The Case for Relaxing Bruen's Historical Analogues Test: Rahimi, Domestic Violence Regulation, and Gun Ownership

Jordan J. Al-Rawi †

ABSTRACT

The Supreme Court's grant of certiorari to review United States v. Rahimi presents the Court with an important opportunity to clarify its 2022 ruling in New York State Rifle & Pistol Association v. Bruen.

In Rahimi, the Fifth Circuit expanded Bruen's historical approach to the Second Amendment when it struck down a 1994 federal law, 18 U.S.C. § 922(g)(8), which allowed a court to disarm a person subject to a domestic violence civil protective order. This essay argues that Rahimi offers insight into one of Bruen's potential flaws, and suggests an alternative analysis of Rahimi that helps to remedy this problem more broadly without undermining Bruen itself. Bruen accepted and perpetuated the results of cost-benefit analyses of the Second Amendment performed by ancient legislatures, leaving no opportunity for interest-balancing by modern lawmakers.

In deciding Rahimi pursuant to Bruen, the Fifth Circuit focused its inquiry on what eighteenth century legislatures had done with regard to perpetrators of domestic violence, and found no analogue sufficient to support § 922(g)(8). At the time of ratification, no calculation had been made to suggest that the societal interests in curbing domestic violence outweighed the interest of gun ownership. This is largely because lawmakers, and society in general, did not recognize domestic violence or the rights of women as categories of social interest, much less as targets of ameliorative legislative or judicial action. It would be nonsensical, therefore, to go backwards in history and rely upon cost-benefit calculations done by a legislature incapable of fully appreciating the challenges faced or values held by modern society. And yet Bruen, as read by the Rahimi court, would bind modern society to that perspective.

To resolve the conundrum, this essay suggests three approaches to

DOI: https://doi.org/10.15779/Z389G5GF86

† Thank you to Professor Rebecca Brown, whose course inspired this paper.

addressing the Rahimi issue while still remaining consistent with the Bruen regime. The most specific solution in Rahimi would be to clarify that persons who have perpetrated domestic violence and are subject to a qualifying civil protective order, even before being convicted of a crime, fall outside the community of "law-abiding citizens" whose gun rights are protected. A broader solution to the analytical problem would be for the Court to adjust the relevant historical period to which it looks for analogues whenever a societal failure of the founding period– such as deeply rooted discrimination and exclusion–rendered early legislatures incapable of striking a meaningful balance between the competing interests at issue. Or, relatedly, the Court could permit explicit means-end scrutiny, in the form of intermediate or strict scrutiny, to be applied to modern regulations that are designed to further a societal interest that was grossly undervalued in the ratification era, particularly due to entrenched systems of discrimination or exclusion. These adjustments to the historical approach advanced by Bruen would preserve the legislature's responsibility of meaningfully considering and balancing gun rights with competing social interests.

ABSTRACT 93
INTRODUCTION 94
PART I: THE *BRUEN* DECISION 97
  I. *The Old Test* 97
  II. *The New Test* 99
  III. *Where does this leave us?* 100
PART II: §922(G)(8) AND *UNITED STATES V. RAHIMI* 102
PART III: HISTORY OF PROTECTIVE ORDERS AND DOMESTIC VIOLENCE 104
  I. *Protective Orders* 104
  II. *English and Colonial Regulation of Domestic Violence* 104
  III. *Post-Revolution Regulation of Domestic Violence* 105
  IV. *Practical Limitations on Domestic Violence Regulation in Early America* 106
  V. *Courts, Prosecutors, and Informal Punishments* 107
  VI. *Legal Reform and Modern Domestic Abuse Regulation* 108
PART IV. *BRUEN*'S LIMITED FORM OF HISTORICAL REVIEW FAILS TO ACCOUNT FOR THE UNRECOGNIZED SOCIAL VALUES AFFECTING THIS HISTORY 110
PART V. PROPOSED SOLUTIONS: ABSTRACTION OR A RETURN OF MEANS-END SCRUTINY 112
PART VI. PERSONS WHO HAVE PERPETRATED ACTS OF DOMESTIC VIOLENCE FALL OUTSIDE THE CATEGORY OF" LAW-ABIDING CITIZENS" WHOSE GUN RIGHTS ARE PROTECTED 115
CONCLUSION 118

INTRODUCTION

The Supreme Court established a rigid framework for judicial review of

challenged laws regulating the Second Amendment right to bear arms in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022). *Bruen* struck down a New York state law requiring that individuals show a special need for self-protection in order to obtain an open carry license for a firearm, replacing means-end scrutiny with a form of historical review temporally limited to the eighteenth century. The *Bruen* test requires the government to justify a challenged gun regulation by pointing to analogous regulations in the historical record that demonstrate a pattern and practice of restricting Second Amendment rights in a similar fashion.

Shortly after the Court's decision in *Bruen*, the Fifth Circuit struck down 18 U.S.C.§ 922(g)(8) in *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023). Passed in 1994, § 922(g)(8) restricted the Second Amendment rights of individuals subject to qualifying civil protective orders that were issued in response to complaints of domestic abuse. The Fifth Circuit concluded that because no analogous regulations to § 922(g)(8) existed in colonial and post-enactment America,[1] the statute was unconstitutional under the *Bruen* test. Though a small number of regulations criminalizing domestic violence existed in colonial and post-enactment America, these regulations either went unenforced or were enforced extrajudicially. As a result, the legislative and judicial record remains underdeveloped and unreliable on the topic of domestic violence.

Domestic violence is a societal issue that is undeniably rooted in gender, which can explain why eighteenth and nineteenth-century lawmakers paid little to no attention to it. During this time, violence within the home was largely unregulated and not formally punished; in some jurisdictions, corporal discipline of women and children was tolerated or outright permitted.[2] Civil protective orders did not exist, women had no political or economic rights, and their protection was left largely to their male guardians. Domestic violence in early America was not recognized as a category of social interest at all, much less an interest powerful enough to outweigh that in gun ownership.[3]

In rebuking the circuit courts' application of means-end scrutiny[4] to

1. This paper uses "post-ratification America" or "early America" or "post-enactment America" to refer to the period following the enactment of the Second Amendment until the Civil War.
2. Because the vast majority of survivors of domestic abuse are women and domestic violence laws in colonial America typically addressed the issue of domestic violence by referring to the perpetrator as the husband and the survivor as the wife, this paper both explicitly and implicitly refers to domestic abuse survivors as women and to persons who have perpetrated acts of domestic violence as men. While not the focus of this paper, it is important to acknowledge that domestic violence is not limited to heterosexual relationships. Indeed, non-heterosexual persons are much more likely to experience domestic violence than are heterosexual persons. *See* Jennifer L. Truman & Rachel E. Morgan, *Violent Victimization by Sexual Orientation and Gender Identity, 2017-2020*, BUREAU OF JUSTICE STATISTICS (Oct. 04, 2023) https://bjs.ojp.gov/library/publications/violent-victimization-sexual-orientation-and-gender-identity-2017-2020 [https://perma.cc/A3HR-GRJ4].
3. *See infra*, Part III.
4. Means-end scrutiny refers to the analytical process of evaluating the constitutionality of government action, such as the adoption of a regulation that burdens or limits a constitutional right. In general terms, a court applying means-end scrutiny to a challenged government

challenged gun regulations and replacing it with a historical test, the *Bruen* Court creates an unworkable dichotomy: early American legislatures' conclusions that protecting a particular social interest justified restricting gun rights are treated as presumptively reasonable, yet modern legislatures are prohibited from engaging in the same cost-benefit calculations. Rather, modern legislatures are bound by the cost-benefit calculations made by colonial and post-enactment legislatures, despite the reality that these early legislatures were incapable of fully appreciating the challenges or values of modern society. This dichotomy is at its worst when the legislative or judicial history being analyzed to determine the constitutionality of a challenged gun regulation is underdeveloped due to a significant failure of early society, such as deeply rooted racism or sexism.

Part I of this paper provides an overview of the Supreme Court's decision in *Bruen*. Part II discusses § 922(g)(8) and the Fifth Circuit's decision in *Rahimi*. Part III analyzes our nation's history of regulating domestic violence from colonial America until the mid-1990s. In Parts IV and V, this paper argues that the *Bruen* test is inapplicable to § 922(g)(8) because the historical record is unreliable on the topic of domestic violence regulation. The Court should carve out reasonable exceptions to the *Bruen* test, and can do so without undermining the principles upon which *Bruen* is based, if it views gender-based issues, such as the lack of domestic violence regulation in colonial and post-enactment America, as a hole in our nation's legislative history. Because colonial and post-enactment societies undervalued the benefit of holding those who have perpetrated acts of domestic violence accountable while protecting survivors[5] from further harm, a proper cost-benefit calculation that weighs this benefit against the cost of disarming persons perpetrating domestic violence would likely result in a different outcome today. Lastly, in Part VI, this paper suggests that the Court may avoid carving out an exception to *Bruen* by holding that person who perpetrate acts of domestic violence and are subject to qualifying civil protective orders are not law-abiding citizens, and thus lack the privilege to exercise Second Amendment rights.

---

action evaluates whether the *means* (the measures and methods chosen to effectuate the government's policy goals) justify the *ends* (the purpose of the government's action and the effect that the government intends its action to produce). The three types of means-end scrutiny are: rational basis review, intermediate scrutiny, and strict scrutiny. Prior to the Supreme Court's decision in *Bruen*, the constitutionality of laws that burdened or limited Second Amendment rights were evaluated under intermediate or strict scrutiny. *See infra* Part I.

5. The word survivor has been used in place of "victim" wherever possible. Feminist and intimate partner violence scholars advocate against "defining women who experience violence at the hands of their intimate partners as 'battered women,'" because this terminology confines survivors identities to that of "powerless and passive objects of another's violence, helpless to free themselves from the constraints imposed" by the person who has perpetrated acts of violence. *See* A. Rachel Camp, *Pursuing Accountability for Perpetrators of Intimate Partner Violence: The Peril (And Utility?) of Shame*, 98 B.U.L. REV. 1677, 1724-25 (2018). Said another way, defining a person by the harm they have suffered takes away their autonomy and confines their identity to this harm. Similarly, this article will strive to refer "persons who have perpetrated acts of domestic violence" rather than "batterers" or "abusers." The use of terms such as "batterer" or "abuser" assumes that persons who have perpetrated acts of domestic violence "lack the willingness or capacity to change." *Id.*, at 1725.

PART I: THE *BRUEN* DECISION

In *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court struck down New York State's proper cause requirement, which required individuals who sought to carry a firearm outside of their home for self-defense purposes to "demonstrate a special need for self-protection distinguishable from that of the general community."[6] The Court also enshrined the Second Amendment as the strongest right in the Constitution by rejecting means-end scrutiny,[7] a judicial tool that permitted states to offer compelling interests, such as the protection of public health and safety, as the justification for a challenged gun control law.[8] The application of means-end scrutiny to challenged gun regulations enabled legislatures to engage in contemporary cost-benefit analyses. After the passage of a gun regulation by a legislature, means-end scrutiny empowered courts to weigh the strength of the government's asserted interest in support of the regulation against the burden that the regulation imposed on an individual's Second Amendment rights. Despite nearly all appellate courts adopting means-end scrutiny in the Second Amendment context,[9] *Bruen* holds that "when[ever] the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct" unless the government can "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[10] As such, the framework set out in *Bruen* cabins judicial review to the historical record, meaning that a challenged gun regulation is only constitutional if there is a pattern and practice of restricting or limiting gun rights, in a similar manner and for similar reasons, that dates back to the enactment of the Second Amendment.

I. *The Old Test*

Following the Supreme Court's landmark decisions in *McDonald v. Chicago*, 561 U.S. 742 (2010) and *District of Columbia v. Heller*, 554 U.S. 570 (2008), almost every Court of Appeals adopted a two-step framework to determine whether a challenged regulation impermissibly restricted conduct protected under the Second Amendment. Indeed, "every Court of Appeals to have addressed the question ha[d] agreed on a two-step framework for evaluating whether a firearm regulation [was] consistent with the Second Amendment" including the "First,

6. *Bruen*, 142 S. Ct. at 2123 (quoting *In re Klenosky*, 75 App. Div. 2d 793, 428 N.Y.S. 2d 256, 257).
7. Erwin Chemerinsky, *Chemerinsky: Supreme Court Gun Ruling Puts Countless Firearm eRegulations in Jeopardy*, A.B.A. J. (Jun. 29, 2022), https://www.abajournal.com/columns/article/chemerinsky-supreme-court-gun-ruling-puts-countless-firearms-regulations-in-jeopardy [https://perma.cc/2YP2-NGPN] ("*Bruen* is, by far, the most expansive reading of the Second Amendment in American history. . . The court's approach… provides more protection for gun rights than virtually any other in the Constitution.").
8. *See Bruen,* 142 S. Ct. at 2127.
9. *See id.* at 2174 (Breyer, J. dissenting) (internal citation omitted).
10. *Id.* at 2126, 2130.

Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits."[11]

The first step required courts to use "text and history to determine 'whether the regulated activity [fell] within the scope of the Second Amendment.'"[12] If a court determined that the first step was satisfied, the second step required courts to "consider 'the strength of the government's justification for restricting or regulating' the Second Amendment right."[13] Courts would then need to apply one of two forms of means-end scrutiny: strict scrutiny and intermediate scrutiny. If a challenged law or regulation burdened the "core Second Amendment right [of]… self-defense *in the home*," which the Supreme Court recognized in *Heller* as the heart of the individual right to gun ownership, courts applied strict scrutiny and asked whether the challenged law or regulation was "'narrowly tailored to achieve a compelling government interest.'"[14] If a challenged law or regulation did not burden this core Second Amendment right, meaning that the law or regulation restricted, limited, or conditioned an aspect of gun ownership unrelated to self-defense *inside of the home*, courts applied intermediate scrutiny by "consider[ing] whether the Government c[ould] show that the regulation [was] 'substantially related to the achievement of an important governmental interest.'"[15]

In the wake of *Heller*, lower courts exercised means-end scrutiny by upholding some laws and striking others. A federal district court upheld the Lautenberg Amendment,[16] which provided for the disarmament of individuals convicted of a misdemeanor crime of domestic violence, holding that the statute was properly tailored to the substantial government interest of "protect[ing] the victims of domestic violence and…keep[ing] guns from the hands of the people who perpetrate such acts [of domestic violence]."[17] Similarly, multiple circuits upheld § 922(g)(8), which provided for the disarmament of individuals subject to domestic-violence-related civil protective orders but who had not yet been convicted of a felony or misdemeanor charge of domestic violence, holding that it was properly tailored to the substantial government interest of protecting survivors of domestic abuse from further violence.[18] However, in *Ezell*, the Seventh Circuit held unconstitutional a series of zoning restrictions that limited the location of firing ranges in Chicago on the basis that these restrictions "severely limit[ed] Chicagoans' Second Amendment right[s]" in exchange for "only speculative claims of harm to public health and safety… [which were] not nearly enough to survive [] heightened scrutiny."[19] Each circuit that addressed means-end scrutiny

11. *Id.* at 2174 (Breyer, J. dissenting) (internal citation omitted).
12. *Id.* (quoting *Ezell v. Chicago*, 846 F.3d 888, 892 (7th Cir. 2017)).
13. *Id.*
14. *Id.* at 2126 (citing *Gould v. Morgan*, 907 F.3d 659, 671 (1st Cir. 2018); *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017).
15. *Id*. (citing *Kachalsky v. County of Westchester*, 701 F.3d 81, 96 (2nd Cir. 2012)).
16. 18 U.S.C. § 922(g)(9).
17. *United States v. Booker*, 570 F.Supp. 2d 161, 164 (D. Me. 2008).
18. *See, e.g.*, *United States v. Chapman*, 666 F.3d 220 (4th Cir. 2012); *see also United States v. Bena*, 664 F.3d 1180 (8th Cir. 2011).
19. *Ezell*, 846 F.3d at 890.

embraced its application to Second Amendment regulations because the test enabled circuits to strike a delicate balance between preserving Second Amendment rights and protecting significant interests of the community which warranted the limitation of such rights.

II. *The New Test*

Even though appellate courts agreed upon using means-end scrutiny as an element of the test to determine whether a challenged gun regulation violates the Second Amendment, [20] Justice Thomas concluded in *Bruen* that neither *Heller* nor *McDonald* "support applying means-end scrutiny in the Second Amendment context."[21]

Instead, *Bruen* holds that:

> [W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its [challenged] regulation…the government must demonstrate that the [challenged] regulation is consistent with the Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside of the Second Amendment's 'unqualified command.'[22]

The test prescribed by *Bruen*, which this paper refers to as "historical analysis," results in extensive Second Amendment protections. Unlike the old test which applied means-end scrutiny at step two of the inquiry, the new test looks solely at historical tradition. Anytime a "challenged regulation addresses a general societal problem that has persisted since the 18th century," such as domestic violence, the regulation is likely unconstitutional if any of the following fact-patterns apply: (1) there is a "lack of [] distinctly similar historical regulation addressing that problem," (2) "earlier generations addressed the societal problem, but did so through materially different means" or (3) "some jurisdictions [] attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds."[23] As a practical matter, this means that the government must produce comparable legislation or judicial opinions from the historical record demonstrating that a cost-benefit analysis was done during the relevant historical period and concluding that the limitation of Second Amendment rights was justified in order to control a presently identified societal problem. For instance, as *Bruen* recognizes, many jurisdictions enacted prohibitions against the concealed carry of pistols and other smaller weapons during the mid-nineteenth century, which presumptively justifies modern

20. *Bruen*, 142 S. Ct., at 2127, n.4.
21. *Bruen*, 142 S. Ct., at 2127.
22. *Id.* at 2126 (citing *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n.10 (1961)).
23. *Id.* at 2131.

concealed carry restrictions.[24]

Justice Thomas instructs lower courts conducting historical analysis to weigh most heavily "evidence of 'how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th Century.'"[25] Later history, particularly to the extent that it "contradicts what the text says," should be given minimal deference.[26]

However, the Court does not contend that Second Amendment rights are limitless: "All that we decide in this case is that the Second Amendment protects the right of law-abiding people to carry a gun outside the home for self-defense…"[27] As the Court acknowledged in *Heller*, certain "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" are "presumptively lawful."[28]

III. *Where does this leave us?*

This paper will address an important gap in *Bruen*: is it proper to cabin the court's constitutional analysis of a challenged gun regulation to the historical record when a general societal problem existed in early America but was (1) not recognized as a problem because post-enactment society did not recognize or hold the same values as does modern society, or (2) left unregulated due not to a failure to recognize the problem altogether but rather a failure to recognize the importance of the problem?

As discussed below in Part III, domestic violence was recognized as a societal problem as early as the establishment of Puritan colonies' criminal codes; however, it was sparsely regulated, and perpetrators of abuse rarely faced punishment for their crimes. The *Bruen* framework imposes a rigid form of historical analysis that fails to consider the possibility that a problem was recognized as *factually* existent in early America but was not *legally* addressed until a later date. Significantly, *Bruen* does not hold that a legislature can never make a cost-benefit calculation regarding whether the existence of a societal problem justifies the limitation of the Second Amendment to control that problem. Rather, *Bruen* binds modern legislatures to the cost- benefit calculations which were made in colonial and post-enactment America, at least to the extent that these calculations were made concerning a general societal problem in existence during this time period.

Although domestic violence existed and was recognized as a social problem in colonial and post-enactment America, legislatures and courts failed to address

24. *Id.* at 2120.
25. *See id*. at 2136 (quoting *Heller*, 554 U.S. at 605) (explaining that evidence from this period is weighed the most heavily while underscoring the primacy of text in constitutional analysis).
26. *Id.* at 2137.
27. *Id.* at 2159 (Alito, J. concurring) (emphasis added).
28. *Id.* at 2162 (Kavanaugh, J. concurring) (quoting Heller, 554 U.S. at 627, n.26).

the problem due to a defect in social values.[29] *Bruen*, as applied by the Fifth Circuit in *Rahimi*, expands the Second Amendment to untenable lengths; in the case of Zackey Rahimi, *Bruen* prevents modern legislatures from depriving a man suspected of domestic violence and found by a court to be an imminent threat to another person of his right to possess a firearm.[30]

Rahimi's strict application of *Bruen*'s history and traditions approach is the result of the Court's failure to provide guidance to lower courts concerning the correct application of this test. The history and tradition approach assumes that, with respect to a societal problem, colonial and post-enactment history is most relevant to resolving the Constitutional question of whether the benefits of addressing the societal problem outweigh the burden (cost) placed on Second Amendment rights.[31] But when a defect in social values affects the cost-benefit analysis performed by colonial and post-enactment legislatures and courts, modern courts should be permitted to extend their analysis of the historical record to a later date when a cost-benefit analysis concerning the societal problem was performed in a meaningful way. Permitting modern courts to expand their analysis of the historical record to a later date at which the legislature performed a cost-benefit analysis which properly balanced the problem of domestic violence with society's interest in gun ownership is consistent with *Bruen* because it allows a cost-benefit calculation to be performed. In other words, the failure of the American legal system to meaningfully address domestic violence immediately following the forming of the Union should not prohibit the legislature from addressing the problem altogether. Where, as in the case of preventing domestic violence, there is widespread consensus that the Founding generation did not properly assess the value of a societal interest, *Bruen* does not preclude, but rather urges modern legislatures to strike the proper balance between burdening Second Amendment rights and protecting the societal interest at stake.

Bruen's historical analysis framework applies to § 922(g)(8) as follows:

(1) Domestic violence is a general societal problem that existed at the time of the passage of the Second Amendment.

(2) There is no evidence in the historical record supporting a finding that courts issued civil protective orders which, by way of any statute, resulted in the deprivation of the Second Amendment rights of a person who perpetrated, but was not convicted of perpetrating, acts of domestic violence.

(3) Because there is a *lack of distinctly similar historical regulations addressing the problem*, § 922(g)(8) is unconstitutional.

However, *Bruen* provides no clarity as to how courts should consider the

29. In the case of domestic violence, the defect in values is self-evident.
30. *See infra* Part II.
31. *Bruen*, 142 S. Ct. at 2137.

historical record when that history reveals anachronistic values that are unanimously rebuked by all fifty states at a future point.[32] Domestic abuse in post-ratification America, when it was reported, either went unpunished or was punished only extrajudicially.[33] In the exceptional circumstance that a domestic abuse case was actually brought, courts typically dealt with it on an informal and impromptu basis.[34] The combination of extrajudicial punishments, informal judicial proceedings, and the lack of a fully developed criminal justice system or victim support network for domestic abuse survivors resulted in an underdeveloped legislative and judicial history of domestic abuse regulation in post-ratification America. Furthermore, and perhaps most significantly, civil protective orders were not available to women who were subjected to abuse until at least the 1970s and were not available to all women in America until 1994.

This paper argues that the rare and insignificant instances of domestic abuse regulation in post-enactment America demonstrate that a cost-benefit calculation was never made during this period regarding whether the societal problem of domestic abuse justified disarming persons who perpetrated acts of domestic abuse. Because the legislature did not actually engage in this cost-benefit calculation until the 1990s, and *Bruen* only permits post-enactment cost-benefit analyses to place limitations on Second Amendment rights, the rigid framework prescribed by *Bruen* yields a nonsensical answer to the question of whether the historical record supports disarming such persons. Thus, any relevant historical analysis of the Second Amendment's application to domestic violence-based gun restrictions must extend at least until the 1990s.

PART II: § 922(G)(8) AND *UNITED STATES V. RAHIMI*

Pursuant to 18 U.S.C. § 922(g)(8),[35]

> It shall be unlawful for any person . . . who is subject to a court order that[:] (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C) [either] (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force

32. *See infra* Part III (discussing the adoption of civil protection order legislation in all fifty states by the 1990s).
33. *Infra*, Part III.
34. *Id.*; It is worth noting that the criteria for determining the criminality of certain conduct was much narrower in post-enactment America than in the modern era. *See infra* Part III. Additionally, some acts of domestic abuse that are now criminalized were once seen to be outside the domain of the courts. For example, the spousal rape exception was not abolished entirely within the United States until approximately 1993.
35. § 922(g)(8) was added to the Federal Firearms Act in 1994. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110401(c), 108 Stat. 2014, 2015 (1994).

> against such intimate partner or child that would reasonably be expected to cause bodily injury . . .to . . . possess in or affecting commerce, any firearm or ammunition . . . .

Recently, the Fifth Circuit held in *United States v. Rahimi* that 18 U.S.C. § 922(g)(8) is unconstitutional under the historical analysis test established in *Bruen*.[36] Zackey Rahimi was indicted by a federal grand jury on charges of possessing a firearm[37] while subject to a domestic violence restraining order in violation of § 922(g)(8).[38] Prior to the Supreme Court's decision in *Bruen*, a pair of Fifth Circuit cases[39] foreclosed any challenges to the constitutionality of § 922(g)(8). However, the Fifth Circuit stated that *Bruen* "'fundamentally change[d]' [its] analysis of laws that implicate the Second Amendment" and "render[ed its] prior precedent obsolete."[40]

For § 922(g)(8) to be upheld as a constitutionally permissible restriction on the right to bear arms, the government bore the burden of "proffering *relevantly similar* historical regulations [to § 922(g)(8)] that imposed *a comparable burden*" on Second Amendment rights and were "*comparably justified*."[41] In applying this test, the Fifth Circuit held that none of the historical analogues offered by the Government justified § 922(g)(8)'s ability to fully deprive a person of their Second Amendment rights through a civil proceeding. Although the court acknowledged that § 922(g)(8) "embodie[d] salutary policy goals meant to protect vulnerable people in our society," the disposal of means-end scrutiny led the Fifth Circuit to strike it down based solely on the conclusion that "our ancestors would never have accepted" § 922(g)(8).[42]

The Fifth Circuit held that persons subject to civil protective orders do not automatically fall outside the community of law-abiding citizens, and thus are not presumptively outside the scope of the Second Amendment. In so holding, the Fifth Circuit interpreted the law-abiding citizen requirement of the Second Amendment to "exclude [only] . . . [those] that have historically been stripped of their Second Amendment rights" such that the Founders would have "'presumptively' tolerated" their disarmament.[43] The court identified only two groups — persons convicted of felonies and individuals with mental illnesses —

36. *United States v. Rahimi*, 61 F.4th 443 (7th Cir. 2023).
37. While subject to a civil protective order that expressly prohibited him from possessing a firearm, Rahimi was involved in five shootings in less than two months. *Rahimi*, 61 F.4th at 448–49.
38. *Id*. at 449.
39. *See United States v. McGinnis*, 956 F.3d 747 (5th Cir. 2020); *see also United States v. Emerson*, 270 F.3d 203 (2001) (holding that 18 U.S.C. § 922(g)(8)(C)(ii) is not unconstitutional).
40. *Rahimi*, 61 F.4th at 450–51 (citing *In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 792 (5th Cir. 2021)).
41. *Id.* at 455 (citing *Bruen*, 142 S. Ct. at 2132-33) (internal quotation marks omitted, emphasis added).
42. *Id.* at 461.
43. *Id.* at 452 (citing *Heller*, 554 U.S. at 627, n.26).

whose disarmament would be presumptively tolerated.[44] As such, the court concluded that domestic violence restraining orders issued in a civil proceeding do not "remove [abusers] from the political community within the amendment's scope" because such orders can be issued without a felony conviction.[45]

PART III: HISTORY OF PROTECTIVE ORDERS AND DOMESTIC VIOLENCE

I. *Protective Orders*

Under § 922(g)(8), a person subject to a civil protective order ("CPO") automatically forfeits their Second Amendment rights in two instances: first, when there is a finding that the person subject to the CPO is a credible threat to the physical safety of an intimate partner or child, and second, when the CPO by its own terms explicitly prohibits the use, attempted use, or threatened use of physical force against an intimate partner or child that would reasonably be expected to cause bodily injury.[46]

Judges issue CPOs, typically following a two-step process: first, a survivor of domestic violence files an application for a temporary restraining order ("TRO") in which they describe the harm suffered.[47] After issuing a TRO, courts require an evidentiary hearing to be held promptly and will issue a permanent or longer-term CPO only after notice and a hearing at which both parties are present to offer testimony.[48] In some states, other emergency remedies such as an Emergency Protective Order can be obtained, which requires only that a survivor of domestic violence "demonstrate reasonable grounds for a judicial officer to believe that [they] or [their] children are in immediate and present danger of domestic violence."[49]

Protective orders have only become widely available to domestic abuse survivors in the past three decades. In fact, prior to 1976, "only two states had protective order (PO) legislation specifically for battered women" and it was not until 1994 that "some form of protective order legislation had been adopted by all 50 states."[50]

II. *English and Colonial Regulation of Domestic Violence*

English and Colonial laws against domestic violence date back to at least the sixteenth century. In sixteenth-century England, persons who perpetrated acts of domestic violence could be charged with a "breach of the peace," resulting in a

---

44. *Id.*
45. *Id.*
46. *See supra* Part II.
47. Carolyn N. Ko, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of "Efficacy,"* 11 S. CAL. INTERDISC. L.J. 361, 365 (2002).
48. *Id.*
49. *Id.* at 366.
50. Matthew J. Carlson, Susan D. Harris & George W. Holden, *Protective Orders and Domestic Violence: Risk Factors for Re-Abuse*, 14 J. FAM. VIOLENCE 205, 205-06 (1999).

requirement that the person "[post] bond or stake pledges from his associates to guarantee his good behavior."[51] Because domestic abuse was charged as a breach of the peace, domestic violence was a crime against the community rather than a crime against an individual.[52]

New England Puritans enacted the first laws in colonial America against family violence.[53] For example, the Plymouth Colony codified a law against spousal abuse in 1672 which provided that wife beating would be punished by a five-pound fine or a whipping.[54] The *Body of Laws and Liberties* adopted by the Massachusetts Bay Colony provided that "Everie marryed woeman shall be free from bodilie correction or stripes by her husband, unlesse it be in his owne defence upon her assault."[55]

However, these colonial laws against domestic violence were seldom used. Only "nineteen cases of wife beating" or other family abuse cases were recorded in Plymouth Colony between 1633 and 1802.[56] Moreover, "[t]he few domestic assaults that were prosecuted were punished by a fine."[57] By the second half of the eighteenth century, "there were at most two complaints [of domestic violence] per decade."[58]

III. *Post-Revolution Regulation of Domestic Violence*

Following the American Revolution, American law began to recognize a "new, institutional right to familial privacy that accorded fewer legal protections to household dependents like abused wives."[59] The revolutionary values of individual liberty and privacy resulted in a general reluctance among the judiciary to punish abusive conduct.[60] Still, courts set the standard for "what kind of violence qualified as assault and battery… much higher for battered wives" than for other victims of abuse."[61] Indeed, in *State v. Hussey*, 44 N.C. 123 (1852), the North Carolina Supreme Court explained that:

> We know that a slap on the cheek, let it be as light as it may, indeed any touching of the person of another in a rude or angry manner—is in law an assault and battery. In the nature of things it cannot apply to persons in the marriage state, it would break down the great principle of mutual confidence and dependence; throw open the bedroom to the gaze of the public; and spread discord and misery,

51. Ruth H. Bloch, *The American Revolution, Wife Beating, and the Emergent Value of Privacy,* 5 EARLY AM.STUD. 223, 233-34 (2007).
52. *See id.* at 234.
53. Elizabeth Pleck, *Criminal Approaches to Family Violence, 1640-1980*, 11 CRIME AND JUST. 19, 22 (1989).
54. *Id*.
55. *Id.* (internal quotation marks omitted).
56. *Id.* at 25.
57. *Id.*
58. *Id.* at 27.
59. Bloch, *supra* note 51, at 250.
60. *See id.* at 238.
61. *Id.* at 239.

contention and strife, where peace and concord ought to reign.[62]

Though the position articulated by the North Carolina Supreme Court was not an absolute one — women could bring suit for assault or battery when a person, including their husband, inflicted permanent injuries upon them — it demonstrates the exceedingly high standard required for survivors of domestic abuse to prevail in these cases.

IV. *Practical Limitations on Domestic Violence Regulation in Early America*

Women in colonial America faced strong disincentives against reporting persons subjecting them to domestic violence. First, unless the woman suffered permanently incapacitating injuries or died, "there were few sentences imposed on violent husbands that went beyond a small fine."[63] If a woman who was abused by her husband sought help from the police or the judiciary, she was unlikely to obtain any assurance that her husband would not assault her again. Indeed, reporting the abuse would likely put a woman at greater risk of further abuse by her husband. In some instances, repeat offenders were asked to post a bond of surety, but persons who perpetrated acts of abuse rarely faced any stronger deterrents against continued assaults.[64]

Second, "subjection to violence never constituted a sufficient reason for legally dissolving a marriage" in colonial America.[65] Following the Revolution, many states passed laws allowing divorce proceedings and criminal charges to be filed on the basis of wife beating, but only when a husband threatened death or permanent physical injury on his wife.[66] Even if an abused wife sought a divorce from her husband, she risked facing social stigma, considerable expenses, and the loss of her husband's financial support.[67] A wife who obtained a divorce from her husband could "los[e] all property, financial support, and [her] children."[68] Because the law strongly disincentivized wives from divorcing or prosecuting persons who perpetrated acts of abuse against them, when their husbands were prosecuted for abuse, women "routine[ly] ple[d] for leniency and non-custodial sentences for their assailants."[69]

Few, if any, resources were available to victims of domestic violence who wanted to leave their abusers. In the nineteenth century, there existed "only one society to protect wives from cruelty."[70] The combination of "police and prosecutorial fail[ures]" to control domestic violence with the "lack of deterrent

62. State v. Hussey, 44 N.C. 123, 126 (1852).
63. Bloch, *supra* note 51, at 234.
64. Pleck, *supra* note 53, at 25.
65. Bloch, *supra* note 51, at 237.
66. *Id.* at 238-240.
67. Carolyn B. Ramsey, *Against Domestic Violence: Public and Private Prosecution of Batterers*, 13 CAL. L.R. ONLINE 45, 53 (2022).
68. Bloch, *supra* note 51, at 237.
69. Ramsey, *Against Domestic Violence*, *supra* note 67, at 53-54.
70. Pleck, *supra* note 53, at 19, 39.

policies or socioeconomic support for abuse victims placed such victims in an untenable position."[71] Until a network for victim support developed in the 1970s, many economically disadvantaged women experiencing domestic abuse were trapped in dangerous situations for fear of losing financial support or facing further violence.

V. *Courts, Prosecutors, and Informal Punishments*

Beginning in approximately 1875, there was a "revival of interest in criminal sanctions against domestic violence." This led to twelve states and the District of Columbia introducing legislation that proposed to punish perpetrators of domestic violence with the whipping post.[72] Three states actually passed this legislation,[73] yet there is little evidence suggesting that abusive husbands were ever punished with the whipping post, and no evidence suggesting that an abusive husband who was punished in this manner faced any further penalties for his abusive behavior.

Domestic violence historians have catalogued well-established trends demonstrating that persons who perpetrated acts of domestic violence were punished using extrajudicial methods in the post-Civil War period rather than with criminal prosecutions. For example, in the nineteenth and twentieth centuries, very few non-lethal intimate assault cases were brought in New York, "indicating that such matters were processed at a lower level, either by the discretionary decisions of police magistrates or by the patrolmen themselves."[74] One police captain in New York stated that arresting a drunken, violent husband would do no more than put the family's wage-earner in jail and leave the wife and children starving; as a result, he addressed instances of domestic violence by beating the perpetrator himself.[75] This suggests that courts in the post-Civil War period were likely under-involved in punishing persons who perpetrated acts of domestic violence and providing remedies to those harmed by abuse.

The few laws that criminalized domestic violence in early and post-Civil War America were rarely and selectively enforced. Prosecutors in early America routinely refused to prosecute cases involving family abuse.[76] Likewise, police officers frequently allowed for "extra-legal station-house releases" of persons who perpetrated acts of domestic violence without charging them with any crimes.[77] When a domestic violence case did make it to court, "justices and magistrates dealt individually and informally" with the perpetrators as long as their violence had not been fatal, resulting in a limited legal record from the early American period.[78]

Furthermore, despite the existence of legislation in at least twenty states by

71. Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880-1920*, 77 U. COLO. L. REV. 101, 106-07 (2006).
72. Pleck, *supra* note 53, at 35, 40.
73. *Id.* at 40.
74. Ramsey, *Intimate Homicide*, *supra* note 71, at 168.
75. Pleck, *supra* note 53, at 31.
76. *Id.*
77. Ramsey, *Intimate Homicide*, *supra* note 71, at 168.
78. Bloch, *supra* note 51, at 233.

the end of the nineteenth century which permitted wives to bring civil suits against their abusive husbands, such suits were limited by the judiciary out of fear "that such torts would sow the seeds of discord and clog the courts."[79] Some courts and legislatures, believing that domestic violence was caused by the consumption of alcohol, required a wife who had been abused to "notify the saloonkeeper in advance not to serve her husband alcohol" in order to be awarded damages against her husband.[80] As a practical manner, damages suits were rarely brought against abusive husbands because their wives typically could not afford to hire a lawyer.

VI. *Legal Reform and Modern Domestic Abuse Regulation*

The Violence Against Women Act ("VAWA"), passed in 1994, was a substantial leap forward in America's domestic violence regulation.[81] VAWA provided grants for domestic violence hotlines, shelters, and other victim resources, established pro-arrest policies to encourage police intervention in domestic violence, and created education and training programs to help identify and prevent domestic violence. [82] The passage of VAWA was preceded by and coincided with the enactment of many state domestic violence laws, such as the New York State Family Protection and Domestic Violence Intervention Act of 1994.[83] Many state laws, including New York's, addressed head-on the deficiencies of domestic violence regulation by establishing no-drop prosecution[84]

79. Pleck*, supra* note 53, at 42.
80. *Id.*
81. Though not the focus of this paper, it would be inappropriate to discuss VAWA without mentioning its setbacks and shortcomings. Chiefly among those was the Supreme Court's decision in *United States v. Morrison*, in which the Court held unconstitutional a provision of VAWA that provided a civil cause of action to survivors of domestic violence against persons who abused them. 529 U.S. 598, 606-09 (2000). In *Morrison*, the Court found that Congress had exceeded its Commerce Clause powers by providing this cause of action to survivors. *Id.* VAWA has also been criticized for its *one-size-fits-all* approach to domestic violence prosecution, particularly in cases in which survivors of domestic abuse do not wish to participate in prosecution due to their immigration status, economic hardship, or religious beliefs. Additionally, though the passage of VAWA was laudable, domestic violence regulation has suffered recent setbacks – particularly in the wake of the Supreme Court's 2022 *Dobbs* decision. For example, the Iowa Attorney General's Office announced in April 2023 that it would "pause its practice of paying for emergency contraception… for victims of sexual assault." *Iowa Won't Pay for Rape Victims 'Abortions or Contraceptives*, ASSOCIATED PRESS (Apr. 9th, 2023) https://apnews.com/article/iowa-rape-victims-contraception-funding-41ad066f0831961eeec57a676b4a67d6 [https://perma.cc/K6MQ-76CW].
82. Hyunkag Cho & Dina J. Wilke, *How Has the Violence Against Women Act Affected the Response of the Criminal Justice System to Domestic Violence*, 32 J. SOCIO. AND SOC. WELFARE 125, 26 (2005).
83. The Family Protection and Domestic Violence Intervention Act of 1994. 1994 N.Y. ALS 222.
84. A no-drop policy strictly limits the ability of both the victim and the prosecutor to drop filed domestic violence charges. No-drop policies can prevent the voluntary withdrawal of a domestic violence complaint by the victim and can prevent a prosecutor from dropping domestic violence charges because of a victim or witness who refuses to cooperate. *See* Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to State Action or Dangerous Solution*, 63 FORDHAM L. REV. 853, 56 (1994).

and mandatory arrest provisions.[85]

VAWA was a significant piece of legal reform and the first comprehensive piece of legislation to address domestic violence at the national level.[86] Yet, *Bruen* instructs courts reviewing modern gun restrictions that touch or concern domestic violence to focus their analysis on pre- and post-enactment history — centuries before domestic violence was meaningfully addressed. Part IV will argue that the history of domestic violence regulation during the pre- and post-enactment period is unreliable since women were undervalued as a population during this period. The undervaluing of women creates tension with the *Bruen* historical review framework, which requires courts reviewing modern gun regulations to preserve the cost-benefit calculations made by post-enactment legislatures that balanced social interests with Second Amendment rights. Because the legislature grossly undervalued women during the relevant historical period, it is unreasonable to rely upon any calculations made by these legislatures balancing Second Amendment rights with the social interest of protecting women subjected to domestic abuse.

To remedy the incongruencies between the *Bruen* test and our nation's history of domestic violence regulation, courts should be permitted to expand their review of the historical record up to and including the point in history at which domestic violence regulation developed meaningfully in America. Though domestic violence regulation is in its infancy and will continue to evolve over the next several decades, VAWA should be a focal point for future courts that apply the *Bruen* test to challenged gun regulations that implicate the issue of domestic violence. Because VAWA is the first comprehensive legal reform to address domestic violence at the national level, permitting courts reviewing modern gun regulations to uphold the cost-benefit calculations made by the legislature when it passed VAWA ensures that the social interest of protecting survivors of domestic abuse is properly valued against the social interest of protecting Second Amendment rights. Accordingly, permitting courts to consider VAWA's cost-benefit analysis is consistent with *Bruen* because this approach allows modern legislatures to strike a balance between these social interests.

A strict application of *Bruen*'s historical analogues test – meaning an application that limits modern courts' consideration of the historical record to the colonial and Founding era – is improper because it prohibits courts from considering the evolution in social values which has resulted in legislation, like VAWA, protecting survivors of domestic violence from the perpetration of further violence. Whenever, as is true concerning domestic violence regulation, Founding-era history is polluted by social values which have been unanimously rejected by modern society, the Court must permit modern courts to expand their review of the historical record such that courts may decide the constitutionality of modern gun restrictions by comparing these modern restrictions to historical

85. Jennifer Sarkees, *Phase Three of New York State Domestic Violence Law: The Financial Aftermath*, 14 BUFF. WOMEN'S L.J. 95, 98 (2005).

86. Sally Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 64 (2002).

analogues developed by a legislature that properly valued the social interest at stake. To this end, Part V argues that the judiciary should apply means-end scrutiny to any challenged portion of VAWA that limits Second Amendment rights to determine whether the statute does so in a manner narrowly tailored to the achievement of the government's goals. This is the only way to preserve the legislature's role in striking the delicate balance between Second Amendment rights and competing social interests.

PART IV. *BRUEN*'S LIMITED FORM OF HISTORICAL REVIEW FAILS TO ACCOUNT FOR THE UNRECOGNIZED SOCIAL VALUES AFFECTING THIS HISTORY.

The Fifth Circuit's review of the historical record yielded no evidence of analogous regulations in post-enactment society that would justify disarming persons who are subject to a qualifying civil protective order under 18 U.S.C. § 922(g)(8). As discussed in Part III, civil protective orders were not an available remedy to women subjected to domestic abuse in early America. Even if a similar remedy had been available, law enforcement and judicial officers would likely have refused to enforce the remedy against perpetrators. Because domestic abuse was punished infrequently and informally in early America, the historical record remains largely underdeveloped on domestic abuse regulations. *Rahimi* formalistically adheres to the temporally limited form of historical review set forth in *Bruen*, and in so doing ignores significant developments in women's rights movements.[87]

While the Supreme Court struck down means-end scrutiny in *Bruen*, it did not outright prohibit the legislature from engaging in cost-benefit analyses to determine whether the existence of a societal problem warranted a corresponding limitation of Second Amendment rights.[88] *Bruen* claims to take a strictly textualist view of the Second Amendment. However, the test it established instructs modern courts reviewing challenged gun regulation to look to the methods earlier generations used.[89] In the words of the Court, "[a]nalogical reasoning requires judges to apply faithfully the balance struck by the founding generation to modern circumstances."[90]

By enshrining into Second Amendment judicial review the regulatory schemes that existed before or immediately followed ratification, the Court accepts and perpetuates the results of cost-benefit analyses performed by pre- and post-enactment legislatures.[91] In effect, this means that modern or future

87. A large amount of scholarship is devoted to the underreporting of domestic violence. This paper does not suggest that there are no longer barriers to reporting domestic violence. Rather, this paper argues that the political and economic barriers that impacted women are less significant today than they were during the post-enactment period.

88. *See Bruen*, 142 S. Ct. at 2133 (requiring judges applying analogical reasoning to perpetuate the balances struck by the founding generation to modern circumstances).

89. *Id*.

90. *Id.*

91. *Id*.

limitations on the Second Amendment are permissible so long as they comply with the bounds drawn by the legislature during the ratification period.[92] The Court justifies its position by explaining that the Second "Amendment codified a preexisting right [which]… was regarded at the time of [its] adoption as rooted in the natural right of resistance and self-preservation."[93] While this explanation seems to justify the relevance of the English common law and post-enactment history, the Court does not adequately explain why modern legislatures are prohibited from redrawing the bounds of the Second Amendment.[94]

In finding § 922(g)(8) unconstitutional, the Fifth Circuit held that the government had failed to sustain its burden of identifying regulations that imposed a relevantly similar burden on Second Amendment rights in the post-Revolutionary period, and which were comparably justified.[95] *Bruen*'s historical analysis is a catch-22 as it applies to § 922(g)(8). The government bears the burden of producing a historical analogue of regulations justifying the disarmament of a person who is subject to a qualifying civil protective order. However, it cannot possibly do so because *Bruen* limits the relevant historical period to a period during which (a) domestic violence was largely unregulated or not formally punished, (b) civil protective orders did not exist, and (c) married women were disenfranchised and economically dependent on their husbands, which would have removed any incentive to seek a comparable remedy to a CPO, had one existed.[96]

Section 922(g)(8) represents a cost-benefit calculation by the legislature: the benefit of disarming persons subject to a qualifying civil protective order issued in response to domestic violence outweighs the cost of restricting their Second Amendment privileges. Indeed, prior to its decision in *Rahimi*, the Fifth Circuit upheld §922(g)(8) through the application of means-end scrutiny and found that the statute was narrowly tailored to the laudable state goal of disarming persons who perpetrated acts of domestic abuse. But under *Bruen*, § 922(g)(8) is unconstitutional because domestic violence, despite its existence during colonial and post-enactment periods, was never addressed with a corresponding limitation of Second Amendment rights.[97] The Fifth Circuit ends the inquiry here without considering whether the legislature's failure to limit Second Amendment rights was the type of cost-benefit calculation that *Bruen* sought to protect.[98] During the

92. *See id* at 2132-2133 (requiring future courts analyzing a challenged gun regulation to uphold the regulation unless the government identifies a "well-established and representative historical analogue" to the modern regulation – even if the modern regulation contemplates circumstances "that were unimaginable at the founding").

93. *Id.* at. 2157 (Alito, J. concurring) (quoting *Heller*, 554 U.S. at 594) (internal quotation marks omitted).

94. *See generally id.*at 2132-34.

95. *See Rahimi*, 61 F.4th 443 at 460 (citing *Bruen*, 142 S. Ct. at 2133).

96. It is worth noting that even had a CPO or comparable remedy existed and a married woman been willing to seek such a remedy, the married woman would likely have been met with additional barriers to obtaining any remedy, such as fear, hostile power dynamics, and severe stigma. *See supra* Part III.

97. This analysis is complicated by the fact that civil remedies were unavailable in America during the colonial and post-enactment periods.

98. *See Rahimi,* 61 F.4th at 460-61.

post-enactment period, the legislature saw no need to protect those harmed by domestic abuse—primarily women and children—by restricting Second Amendment rights because women and children were not recognized as a category of social interest.[99] *Rahimi* highlights an important and unanswered question arising out of *Bruen*: is a historically contingent cost-benefit calculation that balances Second Amendment rights (the cost) with the protection of a competing social interest (the benefit) reliable if American society grossly undervalued the 'benefit' in the post-enactment era?[100]

As discussed in Part III, domestic violence was sparsely regulated in the colonial and post-enactment eras, and the regulations that did exist either went unenforced or were enforced extrajudicially. Women lacked the right to vote, own property, or work for wages during the period that *Bruen* holds relevant to a court's historical analysis. The economic and political disempowerment of women during this period shows that colonial and post-enactment American society significantly undervalued women. These observations yield two possible conclusions relevant to the application of the *Bruen* framework. First, because society grossly undervalued women during this time, any cost-benefit calculation made regarding the balancing of Second Amendment rights with the social value of protecting women from domestic violence is inherently unreliable and cannot be the basis for striking a modern gun restriction that makes the opposite calculation. The alternative conclusion is that society never made a cost-benefit calculation that balanced Second Amendment rights with its interest in addressing domestic violence and, therefore, courts should expand their review of the historical record to the point in time at which the legislature first made such a calculation. The rigid framework of *Bruen* should be relaxed whenever newly appreciated values are realized by modern society.

PART V. PROPOSED SOLUTIONS: ABSTRACTION OR A RETURN OF MEANS-END SCRUTINY

This paper suggests two solutions to *Bruen*'s shortcomings: (1) the Court could adjust the relevant historical period and allow the Government to introduce

99. *See, e.g.*, Pleck, *supra* note 53, at 26 (stating that a child abuse case was never prosecuted in Plymouth courts); 35 (explaining that family privacy values dominated antebellum courtrooms for most of the eighteenth century, resulting in a general unwillingness by the judiciary to intervene in instances of physical abuse). Note that this paper does not intend to argue that post-enactment society placed no value on the lives of women or children. Rather, familial privacy and personal autonomy dominated competing interests, such as protecting women and children from physical abuse.

100. Cost and benefit could be used interchangeably here. This paper refers to the protection of survivors of domestic abuse and the prevention of persons with a history of domestic violence from committing further abuses as the 'benefit 'to society, and the disarmament of persons who perpetrate domestic abuse as the 'cost 'to society. Other courts to have considered and upheld the constitutionality of § 922(g)(8) under means-end scrutiny have cited reducing domestic violence, upholding public safety, keeping firearms out of the hands of persons who constitute a threat to their intimate partner, and reducing domestic gun abuse as important or compelling government interests. *See, e.g., McGinnis*, 956 F.3d at 758; *Chapman*, 666 F.3d at 226-27.

evidence of analogous regulations up to and including the period during which the societal failure in question was corrected (the Abstraction approach), or, relatedly, (2) the Court could permit means-end scrutiny to be exercised in these situations.

Bruen takes the position that the English common law and post-enactment history are of particular importance to judicial review of modern gun regulations because the Second Amendment codified a preexisting right. *Bruen* purports to preserve the delicate balance struck by the Founders between gun rights and competing social interests but does not instruct modern courts on how to consider social interests that were not afforded appropriate weight in the ratification period. The Abstraction approach proposes that societal failures, such as deeply rooted discrimination and exclusion, should be viewed as holes in history that are filled once they are meaningfully addressed.[101] Said another way, a court should decline to credit the historical record whenever a social interest materializes after the close of the *Bruen* historical review period. The Court can preserve *Bruen*'s weight on ratification history by explaining these holes in history in one of two ways: either society conducted an inherently unreliable cost-benefit calculation when it weighed its interest in addressing domestic violence against its interest in protecting gun rights, or society never made any such calculation because it never saw fit to do so. Regardless of the Court's answer, courts reviewing modern gun laws cannot use Second Amendment interpretations from the ratification period as the basis for striking down a challenged domestic violence gun regulation when an undervalued or nonexistent social interest is the subject of review.

At its core, the Abstraction approach to Second Amendment analysis proffered throughout this piece urges the Court to permit instances of evolution in social values. This approach rests on the assertion that it would be impossible or unfair to rely upon the historical record when that record is deficient due to a pervasive social problem, such as racism or sexism. Though *Bruen* purports to permit only those limitations on Second Amendment rights that our Founders would have presumptively tolerated, courts must consider whether the *but-for cause* of the Founders' failure to restrict gun rights in response to an emergency complaint of domestic violence is the Founders' failure to properly value women as a social class. If curing the defect in social values likely would have resulted in a corresponding restriction of Second Amendment rights, then a modern regulation that similarly limits Second Amendment rights should be constitutional.

According to the Abstraction model, the Court should permit the period of history relevant to its historical analysis to be expanded up to and including the period during which the defect in social values was corrected. However, the first laws correcting a social defect would still be subject to means-end scrutiny

101. This paper does not take a position on which certain years of history may be relevant to assessing the constitutionality of a gun regulation that regulates the Second Amendment rights of a person who has perpetrated an act of domestic abuse. As is explained in Part III, domestic violence was not meaningfully regulated until at least the 1990s. Many scholars will argue that domestic violence still is not meaningfully regulated or that extraneous factors contribute to ineffective or insufficient regulation. The purpose of this paper is to encourage courts to consider history beyond the period preceding and immediately following the enactment of the Second Amendment.

whenever they burden a Second Amendment right.[102] If the Court determined that the first laws addressing the defect were constitutional, these laws would be available to governments in the future who sought to justify a challenged gun regulation using historical analogues. As it applies to § 922(g)(8), the Court would apply means-end scrutiny to determine whether the statute is constitutional. If § 922(g)(8) is constitutional, it would be available to a future government seeking to defend an identical or similar gun regulation under the *Bruen* test. Means-end scrutiny must be applied to any modern law that may be used as an example of constitutional gun regulation in the future because the Supreme Court applied means-end scrutiny broadly to all post-enactment regulations which were not outliers in *Bruen*.

The second approach that this paper suggests would permit the application of means-end scrutiny to all regulations of Second Amendment rights of persons perpetrating domestic violence. *Bruen* holds that the cost-benefit calculations made by the legislature which drew the bounds of the Second Amendment during the post-enactment period are presumptively constitutional.[103] However, because the post-enactment legislature undervalued women and did not view domestic violence as a social problem of sufficient importance to justify regulation, that legislature made no cost-benefit analysis on regulations of this type in drafting the Second Amendment. The modern legislature's restriction of the right to bear arms of persons who have perpetrated acts of domestic violence is the first cost-benefit calculation made that interprets how the Second Amendment applies to such persons.[104] By allowing lower courts to apply means-end scrutiny to laws that cannot be justified using historical analogues due to a defect in historical social values, the Court would do no more than allow a cost-benefit calculation balancing Second Amendment rights with its interest in protecting domestic abuse survivors to be made rather than forewent.

102. Although *Bruen* rejected means-end scrutiny, the Court did not completely do away with cost-benefit analyses as a tool to determine whether a limitation on the Second Amendment is justified by the interest sought to be protected. Rather, *Bruen* binds modern generations to the cost-benefit analyses performed by the Founding generation. *See supra* Part I (arguing that the *Bruen* historical analysis framework assumes that all Founding-era cost-benefit analyses concerning limitations on the Second Amendment are presumptively constitutional). Were the Court to permit the period of history relevant to historical analysis to be expanded up to and included the point at which a particular defect in social values is corrected, as is suggested by the Abstraction approach, the Court would still be left with the question of whether a modern limitation on Second Amendment rights is properly tailored to the furthering of the social interest. The Abstraction approach is most consistent with the *Bruen* framework when the Court applies means-end scrutiny to Second Amendment limitations enacted to cure a Founding-era social defect. Doing so ensures that the Abstraction approach does not rubber-stamp *any* Second Amendment regulation enacted in response to a social defect. If regulations implemented to cure a social defect from the Founding era survive means-end scrutiny, then these laws can be used as historical analogues by legislatures seeking to justify future Second Amendment regulations.

103. *See Bruen*, 142 S. Ct. at 2150 (holding that the historical record supports certain "reasonable regulation[s]" on the "*manner* of public carry" including common law restrictions against carrying "deadly weapons in a manner likely to terrorize others" or regulations eliminating concealed carry) (emphasis in original).

104. Goldfarb, *supra* note 86, at 64.

Of the two solutions proposed by this paper, the second is likely more workable for lower courts. A significant body of case law has developed around when and how to apply strict and intermediate scrutiny to challenged gun regulations. With respect to the Abstraction model, it may be difficult or impossible for lower courts to agree upon when the historical record is deficient and, if it is, which periods of history should be relevant to the court's analysis. Accordingly, the second proposal should prevail. Lower courts should be permitted to apply means-end scrutiny to gun regulations that implicate societal issues which, on their face, have an underdeveloped or flawed legislative and judicial history. While not an exhaustive list, this paper proposes that means-end scrutiny, not the *Bruen* test, should apply to gun regulations that require the Court to examine a historical record that is undeniably rooted in race, gender, or other identity-based inequality.

Viewed in this light, *Rahimi*'s application of the *Bruen* test is fundamentally flawed — not because the test was applied incorrectly, but because the test can not apply to § 922(g)(8). Part III argued that domestic violence is a societal problem that has existed since at least the enactment of the Second Amendment, but due to violent gender norms and inequalities was not meaningfully addressed until approximately the 1990s. Thus, the judiciary and the legislature's failure to regulate domestic violence in colonial and post-enactment America is not, as *Bruen* holds, "evidence" that any subsequent gun regulation addressing domestic violence "is inconsistent with the Second Amendment."[105] Because the historical record on this subject cannot be relied upon, the Fifth Circuit erred in applying *Bruen* to § 922(g)(8).

PART VI. PERSONS WHO HAVE PERPETRATED ACTS OF DOMESTIC VIOLENCE FALL OUTSIDE THE CATEGORY OF "LAW-ABIDING CITIZENS" WHOSE GUN RIGHTS ARE PROTECTED

Despite the clear holes in *Bruen*, it is likely that this Supreme Court will be uncomfortable with expanding the historical period relevant to Second Amendment judicial review beyond the bounds that it has prescribed. As such, the Court may avoid this question altogether by holding, quite logically, that the Fifth Circuit erred in concluding that persons who are subject to qualifying civil protective orders are law-abiding citizens.[106] The disarmament of certain populations, including felons and those with mental illnesses, is presumptively lawful under the Second Amendment.[107] *Bruen* reiterated *Heller*'s holding that the Second Amendment protects the rights of law-abiding persons to keep and bear

105. 142 S. Ct. at 2131.

106. *See Rahimi*, 61 F.4th, at 451 (rejecting the Government's argument that "Rahim is neither responsible nor law-abiding, as evidenced by his conduct and by the domestic violence restraining order issued against him" and should therefore "fall…outside the ambit of the Second Amendment.").

107. 142 S. Ct. at 2162 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 626-27).

arms.[108] Persons who are subject to qualifying civil protective orders[109] are not part of the community of law-abiding persons. There are historical regulations that justify disarming violent or dangerous persons who have not been convicted of felonies. Further, the legislature evinced clear intent when it passed § 922(g)(8) that persons subject to such protective orders on the basis of domestic violence be immediately disarmed.[110]

Many historical regulations that limited Second Amendment rights applied to groups other than convicted felons and the mentally ill. For example, "[v]iolent and other dangerous persons… [including] distrusted groups of people… have historically been banned from keeping arms."[111] For instance, in early and post-Civil War America, certain groups of persons, including impoverished immigrants, British loyalists, and free Black citizens, were deprived of their right to bear arms regardless of whether they had been convicted of a felony.[112] Several states, including New Hampshire, Vermont, Rhode Island, Ohio, Massachusetts, Wisconsin, and Iowa fully or partially limited the rights of "tramps," "typically defined as males begging for charity outside of their home country," to possess and carry arms.[113] The Ohio Supreme Court explained that prohibitions on this population's Second Amendment rights were constitutional because tramps were "vicious persons."[114] During the revolutionary period, several states passed laws that "provid[ed] for the confiscation of weapons owned by persons refusing to swear an oath of allegiance to the state or the United States."[115] Prior to the passage of the Fourteenth Amendment, some states maintained "race-based exclusions [which] disarmed slaves and… free [B]lack [people]."[116] These regulations demonstrate that limitations on a person's right to bear arms has not been so limited to felons or the mentally ill as *Bruen* suggests, but rather to persons that society distrusted or deemed dangerous.[117]

It is worth noting that these regulations are predicated on xenophobic and racially prejudiced assumptions. They are useful, however, to understand the scope of our nation's history and tradition of enacting class-based restrictions on the right to bear arms. Following the passage of the Fourteenth Amendment, many class-based restrictions would not pass constitutional muster.[118] But the

108. *Id*. at 2122.
109. This paper's discussion of civil protective orders is limited to only those which result in the disarmament of the person perpetrating acts of abuse under § 922(g)(8).
110. *See generally*, Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, § 110401(c), 108 Stat. 2014, 2015 (1994).
111. Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L.R. 249, 285 (2020).
112. *See id.* at 285; Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 506 (2004).
113. Greenlee, *supra* note 111, at 270.
114. *Id.* (quoting *State v. Hogan*, 63 Ohio St. 202, 218-19 (1900)).
115. Cornell & DeDino, *supra* note 112, at 506.
116. *Id.* at 505.
117. *Bruen*, 142 S. Ct. at 2162..
118. *See, e.g., Heller*, 554 U.S., at 583 n.7 (discussing, in relevant part, the right of newly freed slaves to bear arms).

unconstitutionality of some class-based restrictions does not necessarily mean that all class-based restrictions are inconsistent with the Second Amendment.[119] Rather, these regulations demonstrate that the scope of classes whose Second Amendment rights may be restricted extends beyond just felons and the mentally ill. This paper argues that the legislature should be permitted to make cost-benefit calculations regarding which populations are violent and must be disarmed.

The "law-abiding citizen" requirement in the Second Amendment is a fine line: this requirement is intended to disarm violent or otherwise dangerous persons, but not those who are unvirtuous.[120] Disarming persons subject to civil protection orders ("CPO") is consistent with the historical record, which demonstrates that conviction of a felony was not *per se* a precondition to disarmament. The disarmament provision of § 922(g)(8) is triggered only when the following three conditions are met: first, the alleged perpetrator of domestic violence must be given notice of a hearing and have the opportunity to have their side of the story told; second, following the hearing, the court must issue an order restraining the person from harassing, stalking, or threatening an intimate partner or that intimate partner's child, or otherwise in engaging in conduct which would place the intimate partner in reasonable fear of bodily injury to themselves or their child; and third, the restraining order must either (i) explicitly find that the person represents a credible threat to the physical safety of their intimate partner or child, or (ii) explicitly prohibit the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.[121] Therefore, a person subject to a civil protective order based on an allegation of domestic violence loses their Second Amendment rights under the statute only once a judge determines, following a hearing, that the person presents a threat to the complainant that is sufficient to justify a restraining order and either that the person is a credible threat to the complainant or that the restraining order should explicitly prohibit the person from threatening violence against the complainant.[122] § 922(g)(8) by its terms deprives a person of their right to possess and bear arms only if that person, based upon a history of extralegal conduct, presents a threat of committing further abusive or violent conduct.[123]

The case for disarming persons subject to qualifying CPOs is stronger than the class-based restrictions that existed in the pre– and post–Revolutionary period. Many prohibitions and limitations on the right of "tramps," British loyalists, and free Black Americans to bear arms swept broadly, capturing all members of these classes regardless of the individual risk posed by each individual.[124] In contrast, §

119. *See, e.g.*, *Bruen*, 142 S. Ct., at 2162 ("'longstanding prohibitions on the possession of firearms by felons and the mentally ill'" are constitutional) (quoting *Heller*, 554 U.S. at 626-27).

120. *See* Greenlee, *supra* note 111, at 275 (arguing that unvirtuous citizens-—a class of persons including nonviolent felons or nonviolent misdemeanants-—cannot be deprived of their right to bear arms even though they have engaged in conduct that is unlawful).

121. 18 U.S.C. § 922(g)(8).

122. *See id.*

123. *Id*.

124. *See, e.g.*, Greenlee, *supra* note 111, at 265 ("revolutionary and founding-era gun regulations… targeted… Loyalists [even though they] were neither criminals nor traitors… [because]

922(g)(8) deprives a person of their right to possess and bear arms only after an impartial judge deems that such remedy is commensurate to the threat posed by the person.[125] Moreover, § 922(g)(8) does not disarm persons based on racist or xenophobic generalizations, but rather based on an individualized determination of the disarmed person's risk of committing future acts of violence. As such, § 922(g)(8) is not only justifiable on a historical basis– it is also sufficiently narrowly tailored so as not to deprive a non-violent person of their right to bear arms. Accordingly, the Court should find that persons subject to CPOs that qualify under § 922(g)(8) fall outside the community of law-abiding citizens.

CONCLUSION

The rigid historical analysis adopted by the Supreme Court in *Bruen* solidified the Second Amendment as our strongest constitutional right.[126] *Bruen*'s demand that the government defend challenged gun restrictions by pointing to historical analogues that establish a pattern and practice of restricting Second Amendment rights in a similar manner to the challenged restriction is itself a form of means-end scrutiny. By upholding modern gun laws that are sufficiently similar to colonial and post-enactment restrictions, the Supreme Court allows cost-benefit calculations to be made as to whether a restriction sufficiently serves a government interest so as to justify the limitation of Second Amendment rights. *Bruen*'s historical analogues test does no more than change the yardstick against which modern gun restrictions are measured: modern legislatures are permitted to limit the exercise of Second Amendment rights to protect any social interest so long as someone else thought to protect that interest in the past.

This paper seeks to ask and answer a deeper question raised by the Court's ruling in *Bruen*: how do lower courts consider a modern restriction which places limits on the exercise of Second Amendment rights in furtherance of a pervasive social issue that existed in colonial and post- enactment America, but was not properly addressed due to some other social failure present at that time (such as racism or sexism)? As applied to 18 U.S.C. § 922(g)(8): should courts be permitted to look beyond colonial and post-enactment history to consider how our nation has balanced Second Amendment rights with the protection of survivors of domestic violence given that America failed to meaningfully regulate domestic violence until at least the 1990s, even though the historical record includes some regulations dating back to the Puritan colonies?

Bruen's fatal flaw is its rigidity; the Court's focus on near-enactment history and neglect of outlier regulations presupposes omniscience and perfection on

---

legislators had determined that permitting these people to keep and bear arms posed a potential danger.") (quoting *NRA of Am. v. Bureau of Alcohol*, 700 F.3d 185, 200 (5th Cir. 2012); 281 (historically, 'Indians and black slaves… were barred from owning firearms'") (citing *United States v. Carpio-Leon*, 701 F.3d 974 (4th Cir. 2012)); 270 (discussing New Hampshire's 1878 law which provided for the imprisonment of any tramp "found carrying any fire-arm or other dangerous weapon).

125. § 922(g)(8)(A).

126. Chemerinsky, *supra* note 7.

behalf of Founding legislatures, leaving no room for an evolution of social values. This paper argues that *Bruen* permits courts to look beyond the historical period described in *Bruen* because the gender inequality in early American society implies that either: (1) a cost-benefit calculation as to whether persons who have perpetrated acts of domestic violence could be deprived of their Second Amendment rights was never made given that legislatures were not concerned with protecting survivors of domestic violence, or (2) any cost-benefit calculation that was made during the relevant historical period is inherently unreliable, also because the society making the calculation undervalued the survivors of domestic violence—largely women—due to the pervasive social failure of the patriarchy.

Social failures, such as deeply rooted discrimination and exclusion based on gender or race, should be viewed as holes in the historical record. Adopting this view would permit courts to look beyond colonial and post-enactment historical records for analogues that support a challenged modern gun restriction. The Supreme Court could carve out a narrow exception to *Bruen* that would apply whenever the historical record cannot be relied upon because of racism, sexism, or a similar failure of early American society. When the exception applies, lower courts should be permitted to either apply means-end scrutiny to a challenged modern gun law or to look beyond *Bruen*'s historical period until and including the period of time during which the societal failure in question was corrected to find analogues that support the challenged restriction. As applied to § 922(g)(8), the court would either permit the application of means-end scrutiny to the statute or would allow the Government to introduce evidence of historical analogues supporting the statute up to and including the point at which domestic violence became meaningfully regulated by the Government. According to the latter method, because § 922(g)(8) represents the first point in time at which the legislature made a cost-benefit calculation that appropriately weighed the social interest of protecting survivors from abuse against the interest in those with CPOs issued against them in retaining their Second Amendment rights, the court would be required to apply means-end scrutiny to the statute to determine whether future domestic violence gun restrictions could be justified upon the basis of § 922(g)(8).

This paper recognizes that the modern Supreme Court may be hostile to carving out exceptions to *Bruen*. The Court may avoid adopting any exception to *Bruen* by explaining who the law-abiding citizen is who is entitled to exercise Second Amendment rights. Throughout our nation's history, several politically unpopular groups without criminal histories or mental illnesses have been deprived entirely of their Second Amendment rights because society deemed these groups to be dangerous. The law-abiding citizen requirement exists to disarm dangerous groups of people. § 922(g)(8) deprives those with CPOs of their right to bear arms only after a judge has issued a qualifying civil protective order against the perpetrator of domestic abuse. The issuance of a qualifying civil protective order itself represents a finding by a judge that the person against whom the CPO is issued is dangerous. The law-abiding citizen requirement articulated by the Supreme Court should be used to disarm these dangerous members of society.

The Supreme Court recently granted certiorari in *Rahimi*. The Court has the

opportunity to carve out a sensible exception to *Bruen*'s rigid historical analysis test and protect a vulnerable population in doing so.