, 595–601 (2008); Blocher & Ruben, *supra* note 48, at 103–04.

228 *Cf. Heller*, 554 U.S. at 592 (reading "keep and bear arms" to codify a pre-existing individual right of personal defense that is not confined to militia service (quoting U.S. CONST. amend. II).

229 *See supra* Section IV.C; *cf.* Ulrich, *supra* note 212 (arguing Second Amendment analysis should account for contemporary gun violence contexts and the state's public safety interests, rather than relying on history alone).

address conflicting historical evidence, or offer a principle-based method for analysis, *Bruen* has created a circuit split on firearm regulations like 18 U.S.C. § 922(g)(1). These shortcomings can be resolved if the Supreme Court grants certiorari in one of the lower-court circuit-split cases. In resolving this circuit split, the Court should clarify the *Bruen* and *Heller* frameworks to center the historical window on 2010, given its jurisprudential significance. Further, the Court should provide recency guidelines for conflicting historical records that prioritize the evaluation of newer laws more closely aligned with modern contexts. Lastly, the Court should shift its narrow history-by-analogy reasoning to a broader principle-based analysis that emphasizes historical legislative intent over means. Doing so would preserve the historical foundations of the Second Amendment and its continued jurisprudence while empowering legislatures to address the real and concerning public safety challenges surrounding an armed population. The Supreme Court should balance its commitment to tradition with the realities of today's societal needs to ensure that the Second Amendment is protected in a way that is consistent yet safe.