Washington Law Review

Volume 99 | Number 1

3-1-2024

Salvaging Federal Domestic Violence Gun Regulations in Bruen's Wake

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SALVAGING FEDERAL DOMESTIC VIOLENCE GUN REGULATIONS IN *BRUEN*'S WAKE

Bonnie Carlson*

Abstract: Congress passed two life-saving laws in the mid-1990s: a protection order prohibition, which bars firearm possession for protection order respondents, and the Lautenberg Amendment, which bars firearm possession for those convicted of misdemeanor crimes of domestic violence. Both laws have been repeatedly upheld by federal courts nationwide in the nearly thirty years since their enactment. Both faced renewed constitutional challenges after the United States Supreme Court's foundation-shifting decision in *New York State Rifle & Pistol Ass'n v. Bruen* on June 23, 2022. The Lautenberg Amendment has fared well; every court to consider it post-*Bruen* has upheld it. Courts have split, however, regarding the constitutionality of the protection order prohibition. Critically, the United States Court of Appeals for the Fifth Circuit struck down the protection order prohibition in early 2023 in *United States v. Rahimi*. The Supreme Court heard oral arguments on the appeal on November 7, 2023, and is expected to issue its decision by the end of the 2023–2024 term.

This Article directly addresses how the two federal domestic violence prohibitors remain constitutional even under *Bruen*'s new two-part test. First, neither law implicates conduct of "the people" protected by the Second Amendment because those who commit domestic violence are not "law-abiding" citizens as the Supreme Court's jurisprudence has required since *District of Columbia v. Heller*. Even if courts reach *Bruen*'s second step, in which the government must demonstrate that the law is consistent with the nation's historical tradition of firearm regulation, both laws have relevantly similar historical analogues.

As the nation continues to grapple with firearm regulation and domestic violence prevention, this Article provides a critical path forward for courts to apply *Bruen* to uphold the constitutionality of these two critical prohibitions on firearm possession for those who abuse their family members.

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INTRODUCTION

Congress has historically prohibited certain classes of people from possessing firearms, including those suffering from mental illnesses[1] or actively using illegal substances.[2] This Article specifically focuses on two classes of people who are banned from possessing firearms under federal law: those convicted of misdemeanor crimes of domestic violence[3] and those subject to protection orders.[4] In order to lawfully sell a firearm, a federally licensed dealer must run a background check on a prospective buyer to ensure they do not fall into one of these prohibited categories.[5] Over the past twenty-five years, background checks have prevented gun

1. 18 U.S.C. § 922(g)(4).

2. *Id.* § 922(g)(3).

3. *Id.* § 922(g)(9).

4. *Id.* § 922(g)(8). Hereinafter, these two regulations will be referred to as the "domestic violence prohibitors."

5. *See Firearms Checks (NICS)*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics (last visited Jan. 17, 2024).

sales to more than 2.2 million individuals.[6] Both the number and the rate of blocked gun sales have increased in recent years: in 2020, over 300,000 sales were prevented, increasing the rate of rejected sales from 0.6% to 0.8%.[7] Of the 2.2 million people blocked from gun purchases, nearly 271,000 of these individuals were stopped from buying a gun due to one of the domestic violence prohibitors named above.[8] It is impossible to know how those people would have gone on to handle firearms if they had been permitted to purchase them. It is also impossible to know how many individuals wanted to buy a firearm but decided to forego any attempt to purchase one because they knew the legal restrictions would be a bar.[9] However, given that a woman is five times more likely to be killed when her abusive partner has access to a gun,[10] it is likely that the laws stopping these sales saved many lives.

In June 2022, the United States Supreme Court handed down its highly anticipated ruling in *New York State Rifle & Pistol Ass'n v. Bruen*,[11] creating a new Second Amendment test that immediately cast doubt on a host of gun regulations nationwide, including the longstanding gun regulations contained within the Gun Control Act of 1968.[12] Under *Bruen*'s new test, the effectiveness of a gun regulation in preventing violence is irrelevant. Instead, what matters to the Supreme Court is whether the modern gun law is "consistent with the Nation's historical tradition of firearm regulation."[13] Lower courts struggle to apply this test, with different jurisdictions often reaching opposite results when considering the constitutionality of the same law.[14]

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6. *Federal Denials*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/file-repository/federal_denials.pdf/view [https://perma.cc/ENQ3-DFYF].

7. Lindsay Whitehurst, *Background Checks Blocked a Record High 300,000 Gun Sales*, AP (June 22, 2021), https://apnews.com/article/gun-background-checks-blocked-record-high-sales-e0c3105b6632740b8f15858cd930441a [https://perma.cc/Y3QX-C434].

8. *Federal Denials*, *supra* note 6.

9. Unfortunately, background checks are not required for gun sellers who are not federally licensed firearm dealers, so individuals who are otherwise banned under the Gun Control Act can still easily—though unlawfully—purchase firearms. *See Background Checks on All Gun Sales*, EVERYTOWN FOR GUN SAFETY, https://www.everytown.org/solutions/background-checks/ [https://perma.cc/R3RB-KSTU].

10. *Domestic Violence and Firearms*, THE EDUC. FUND TO STOP GUN VIOLENCE, https://efsgv.org/learn/type-of-gun-violence/domestic-violence-and-firearms/ [https://perma.cc/8TB7-PWNJ] (last updated July 2020).

11. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111 (2022).

12. 18 U.S.C. § 922. See *infra* section II.B for further discussion of the Gun Control Act.

13. *Bruen*, 142 S. Ct. at 2130.

14. Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 105–07 (2023). See *infra* section II.C for further discussion of the divergent results district courts have reached when considering identical gun regulations.

The Lautenberg Amendment[15]—which, under the federal Gun Control Act, bans individuals convicted of misdemeanor crimes of domestic violence from possessing firearms—has, thus far, been uniformly upheld in *Bruen*'s wake. Although the sixteen district courts that have considered the issue have taken different approaches under *Bruen*'s test in reaching that result, each has preserved it.[16] The protection order prohibition[17]—banning firearm possession by respondents to protection orders—has not enjoyed the same treatment by courts in the wake of *Bruen*. While seven district courts found the protection order prohibition to remain constitutional under *Bruen*, two district courts and the Fifth Circuit struck it down.[18] The federal government appealed the Fifth Circuit's decision to the United States Supreme Court, which granted certiorari and is considering the case in its 2023–2024 term.[19]

The continued constitutional viability of these two laws is critical to protect domestic violence victims. To be clear, I disagree with the Court's decision in *Bruen*, as it has created chaos in the lower courts, completely devalues advances in social or technological understanding, and disproportionately weighs the beliefs of white men more than 200 years ago.[20] That said, both the Lautenberg Amendment and the protection order prohibition meet the Court's new test; neither implicate the plain text of the Second Amendment and, even if they did, both have relevantly similar historical analogues to support their constitutionality, as the new standard requires.

This Article will proceed in four parts. First, I will describe the rampant problem of guns and domestic violence in the United States today, as well as the laws that Congress passed in order to protect victims. Next, I will discuss the United States Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, specifically explaining how it upended recent Second Amendment jurisprudence and examining a variety of issues that have already arisen in its application to other federal gun laws. Third, I will discuss how courts have applied *Bruen*'s test to the two federal domestic violence prohibitors. Finally, I will discuss why the laws both remain constitutional in *Bruen*'s wake.

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15. 18 U.S.C. § 922(g)(9).

16. See *infra* section III.A for a more in-depth discussion.

17. 18 U.S.C. § 922(g)(8).

18. *See infra* section III.B.

19. United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), *cert. granted*, __ U.S. __, 143 S. Ct. 2688 (June 30, 2023).

20. See *infra* section II.C for a description of several of the major concerns that have been raised about *Bruen* in its aftermath.

I. DOMESTIC VIOLENCE AND GUNS

A. The Problem

The United States Department of Justice defines domestic violence[21] as "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner."[22] Domestic violence is pervasive in the United States today; nearly twenty people are physically abused by their partner each minute.[23] That amounts to ten million individuals experiencing domestic violence over the course of a year.[24] In fact, domestic violence constitutes twenty-one percent of all violent crime in the United States.[25] Though both men and women experience domestic violence, women are victimized at far higher rates; a reported eighty-five percent of domestic violence victims are women.[26]

Adding a gun into an already abusive relationship can have fatal consequences. As Senator Frank Lautenberg noted on the Congress floor in 1996, "all too often, the difference between a battered woman and a dead woman is the presence of a gun."[27] When an abusive male partner has access to a firearm, the risk of homicide increases by more than one

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21. For the purposes of this Article, I will use the terms "domestic violence" and "intimate partner violence" interchangeably.

22. *Domestic Violence*, U.S. DEP'T OF JUST. OFF. ON VIOLENCE AGAINST WOMEN, https://www.justice.gov/ovw/domestic-violence [https://perma.cc/DH77-XGWS] (last updated Dec. 6, 2023); *see also id.* ("Domestic violence can be physical, sexual, emotional, economic, psychological, or technological actions or threats of actions or other patterns of coercive behavior that influence another person within an intimate partner relationship. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.").

23. *Statistics*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/statistics [https://perma.cc/9AL8-QRE2].

24. *Id.*

25. JENNIFER L. TRUMAN & RACHEL E. MORGAN, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT., NONFATAL DOMESTIC VIOLENCE, 2003–2012, at 1 (2014), https://bjs.ojp.gov/content/pub/pdf/ndv0312.pdf [https://perma.cc/JQQ3-99SS]. This is the case despite domestic violence being notoriously underreported. *Domestic Violence/Intimate Partner Violence Facts*, EMORY UNIV. SCH. OF MED., https://med.emory.edu/departments/psychiatry/nia/resources/domestic_violence.html [https://perma.cc/VL9Q-VJAD].

26. CALLIE MARIE RENNISON, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT., INTIMATE PARTNER VIOLENCE, 1993-2001, at 1 (2003), https://bjs.ojp.gov/content/pub/pdf/ipv01.pdf [https://perma.cc/7U5U-V8PN].

27. 142 CONG. REC. S24,648 (1996) (statement of Sen. Frank Lautenberg) (quoting Sen. Paul Wellstone).

thousand percent.[28] More than half of domestic homicides are committed with a firearm,[29] and from 2001 to 2020 a woman was shot to death by her intimate partner in the United States approximately every nineteen hours.[30] Not only is the risk of death in a domestic violence incident disproportionately affected by gender, but Black women are twice as likely to be fatally shot by an intimate partner as compared with white women.[31]

Fatality, though the most serious risk, is not the only harm that befalls domestic violence victims whose partners have firearms; injury or trauma can follow when victims have a weapon drawn on them or are threatened with a shooting.[32] Nineteen percent of domestic violence incidents include the use of a weapon.[33] This often involves abusive partners using firearms to threaten harm to their victims.[34] Approximately 13.6 percent of women presently living in the United States have been threatened by an intimate partner with a firearm.[35]

While the danger posed by abusive individuals having firearms is most acute to their partners, society at large also bears a significant risk. In more

28. Chelsea M. Spencer & Sandra M. Stith, *Risk Factors for Male Perpetration and Female Victimization of Intimate Partner Homicide: A Meta-Analysis*, 21 TRAUMA VIOLENCE & ABUSE 527, 536 (2020).

29. *Easy Access to the FBI's Supplementary Homicide Reports (EZASHR)*, U.S. DEP'T OF JUST. NAT'L CTR. FOR JUV. JUST., https://www.ojjdp.gov/ojstatbb/ezashr/ (last updated Dec. 9, 2021) (last visited Jan. 17, 2024) (click "Victim Crosstabs"; then select "Family" in the "Victim-Offender relationship" box and "Weapon used" from the "Column Variable" dropdown; and then click "show table") (showing that firearms were used in 49,374 of the 94,421 homicides of family members occurring from 1980 to 2020).

30. *Id.* (click "Victim Crosstabs"; then select the years 2001–2020 in the "Year of incident" box, "family" in the "Victim-Offender relationship" box, "Female" in the "Sex" box under the "Characteristics of Victim" header, and "Weapon used" from the "Column Variable" dropdown; and then click "show table") (showing that 9,451 female intimate homicide victims were killed with a firearm from 2001 to 2020).

31. Marissa Edmund, *Gun Violence Disproportionately and Overwhelmingly Hurts Communities of Color*, CTR. FOR AM. PROGRESS (June 30, 2022), https://www.americanprogress.org/article/gun-violence-disproportionately-and-overwhelmingly-hurts-communities-of-color/ [https://perma.cc/CEX7-DGEU].

32. *Quick Facts About Domestic Violence in the United States*, PLANSTREET (June 20, 2022), https://www.planstreetinc.com/quick-facts-about-domestic-violence-in-the-united-states/ [https://perma.cc/Q9PP-BL62].

33. *Id.*

34. *See generally* Emily F. Rothman, David Hemenway, Matthew Miller & Deb Azrael, *Batterers' Use of Guns to Threaten Intimate Partners*, 60 J. AM. MED. WOMEN'S ASS'N 62 (2005).

35. Avanti Adhia, Vivian H. Lyons, Caitlin A. Moe, Ali Rowhani-Rahbar & Frederick P. Rivara, *Nonfatal Use of Firearms in Intimate Partner Violence: Results of a National Survey*, PREVENTATIVE MED., June 2021, at 1, 1, 3.

than two-thirds of mass shootings,[36] the shooter had a history of domestic violence or killed a family member or intimate partner.[37] For example, Omar Mateen, who killed forty-nine people and injured fifty-three more at the Pulse nightclub in 2016,[38] had a history of physically assaulting his ex-wife, at one point even holding her hostage.[39] His history of domestic violence was not known to authorities,[40] and he passed a background check to purchase firearms shortly before carrying out the massacre.[41]

B. The Laws

Congress first prohibited certain categories of individuals from possessing firearms in the Gun Control Act of 1968 (GCA).[42] This statute was enacted following the assassinations of President John F. Kennedy, the Reverend Dr. Martin Luther King, Jr., and Robert Kennedy, as well as in response to rising rates of crime and rioting.[43]

Congress amended the GCA in 1994 when it banned those subject to domestic violence protection orders from possessing firearms (hereinafter referred to as the "protection order prohibition").[44] A protection order is a civil order issued by a state court that directs an individual to stop harming

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36. A "mass shooting" is defined as an event with at least four fatalities by gunfire, not including the perpetrator. Press Release, The Educ. Fund to Stop Gun Violence, Study: Two-Thirds of Mass Shootings Linked to Domestic Violence, https://efsgv.org/press/study-two-thirds-of-mass-shootings-linked-to-domestic-violence/ [https://perma.cc/DFG3-RS4U].

37. *Id.*

38. Ariel Zambelich & Alyson Hurt, *3 Hours in Orlando: Piecing Together an Attack and Its Aftermath*, NPR: THE TWO-WAY (June 26, 2016), https://www.npr.org/2016/06/16/482322488/orlando-shooting-what-happened-update [https://perma.cc/D3EQ-2HXE].

39. Michael Safi, *Omar Mateen: Orlando Killer's Ex-Wife Says He Beat Her and Held Her Hostage*, GUARDIAN (June 13, 2016), https://www.theguardian.com/us-news/2016/jun/13/orlando-massacre-omar-mateens-ex-wife-says-he-beat-her-and-held-her-hostage [https://perma.cc/2XF2-XQ2J].

40. *Cf. id.*

41. *See* Crimesider Staff, *Gun Shop Owner: Orlando Shooter Passed Background Check*, CBS NEWS (June 13, 2016), https://www.cbsnews.com/news/gun-shop-owner-orlando-nightclub-shooter-omar-mateen-passed-background-check/ [https://perma.cc/YAN2-WZLG].

42. Jodi L. Nelson, Note, *The Lautenberg Amendment: An Essential Tool for Combatting Domestic Violence*, 75 N.D. L. REV. 365, 370 (1999); 18 U.S.C. § 922(g) (including bans on possession of firearms from individuals suffering from mental illness and those convicted of felonies, among others).

43. Olivia B. Waxman, *How the Gun Control Act of 1968 Changed America's Approach to Firearms—and What People Get Wrong About That History*, TIME (Oct. 30, 2018, 11:52 AM), https://time.com/5429002/gun-control-act-history-1968/ [https://perma.cc/FMQ4-VL6M].

44. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110401(c), 108 Stat. 1796, 2014–15 (1994) (codified at 18 U.S.C. § 922(g)(8)).

another individual.[45] Protection orders can include a wide variety of relief, including requiring the respondent to stay away from the petitioner, the petitioner's home, and other locations the petitioner frequents.[46] They can also prohibit the respondent from contacting the petitioner entirely.[47] Other forms of relief may be available in a protection order, depending on the state.[48]

To qualify for the gun ban under the protection order prohibition, the individual subject to the protection order must have received actual notice of the hearing at which the protection order was issued.[49] The protection order must also either include a finding that the respondent represents a credible threat to the petitioner or explicitly prohibit the use, attempted use, or threatened use of violence against the petitioner.[50] Additionally, for the gun ban to trigger, the protection order must mandate the respondent not to harass, stalk, threaten, or otherwise place an intimate partner or intimate partner's child in fear of bodily injury.[51]

Protection orders generally last from one to three years,[52] and the gun ban for persons subject to a protection order is in place for the life of the

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45. *See Domestic Violence Restraining Orders*, WOMENSLAW.ORG, https://www.womenslaw.org/laws/general/restraining-orders [https://perma.cc/DE84-DM74].

46. *Id.*

47. *Id.*

48. *Id.* Relief available often includes temporary child support, temporary child custody and visitation rights, exclusive use and possession of a jointly owned vehicle, exclusive use and possession of a residence, or mandatory treatment for the respondent, including batterer's intervention programs or alcohol or drug counseling. *See, e.g.*, GA. CODE ANN. § 19-13-4(a) (2003) (authorizing Georgia courts to issue family violence protective orders that "(1) Direct the respondent to refrain from such acts; (2) Grant to a party possession of the residence or household of the parties and exclude the other party from the residence or household; (3) Require a party to provide suitable alternate housing for a spouse, former spouse, or parent and the parties' child or children; (4) Award temporary custody of minor children and establish temporary visitation rights; (5) Order the eviction of a party from the residence or household and order assistance to the victim in returning to it, or order assistance in retrieving personal property of the victim if the respondent's eviction has not been ordered; (6) Order either party to make payments for the support of a spouse as required by law; . . . (8) Provide for possession of personal property of the parties; (9) Order the respondent to refrain from harassing or interfering with the victim; (10) Award costs and attorney's fees to either party; and (11) Order the respondent to receive appropriate psychiatric or psychological services as a further measure to prevent the recurrence of family violence").

49. 18 U.S.C. § 922(g)(8)(A).

50. *Id.* § 922(g)(8)(C).

51. *Id.* § 922(g)(8)(B).

52. *See* Am. Bar Ass'n Comm'n on Domestic & Sexual Violence, Nat'l Network to End Domestic Violence & WomensLaw.org, *Domestic Violence Civil Protection Orders (CPOs)*, AM. BAR ASS'N (June 2020), https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/charts/cpo2020.pdf (last visited Jan. 19, 2024). There are some exceptions to this. For example, Connecticut orders are 120 days. *See* CONN. GEN. STAT. § 46B-15(d) (2022). In Mississippi, the duration of the order is at the court's discretion and can be indefinite. *See* MISS. CODE ANN. § 93-21-15(2)(b) (2019).

order.[53] In addition to banning possession of firearms, the protection order prohibition also bans shipping, transporting, or receiving firearms or ammunition.[54]

Two years after passing the protection order prohibition, Congress again sought to protect victims from gun violence by passing the Lautenberg Amendment.[55] The Lautenberg Amendment bans individuals convicted of misdemeanor domestic violence crimes from possessing, shipping, transporting, or receiving firearms or ammunition.[56] Congress apparently believed that the Lautenberg Amendment was necessary to close a problematic and dangerous loophole in existing gun laws. The GCA already banned felons from possessing firearms.[57] However, in this era, the criminal legal system often treated violence committed by individuals against intimate partners less seriously than violence committed against strangers; acts of violence that generally would be charged as felonies when perpetrated upon a stranger were often charged as misdemeanors when perpetrated upon an intimate partner.[58] Even when intimate partner violence was initially charged as a felony, often those defendants were able to plead down to misdemeanor charges.[59]

To qualify as a misdemeanor crime of domestic violence under the Lautenberg Amendment, the underlying conviction must stem from a law that involves "the use or attempted use of physical force, or the threatened use of a deadly weapon."[60] The defendant must also have a particular relationship with the victim; the Lautenberg Amendment only applies where the defendant is a current or former spouse, parent, or person in a dating relationship with the victim.[61] If the case meets these requirements,

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53. *See* 18 U.S.C. § 922(g)(8).

54. *Id.* § 922(g).

55. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 658(b)(2)(C), 110 Stat. 3009, 3009-372 (1996) (codified at 18 U.S.C. § 922(g)(9)).

56. 18 U.S.C. § 922(g)(9).

57. *See id.* § 922(g)(1).

58. PATRICK A. LANGAN & CHRISTOPHER A. INNES, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT., PREVENTING DOMESTIC VIOLENCE AGAINST WOMEN 2–3 (1986), https://bjs.ojp.gov/content/pub/pdf/pdvaw.pdf [https://perma.cc/J3DZ-RG4X] (finding that a third of misdemeanor domestic violence charges would have been charged as felonies if committed against a stranger).

59. 142 CONG. REC. H23,421 (1996) (statement of Rep. Patricia Schroeder).

60. 18 U.S.C. § 921(a)(33)(A)(ii).

61. *Id.* § 921(a)(32) (defining "intimate partner" as "the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person"); *see also id.* § 921(a)(33)(A) (defining "misdemeanor crime of domestic violence" as "an offense . . . committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is

the gun ban becomes effective immediately upon the defendant's conviction and is permanent.[62]

The Lautenberg Amendment was signed into law on September 30, 1996.[63] In his remarks from the Senate floor before Congress voted on his amendment, Senator Lautenberg stated:

> [w]e hope that the enforcement of the law will be as rigid as the law very simply defines it. If you beat your wife, if you beat your child, if you abuse your family and you are convicted, even of a misdemeanor, you have no right to possess a gun.[64]

In passing both the protection order prohibition and the Lautenberg Amendment, Congress recognized the danger present when people who commit domestic violence possess firearms. Both laws were an attempt to address that danger, and both have achieved some success.[65] The Lautenberg Amendment has led to a seventeen percent decrease in gun-related homicides among female victims of intimate partner

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cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, by a person similarly situated to a spouse, parent, or guardian of the victim, or by a person who has a current or recent former dating relationship with the victim"); Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12005(a)(1), 136 Stat. 1313, 1332 (2022) (adding the "current or recent former dating relationship with the victim" provision to the definition of "misdemeanor crime of domestic violence"). Although the recent Bipartisan Safer Communities Act, signed into law by President Joseph Biden on June 25, 2022, closed the "boyfriend loophole" by expanding the definition of "misdemeanor crime of domestic violence" in the Lautenberg Amendment, it did not change the definition for the protection order prohibition. *See id.*

62. *See* 18 U.S.C. § 922(g)(9); *see also* Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411, 1419 (2005).

63. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 658(b)(2)(c), 110 Stat. 3009, 3009–372 (1996) (codified at 18 U.S.C. § 922(g)(9)); *see also* U.S. DEP'T OF JUST., *Criminal Resource Manual 1117: Restrictions on the Possession of Firearms by Individuals Convicted of a Misdemeanor Crime of Domestic Violence*, https://www.justice.gov/archives/jm/criminal-resource-manual-1117-restrictions-possession-firearms-individuals-convicted [https://perma.cc/96YZ-RFGN] (last updated July 2013).

64. 142 CONG. REC. S26,676 (1996) (statement of Sen. Frank Lautenberg).

65. The laws have also partially failed to live up to their promises for a variety of reasons, including failure to fully staff both the Bureau of Alcohol, Tobacco, and Firearms (ATF) to investigate violations and United States Attorney's Offices to prosecute these violations and the fact that some states fail to provide complete information to NICS. *See* AMS. FOR RESPONSIBLE SOLS. & THE NAT'L DOMESTIC VIOLENCE HOTLINE, SAVING WOMEN'S LIVES: ENDING FIREARMS VIOLENCE AGAINST INTIMATE PARTNERS 14 (2014); *see also* Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 EVALUATION REV. 313, 322 (2006); ARKADI GERNEY & CHELSEA PARSONS, WOMEN UNDER THE GUN: HOW GUN VIOLENCE AFFECTS WOMEN AND 4 POLICY SOLUTIONS TO BETTER PROTECT THEM 3 (2014) (identifying, in a study by the Center for American Progress, only three states—Connecticut, New Hampshire, and New Mexico—as submitting "reasonably complete records" and noting that records from these states constitute seventy-nine percent of all records submitted to the FBI).

violence.[66] The protection order prohibition has also been shown to reduce domestic homicides.[67]

Thirty-four states and the District of Columbia have adopted laws similar to the Lautenberg Amendment to ban individuals convicted of misdemeanor domestic violence from possessing firearms.[68] Forty-two states and the District of Columbia either authorize or require a ban on gun possession for respondents to protection orders.[69] Multiple studies have found a decrease in the rates of intimate partner homicides committed both with and without a firearm after states passed such protection order prohibitions.[70] One study found an eight percent decline in the rates of female intimate partner homicide after states passed such laws.[71]

The United States Supreme Court has had several occasions to interpret the Lautenberg Amendment and has never questioned its constitutionality.[72] While the Supreme Court has not had the opportunity to consider the constitutionality of the protection order prohibition, both the Third[73] and Eighth[74] Circuits upheld it under the Second Amendment before the Supreme Court's 2022 decision in *New York State Rifle & Pistol Ass'n v. Bruen*.

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66. Kerri M. Raissian, *Hold Your Fire: Did the 1996 Federal Gun Control Act Expansion Reduce Domestic Homicides?*, 35 J. POL'Y ANALYSIS & MGMT. 67, 69 (2016).

67. DANIEL W. WEBSTER, JON S. VERNICK, KATHERINE VITTES, EMMA E. MCGINTY, STEPHEN P. TERET & SHANNON FRATTAROLI, THE CASE FOR GUN POLICY REFORMS IN AMERICA 8 (2012).

68. *See Who Can Have a Gun: Domestic Violence and Firearms*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/ [https://perma.cc/Q5CX-PWHP].

69. *See id.*

70. APRIL M. ZEOLI, BATTERED WOMEN'S JUST. PROJECT, DOMESTIC VIOLENCE AND FIREARMS: RESEARCH ON STATUTORY INTERVENTIONS 3 (2018), https://www.preventdvgunviolence.org/dv-and-firearms-zeoli.pdf [https://perma.cc/X44V-FCLP].

71. Vigdor & Mercy, *supra* note 65, at 337.

72. *See* United States v. Hayes, 555 U.S. 415, 418 (2009) (holding "that [a] domestic relationship . . . need not be a defining element of the predicate" misdemeanor crime of domestic violence to trigger the Lautenberg Amendment); United States v. Castleman, 572 U.S. 157, 168 (2014) (holding that the Lautenberg Amendment's requirement that a qualifying domestic violence crime include "physical force" is satisfied by the degree of force supporting a common law conviction for battery); Voisine v. United States, 579 U.S. __, 136 S. Ct. 2272, 2278 (2016) (holding that "reckless domestic assault qualifies as a 'misdemeanor crime of domestic violence'" under the Lautenberg Amendment).

73. United States v. Boyd, 999 F.3d 171, 189 (3d Cir. 2021).

74. United States v. Bena, 664 F.3d 1180, 1182–85 (8th Cir. 2011).

II. SHIFTING GROUND: *NEW YORK STATE RIFLE AND PISTOL ASSOCIATION V. BRUEN*

To understand the Supreme Court's foundational shift in Second Amendment jurisprudence, it is first necessary to understand the recent historical interpretation of the Second Amendment. The Second Amendment to the United States Constitution reads, in its entirety, as follows: "[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."[75] Below I describe the Court's recent jurisprudence leading up to its decision in *Bruen*.

A. Landscape of the Law Before Bruen

Before the Supreme Court decided *New York State Rifle & Pistol Ass'n v. Bruen* in 2022, there was relative nationwide cohesion in federal courts' interpretation of the Second Amendment. That cohesion stemmed from the Supreme Court's 2008 decision in *District of Columbia v. Heller*.[76] In that case, the Court considered the constitutionality of the District of Columbia's gun registration scheme.[77] At the time, the District of Columbia banned the possession of unregistered firearms and prohibited the registration of handguns,[78] effectively banning the possession of handguns. The Supreme Court struck down this regulatory scheme as a violation of the petitioner's Second Amendment rights.[79] In so doing, it held that the Second Amendment confers an individual right to keep and bear arms specifically for the purpose of self-defense, unrelated to militia service.[80]

The Supreme Court cautioned in its holding that:

> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[81]

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75. U.S. CONST. amend. II.
76. 554 U.S. 570 (2008).
77. *See generally id.*
78. *Id.* at 574–75.
79. *Id.* at 635.
80. *Id.*
81. *Id.* at 626–27.

However, one element notably absent in the Court's decision was a test that federal courts should apply to determine the constitutionality of firearms regulations moving forward.[82] The Court suggested that something like rational basis was not the appropriate standard of review,[83] but provided no further guidance to lower courts.

Following *Heller*, federal courts were left to determine an appropriate test to apply to firearms regulations. In so doing, "the Courts of Appeals have coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny."[84] Under the first step, courts determined whether the statutory provision at issue impinged upon the Second Amendment right.[85] If a court answered that question in the negative, the statute would be upheld.[86] If the law did impinge on the Second Amendment right, the court would then determine whether the provision survived either intermediate or strict scrutiny.[87] The level of scrutiny would depend on how much the law at issue burdened the Second Amendment right.[88] For a law that burdened the "core" of the Second Amendment right, the government was tasked with proving that the law was "narrowly tailored to achieve a compelling governmental interest."[89] For laws that did not burden the core of the Second Amendment right, the government bore the lesser burden of demonstrating that the law was "substantially related to the achievement of an important governmental interest."[90] Every federal court of appeals that considered the issue adopted this two-step test.[91] In *Bruen*, the Supreme Court called this two-step approach "one step too many."[92]

B. The Bruen *Decision*

The New York laws at issue in *Bruen* made it a crime to possess a firearm, either inside or outside of the home, without a license.[93] In order

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82. *See id.* at 628–29 (noting that under any test the District of Columbia's registration scheme was unconstitutional).

83. *See id.* at 628 n.27.

84. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2125 (2022).

85. *Id.* at 2126.

86. *See id.*

87. *Id.*

88. *See id.*

89. *Id.* (quoting Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017)).

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

91. *Id.* at 2174 (Breyer, J., dissenting).

92. *Id.* at 2127 (majority opinion).

93. *Id.* at 2122.

to obtain a license to possess a firearm at home or in a place of business, applicants were required to prove that they were "of good moral character, ha[d] no history of crime or mental illness, and that 'no good cause exists for the denial of the license.'"[94] To obtain a license for firearm possession outside of their home or place of business, an applicant had several options. First, if they wanted an unrestricted license to possess a concealed firearm, they had to prove that "proper cause" existed to issue it.[95] "Proper cause" was interpreted to mean that the applicant could "demonstrate a special need for self-protection distinguishable from that of the general community."[96] If an applicant could not make that showing, they were eligible to receive a "restricted" license for public carry for limited purposes only, such as hunting and target shooting.[97] If a license application was denied, judicial review was limited.[98] This scheme was called a "may issue" licensing law and mirrored similar laws in six other jurisdictions.[99] However, the majority of jurisdictions had "shall issue" licensing laws that did not give licensing officers discretion to deny concealed carry firearms licenses once an applicant met basic requirements.[100]

The petitioners in *Bruen* were Brandon Koch and Robert Nash, both residents of Rensselaer County, New York.[101] Both individuals had similar experiences seeking public carry licenses between the years of 2008 and 2017: Nash originally applied for an unrestricted license but was granted only a restricted license, while Koch already had an unrestricted license; each later applied to have the restrictions removed, and each had that application denied.[102] Koch and Nash filed a lawsuit against the superintendent of the New York State Police and a New York Supreme Court justice for their involvement in enforcing the licensing application process.[103] After the district court dismissed the case and the court of

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

95. *Id.* at 2123 (quoting N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2022)).

96. *Id.* (quoting *In re* Klenosky, 428 N.Y.S.2d 256, 257 (1980)).

97. *Id.*

98. *Id.*

99. *Id.* at 2124.

100. *Id.* at 2123 ("[T]he vast majority of our States—43 by our count—are 'shall issue' jurisdictions, where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability.").

101. *Id.* at 2124–25.

102. *Id.* at 2125.

103. *See id.*

appeals affirmed,[104] Koch and Nash appealed to the United States Supreme Court, which granted certiorari in 2021.[105]

On June 23, 2022, the Supreme Court announced its decision, finding the New York "may issue" scheme unconstitutional under the Second Amendment.[106] The majority, in an opinion by Justice Clarence Thomas, held as follows:

> [w]hen 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."[107]

Although the *Bruen* Court decried the previous legal framework adopted by the courts of appeals as "one step too many,"[108] it ultimately adopted its own two-step approach.[109] Under step one, the court must first determine whether the Second Amendment protects the individual behavior or conduct covered by the law at issue.[110] If the Second Amendment plainly covers the conduct in question, the government then bears the burden of demonstrating that the law is consistent with the nation's historical tradition of firearm regulation.[111] The opinion explicitly disavows the means-ends scrutiny courts applied following *Heller*, citing that this approach has recently led federal courts to wrongfully defer to judgments made by legislatures.[112]

In applying this new test to New York's "may issue" gun licensing scheme, the Court determined, with relatively little discussion, that the Second Amendment covered the petitioners' conduct in that it guaranteed petitioners the right to bear arms in public for self-defense.[113] The respondents did not dispute this.[114] The bulk of the Court's opinion compared the "may issue" scheme to historical laws the government had

104. *Id.*
105. *Id.*
106. *See id.* at 2156.
107. *Id.* at 2129–30 (quoting Konigsberg v. State Bar of Cal., 336 U.S. 36, 50 n.10 (1961)).
108. *Id.* at 2127.
109. *Id.* at 2129–30.
110. *Id.*
111. *Id.* at 2130.
112. *Id.* at 2131.
113. *See id.* at 2134–35.
114. *Id.* at 2134.

identified as analogous.[115] The Court dismissed each of those historical analogues in turn, ultimately holding for the petitioners that the New York regulation was not in line with the nation's historical tradition of firearm regulations.[116]

C. Critiques of Bruen

Several of the critiques of the decision demonstrate how significantly it has upended Second Amendment jurisprudence nationwide. Because the *Bruen* test is so fundamentally different from how federal courts previously adjudicated the constitutionality of gun regulations, a number of modern-day regulations are potentially on the chopping block. While the Lautenberg Amendment and protection order prohibition should survive the new test, it is helpful to understand the problems that have already arisen under *Bruen* before proceeding to that discussion.

The critiques of the *Bruen* decision can be summarized in several points. First, the new test will lead—and already has led—to widely disparate outcomes among different district courts analyzing gun regulations. Second, the test forces lawyers and courts to rely on history, even though they may lack the expertise to do so properly. Third, the test fails to account for the tremendous societal and technological changes that have occurred since the ratification of the Second Amendment. Fourth, requiring a sole reliance on history is problematic because large categories of people were disqualified from participating in the democratic process during the time at which courts are now required to find analogous laws.

1. Bruen *Leads to Disparate Outcomes*

The *Bruen* decision has created a mess in the lower courts, leading to "wildly manipulable and unpredictable case outcomes."[117] Since *Bruen* was decided, courts have reached differing results on the constitutionality of laws restricting gun possession or acquisition by people under felony indictment, by unlawful users of controlled substances, and by individuals between the ages of eighteen and twenty.[118] Courts have also diverged regarding the constitutionality of bans on firearms with obliterated serial

115. *See id.* at 2135–56.

116. *See id.*

117. Blocher & Ruben, *supra* note 14, at 105.

118. *Id.* at 105–06.

numbers, as well as restrictions on "ghost guns"[119] and on possessing guns in "sensitive places."[120]

Why have courts applying the *Bruen* test failed to achieve consistency in their opinions? The problem lies in the heart of the new test: courts are being asked to find evidence that modern gun laws are "consistent with the Nation's historical tradition of firearm regulation."[121] However, for most of the nation's history, firearm regulations were not uniform.[122] Disparity among laws between states and localities was the norm,[123] particularly during the time period to which the *Bruen* Court directs courts to give the most weight.[124] Specifically, the *Bruen* Court noted that the scope of a constitutional right is to be understood by how it was perceived at the time the people adopted it.[125] Therefore, the *Bruen* Court explained that it is most instructive for courts to identify analogous gun regulations that existed around the time the Second Amendment was adopted in order to determine whether the modern gun regulation at issue is constitutional.[126]

The Second Amendment was adopted in 1791, and the Fourteenth Amendment, which bound the states to the Second Amendment, was adopted in 1868.[127] The *Bruen* Court cautioned against relying too much on gun regulations that pre- or post-dated that time period.[128] However, uniformity among firearms regulations in the United States was not prevalent until the early- to mid-twentieth century, when model firearms legislation began to emerge.[129] As a result, courts are faced with the impossible task of identifying laws consistent with the tradition of a nation that did not yet enjoy a common understanding of gun regulations. Disparate outcomes, then, are to be expected when courts can

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119. *Id.* "Ghost guns" are take-home, build yourself firearms which are accessible for purchase online and difficult to regulate. *See What Are Ghost Guns?*, BRADY, https://www.bradyunited.org/fact-sheets/what-are-ghost-guns [https://perma.cc/G6XC-GYFK].

120. Blocher & Ruben, *supra* note 14, at 106.

121. *Bruen*, 142 S. Ct. at 2130.

122. 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, 683 (2023) [hereinafter Charles, *The Fugazi Second Amendment*].

123. *See id.*

124. *Bruen*, 142 S. Ct. at 2136.

125. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008)).

126. *Id.*

127. *Id.*

128. *Id.* ("Historical evidence that long predates either date may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years. . . . Similarly, we must also guard against giving postenactment history more weight than it can rightly bear.").

129. Charles, *The Fugazi Second Amendment*, *supra* note 122, at 683.

pick and choose laws to either analogize with or distinguish from modern regulations in front of them. This is especially true when they may not be representative of the broader societal perception of gun rights in the late eighteenth to mid-nineteenth centuries.

2. Bruen *Uses History Unreliably*

Judges have not been asked to apply a test quite like *Bruen*'s before. Scholars Joseph Blocher and Eric Ruben cited "other areas of constitutional-rights adjudication–none of which employ historical-analogical inquiry as the sole means of determining constitutionality."[130] Because courts have not been asked to rely solely on this type of reasoning before, they lack the experience and expertise to apply *Bruen*'s test. This also helps to explain the problem discussed above: disparate outcomes are also to be expected when courts are forced to rely on an attorney-developed record. This puts courts at the whim of the competency of each side's legal research skills.[131]

Lawyers are not historians and generally lack the expertise that historians have. Still, under *Bruen*, lawyers are tasked with creating a record that proves or disproves historical points. Without the background in history or the deep understanding of historical research, it is difficult to ask lawyers to compile such a record in an accurate way. In addition, the adversarial nature of our legal system requires that lawyers attempt to put together a record favorable to their clients.[132] Lawyers' fidelity is to their

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130. Blocher & Ruben, *supra* note 14, at 133; *id.* at 133–34 ("The majority attempted to link the historical-analogical approach to other areas of constitutional law, but as others–including those who support *Bruen*'s result–have noted, this attempt to claim doctrinal consistency is 'extremely tendentious.'" (footnote omitted)); *cf. Bruen*, 142 S. Ct. at 2130 ("This Second Amendment standard accords with how we protect other constitutional rights.").

131. United States v. Perez-Gallan, 640 F. Supp. 3d 697, 713–14 (W.D. Tex. 2022), *aff'd*, No. 22-51019, 2023 WL 4932111 (5th Cir. Aug. 2, 2023) ("[O]ne could easily imagine a scenario where separate courts can come to different conclusions on a law's constitutionality, but both courts would be right under *Bruen*. Say the Government in Court A develops an in-depth historical analysis to uphold a regulation, and Court A finds that the Government met the burden imposed by *Bruen*'s step two. The Government in Court B, in contrast, could face the same regulation as in Court A on the same day, but develop no analysis or fail to respond at all. An inflexible reading of *Bruen*, then, would require Court B to declare the regulation unconstitutional. On that basis, the same regulation gets different results based on how adept at historical research the Government's attorneys are in a particular location or the time they have to devote to the task.").

132. Charles, *The Fugazi Second Amendment*, *supra* note 122, at 679 ("Simply put, our adversarial legal system, at least as currently constituted, is not all that conducive to providing the courts with honest and objective history from which to jurisprudentially reason. This is largely because the courts are receiving their history *not* from experienced historians or respected historical works, but from lawyers and 'motivated groups that are pressing for a particular outcome.'" (emphasis in original) (quoting Allison Orr Larsen, *The Supreme Court Decisions on Guns and Abortion Relied Heavily on*

client and not to historical accuracy. When judges, who are also not typically historians, are presented with evidence created by two outcome-motivated sides, their job of finding the historical "truth" becomes even more difficult. This judicial lack of historical understanding is on full display in the *Bruen* opinion, as at least one historian has decried, lamenting that the opinion "fails to adhere to even basic academic standards."[133]

Finally, *Bruen*'s sole reliance on history assumes that when the state has historically not legislated in an area, it is because it *could not*.[134] There are, of course, a variety of reasons why legislative bodies may decline to regulate certain conduct: lack of interest, lack of need, inability to build consensus, lack of popularity, or unwillingness to protect a vulnerable group, to name a few.[135] But because *Bruen* requires the government to show a historical analogue to support any modern gun regulation,[136] the absence of such a regulation is itself evidence that the current law is unconstitutional. As one scholar put it:

> [a]nd 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.
>
> Specifically, it must assume that historical legislatures always legislated to the maximum extent of their constitutional authority, at least with respect to guns.[137]

3. Bruen *Discounts Major Societal and Technological Changes*

As a foundational matter, it is important to consider the practical realities of implementing a test that requires courts to rely on—and

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History. But Whose History?, POLITICO (July 26, 2022), https://www.politico.com/news/magazine/2022/07/26/scotus-history-is-from-motivated-advocacy-groups-00047249 [https://perma.cc/ZW8D-ECHA])).

133. *Id.* at 626; *id.* at 625–26 ("Where *Bruen* severely falters, however, is in its use and application of history. It is difficult to say what history-based jurisprudential methodology *Bruen* employs. On its face, *Bruen* appears to be grounded in public meaning originalism. Yet at several points the *Bruen* majority picks and chooses historical evidence on little more than a whim. Yet no matter how *Bruen* is methodologically classified—whether it be originalist or some other history-based form of constitutional interpretation—the fact of the matter is that the 6-3 majority's historical approach is neither objective nor holistic." (footnotes omitted)).

134. Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 111 (2023) [hereinafter Charles, *The Dead Hand*].

135. *Id.* at 115.

136. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111 (2022).

137. Charles, *The Dead Hand*, *supra* note 134, at 111.

conform to—an originalist understanding of the Second Amendment.[138] This raises questions such as: who benefitted from the laws that existed at that time? Who would benefit from a return to that historical understanding? Who was harmed by the laws that existed historically? Who would benefit from a modernization of laws to better fit our current reality?

Under the common law, husbands were permitted to "chastise[]" their wives in the form of corporal punishment, provided that no permanent injury resulted.[139] This fit squarely within the existing legal framework of marriage at the time: a wife needed her husband's participation to file a lawsuit; a husband was entitled to the value of his wife's labor and most of her property; and a wife was obligated to obey and serve her husband.[140] Even by the 1870s, when the doctrine of chastisement was formally and universally condemned, violence within marriage was often still condoned.[141] This was the norm during the time frame on which the *Bruen* majority instructs lower courts to rely to determine the historical societal understanding of gun laws.[142]

Of course, a great deal has changed since that time, including societal understanding of the appropriateness of violence in an intimate partner relationship. Every state and the District of Columbia now criminalizes domestic violence.[143] A victim of domestic violence can ask a court for an order of protection against domestic violence in every American jurisdiction.[144] Domestic violence is widely repudiated in the United States, and a 2018 survey found that sixty-two percent of Americans identified domestic violence as an "extremely serious issue."[145]

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138. Charles, *The Fugazi Second Amendment*, *supra* note 122, at 694 ("The point to be made is that when members of the bench and bar advocate for a so-called originalist return to a past legal rule or system it is important to first consider how and why our society moved away from that rule or system, and then ask themselves the following questions: How will returning to that past legal rule or system work today? What, if anything, will it legally upend? What are the benefits and burdens of making this originalist return?").

139. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996).

140. *Id.* at 2122–23.

141. *Id.* at 2129–30.

142. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2136 (2022).

143. Ryan, *Guide to Domestic Violence Law in America*, LAWSUIT.ORG, https://lawsuit.org/family-law/domestic-violence-law/ [https://perma.cc/N2LT-VNAM]. Most states have a specific code provision for domestic violence, but all at least punish assault and battery. *See id.*

144. *Overview of Protection Orders*, VAWNET, https://vawnet.org/sc/overview-protection-orders [https://perma.cc/88K9-APWN].

145. ALLSTATE FOUND., 2018 PUBLIC OPINION RESEARCH AT A GLANCE (2018), https://perma.cc/N4KT-5WPJ.

Our societal understanding of domestic violence has also changed. Recent data demonstrates that people who commit violence pose an even greater risk to their intimate partners when they have access to a gun.[146] Stronger gun laws are positively correlated with lower rates of female gun homicides.[147] Yet, the mandate of the *Bruen* Court is to ignore our modernized view of domestic violence and its fatal interplay with gun possession, instead considering only what laws would have been supported at the time of our nation's founding.

In his concurring opinion in *Bruen*, Justice Alito crystallized this position when he criticized Justice Breyer's dissenting opinion for discussing recent statistics about gun violence.[148] Justice Alito questioned the "relevance" of the statistics to which Justice Breyer cited, highlighting the majority opinion's view that modern-day realities are somehow insignificant in determining the constitutionality of modern-day gun regulations.[149] There is no justifiable reason, practically or constitutionally, to disregard centuries of research, data, and social progress that this country has made when determining a gun law's validity.

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146. See *supra* section I.A for an in-depth discussion of the data on the risk association between firearm ownership and domestic violence.

147. *See* Marissa Edmund, *Weak Gun Laws Are Harmful to Women and Survivors of Domestic Violence*, CTR. FOR AM. PROGRESS (Oct. 31, 2022), https://www.americanprogress.org/article/weak-gun-laws-are-harmful-to-women-and-survivors-of-domestic-violence/ [https://perma.cc/9DZD-UCA3].

148. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2157–58 (2022) (Alito, J., concurring) ("*Why, for example, does the dissent think it is relevant to recount the mass shootings that have occurred in recent years?* Does the dissent think that laws like New York's prevent or deter such atrocities? Will a person bent on carrying out a mass shooting be stopped if he knows that it is illegal to carry a handgun outside the home? And how does the dissent account for the fact that one of the mass shootings near the top of its list took place in Buffalo? The New York law at issue in this case obviously did not stop that perpetrator. *What is the relevance of statistics about the use of guns to commit suicide?* Does the dissent think that a lot of people who possess guns in their homes will be stopped or deterred from shooting themselves if they cannot lawfully take them outside? *The dissent cites statistics about the use of guns in domestic disputes, but it does not explain why these statistics are relevant to the question presented in this case.* How many of the cases involving the use of a gun in a domestic dispute occur outside the home, and how many are prevented by laws like New York's? *The dissent cites statistics on children and adolescents killed by guns, but what does this have to do with the question whether an adult who is licensed to possess a handgun may be prohibited from carrying it outside the home?* Our decision, as noted, does not expand the categories of people who may lawfully possess a gun, and federal law generally forbids the possession of a handgun by a person who is under the age of 18, and bars the sale of a handgun to anyone under the age of 21. *The dissent cites the large number of guns in private hands—nearly 400 million—but it does not explain what this statistic has to do with the question whether a person who already has the right to keep a gun in the home for self-defense is likely to be deterred from acquiring a gun by the knowledge that the gun cannot be carried outside the home*." (emphasis added) (citations omitted)).

149. *Id.*

4. Bruen *Relies on Historical Law Creation that Excluded Certain Races and Genders*

To accurately understand who would benefit or be harmed by a return to originalist ideologies surrounding gun law, an even more fundamental, threshold inquiry must examine who, during that time period, was excluded from participation in the legal process altogether? African American males were finally given the right to vote with the ratification of the Fifteenth Amendment in 1870.[150] Women, of any race, were not granted the right to vote until the ratification of the Nineteenth Amendment in 1920.[151] These large swaths of the population could not participate in the democratic process at the time that the Second and Fourteenth Amendments were ratified. Excluded from the right to vote, African American and female voices were intentionally disregarded at this time, and the primary perspective informing the gun laws passed during the critical period the *Bruen* majority privileges is that of white men. A justice on the Ohio Supreme Court remarked on this problem in a recent dissenting opinion. Justice Brunner wrote that "no such analysis [of the historical record of firearms regulation] could account for what the United States' historical tradition of firearm regulation would have been if women and nonwhite people had been able to vote for the representatives who determined these regulations."[152]

This sentiment is not confined to the context of firearms regulation. In the dissenting opinion in the Supreme Court's decision overturning *Roe v. Wade*,[153] several justices opined: "of course, 'people' did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation."[154]

What is the value of putting so much modern-day constitutional weight on laws passed by only a fraction of our historical forbearers? Even ignoring the issues raised in this section, the complete non-representation of women and people of color from the democratic process at the time of the ratification of the Second and Fourteenth Amendments, on its own, should be sufficient to cast serious doubt on an approach that condones and exclusively considers laws passed during that time period.

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150. U.S. CONST. amend. XV.

151. *Id.* amend. XIX.

152. State v. Philpotts, 194 N.E.3d 371, 373 (Ohio 2022) (Brunner, J., dissenting).

153. 410 U.S. 113 (1973).

154. Dobbs v. Jackson Women's Health Org., 597 U.S. __, 142 S. Ct. 2228, 2324 (2022) (Breyer, J., dissenting).

III. CASES INTERPRETING DOMESTIC VIOLENCE LAWS AFTER *BRUEN*

Despite its inherent shortcomings, *Bruen* is currently the law of the land, and it has already begun to impact today's gun regulations. Since June 2022, a number of courts have applied the *Bruen* test to the Lautenberg Amendment and the protection order prohibition. This section discusses trends in courts' approaches to each law.

A. Bruen *Applied to the Lautenberg Amendment*

I have identified twenty-one cases in sixteen district courts that have decided constitutional challenges to the Lautenberg Amendment following the Supreme Court's decision in *Bruen*.[155] Each district court to consider the issue has affirmed the validity of the law.[156] In response to the first question *Bruen* poses—whether possession of firearms by individuals convicted of misdemeanor domestic violence was covered by the Second Amendment—their approaches have varied. Their answers

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155. *See* United States v. Jones, No. 1:23-CR-52-SEG-JKL, 2023 WL 8275969 (N.D. Ga. Nov. 30, 2023); United States v. Brooks, No. CR23-53, 2023 WL 7706554 (N.D. Iowa Nov. 15, 2023); United States v. Delauder, No. 2:23CR08, 2023 WL 5658924 (N.D. W. Va. Aug. 31, 2023); United States v. Proctor, No. 2:23-cr-00074, 2023 WL 4710883 (S.D. W. Va. July 24, 2023); United States v. Donahue, No. 2:22-CR-00128-1, 2023 WL 4372706 (S.D. Tex. July 5, 2023); United States v. Hughes, No. 2:22-cr-00640, 2023 WL 4205226 (D.S.C. June 27, 2023); United States v. Ryno, No. 3:22-cr-00045, 2023 WL 3736420 (D. Alaska May 31, 2023), *appeal docketed*, No. 23-3426 (9th Cir. Nov. 9, 2023); United States v. Padgett, No. 3:21-cr-00107-TMB-KRF, 2023 WL 2986935 (D. Alaska Apr. 18, 2023); United States v. Bruner, No. CR-22-518, 2023 WL 2653392 (W.D. Okla. Mar. 27, 2023); United States v. Hoeft, No. 4:21-CR-40163, 2023 WL 2586030 (D.S.D. Mar. 21, 2023); United States v. Porter, No. 22-00277, 2023 WL 2527878 (W.D. La. Mar. 14, 2023), *appeal docketed*, No. 23-30679 (5th Cir. Sept. 27, 2023); United States v. Hammond, 656 F. Supp. 3d 857 (S.D. Iowa 2023), *appeal dismissed*, No. 23-02623 (8th Cir. Jan. 8, 2024); United States v. Farley, No. 22-cr-30022, 2023 WL 1825066 (C.D. Ill. Feb. 8, 2023), *appeal docketed*, No. 23-03270 (7th Cir. Nov. 28, 2023); United States v. Gleaves, 654 F. Supp. 3d 646 (M.D. Tenn. 2023); United States v. Bernard, No. 22-CR-03, 2022 WL 17416681 (N.D. Iowa Dec. 5, 2022), *appeal docketed*, No. 23-02808 (8th Cir. Aug. 9, 2023); United States v. Anderson, No. 2:21CR00013, 2022 WL 10208253 (W.D. Va. Oct. 17, 2022); United States v. Nutter, 624 F. Supp. 3d 636 (S.D. W. Va. 2022), *appeal docketed*, No. 22-04541 (4th Cir. Sept. 22, 2022); United States v. Jackson, 622 F. Supp. 3d 1063 (W.D. Okla. 2022), *appeal docketed*, No. 23-06047 (10th Cir. Apr. 3, 2023); United States v. Hatch, No. 1:22-CR-59 HAB, 2024 WL 340762 (N.D. Ind. Jan. 30, 2024); United States v. Martin, No. 1:21-CR-00228, 2024 WL 456703 (E.D. Cal. Feb. 6, 2024); United States v. Foster, No. 3:23-CR-56, 2024 WL 457159 (W.D. Ky. Feb. 6, 2024).

156. *See Jones*, 2023 WL 8275969, at *4; *Brooks*, 2023 WL 7706554, at *7; *Delauder*, 2023 WL 5658924, at *1; *Proctor*, 2023 WL 4710883, at *1; *Donahue*, 2023 WL 4372706, at *1; *Hughes*, 2023 WL 4205226, at *12; *Ryno*, 2023 WL 3736420, at *1; *Padgett*, 2023 WL 2986935, at *1; *Bruner*, 2023 WL 2653392, at *1; *Hoeft*, 2023 WL 2586030, at *3; *Porter*, 2023 WL 2527878, at *1; *Hammond*, 656 F. Supp. 3d at 858; *Farley*, 2023 WL 1825066, at *1; *Gleaves*, 654 F. Supp. 3d at 651; *Bernard*, 2022 WL 17416681, at *1; *Anderson*, 2022 WL 10208253, at *1; *Nutter*, 624 F. Supp. 3d at 637; *Jackson*, 622 F. Supp. 3d at 1068; *Hatch*, 2024 WL 340762, at *6; *Martin*, 2024 WL 456703, at *5; *Foster*, 2024 WL 457159, at *4.

were unanimous, however, in addressing *Bruen*'s second question: all courts that considered the matter found that the Lautenberg Amendment has historical analogues consistent with our nation's tradition.[157]

Courts have made one of three conclusions when asked to decide whether people convicted of misdemeanor crimes of domestic violence have a protected Second Amendment right to firearm possession: some have held that there *is* such a protected right; some have held that there is *not* such a protected right; and some have determined that they did not need to answer that question to rule in the given case.[158] While these analyses considered several issues, the determinative factor appears to be how each district court framed the Second Amendment right. The first approach, which one court called the "'individual-right' approach," asserts that the right to keep and bear arms applies to all people who are part of the national community.[159] Courts taking this approach conceptualized the Second Amendment right broadly and reasoned that this framing is consistent with courts' typical conceptualization of constitutional rights, such as the First Amendment right to free speech.[160] The second approach, referred to as the "'scope-of-the-right' or 'civic-virtue' approach," defines the Second Amendment right more narrowly, as one from which certain groups of people are excluded.[161] This framing points to the Supreme Court's repeated use of the word "law-abiding" to qualify "the people" who enjoy the Second Amendment right.[162] While a judge on the Seventh Circuit, current Justice Amy Coney Barrett described the two approaches as follows: "one uses history and tradition to identify the scope of the right, and the other uses that same body of

157. *See Jones*, 2023 WL 8275969, at *4; *Brooks*, 2023 WL 7706554, at *7; *Delauder*, 2023 WL 5658924, at *3; *Proctor*, 2023 WL 4710883, at *2; *Donahue*, 2023 WL 4372706, at *2; *Hughes*, 2023 WL 4205226, at *12; *Ryno*, 2023 WL 3736420, at *7; *Padgett*, 2023 WL 2986935, at *11; *Bruner*, 2023 WL 2653392, at *2; *Hoeft*, 2023 WL 2586030, at *4; *Porter*, 2023 WL 2527878, at *4; *Hammond*, 656 F. Supp. 3d at 865; *Farley*, 2023 WL 1825066, at *3; *Gleaves*, 654 F. Supp. 3d at 651; *Bernard*, 2022 WL 17416681, at *7; *Anderson*, 2022 WL 10208253, at *1; *Nutter*, 624 F. Supp. 3d at 645; *Jackson*, 622 F. Supp. 3d at 1067; *Hatch*, 2024 WL 340762, at *6; *Martin*, 2024 WL 456703, at *5; *Foster*, 2024 WL 457159, at *3.

158. Two decisions—*Farley*, 2023 WL 1825066, and *Gleaves*, 654 F. Supp. 3d 646—did not explicitly address step one. Three decisions—*Hughes*, 2023 WL 4205226, *Bruner*, 2023 WL 2653392, and *Anderson*, 2022 WL 10208253—assumed that step one was met. In *Bruner*, the government did not make an argument regarding step one.

159. *Padgett*, 2023 WL 2986935, at *5 (foregoing the first question as it determined the Lautenberg Amendment was constitutional under *Bruen*'s second step).

160. *Id.*

161. *Id.* at *4.

162. *Id.* (first quoting District of Columbia v. Heller, 554 U.S. 570, 625, 635 (2008); then quoting *id.* at 643 (Stevens, J., dissenting); and then quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2122, 2125, 2131, 2133, 2134, 2135 n.8, 2138, 2138 n.9, 2150, 2156 (2022)).

evidence to identify the scope of the legislature's power to take it away."[163]

Courts following the first approach found that gun possession under the Lautenberg Amendment plainly implicated the Second Amendment right.[164] One court addressed the immediate threshold issue: whether criminalizing firearm possession regulates conduct protected by the Second Amendment.[165] When framed in these terms alone, it would be difficult to answer this question in anything but the affirmative. However, in these cases, the government still argued that the defendant's firearm possession was not protected by the Second Amendment because they were not "law-abiding citizens."[166] Although acknowledging that the language of the Second Amendment itself does not include a qualifier like "law-abiding" when defining who enjoys the right, the courts noted that the Supreme Court has included that descriptor in its most recent Second Amendment cases.[167] The government argued that the "law-abiding" qualifier imposed by *Heller* and other recent cases disqualified defendants convicted of misdemeanor crimes of domestic violence from protection under the Second Amendment.[168] These district courts disagreed, referencing the plain language of the Second Amendment, which designates "people" as the holder of the right.[169] One court emphasized this further by saying "[t]his Court declines to read into *Bruen* a qualification that Second Amendment rights belong only to individuals who have not violated any laws."[170] These courts read the Second Amendment right broadly and as an affirmative right to firearm possession that can only be restricted under *Bruen*'s second step.

On the other hand, several district courts followed the "civic-virtue" approach and found that the Lautenberg Amendment does not cover

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163. Kanter v. Barr, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting).

164. *See* United States v. Bernard, No. 22-CR-03, 2022 WL 17416681, at *7 (N.D. Iowa Dec. 5, 2022), *appeal docketed*, No. 23-02808 (8th Cir. Aug. 9, 2023); United States v. Jackson, 622 F. Supp. 3d 1063, 1066 (W.D. Okla. 2022), *appeal docketed*, No. 23-06047 (10th Cir. Apr. 3, 2023).

165. *See Bernard*, 2022 WL 17416681, at *6.

166. *Id.*

167. *Id.*; *Jackson*, 622 F. Supp. 3d at 1066; *see also Bruen*, 142 S. Ct. at 2122 ("In *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010), we recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense. In this case, petitioners and respondents agree that ordinary, law-abiding citizens have a similar right to carry handguns publicly for self-defense." (citations omitted)).

168. *Bernard*, 2022 WL 17416681, at *7; *Jackson*, 622 F. Supp. 3d at 1066.

169. *Bernard*, 2022 WL 17416681, at *7; *Jackson*, 622 F. Supp. 3d at 1066.

170. *Jackson*, 622 F. Supp. 3d at 1066.

conduct protected by the Second Amendment.[171] These courts framed the Second Amendment right more narrowly than the courts that reached the opposite outcome, and instead considered the right as one that the government could extend or deny to people considered dangerous.[172] For example, in *United States v. Nutter*,[173] Judge Irene C. Berger, on behalf of the Southern District of Virginia, wrote that "[n]othing in the historical record suggests a popular understanding of the Second Amendment at the time of the founding that extended to preserving gun rights for groups who pose a particular risk of using firearms against innocent people."[174] The right at issue, as above, was still the possession of firearms, which the Lautenberg Amendment clearly regulates. However, these courts found that the right does not reach those convicted of domestic violence, who are by definition not "law-abiding citizens."[175] Thus, the determinative consideration by these courts appears to be how much weight each gave to the Supreme Court's insertion of the "law-abiding" qualifier into the language of those protected by the Second Amendment.[176]

The courts that found that the Second Amendment did not cover conduct committed by those convicted under the Lautenberg Amendment also distinguished *Bruen* and *Heller* from their own cases because those Supreme Court cases had each rejected gun regulations that impacted the general public, most of which is law-abiding.[177] The Lautenberg Amendment, on the other hand, applies only to "those found, following due process, to pose a special danger of misusing firearms based

171. *See* United States v. Hoeft, No. 4:21-CR-40163, 2023 WL 2586030, at *4 (D.S.D. Mar. 21, 2023); United States v. Nutter, 624 F. Supp. 3d 636, 644 (S.D. W. Va. 2022), *appeal docketed*, No. 22-04541 (4th Cir. Sept. 22, 2022).

172. *See, e.g.*, *Nutter*, 624 F. Supp. 3d at 644 ("[T]he distinction between regulations that impact everyone and those that impact discrete groups found to pose a danger to the public is key to a historical understanding of the Second Amendment.").

173. 624 F. Supp. 3d 636 (S.D. W. Va. 2022), *appeal docketed*, No. 22-04541 (4th Cir. Sept. 22, 2022).

174. *Id.* at 645.

175. *Id.*; *Hoeft*, 2023 WL 2586030, at *4.

176. *See* United States v. Porter, No. 22-00277, 2023 WL 2527878, at *2 (W.D. La. Mar. 14, 2023) (agreeing that the defendant was not protected by the Second Amendment as he was convicted of domestic abuse battery and was therefore not "law-abiding," but proceeding to analyze the Lautenberg Amendment under *Bruen*'s second step, acknowledging that "there is some debate over the extent to which the Court's 'law-abiding' qualifier constricts the Second Amendment's reach" (quoting United States v. Rahimi, 61 F.4th 443, 451 (5th Cir. 2023), *cert. granted*, __ U.S. __, 143 S. Ct. 2688 (June 30, 2023)), *appeal docketed*, No. 23-30679 (5th Cir. Sept. 27, 2023).

177. *See, e.g.*, *Nutter*, 624 F. Supp. 3d at 644 (noting that "the distinction between regulations that impact everyone and those that impact discrete groups found to pose a danger to the public is key to a historical understanding of the Second Amendment" and that "[r]ecent decisions applying *Bruen* have reached similar conclusions").

on their own actions."[178] Courts that found that the Second Amendment did not cover conduct by those convicted under the Lautenberg Amendment also seemed more willing than courts that reached the opposite outcome to consider evidence of the practical danger that armed abusive partners pose to their victims.[179]

At least one court has advocated for a more nuanced approach to answering *Bruen*'s first question.[180] In *United States v. Hammond*,[181] Judge Stephen H. Locher, writing for the United States District Court for the Southern District of Ohio, summarized other courts' engagement with the issue as "a straightforward analysis that simply asks whether the defendant (a) is part of 'the people' and (b) possessed a firearm of the type in common use."[182] Judge Locher found that this approach, while maybe technically correct, unnecessarily forces courts to reckon with fraught historical questions under *Bruen*'s second step that it could avoid altogether.[183] Judge Locher advocated for a more nuanced approach to *Bruen*'s step one to decide cases before reaching step two.[184] He pointed to Eighth Circuit precedent, *United States v. Bena*,[185] which he found consistent with *Bruen*.[186] Judge Locher wrote:

> *Bena* suggests the proper question when analyzing the "plain text" of the Second Amendment is not what "the people" means, but rather whether the "right . . . to keep and bear Arms," as understood in the Founding era, covers an individual's conduct when the person possesses a firearm after having been proven to be dangerous.[187]

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178. *Id.* For example, while not deciding whether "the people" includes those convicted of domestic violence, the court in *United States v. Hammond*, 656 F. Supp. 3d 857 (S.D. Iowa 2023), *appeal dismissed*, No. 23-02623 (8th Cir. Jan. 8, 2024), distinguished the Lautenberg Amendment from the law at issue in *Bruen* because

> Section 922(g) works in the opposite direction. It starts from the premise that everyone has the right to possess firearms, but then takes that right away from certain categories of people, including, *inter alia*, convicted felons, fugitives from justice, and persons convicted of crimes of domestic violence; i.e., those who arguably might be considered dangerous or non-law-abiding.

656 F. Supp. 3d at 861.

179. *See, e.g.*, *Nutter*, 624 F. Supp. 3d at 644 ("Rather than promoting public safety, empirical evidence establishes that their possession of firearms poses a threat.").

180. *Hammond*, 656 F. Supp. 3d at 864 (finding that it did not need to decide the question but discussing it as an issue likely to arise in the future).

181. 656 F. Supp. 3d 857 (S.D. Iowa 2023), *appeal dismissed*, No. 23-02623 (8th Cir. Jan. 8, 2024).

182. *Id.* at 864.

183. *Id.*

184. *Id.*

185. 664 F.3d 1180 (8th Cir. 2011).

186. *Hammond*, 656 F. Supp. 3d at 864.

187. *Id.* at 863.

This aligns with the more narrow approach described above adopted by courts that ultimately concluded that individuals convicted under the Lautenberg Amendment were not protected by the Second Amendment. Under similar reasoning then, those courts that determined that the Second Amendment does not protect the right of individuals convicted of misdemeanor domestic violence to possess firearms did not need to reach *Bruen*'s second step.

By contrast, the courts that did find that the Second Amendment covered these defendants next had to analyze whether the Lautenberg Amendment is consistent with the nation's historical tradition of gun regulations. All courts that have considered this question have found appropriate historical analogues and upheld the law.[188]

The *Bruen* Court offered some guidance to lower courts when determining whether a historic regulation and modern-day regulation are "relevantly similar"—the Court's description of the threshold satisfying *Bruen*'s second step.[189] Specifically, the Court provided two important metrics: "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[190] In other words, the means of firearm regulations and the justifications of firearm regulations are two important points of comparison. Importantly, the *Bruen* Court also clarified that, to support the constitutionality of a gun regulation, the government need not identify a "historical *twin*," but that a "well-established and representative historical *analogue*" is sufficient.[191]

Generally, courts have identified three categories of analogical historical laws comparable to the Lautenberg Amendment: laws authorizing the government to disarm "dangerous people," including surety laws; laws authorizing the government to disarm those considered delinquent or disaffected; and the federal felon-in-possession law.

Many courts noted that the Lautenberg Amendment is relevantly similar to the nation's historic tradition of disarming individuals it considered dangerous.[192] One court cited several proposed bills at state ratifying conventions that would have amended the Constitution to

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188. *See supra* note 155 and accompanying text.

189. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2132 (2022).

190. *Id.* at 2133.

191. *Id.* (emphasis in original).

192. *See, e.g.*, United States v. Nutter, 624 F. Supp. 3d 636, 643 (S.D. W. Va. 2022), *appeal docketed*, No. 22-04541 (4th Cir. Sept. 22, 2022) ("The prohibition on possession of firearms by those convicted of misdemeanor crimes of domestic violence fits easily within this framework of regulation consistent with the history and purposes of the Second Amendment and designed to keep firearms away from dangerous people.").

explicitly prevent disarming "peaceable" individuals,[193] or that would have prevented disarming people "unless for crimes committed, or real danger of public injury from individuals."[194] Although the court noted that these proposed amendments were not adopted, it found no evidence "that their failure to pass was due to [their] perceived unconstitutionality."[195] As such, the court considered the proposed amendments as evidence that regulating firearm ownership for people the government considered dangerous was considered to be constitutional.[196]

Courts also highlighted surety laws as a historical example of legislatures disarming dangerous people. Surety laws allowed individuals to request that another individual be dispossessed of their firearms or pay a surety to avoid dispossession.[197] At least one court framed surety laws as historical analogues of the Lautenberg Amendment because they permitted disarming individuals that society had deemed dangerous.[198]

Several courts have noted that Black individuals as well as Native Americans were legally prohibited from possessing firearms during the founding era.[199] These were categories of people that states deemed dangerous at the time.[200] Some courts have made analogies to this racist history, stating that it supports the constitutionality of the Lautenberg Amendment under the *Bruen* test. For example, Judge Irene C. Berger, writing for the United States District Court for the Southern District of West Virginia, stated:

> [c]ommon sense tells us that the public understanding of the Second Amendment at the time of its enactment, which allowed for disarmament of Blacks and Native Americans based on their perceived threat, would have accepted disarmament of people convicted of misdemeanor crimes of domestic violence, a group

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193. United States v. Hughes, No. 2:22-CR-00640, 2023 WL 4205226, at *10 (D.S.C. June 27, 2023) (emphasis omitted) (quoting THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 157 (Neil H. Cogan ed., 1997)).

194. *Id.* (citing THE COMPLETE BILL OF RIGHTS, *supra* note 193, at 276).

195. *Id.* at *10 n.19.

196. *Id.* at *10.

197. See *infra* section III.B for further discussion of surety laws and how courts have assessed whether they are analogous to the protection order prohibition.

198. *See, e.g.*, United States v. Nutter, 624 F. Supp. 3d 636, 641 (S.D. W. Va. 2022), *appeal docketed*, No. 22-04541 (4th Cir. Sept. 22, 2022) ("The surety laws cited by the United States establish that domestic violence was a concern in the founding era, and that laws designed to restrict the rights of those who committed such abuse, and protect the victims, were not viewed as controversial.").

199. *Id.* at 643 (quoting Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1562–63 (2009)).

200. *Id.*

> found by the legislative branch to present a danger of misusing firearms.[201]

In other words, some courts have extrapolated a broader principle from the racist laws of our forbearers: if the government could historically disarm individuals it considered dangerous (based on race), then it must be able to presently disarm individuals considered dangerous today (based on the commission of domestic violence).

Bolstering the argument that the Lautenberg Amendment is consistent with the nation's tradition of firearm regulation, courts have noted criminal defendants' due process rights in domestic violence cases.[202] Due process is another safeguard to protect potential firearm possessors from the risk of erroneous deprivation of their Second Amendment right.[203]

Courts also pointed to attainder laws during the colonial period as examples of statutes which disarmed the "disaffected" and "delinquent,"[204] as well as laws precluding people with felonies from owning "property or chattels," including firearms.[205] State legislatures in the late 1700s also disarmed people who they considered unwilling to follow the law, including those involved in rebellions against the state.[206]

District courts considering analogues to the Lautenberg Amendment also referred to the *Bruen* Court's affirmations of its prior holdings in *Heller* and *McDonald*;[207] in those cases, the Court had clarified that longstanding firearms regulations, including the felon-in-possession law, were constitutional.[208] District courts considering the constitutionality of the felon-in-possession law following the Supreme Court's decision in

201. *Id.* at 645.

202. *See e.g.*, United States v. Porter, No. 22-00277, 2023 WL 2527878, at *3 (W.D. La. Mar. 14, 2023), *appeal docketed*, No. 23-30679 (5th Cir. Sept. 27, 2023) (pointing out that the Lautenberg Amendment "actually provides greater safeguards—as compared to historical laws—for those deemed dangerous, by requiring due process in the criminal arena before an individual's right to bear arms can be restricted, and allowing for those criminal convictions to be expunged or pardoned").

203. *See id.*

204. United States v. Hoeft, 4:21-CR-40163, 2023 WL 2586030, at *3 (D.S.D. Mar. 17, 2023) (quoting United States v. Coombes, 629 F. Supp. 3d 1149, 1157 (N.D. Okla. 2022)).

205. *Id.* (quoting *Coombes*, 629 F. Supp. 3d at 1158).

206. *Id.* at *4.

207. *See, e.g.*, United States v. Bernard, No. 22-CR-03, 2022 WL 17416681, at *7 (N.D. Iowa Dec. 5, 2022), *appeal docketed*, No. 23-02808 (8th Cir. Aug. 9, 2023) ("It is abundantly clear that the *Bruen* Court did not disturb the conclusions in *Heller* and *McDonald* in which the Justices made it plain that it left undisturbed government regulations prohibiting felons form possessing firearms.").

208. District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008); McDonald v. Chicago, 561 U.S. 742, 786 (2010).

Bruen have consistently upheld it.[209] District courts considering the Lautenberg Amendment have then analogized the ban on firearm possession for felons to the ban on firearm possession for individuals convicted of misdemeanor crimes of domestic violence.[210]

Courts engaging in this relevantly similar analysis have also reasoned that it would be difficult to find more directly similar historic analogues to the Lautenberg Amendment. Because the nation's treatment of domestic violence has evolved so greatly over time, and because the Lautenberg Amendment was passed relatively recently, there is little evidence to suggest that specifically banning domestic violence misdemeanants from possessing firearms would have been consistent with the nation's tradition of gun regulation.[211] But courts upholding the law found that not to be dispositive and instead found similar historical analogues not directly related to domestic violence.[212]

B. Bruen *Applied to the Protection Order Prohibition*

I have identified twelve cases that considered constitutional challenges to the protection order prohibition post-*Bruen*; eleven were decided by nine different federal district courts,[213] and one was decided by the United

209. *Bernard*, 2022 WL 17416681, at *7 (citing United States v. Price, 635 F. Supp. 3d 455, 466 (S.D. W. Va. 2022)). *But see* Range v. Att'y Gen. U.S., 69 F.4th 96 (3d Cir. 2023) (finding the federal felon-in-possession ban unconstitutional as applied to this defendant, convicted of making false statements to obtain food stamps).

210. *Bernard*, 2022 WL 17416681, at *7; *see also* United States v. Bruner, No. CR-22-518, 2023 WL 2653392, at *2 (W.D. Okla. Mar. 27, 2023).

211. *See, e.g.*, United States v. Nutter, 624 F. Supp. 3d 636, 641 (S.D. W. Va. 2022), *appeal docketed*, No. 22-04541 (4th Cir. Sept. 22, 2022) ("Laws surrounding domestic violence have evolved, in part as women's rights and roles in society expanded. The absence of stronger laws may reflect the fact that the group most impacted by domestic violence lacked access to political institutions, rather than a considered judgment about the importance or seriousness of the issue.").

212. *See, e.g.*, *id.* (discussing surety laws); *Bernard*, 2022 WL 17416681, at *8 (comparing misdemeanant disarmament to laws regulating the disarmament of felons).

213. United States v. Sloan, No. 20-cr-00022, 2023 WL 7716451 (E.D. Cal. Nov. 15, 2023); United States v. Lewis, No. 21 Cr. 789 (NSR), 2023 WL 6066260 (S.D.N.Y. Sept. 18, 2023); United States v. Brown, No. 2:22-cr-00239, 2023 WL 4826846 (D. Utah July 27, 2023), *appeal docketed*, No. 23-04151 (10th Cir. Nov. 28, 2023); United States v. Silvers, 671 F. Supp. 3d 755 (W.D. Ky. 2023); United States v. Reuter, No. 4:21 CR 423 RWS/DDN, 2023 WL 3936934 (E.D. Mo. Apr. 24, 2023); United States v. Guthery, No. 2:22-cr-00173, 2023 WL 2696824 (E.D. Cal. Mar. 29, 2023); United States v. Robinson, No. 4:22 CR 165 RLW, 2023 WL 3911426 (E.D. Mo. Mar. 28, 2023), *appeal docketed*, No. 23-03316 (8th Cir. Oct. 17, 2023); United States v. Combs, 654 F. Supp. 3d 612 (E.D. Ky. 2023), *appeal docketed*, No. 23-05121 (6th Cir. Feb. 13, 2023); United States v. Perez-Gallan, 640 F. Supp. 3d 697 (W.D. Tex. 2022), *aff'd*, No. 22-51019, 2023 WL 4932111 (5th Cir. Aug. 2, 2023); United States v. Kays, 624 F. Supp. 3d 1262 (W.D. Okla. 2022); United States v. DeBorba, No. 3:22-CR-05139, 2024 WL 342546 (W.D. Wash. Jan. 30, 2024).

States Court of Appeals for the Fifth Circuit.[214] This section will discuss the district court cases first, followed by the appellate decision.

1. District Court Cases

Like the district courts that considered the Lautenberg Amendment, courts determining the constitutionality of the protection order prohibition first had to consider whether the possession of firearms by individuals subject to protection orders is covered by the Second Amendment.[215] Unlike the courts that considered this question in relation to the Lautenberg Amendment, all district courts considering Second Amendment challenges in this context have answered it in the affirmative.[216] All district courts then proceeded to answer the second question posed by *Bruen*: is the protection order prohibition consistent with the nation's tradition of firearms regulations? On this question, the district courts were split.[217] In that way, the analyses of the two *Bruen* questions applied to the protection order prohibition are diametrically opposed to the same analyses applied to the Lautenberg Amendment. Where the Lautenberg Amendment universally withstood scrutiny at the second step, the protection order prohibition has not, and where the Lautenberg Amendment met mixed results under step one, the protection order prohibition universally was covered by step one.

All district courts to consider the issue have decided that possession of firearms by individuals subject to the protection order prohibition is conduct protected by the Second Amendment.[218] The courts' reasoning mirrors the explanations given by other courts that have reached the same finding under the Lautenberg Amendment; again, the critical question has been deciding which individuals are considered "the people" entitled to

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214. United States v. Rahimi, 61 F.4th 443, 449 (5th Cir. 2023), *cert. granted*, __ U.S. __, 143 S. Ct. 2688 (2023).

215. Several courts found that prior circuit precedent controlled, having not been abrogated by *Bruen*, and did not conduct an analysis under *Bruen*'s test. *See, e.g.*, *Reuter*, 2023 WL 3936934, at *10–11 (finding that the Eighth Circuit's pre-*Bruen* decision in *United States v. Bena* upholding the protection order prohibition remained binding precedent).

216. *Lewis*, 2023 WL 6066260, at *5; *Silvers*, 671 F. Supp. 3d at 759; *Guthery*, 2023 WL 2696824, at *6; *Combs*, 654 F. Supp. 3d at 615–17; *Perez-Gallan*, 640 F. Supp. 3d at 701; *Kays*, 624 F. Supp. 3d at 1265–66.

217. *Compare, e.g.*, *Lewis*, 2023 WL 6066260, at *7 (finding that the protection order prohibition is consistent with the nation's historical tradition of firearm regulation), *with Perez-Gallan*, 640 F. Supp. 3d at 713 (finding that the protection order prohibition is inconsistent with the nation's historical tradition of firearm regulation).

218. *Lewis*, 2023 WL 6066260, at *5; *Silvers*, 671 F. Supp. 3d at 759; *Guthery*, 2023 WL 2696824, at *6; *Combs*, 654 F. Supp. 3d at 615–17; *Perez-Gallan*, 640 F. Supp. 3d at 701; *Kays*, 624 F. Supp. 3d at 1265–66; *DeBorba*, 2024 WL 342546, at *5.

the Second Amendment right. After *Heller* and other Supreme Court decisions used the term "law-abiding" as a qualifier for "the people" repeatedly in recent years, the government has argued that the Second Amendment right is limited to those who abide by the law, thus often excluding respondents to a protection order. Courts have not been receptive to that argument in the protection order context.[219]

Generally, courts have found that the Second Amendment still applies to those who have broken the law.[220] One court expressed its concern that the protection order prohibition could lead to a slippery slope to narrowing the Second Amendment right to exclude anyone accused of violating any law.[221] The court put it bluntly:

> [s]urely the Government doesn't believe that someone ticketed for speeding—thus, not abiding by the law—should lose their Second Amendment rights. Nor should the person who negligently (irresponsibly) forgets to set out the "Wet Floor" sign after mopping lose their Second Amendment rights. Of course not. This Court doesn't think the Government wants such results, but the absurd consequences are there all the same.[222]

To explain the Supreme Court's repeated use of "law-abiding" as a qualifier of "the people," one district court reasoned that law-abiding people are *part* of the people protected by the Second Amendment, but not the *only* people.[223] In other words, being a law-abiding person automatically includes someone in the Second Amendment protection, but not being a law-abiding person does not automatically exclude someone.[224]

Courts also noted that, historically, the Second Amendment protection depends on an individual's conduct, rather than status.[225] Since being a respondent to a protection order is a status rather than based on an individual's conduct, it follows that the Second Amendment protects those respondents. This framing was also adopted by the *Bruen* Court, which held that "when the Second Amendment's plain text covers an

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219. *See, e.g.*, *Perez-Gallan*, 640 F. Supp. 3d at 708–09 (finding that "defining 'the people' as law-abiding, responsible citizens would lead to absurd results").

220. *See, e.g.*, *Kays*, 624 F. Supp. 3d at 1265 ("This Court declines to read into *Bruen* a qualification that Second Amendment rights belong only to individuals who have not been accused of violating any laws.").

221. *Perez-Gallan*, 640 F. Supp. 3d at 707–09.

222. *Id.* at 708–09.

223. *Combs*, 654 F. Supp. 3d at 617.

224. *Id.*

225. *Kays*, 624 F. Supp. 3d at 1265 n.4.

individual's conduct, the Constitution presumptively protects that conduct."[226]

Finally, "the people," as used in the Second Amendment, is a term of art. It is used six other times throughout the Constitution and consistently refers to all members of the political community.[227] The Fourth Amendment, for example, which protects the right of "the people" against unreasonable searches and seizures,[228] applies to all Americans; it is not stripped away when a person breaks the law or is convicted of a crime.[229] For those reasons, courts have unanimously found that the Second Amendment right covers protection order respondents.

Thus far, district courts have universally agreed that protection order respondents' possession of firearms is conduct covered by the Second Amendment. However, courts have diverged at *Bruen*'s second step. Of the eleven district court cases identified, nine cases—in seven district courts—upheld the protection order prohibition under step two, finding adequate historical analogues to the law.[230] On the other hand, two struck down the provision, finding no such historical support.[231] Like the courts who found historical analogues to the Lautenberg Amendment, courts considering analogues to the protection order prohibition identified three different types of relevant laws: surety laws, laws prohibiting firearm possession by dangerous people, and laws prohibiting firearm possession by people considered disloyal.

Several courts found that the surety laws enacted by the colonies served as a proper historical analogue to the protection order prohibition.[232] These laws authorized the requirement of certain individuals to post a

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226. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2126 (2022).

227. *Combs*, 654 F. Supp. 3d at 617 (citing District of Columbia v. Heller, 554 U.S. 570, 579–80 (2008)).

228. U.S. CONST. amend. IV.

229. United States v. Perez-Gallan, 640 F. Supp. 3d 697, 708 (W.D. Tex. 2022), *aff'd*, No. 22-51019, 2023 WL 4932111 (5th Cir. Aug. 2, 2023).

230. United States v. Sloan, No. 20-cr-00022, 2023 WL 7716451, at *2–3 (E.D. Cal. Nov. 15, 2023); United States v. Lewis, No. 21 Cr. 789 (NSR), 2023 WL 6066260, at *7 (S.D.N.Y. Sept. 18, 2023); United States v. Brown, No. 2:22-cr-00239, 2023 WL 4826846, at *9–14 (D. Utah July 27, 2023), *appeal docketed*, No. 23-04151 (10th Cir. Nov. 28, 2023); United States v. Silvers, 671 F. Supp. 3d 755, 775 (W.D. Ky. 2023); United States v. Reuter, No. 4:21 CR 423 RWS/DDN, 2023 WL 3936934, at *10–11 (E.D. Mo. Apr. 24, 2023); United States v. Guthery, No. 2:22-CR-00173, 2023 WL 2696824, at *6–9 (E.D. Cal. Mar. 29, 2023); United States v. Robinson, No. 4:22 CR 165 RLW, 2023 WL 3911426, at *7 (E.D. Mo. Mar. 28, 2023), *appeal docketed*, No. 23-03316 (8th Cir. Oct. 17, 2023); *Kays*, 624 F. Supp. 3d at 1266–67; United States v. DeBorba, No. 3:22-cr-05139, 2024 WL 342546 (W.D. Wash. Jan. 30, 2024).

231. *Combs*, 654 F. Supp. 3d at 619–20; *Perez-Gallan*, 640 F. Supp. 3d at 703–14.

232. *See, e.g.*, *Guthery*, 2023 WL 2696824, at *8 (discussing whether surety laws were sufficiently analogous to prohibitions on gun possession).

"surety of the peace" in order to carry weapons if they posed a danger to another person.[233] A surety could be in the form of a monetary payment or a pledge by a third party "in support of his future good conduct."[234] That surety would be required either upon "confession" or "legal proof,"[235] but it could also be ordered solely upon the oath of one individual.[236] When a person failed to provide that surety, the government could confiscate their firearms.[237] This practice existed at common law and was later codified by numerous state governments.[238] In *Bruen*, the Supreme Court distinguished surety laws from New York's "may-issue" permit law, because the laws "were not bans on public carry, and they typically targeted only those threatening to do harm."[239] However, the courts reasoned that the protection order prohibition, unlike the New York law at issue in *Bruen*, is targeted only at those who pose a threat to others, making it analogous to surety laws in a way that the New York permit law was not.[240]

The colonies also had laws that banned people from "bearing arms in a way that spread[] 'fear' or 'terror' among the people,"[241] as well as laws that banned "going armed offensively in a threatening manner."[242] These laws were adopted as a continuation of English common law dating back to the seventeenth century.[243] Together, these laws demonstrated that the government is empowered to disarm "those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety."[244]

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233. *Id.* at *8.

234. Supplemental Brief for Appellee the United States at 28, United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023) (quoting Young v. Hawaii, 992 F.3d 765, 791 n.12 (9th Cir. 2021) (en banc), *vacated*, __ U.S. __, 142 S. Ct. 2895 (2022)); *id.* at 30.

235. *Id.* at 28–29 (quoting ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW HAMPSHIRE IN NEW ENGLAND 1, 1–2 (1761)).

236. *Id.* at 31 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 252 (1769)).

237. *Guthery*, 2023 WL 2696824, at *8.

238. United States v. Silvers, 671 F. Supp. 3d 755, 771 (W.D. Ky. 2023).

239. *Guthery*, 2023 WL 2696824, at *8 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2148 (2022)).

240. *Id.*

241. *Silvers*, 671 F. Supp. 3d at 770 (quoting *Bruen*, 142 S. Ct. at 2145).

242. *Guthery*, 2023 WL 2696824, at *7 (citation omitted).

243. *E.g.*, *Silvers*, 671 F. Supp. 3d at 769.

244. *Guthery*, 2023 WL 2696824, at *7 (quoting Kanter v. Barr, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting)).

Historically, some jurisdictions barred certain individuals from possessing firearms based on race or ethnicity.[245] In some cases, the government has argued that those laws are analogous to the protection order.[246] One court specifically identified the colonies' prohibition on gun ownership by enslaved people and Native Americans as a problematic justification for modern gun regulation, stating:

> [i]t would be unconscionable to conclude limitations on Constitutional rights based on these categorizations were wise or justified at any point in time, and the court does not understand the government – or any other court pointing to such obsolete codes — to suggest as much. It cannot be that historical error in the form of impermissible bias, even if once acceptable among those with political and economic power, could provide the government a continuing license to unfairly discriminate against a group of people, whether it be in restricting Second Amendment rights or any others.[247]

Courts taking this approach did not extrapolate a broader principle—that the government has always been able to disarm individuals considered dangerous—based on the clear present-day unconstitutionality of those historic laws.

Courts that found these laws analogous to the protection order prohibition found them persuasive because they comported with the *Bruen* Court's guidelines for identifying relevantly similar laws: by finding regulations that were similar in form (the how) and in purpose (the why).[248] The form of the laws, governmental disarmament, and the purpose of the laws—to protect public safety—made them properly analogous.[249] The historic laws that formed the basis of comparison were also relevantly similar because, like the protection order prohibition, they utilized a combination of civil and criminal legal proceedings.[250] Surety laws, for example, required only civil proceedings and could be initiated

245. *See id.* at *8.

246. *E.g.*, *id.*

247. *Id.*

248. *Id.* At least one court analyzed the "how" and "why" of two different types of laws in finding historical support: "[w]hen the *how* of 'dangerousness' laws and the *why* of surety laws are paired together, the court is convinced that § 922(g)(8) does not go beyond this Nation's historical limits on firearm regulation." United States v. Brown, No. 2:22-cr-00239, 2023 WL 4826846, at *14 (D. Utah July 27, 2023) (emphasis in original), *appeal docketed*, No. 23-04151 (10th Cir. Nov. 28, 2023).

249. United States v. Silvers, 671 F. Supp. 3d 755, 775 (W.D. Ky. 2023) (finding that the laws "existed for a similar purpose (prevention of violence and terror) and acted through similar mechanisms (temporary disarmament in response to legal process and a judicial determination of dangerousness)").

250. *Id.* at 773.

by private individuals.[251] A person's failure to comply with a surety law could be criminally prosecuted.[252] Similarly, protection order cases are civil in nature,[253] and the protection order prohibition allows for criminal prosecution under certain circumstances.[254]

Finally, several courts held that the colonies' laws prohibiting firearm possession by those considered disloyal could be properly analogized to the protection order prohibition.[255] In particular, courts cited to laws that allowed the government to remove firearms from those who would not swear an oath of allegiance to the United States, as they were considered potential rebels who may commit violence.[256]

Summarizing the analogous nature of these laws, one court stated that "[t]hese going-armed, loyalty, and surety laws refute [defendant's] position that the scope of the common-law right, as codified by the founding generation, privileges gun possession over the dangerous behavior and legal process underlying [defendant's protection order]."[257]

In *United States v. Kays*,[258] the District Court for the Western District of Oklahoma, which had just ten days earlier affirmed the constitutionality of the Lautenberg Amendment post-*Bruen*,[259] upheld the protection order prohibition for similar reasons.[260] Rather than conducting an extended analysis into historically similar laws, the court analogized the protective order prohibition to the Lautenberg Amendment, noting that each provision bans "the possession of firearms by narrow classes of persons who, based on their past behavior, are more likely to engage in domestic violence."[261] The court had previously compared the Lautenberg Amendment with the longstanding prohibition on felons possessing firearms and determined that the protection order prohibition is similar enough to the felon ban to uphold its constitutionality.[262]

However, at least two courts were not convinced that surety laws (or any other laws discussed above) were analogous to the protection order

251. *Id.*

252. *Id.*

253. See *supra* section I.B for more information about civil protection orders.

254. 18 U.S.C. § 922(g)(8).

255. *E.g.*, *Silvers*, 671 F. Supp. 3d at 773.

256. *E.g.*, *id.* at 769.

257. *Id.* at 774.

258. 624 F. Supp. 3d 1262 (W.D. Okla. 2022).

259. United States v. Jackson, 622 F. Supp. 3d 1063, 1067–68 (W.D. Okla. 2022), *appeal docketed*, No. 23-06047 (10th Cir. Apr. 3, 2023).

260. *Kays*, 624 F. Supp. 3d at 1266–67.

261. *Id.* (quoting United States v. Reese, 627 F.3d 792, 802 (10th Cir. 2010)).

262. *Id.* at 1266–67.

prohibition and invalidated the regulation. In discussing the analogy between surety laws and the protection order prohibition, one court found that the "why" of the two laws was relevantly similar: to prevent a person known to be a danger from having access to a firearm.[263] Regarding the other relevant metric—the "how" of the two laws—the court found to be "markedly different."[264] Surety laws represented only a "possible disarmament."[265]

The court found the same issue with the government's comparison to colonial laws barring firearm possession by individuals considered disloyal. Rather than an automatic ban on possession, that penalty could be avoided entirely if a person swore an oath of allegiance to the United States.[266] For loyalty laws, the court also found that the other metric—the "why" of the laws—was not analogous to the protection order prohibition, as it was meant to address an internal threat from citizens loyal to another country.[267]

Finally, some courts disagreed that historic laws allowing the government to disarm individuals it considered dangerous were properly analogous to the protection order prohibition. One court found the critical difference between the laws was that the former was intended to protect *public* safety while the latter was intended to protect *private, individual* safety. This opinion noted that

> [t]his Court's leap of faith, however, is not that the colonies wished to keep the public safe from those seen as "dangerous"—history supports that proposition. Rather the leap of faith is whether the colonies considered domestic abusers a "threat to *public safety*." The Government and the Court's historical inquiries above don't support that conclusion.[268]

The same court began its analysis with a narrower view of historical analogues by engaging in an in-depth discussion of the historic lack of a governmental response to domestic violence.[269] It noted that "[d]omestic abusers are not new. But until the mid-1970s, government intervention—much less removing an individual's firearms—because of domestic

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263. United States v. Combs, 654 F. Supp. 3d 612, 618–19 (E.D. Ky. 2023), *appeal docketed*, No. 23-05121 (6th Cir. Feb. 13, 2023).

264. *Id.* at 619.

265. *Id.* (quoting United States v. Perez-Gallan, 640 F. Supp. 3d 697, 709 (W.D. Tex. 2022), *aff'd*, No. 22-51019, 2023 WL 4932111 (5th Cir. Aug. 2, 2023)).

266. *See id.*

267. *Id.* at 620.

268. *Perez-Gallan*, 640 F. Supp. 3d at 711 (emphasis in original).

269. *Id.* at 703.

violence practically did not exist."[270] The court also noted that in the seventeenth and eighteenth centuries family violence was generally considered to be a private matter.[271] When such violence was made public, communities often relied on the church to shame abusers.[272] Moving into the nineteenth and twentieth centuries, the court explained that the most common governmental response to domestic violence was to impose a fine on the perpetrator.[273] The court found no "consistent examples" of the government responding to domestic violence with firearm confiscation before the protection order prohibition was enacted in 1994.[274] Although the court wrote that this finding would permit it to end its inquiry, it went on to analyze surety and other statutes described above, ultimately dismissing them as not relevantly similar to the protection order prohibition.[275]

2. The Fifth Circuit

Thus far, the most consequential decision impacting either the Lautenberg Amendment or the protection order prohibition has been the Court of Appeals for the Fifth Circuit's decision in *United States v. Rahimi*.[276] In December 2019, Zackey Rahimi got into an argument in a parking lot in Arlington, Texas, with his then-girlfriend, C.M.[277] When C.M. tried to leave the parking lot, Rahimi "grabbed her [by] the wrist, [which knocked] her to the ground."[278] He dragged her to his car and shoved her inside, hitting her head on the dashboard.[279] He noticed that a bystander had witnessed these events, so "he retrieved a gun and fired a shot."[280] C.M. was able to get out of the car and left the scene.[281] Later, Rahimi called and threatened to shoot her if she told anyone what he had done.[282]

270. *Id.*

271. *See id.* at 703–04.

272. *Id.* at 704.

273. *Id.*

274. *Id.* at 705.

275. *Id.* at 707, 709–10, 716.

276. 61 F.4th 443 (5th Cir. 2023), *cert. granted*, __ U.S. __, 143 S Ct. 2688 (2023).

277. The government's petition for a writ of certiorari referred to the defendant's ex-girlfriend as C.M. Petition for Writ of Certiorari at 2, United States v. Rahimi, No. 22-915 (U.S. argued Nov. 7, 2023).

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

On February 5, 2020, Rahimi agreed to the entry of a civil protection order against him by the Tarrant County State District Court in Texas on behalf of C.M.[283] In addition to enjoining Rahimi from possessing a firearm, the order prohibited him from "'[c]omitting family violence,' '[g]oing to or within 200 yards of the residence or place of employment' of [C.M.], and '[e]ngaging in conduct . . . including following the person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass'" C.M., her family, or her household members.[284] He violated that order in August 2020 when he approached C.M.'s house in the middle of the night, leading to his arrest.[285] Three months later, in November 2020, he was separately charged with aggravated assault when he threatened another woman with a gun.[286]

Starting in December 2020, and over the course of the next two months while the order was still in effect, Rahimi was involved in five shootings in the Arlington, Texas, area.[287] On December 1, he shot into the home of an individual to whom he had just sold narcotics; on December 2, he shot at the driver of a vehicle with whom he was involved in a car accident, then left the scene of the accident and returned in a different vehicle and again shot at the other car; on December 22, he shot at a constable's vehicle; and finally, on January 7, he shot into the air at a fast food restaurant.[288]

Arlington police officers obtained a search warrant for Rahimi's home, where they found two firearms: a rifle and a pistol.[289] He was indicted by a grand jury for violating the protection order prohibition.[290] He moved to dismiss the indictment, arguing that the protective order prohibition was unconstitutional, but his motion was denied and Rahimi ultimately pleaded guilty.[291] He appealed his conviction, again mounting a constitutional challenge to the protection order prohibition, and his argument was rejected by the Fifth Circuit Court of Appeals.[292] However, shortly thereafter, the United States Supreme Court issued its ruling in

283. United States v. Rahimi, 61 F.4th 443, 449 (5th Cir. 2023), *cert. granted*, __ U.S. __, 143 S. Ct. 2688 (2023).

284. *Id.* (third alteration added).

285. Petition for Writ of Certiorari, *supra* note 277, at 2.

286. *Id.* at 3.

287. *Rahimi*, 61 F.4th at 448.

288. *Id.* at 448–49.

289. *Id.* at 449.

290. *Id.*

291. *Id.*

292. *Id.*

Bruen, prompting the Fifth Circuit to withdraw its opinion, order supplemental briefing, and schedule oral arguments.[293]

In early 2023, the Fifth Circuit issued its decision holding that the protection order prohibition was facially unconstitutional.[294] In so holding, it answered the two questions posed by *Bruen*: (1) was Rahimi part of "the people" covered by the Second Amendment and (2) was the restriction on Rahimi's right to possess a firearm consistent with the Second Amendment after *Bruen*? The court answered the first question in the affirmative, holding that Rahimi was part of "the people" covered by the Second Amendment.[295] The Fifth Circuit found that the Supreme Court's repeated use of the phrase "law-abiding" in both *Heller* and *Bruen* does not limit the Second Amendment's reach as it contains no true limiting principle.[296]

Turning to the second question, the court examined a number of historical laws that the government argued were appropriate analogues to the protection order prohibition. The court separated these laws into three categories: "(1) English and American laws (and sundry unadopted proposals to modify the Second Amendment) providing for disarmament of 'dangerous' people, (2) English and American 'going armed' laws, and (3) colonial and early state surety laws."[297] The Fifth Circuit rejected each of these categories in turn, finding that they were not historical analogues, and that ultimately no historical analogues were provided in the record that would satisfy the Supreme Court's new test in *Bruen*.[298]

Specifically, the Fifth Circuit found that the purpose of colonial laws disarming "dangerous" and "disloyal" people was "the preservation of political and social order, not the protection of an identified person from the threat of 'domestic gun abuse' . . . posed by another individual."[299] Regarding the "going armed" laws, the court found that the four historic examples provided by the government were, first, not enough to show that they were consistent with the nation's historic tradition.[300] The "going armed" laws also only operated upon criminal proceedings and a conviction, unlike the protection order prohibition's purely civil

293. *Id.* at 449–50.

294. *Id.* at 450.

295. *Id.* at 453 ("Rahimi, while hardly a model citizen, is nonetheless among 'the people' entitled to the Second Amendment's guarantees, all other things equal.").

296. *Id.*

297. *Id.* at 456.

298. *Id.*

299. *Id.* at 457 (citing United States v. McGinnis, 956 F.3d 747, 758 (5th Cir. 2020)).

300. *Id.* at 458.

process.[301] Additionally, at least two of the cited laws removed, or never included, firearm forfeiture as a penalty within four years of the ratification of the Second Amendment.[302]

Finally, the Fifth Circuit found that, although the surety laws "come closer" to being relevantly similar to the protection order prohibition, they, too, were not analogous.[303] The reasoning behind surety laws—to protect one individual from potential harm committed by another individual—was the same, as was the civil nature of the proceedings.[304] However, surety laws allowed individuals who posted a surety to retain possession of their firearms, whereas the protection order prohibition operates as an automatic and complete deprivation of possession.

In March 2023, the United States filed a petition for a writ of certiorari to the United States Supreme Court, noting the time-sensitive nature of the case.[305] On June 31, 2023, the Supreme Court granted certiorari,[306] and heard oral arguments on November 7, 2023. The Court's decision in that case, and any following substantive decision by the Court on the protection order prohibition, will of course further instruct courts and litigators how to interpret these regulations moving forward.

IV. A CONSTITUTIONAL PATH FORWARD

In this section, I will explain what I believe are the most effective arguments that the Lautenberg Amendment and the protection order prohibition are still constitutional under *Bruen*'s test. I will begin by reiterating what I noted in the Introduction: I believe that *Bruen* was wrongly decided, for many of the reasons discussed above.[307] Specifically, I believe that it is improper and ineffective to bind modern society to a legal understanding of the Second Amendment from nearly 200 years ago. A great deal has changed in the intervening period: different portions of the population are no longer excluded from participation in the democratic

301. *Id.* at 458–59.

302. *Id.* at 458.

303. *Id.* at 459–60.

304. *Id.*

305. Petition for Writ of Certiorari, *supra* note 277, at 15–16 ("Given the significant disruptive consequences of the Fifth Circuit's decision, the government is filing this petition for a writ of certiorari on a highly expedited schedule—a little more than two weeks after the issuance of the Fifth Circuit's final amended opinion—in order to allow the Court to consider the petition before it recesses for the summer.").

306. United States v. Rahimi, __ U.S. __, 143 S. Ct. 2688, 2688–89 (2023).

307. See *supra* section II.C for an overview of a number of the critiques that scholars have levied against the *Bruen* decision.

process,[308] society's understanding of gender roles has evolved, and gun technology has advanced to a point where today's firearms are far more dangerous than any that existed at the nation's founding.[309]

As a society, we know a great deal more about domestic violence than we did when the Second Amendment was ratified. The historical arc of domestic violence laws reflects that change. As noted earlier, at common law, a husband was entitled to physically "chastise" his wife, provided she was not left with permanent injury.[310] This right was rescinded during the nineteenth century,[311] but it was 1980 before most states passed statutes authorizing courts to grant victims protection orders against their abusers.[312] Congress passed the Violence Against Women Act in 1994, marking the first major federal legislation focused on domestic violence.[313] These relatively recent laws all demonstrate a cultural and legal shift in how we understand and respond to domestic violence.

With this new understanding of domestic violence came a plethora of scientific research about how firearms and domestic violence co-exist. The science in this area is abundant and clear.[314] First, victims of domestic violence are in heightened danger when their abusive partners have access to firearms.[315] Second, gun laws, including those targeting individuals who commit domestic violence, save lives.[316] There is simply no reason to handcuff ourselves to a historic understanding of the Second Amendment that lacked these insights; to act like this information does not exist is to prioritize an outdated and incomplete societal outlook. And ultimately, to take this approach is to put domestic violence victims at risk.

However, critiques of *Bruen* notwithstanding, the purpose of this Article is to explain how and why existing domestic violence-based gun

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308. *See, e.g.*, U.S. CONST. amends. XV, XIX (granting the right to vote to all men regardless of "race, color, or previous condition of servitude" and women, respectively).

309. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2163–70, 2174–75 (Breyer, J., dissenting).

310. Siegel, *supra* note 139, at 2188.

311. *Id.*

312. JEFFREY FAGAN, U.S. DEP'T OF JUST., THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS 9 (1996), https://www.ojp.gov/pdffiles/crimdom.pdf [https://perma.cc/W38K-SKU2].

313. *History of VAWA*, LEGAL MOMENTUM, https://www.legalmomentum.org/history-vawa [https://perma.cc/LE8E-LG9G].

314. See *supra* section I.A for data on the fatality risk to domestic violence victims when their intimate partners have access to firearms.

315. *See supra* section I.A.

316. See *supra* section I.B for data on the reduction in homicides that have been attributed to these laws.

restrictions should survive its new test. In this vein, I will address the two questions posed by *Bruen*. First, does each law cover conduct by "the people" in a way that implicates the Second Amendment? If so, is each law consistent with the nation's historic understanding of the Second Amendment? I will argue that the answer to the first question is no: the individuals whose conduct is regulated by both laws do not comprise "the people" under the Second Amendment. And even if courts disagree, the answer to the second question is clearly yes: both laws comport with our historic understanding of lawful firearm regulations.

A. Individuals Subject to the Lautenberg Amendment and the Protection Order Prohibition Are Not Part of "the People" Covered by the Second Amendment's Protections

At *Bruen*'s first step, courts must decide whether the challenged law covers conduct protected by the Second Amendment.[317] Courts that have considered the Lautenberg Amendment and the protection order prohibition after *Bruen* have spent much less time discussing this question.[318] It is not clear how strenuously the government argued step one in these cases, though several courts noted that the government did not contest the issue.[319] This is a missed opportunity for domestic violence victims. Compelling arguments must demonstrate that the Lautenberg Amendment and the protection order prohibition do not regulate conduct covered by the Second Amendment.

There are two reasons the government should not concede that step one is met under *Bruen*—one constitutional and one practical. The constitutional reason is that the proper interpretation of the Second Amendment begins with the presumption that not all conduct is covered and that the Lautenberg Amendment and protection order prohibition rightly fall outside the Second Amendment's "unqualified command."[320] The practical reason to argue at *Bruen*'s step one is that it may prevent courts from reaching step two. As discussed below, step two of the *Bruen* test presents real challenges. Therefore, to the extent courts

317. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2126 (2022).

318. *See, e.g.*, United States v. Hoeft, No. 4:21-CR-40163, 2023 WL 2586030, at *3 (D.S.D. Mar. 21, 2023) (explaining in one paragraph how the Lautenberg Amendment still survives a facial constitutional challenge under Eighth Circuit precedent after *Bruen*).

319. *See, e.g.*, United States v. Bruner, No. CR-22-518, 2023 WL 2653392, at *2 (W.D. Okla. Mar. 27, 2023) (noting how the government "d[id] not directly address whether the Second Amendment's plain text covers [the] Defendant's conduct").

320. *See Bruen*, 142 S. Ct. at 2126.

can avoid the question altogether, it may improve outcomes for these laws.[321]

Two points are impossible to dispute regarding the Lautenberg Amendment and the protection order prohibition as they relate to the Second Amendment. First, both laws clearly implicate firearm possession, which the Second Amendment protects.[322] Second, the laws are not specific as to the type of firearms they regulate, but the Second Amendment protects firearms "in common use at the time,"[323] which would include most guns owned by defendants in Lautenberg Amendment or protection order prohibition cases.[324]

People who are convicted of misdemeanor domestic violence or are subject to protective orders do not fall within "the people" referred to in the Second Amendment. In its recent jurisprudence, the Supreme Court has repeatedly used the qualifier "law-abiding" when referring to "the people" covered by the Second Amendment.[325] In *Bruen*, the majority and concurring opinion use the phrase "law-abiding" twenty-one times.[326] It is also used three times in the dissent.[327] There is no reason to ignore the Court's repeated use of this qualifier.

In *Bruen*, it was clear that the Second Amendment protected "the people" subject to New York's may-issue law.[328] It stands to reason that most individuals applying for a license to possess a firearm in their homes would be law-abiding; in other words, the regulation did not specifically target individuals who were not law-abiding. The government did not dispute that the Second Amendment protected gun possession for these individuals.[329]

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321. *See, e.g.*, United States v. Hammond, 656 F. Supp. 3d 857, 864 (S.D. Iowa 2023) ("A more nuanced approach to the first stage of the *Bruen* analysis helps avoid this dilemma."), *appeal dismissed*, No. 23-02623 (8th Cir. Jan. 8, 2024).

322. District of Columbia v. Heller, 554 U.S. 570, 581–82 (2008).

323. *Id.* at 624. The *Bruen* Court instructs gun legislation advocates to examine legislation in existence at the time the Second Amendment was ratified for the most instructive analogues consistent with the nation's historical tradition of firearm regulation. *Bruen*, 142 S. Ct. at 2136.

324. If a defendant convicted under one of the statutes possessed only a weapon not "in common use at the time," *Heller*, 554 U.S. at 624, and later mounted an as-applied challenge to the law, the government could argue that the type of weapon possessed on its own made the defendant's conduct fall outside the sphere of the Second Amendment.

325. *See, e.g.*, *id.* at 625 (clarifying that the Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes").

326. *Bruen*, 142 S. Ct. at 2122, 2125, 2131, 2133–34, 2138, 2150, 2156; *id.* at 2157–59, 2161 (Alito, J., concurring); *id.* at 2161 (Kavanaugh, J., concurring).

327. *Id.* at 2186–87, 2190 (Breyer, J., dissenting).

328. *Id.* at 2134 (majority opinion).

329. *Id.*

However, in the context of the Lautenberg Amendment and the protection order prohibition, the individuals whose right to gun possession stands to be forfeited are, by definition, not law-abiding.[330] To trigger the Lautenberg Amendment, a person must be convicted of a misdemeanor crime of domestic violence.[331] That conviction is accompanied by all the due process guarantees of the criminal legal process. A court has found that individual to not be a law-abiding person, thereby placing them outside the Second Amendment's protection. Domestic violence misdemeanants are analogous in this way to people convicted of felonies, who are also not among "the people" protected by the Second Amendment.[332]

The protection order prohibition presents a much closer question as to whether implicated defendants are part of "the people" covered by the Second Amendment. Thus far, every court to consider the issue has determined that protection order respondents are constitutionally protected.[333] However, like Lautenberg Amendment defendants, protection order respondents are, by definition, generally not law-abiding. After receiving notice and the opportunity to be heard, these respondents have been found to pose a "credible threat" or a real threat to another person's safety.[334] Most of the time, the conduct leading to the entry of a protection order against a person is criminal in nature, such as assault or battery. When a court has found that a person has engaged in such conduct, that person is not "law-abiding."

The protection order prohibition is also triggered when an individual is not found to pose a "credible threat" or a real threat, if, as part of the order, the court bans the respondent from "the use, attempted use, or threatened use of physical force against [their] intimate partner or child."[335] This section of the regulation makes sense as courts are only likely to order this relief where "evidence credited by the court reflected a real threat or

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330. One court considering whether Lautenberg Amendment defendants were among "the people" protected by the Second Amendment analogized them with incarcerated individuals and their First Amendment rights. United States v. Hammond, 656 F. Supp. 3d 857, 863 (S.D. Iowa 2023), *appeal dismissed*, No. 23-02623 (8th Cir. Jan. 8, 2024). Specifically, once an individual is in the custody of the state, they no longer enjoy the right guaranteed by the First Amendment of "the people" to peaceably assemble. *Id.*

331. 18 U.S.C. § 922(g)(9).

332. *Cf. Hammond*, 656 F. Supp. 3d at 862–63 (citing United States v. Coleman, No. 3:22-CR-8-2, 2023 WL 122401, at *2 (N.D. W. Va. Jan. 6, 2023) ("The bottom line is the Defendant's status as a felon removes him from 'the people' enumerated in the Second Amendment.")).

333. *See supra* section III.B.

334. 18 U.S.C. §§ 922(g)(8)(A), (C)(i).

335. *Id.* § 922(g)(8)(C).

danger of injury to the protected party."[336] Given the reasons stated above, such individuals are not law-abiding.

There is also language in *Bruen* indicating that the protection order prohibition is constitutional. While the Court struck down the New York "may-issue" law at issue in *Bruen*, the Court discussed the "shall-issue" schemes that existed in the majority of other states with approval.[337] Several of those states exclude protection order respondents (or certain classes of protection order respondents) from their shall-issue laws.[338] The *Bruen* Court specified that "these shall-issue regimes, which often require applicants to undergo a background check . . . , are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'"[339]

Although thus far courts have not been persuaded to find that protection order respondents fall outside the Second Amendment's "unqualified command,"[340] that is the proper interpretation. Defendants bear the burden to demonstrate how they, as individuals subject to a protection order, are covered by the Second Amendment and that burden cannot be met.

There may also be room to argue beyond the point that "the people" covered by the Second Amendment do not include individuals such as defendants implicated by the Lautenberg Amendment and the protection order prohibition. In *United States v. Hammond*, the court called for a deeper textual analysis of the Second Amendment. That court turned to precedent in the Eighth Circuit case *United States v. Bena*, which found that

> the proper question when analyzing the "plain text" of the Second Amendment is not what "the people" means, but rather whether the "right . . . to keep and bear Arms," as understood in the Founding era, covers an individual's conduct when the person possesses a firearm after having been proven to be dangerous.[341]

The *Hammond* court found this approach to be consistent with *Bruen*, stating that

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336. Supplemental Brief for Appellee the United States at 18 n.1, United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023) (No. 21-11001) (quoting United States v. Emerson, 270 F.3d 203, 262 (5th Cir. 2001)).

337. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2138 n.9 (2022); *see id.* at 2161–62 (Kavanaugh, J., concurring).

338. *E.g.*, TEX. GOV'T CODE § 411.172(a)(12).

339. *Bruen*, 142 S. Ct. at 2138 n.9 (quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008)).

340. *Id.* at 2130 (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961)).

341. United States v. Hammond, 656 F. Supp. 3d 857, 863 (S.D. Iowa 2023) (citing United States v. Bena, 664 F.3d 1180, 1183 (8th Cir. 2011)), *appeal dismissed*, No. 23-02623 (8th Cir. Jan. 8, 2024).

> *Bruen* already, for example, requires Courts at the first stage of the inquiry to analyze history to understand what the word "arms" means as used in the Second Amendment. . . . It is plausible that the words "right" and "infringe" are to be interpreted through the same historical lens at the first *Bruen* stage.[342]

This approach has not been adopted thus far; most courts have focused on defining "the people." But there is room for future advocates to argue that the "right" itself is not "infringed" at *Bruen*'s first step.

B. The Lautenberg Amendment and Protection Order Prohibition Both Have Historical Analogues Consistent with the Nation's Tradition of Regulating Firearms

If courts reach the second step of *Bruen*'s test, they will be required to determine whether the Lautenberg Amendment and the protection order prohibition are consistent with the nation's historic understanding of the Second Amendment.[343] At this step, the government bears the burden of proof and must demonstrate that the law at issue has some relevant historical analogue.[344]

Plainly stated, the constitutionality of any federal or state gun regulation will depend on how broadly or narrowly courts interpret *Bruen*'s second step. The reality is, if the government is required to identify a legal historical analogue that very narrowly matches the regulation at issue, that law will almost certainly be found unconstitutional.[345] If courts interpret step two more broadly, then more modern-day gun regulations will be upheld.

The *Bruen* Court provides guidance here and states that the government need not identify a "historical *twin*."[346] There are significant public policy reasons to support this broad approach. Of course, many of the issues facing the country today are far different than those facing the founders. In 1790, the nation's population of only four million people lived predominantly in rural settings.[347] The safety concerns surrounding the prevalence of gun violence were fundamentally different in that environment than they are today, when out of nearly 335 million people,

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342. *Id.* at 864 (citation omitted).

343. *Bruen*, 142 S. Ct. at 2126.

344. *Id.*

345. *See* Charles, *The Fugazi Second Amendment*, *supra* note 122, at 684–85 ("The historical reality is that but for a handful of firearms and weapons regulations, such as unlawful discharge and concealed carry laws, meeting this constitutional threshold will be almost impossible for government defendants.").

346. *Bruen*, 142 S. Ct. at 2133 (emphasis in original).

347. *Id.* at 2180 (Breyer, J., dissenting).

an estimated eighty-three percent of the population live in cities.[348] Additionally, gun technology has advanced to the point that today's firearms would be unrecognizable to the nation's founders. For example, historically, loading and reloading a firearm was a time-consuming process[349] that resulted in an average Revolutionary War infantryman being able to fire three shots per minute;[350] today, automatic weapons can generally fire between 500 and 1,000 rounds per minute.[351] Firearm technology continues to advance, as lawmakers grapple with how to regulate "ghost guns," which are 3D-printed firearms that can consumers can purchase online and assemble at home.[352] This kind of technology was simply nonexistent, and not foreseeable, at the time the Second Amendment was ratified.

Society has also dramatically changed since the Second Amendment's passage, because our modern government can no longer legally exclude portions of the country from the democratic process on the explicit basis of race or gender.[353] As such, any historic "twins" that the government *could* identify would not necessarily be representative of our nation's historic understanding of the Second Amendment, but rather the understanding of one subset of the population that had its voice heard.

For these reasons, courts must construe *Bruen*'s second step broadly and find a tradition of regulation even if based on generally similar analogues. There are cases where the *Bruen* Court itself identified that "a more nuanced approach" may be necessary;[354] specifically, that approach is necessary when the laws under consideration "implicat[e]

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348. CTR. FOR SUSTAINABLE SYS., UNIV. OF MICH., U.S. CITIES 1 (2023), https://css.umich.edu/sites/default/files/2023-10/U.S.%20Cities_CSS09-06_0.pdf [https://perma.cc/53PT-FFTZ]; *U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/ [https://perma.cc/64XP-4DCA].

349. Phil Klay, *How Did Guns Get So Powerful?*, NEW YORKER (June 11, 2022), https://www.newyorker.com/tech/annals-of-technology/how-did-guns-get-so-powerful [https://perma.cc/6ZZD-XDRS] ("Back then, reloading a gun was an arduous process, requiring the shooter to drop the weapon from the shoulder, point its muzzle upward, pour in gunpowder, shove in a bullet alongside a small piece of cloth, push both down the barrel with a ramrod until the bullet was seated against the powder charge, and then prime the firing mechanism.").

350. *See Weapons of War*, NAT'L PARK SERV. GUILFORD COURTHOUSE NAT'L MIL. PARK, https://www.nps.gov/museum/exhibits/revwar/guco/gucoweapons.html [https://perma.cc/US2Y-9HH8] (last modified July 26, 2001).

351. *Machine Gun*, BRITANNICA, https://www.britannica.com/technology/machine-gun [https://perma.cc/TLG4-YR5M] (last updated Dec. 6, 2023).

352. *See Which States Regulate Ghost Guns?*, EVERYTOWN FOR GUN SAFETY SUPPORT FUND, https://everytownresearch.org/rankings/law/ghost-guns-regulated/ [https://perma.cc/Q87G-XNXX] (last updated Jan. 4, 2024).

353. *See* U.S. CONST. amends XV, XIX.

354. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2132 (2022).

unprecedented societal concerns or dramatic technological changes."[355] It makes the most sense, in these cases, to require the government to identify "historical antecedents that share only broad commonalities."[356]

Part of this broad approach is determining how many analogous laws must exist before the court will be satisfied that *Bruen*'s second step is met. One similar legal tradition[357] should suffice to fulfill this step. For the Lautenberg Amendment and protection order prohibition, that one similar legal tradition is clear: laws banning firearm possession for felons and surety laws, respectively.[358] However, when the government cannot identify one similar legal tradition, courts should consider a combination of historical laws, distill principles from those laws, and determine whether the modern-day gun regulation is consistent with those principles. This is where the Fifth Circuit faltered in *United States v. Rahimi*. There, the court considered the government's proposed analogues individually and dismissed them based on minor differences.[359] The court failed to consider the body of historical analogues as a whole and to make a separate determination as to whether the protection order prohibition was consistent.[360]

As discussed above, the Supreme Court provided two metrics for lower courts to consider when determining whether modern-day gun regulations are relevantly similar to purported historical analogues: the form or mechanics of the law (the how) and the purpose or justification for the law (the why).[361]

Before discussing how and why appropriate historical analogues exist for both the Lautenberg Amendment and the protection order prohibition, I want to briefly explain the role that I believe problematic historical laws should play as bases of comparison for modern gun regulations. The particular laws that concern me are the historical laws disarming people that the government then considered to be dangerous or disloyal based on ethnicity. For example, Massachusetts, Connecticut, Maryland, New York, Pennsylvania, Rhode Island, and Virginia all had laws that

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355. *Id.*

356. *See* United States v. Padgett, No. 3:21-cr-00107-TMB-KFR, 2023 WL 2986935, at *7 (D. Alaska Apr. 18, 2023).

357. By one legal tradition, I mean a sufficient number of colonies or states all recognizing the same legal practice. The *Bruen* Court did not specify how many colonies or states had to have the same manner of law before it could properly be considered a legal tradition. *See Bruen*, 142 S. Ct. 2111.

358. *See supra* section III.A.

359. Petition for Writ of Certiorari, *supra* note 277, at 11.

360. *See id.*

361. *Bruen*, 142 S. Ct. at 2133.

prohibited the sale of firearms or ammunition to Native Americans.[362] Several courts have found that the underlying principle of these laws—the government's ability to remove firearms from a group of people it considers dangerous—is similar enough to the Lautenberg Amendment and protection order prohibition to uphold the constitutionality of both laws.[363] Several courts have dismissed analogies to these laws based on their odious nature.[364]

Laws such as those historically banning Native Americans or African Americans would clearly be unconstitutional today. But it is not the substance of these laws that is relevant; rather, the critical principle to glean from these historic laws is that there was an understanding that the government had the power to disarm individuals it considered dangerous. In other words, *who* the government considered to be dangerous is not at issue; but the very fact that these laws existed demonstrates what, historically, the nation understood as the state's power to regulate firearm possession. That is precisely the analysis that *Bruen* requires courts to conduct. Ignoring these laws due to their abhorrent nature would strip gun safety advocates today from an important pool of evidence directly relevant to supporting modern regulations. Additionally, legislatures that categorize certain people as "dangerous" are now bound by our more modern Constitution, which would bar most prohibitions on racial and gender discrimination. Of course, in drawing analogies with these historical laws, courts should take care to repudiate the racist nature of the historic laws, but should still look to them as evidence of the scope of the government's historic power to legislate in this field.[365]

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362. *See* Joseph Blocher & Caitlan Carberry, *Historical Gun Laws Targeting "Dangerous" Groups and Outsiders*, *in* NEW HISTORIES OF GUN RIGHTS AND REGULATION: ESSAYS ON THE PLACE OF GUNS IN AMERICAN LAW AND SOCIETY 131, 135 nn.36–37 (Joseph Blocher, Jacob D. Charles & Darrell A.H. Miller eds., 2023).

363. *See, e.g.*, United States v. Nutter, 624 F. Supp. 3d 636, 643 (S.D. W. Va. 2022) (finding that laws prohibiting firearm possession by dangerous people in the founding era are sufficiently analogous to the Lautenberg Amendment), *appeal docketed*, No. 22-04541 (4th Cir. Sept. 22, 2022).

364. *See, e.g.*, United States v. Guthery, No. 2:22-cr-00173, 2023 WL 2696824, at *8 (E.D. Cal. Mar. 29, 2023) ("It would be unconscionable to conclude limitations on Constitutional rights based on these categorizations were wise or justified at any point in time, and the court does not understand the government – or any other court pointing to such obsolete codes — to suggest as much.").

365. *See* Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE 30, 35–37 (2023) (arguing in favor of an "Abstraction Approach," in which courts would decry the discriminatory laws themselves, but still extract their underlying principles for purposes of making historical analogies).

1. *The Lautenberg Amendment Is Analogous to the Felon-in-Possession Law, Which the* Heller *Court Presumed to Be Constitutional*

If a court decides to interpret *Bruen*'s second step narrowly, it will be unlikely to uphold the constitutionality of the Lautenberg Amendment. Historically, the law banning people convicted of misdemeanor domestic violence from possessing firearms only dates back to 1996.[366] For much of the nation's history, domestic violence was not criminalized, and even when it was, gun confiscation was not a common penalty available to the state.[367]

However, as explained above, at a slightly higher level of generality, the Lautenberg Amendment is consistent with the nation's historic understanding of the Second Amendment. Specifically, the Lautenberg Amendment is analogous to the federal and state laws that ban felons from possessing firearms. Nearly every court to consider the federal felon-in-possession law in *Bruen*'s wake has affirmed its constitutionality.[368] This fits with the *Heller* Court's earlier explanation that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill."[369]

To understand why the Lautenberg Amendment is analogous to the felon-in-possession ban, it is critical to review the legislative intent behind the newer law. The Lautenberg Amendment was passed because prosecutors were not handling domestic violence crimes the way they were handling violent crimes involving strangers; domestic violence cases were notoriously undercharged or pleaded down.[370] An assault that would have been charged as a felony had it occurred between strangers was often charged as a misdemeanor when perpetrated upon an intimate partner.[371] Since felons were already banned from possessing firearms, and since people convicted of misdemeanor crimes of domestic violence often should have been convicted of felonies, Congress saw the

366. See *supra* section I.B. for further discussion of the Lautenberg Amendment.

367. See *supra* section II.C.3 for further discussion of the history of domestic violence laws and section III.B.1 for discussion of laws permitting gun confiscation due to domestic violence.

368. *See* United States v. Cummings, No. 1:22-CR-51-HAB, 2023 WL 3023608, at *1 (N.D. Ind. Apr. 20, 2023) (noting that "ninety judicial opinions" have affirmed the constitutionality of the federal felon-in-possession ban after *Bruen*). *But see* Range v. Att'y Gen. U.S., 69 F.4th 96, 98, 106 (3d Cir. 2023) (finding the federal felon-in-possession ban unconstitutional as applied to this defendant, convicted of making false statements to obtain food stamps).

369. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

370. See *supra* section I.B for further discussion about the passage of the Lautenberg Amendment.

371. *See supra* section I.B.

Lautenberg Amendment as closing a loophole in gun possession by violent criminals.[372] In other words, the "why" of both laws—one of the two metrics that *Bruen* instructs courts to assess—is identical between the felon-in-possession ban and the Lautenberg Amendment. Both laws are intended to prevent an ostensibly dangerous person from being able to cause a great deal of harm.

The "how" of both laws is also identical. The felon-in-possession ban and the Lautenberg Amendment are triggered only upon a criminal conviction.[373] Defendants are entitled to all the due process that the Constitution requires. Both bans also operate as complete bans on firearm possession, rather than partial restrictions.[374]

This is the strongest analogy because the felon-in-possession law bears such a close resemblance to the Lautenberg Amendment. That said, there is some skepticism surrounding the constitutionality of the felon-in-possession ban in *Bruen*'s wake. As mentioned above, most courts have upheld the law, although the Third Circuit Court of Appeals recently struck it down on narrow grounds.[375] One critique of the felon-in-possession ban as a historical analogue is that this law post-dates the law struck down by the *Bruen* Court.[376] However, recency alone is not the reason the Court struck down the New York law at issue in *Bruen*. Rather, the Court found that the restrictions in place in New York were outliers and not representative of the nation's historic tradition.[377] The date of the historical analogue's initial passing, then, is not solely dispositive of the modern gun regulation's constitutionality; courts must also consider the commonality of the historic traditions. Because the felon-in-possession ban was federal in nature and therefore applied nationwide, it is fundamentally distinguishable from the New York law struck down in *Bruen*.

Although the felon-in-possession ban provides the closest example of a relevantly similar historic analogue, compelling analogies can be made between the Lautenberg Amendment and other laws as well—specifically

372. *See supra* section I.B.

373. 18 U.S.C. § 922(g)(9).

374. *See, e.g.*, U.S. CONST. amend. VI (guaranteeing the right to an attorney for criminal defendants).

375. Range v. Att'y Gen. U.S., 69 F.4th 96, 106 (3d Cir. 2023) (stating "[o]ur decision today is a narrow one" and finding the federal felon-in-possession ban unconstitutional as applied to a defendant convicted of a non-violent felony).

376. The first federal felon-in-possession ban passed in the Federal Firearms Act of 1938. Federal Firearms Act of 1938, Pub. L. No. 75-785, 52 Stat. 1250 (1938). By contrast, the New York law banning unlicensed firearm carry that the Court struck down *Bruen* passed in 1905. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2122 (2022).

377. *See Bruen*, 142 S. Ct. at 2153–54.

to historic laws allowing the state to disarm people it considered dangerous. As discussed above, it was historically understood that the government could disarm Native Americans, for example, because they were perceived as dangerous. While that categorization itself is problematic, it is representative of the broader notion that the government can remove firearms from individuals it considers dangerous, which is specifically how Congress identified those convicted of misdemeanor crimes of domestic violence when it passed the Lautenberg Amendment.

2. *The Protection Order Prohibition Is Analogous to Surety Laws, Which Disarmed Dangerous Individuals During the Colonial Era*

Like the Lautenberg Amendment, there is no "historical twin" analogue for the protection order prohibition.[378] Protection orders themselves have only existed in most states for fewer than fifty years.[379] Again, though, at a slightly broader level of generality, the protection order prohibition is analogous to several firearm regulations that existed at the time the Second Amendment was ratified: surety laws and laws disarming dangerous people. Although district courts and the Fifth Circuit have thus far been divided on whether these laws are truly analogous, an examination of the historic laws under *Bruen*'s required metrics—the "how" and the "why" of the laws—demonstrates that they are relevantly similar for Second Amendment purposes.

Surety laws originated in England, continued in the American colonies, and were adopted by the states.[380] Their purpose was to give the government the ability to temporarily disarm someone who another individual believed posed a credible threat. In that way, the "why" of surety laws and the protection order prohibition are the same: to prevent a dangerous person from being able to cause significant harm. A primary difference between surety laws and felon-in-possession or other bans is that surety laws did not require a criminal conviction in order to be utilized. Rather, Sir William Blackstone wrote that surety laws were "intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion, that some crime [wa]s intended or likely to happen."[381] In that way, surety laws are just like the protection order prohibition: both are intended to prevent likely future crimes.

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378. *Id.* at 2133 (emphasis omitted).

379. Carolyn N. Ko, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of "Efficacy*,*"* 11 S. CAL. INTERDISC. L.J. 361, 362 (2002).

380. Supplemental Brief for Appellee the United States, *supra* note 234, at 27–29.

381. *Id.* at 28 (alteration in original) (citing BLACKSTONE, *supra* note 236, at 249).

The "how" of the protection order prohibition and surety laws is also very similar. They both authorize only temporary disarmament,[382] and both require some level of due process within the legal system.[383] There are some differences, of course. Historically, an individual could simply pay the surety or have others vouch for his good future conduct and maintain his firearms.[384] There is no similar possibility within the protection order prohibition, once it applies.

However, that difference should be understood as follows: with surety laws, there were a variety of possible punishments, including both imprisonment and disarmament.[385] The government at the time permitted a payment or third-party assurance to avoid those penalties.[386] Congress, in passing the protection order prohibition, did not find that to be appropriate.[387] But the underlying power—the power of the government to disarm an individual found to pose a threat—is the same. The fact that colonial and state governments historically concluded that some exceptions could be made to the government's exercise of that power does not limit the power itself.

In that way, the legal process behind a protection order often offers more protection to a potential respondent than surety laws did. In a protection order case, the court usually finds that the respondent poses a credible threat to their intimate partner or their intimate partner's child, and often finds specifically what crime the respondent has committed.[388] If the court cannot make that finding, no protection order is entered and the gun ban does not apply.

While surety laws offer the closest historic analogue to the protection order prohibition, the law is also relevantly similar to historic regulations disarming dangerous people. While the subject of those laws—individuals of a certain race—is inappropriate and unconstitutional today, the nature

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382. *Id.* at 30.

383. As protection order cases are civil in nature, they do not trigger criminal constitutional protections. However, litigants are entitled to procedural fairness inherent in the legal system, including being notified of a hearing and having a right to appear.

384. *Id.* at 30.

385. *Id.*

386. *Id.* at 28.

387. *See* 18 U.S.C. § 922(g)(8).

388. *Domestic Violence Restraining Orders Laws and Forms: 50-State Survey*, JUSTIA, https://www.justia.com/criminal/domestic-violence-restraining-orders-forms-50-state-resources/ [https://perma.cc/LC8G-E3UD]. As discussed above, protection orders can also trigger the gun prohibition if they order a person not to use, attempt to use, or threaten to use physical force against their intimate partner or their intimate partner's child in the future. 18 U.S.C. § 922(g)(8)(C)(ii).

of the laws, disarming people the state considered dangerous, is directly analogous with today's protection order prohibition.[389]

In *Rahimi*, the Fifth Circuit raised what it considered a critical difference between these historic laws and the protection order prohibition: laws disarming dangerous people were passed for "preservation of political and social order," and were not intended for "the protection of an identified person."[390] Assuming the accuracy of the Court's assumption about the historic laws, there is ample evidence to suggest that the protection order prohibition also serves to protect the political and social order. As discussed above, people who commit domestic violence are far more likely to pose a threat to the general public safety, as evidenced by domestic abusers being disproportionately responsible for mass shootings.[391] In that way, individuals who commit domestic violence and are subject to protection orders pose a threat to more than just their intimate partner or family member; they are also a threat to anyone in close enough proximity that a bullet could reach them.

That said, let us assume, again, that the Fifth Circuit is correct about the purpose of historic laws disarming dangerous people. Let us also assume that the protection order prohibition has a distinct purpose to protect identifiable individuals despite its ability to protect the general public for the reasons described above. This difference in purpose, if anything, favors the constitutionality of the protection order prohibition. The modern law requires that the state make a finding that there is a particular individual who is at risk, rather than a generalized risk to society.[392] The burden on the government is higher. And ultimately, who are the identifiable individuals at risk in protection order cases, if not members of the "political and social order"?[393]

Together, historic English and colonial laws that disarmed people considered dangerous, in combination with surety laws and the felon-in-possession ban, demonstrate a societal understanding at the time the Second Amendment was ratified that the government is empowered to remove guns from individuals who pose a threat of harm to others. That is exactly the purpose of both the Lautenberg Amendment and the protection order prohibition. The "whys" of both sets of laws are analogous, and the "hows" of both sets of laws are also similar in that they

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389. *See supra* section IV.B.

390. United States v. Rahimi, 61 F.4th 443, 457 (5th Cir. 2023), *cert. granted*, __ U.S. __, 143 S. Ct. 2688 (2023).

391. *See supra* section I.A.

392. *See* 18 U.S.C. § 922(g)(8)(C).

393. *Rahimi*, 61 F.4th at 457.

allow for temporary or permanent disarmament of individuals with some legal process, though not necessarily a criminal conviction.

Ultimately, based on cases published during the brief period the courts have had to consider the constitutionality of both laws, it appears that the Lautenberg Amendment stands on relatively solid constitutional ground. Every district court to consider it has affirmed its constitutionality.[394] Given the recent divergence of courts on the felon-in-possession ban, though, the constitutional landscape could shift. However, a review of the legislative purpose and the operation of the Lautenberg Amendment demonstrate that it is consistent with the nation's historic tradition of firearm regulation.

The protection order prohibition is currently on much shakier ground. The Fifth Circuit decision in *Rahimi* is a significant setback for gun control advocates, and district courts have reached divergent conclusions on the law. Still, a close examination and application of the *Bruen* test supports the law's constitutionality.

CONCLUSION

In deciding *Bruen*, the Supreme Court radically altered our courts' approach to Second Amendment jurisprudence. The extent and impact of this shift remains to be seen. Given the nature of *Bruen*'s test, lower courts have reached divergent outcomes when considering the constitutionality of a panoply of modern firearm regulations. While courts have uniformly upheld the Lautenberg Amendment, they have been divided on the constitutionality of the protection order prohibition. It is critical that both laws remain valid in order to protect victims of domestic violence from the threat of serious harm by their partners. To maintain these laws, the government must embrace *Bruen*'s test and argue both that (1) these laws do not implicate the Second Amendment and that, (2) even if they do implicate the Second Amendment, they are both consistent with the nation's historic understanding of firearm regulation. While this is a difficult and demanding test for the government to meet, history bears out why these two laws meet the test and why they should remain good law today.

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394. *See supra* note 155 and accompanying text.