UNREASON BY ANALOGY: PRINCIPLE OVER PEDANTICISM AND THE NUANCED APPROACH TO *BRUEN*

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The Supreme Court decision of New York State Rifle & Pistol Ass'n v. Bruen *held that to withstand a Second Amendment challenge, a modern firearm regulation must boast a "historical analogue" sharing a "comparable burden on the right of armed self-defense" that is also "comparably justified." Despite this exacting standard,* Bruen *licensed "a more nuanced approach" when "unprecedented societal concerns or dramatic technological changes" demand as such. This Note first criticizes reasoning by analogy for its malleability and inconsistent results that ultimately frustrate constitutional fidelity. Thereafter, it discusses the historical tradition of curtailing enumerated rights to preserve public safety that has culminated in numerous constitutional doctrines, which this Note coins the "principled" approach. Identifying* Bruen *as an outlier to the Court's principled approach, this Note attempts to reconcile the two by proposing a "nuanced approach" to* Bruen*'s historical analogue inquiry, which promises practicality in its application, consistency in its results, and fidelity to the nation's historical understanding of the Second Amendment.*

TABLE OF CONTENTS

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INTRODUCTION

Nothing rattled Second Amendment jurisprudence quite like *New York State Rifle & Pistol Ass'n v. Bruen*.[1] Prior to *Bruen*, circuit courts habitually employed a two-step, means-end scrutiny analysis for Second Amendment challenges.[2] Thus, when an individual's conduct was covered by the plain text of the Second Amendment, it was presumed to be constitutionally protected.[3] Thereafter, to justify a firearm regulation, the government only needed to prove it promoted an important interest.[4]

However, *Bruen* rejected means-end scrutiny to Second Amendment challenges.[5] The Court explained that where the Second Amendment was itself a product of interest balancing by the Founders, it did not permit "judicial deference to legislative interest balancing" through means-end scrutiny.[6] No matter how compelling a government interest is, the Second Amendment does not license curtailment of the right to armed self-defense in the name of post hoc interest balancing.

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1. 597 U.S. 1 (2022).

2. *See, e.g.*, United States v. Marzzarella, 614 F.3d 85, 96, 96 n.14–15 (3d Cir. 2010) (applying strict scrutiny in a Second Amendment challenge but acknowledging the standard of scrutiny in such challenges is uncertain), *abrogated by Bruen*, 597 U.S. 1; United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010) (establishing intermediate scrutiny as the standard of review in a Second Amendment challenge), *abrogated by Bruen*, 597 U.S. 1.

3. *Bruen*, 597 U.S. at 17.

4. *Id.*

5. *Id.* at 24 ("[T]he Courts of Appeals' second step is inconsistent with *Heller*'s historical approach and its rejection of means-end scrutiny. . . . When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 n.10 (1961))).

6. *Id.* at 26.

Underscoring the Second Amendment's "unqualified command,"[7] *Bruen* instructed an exacting standard moving forward. It retained the first step—the Constitution presumptively protects conduct that is covered by the plain text of the Second Amendment.[8] However, in lieu of the second step that invoked interest balancing, *Bruen* instructs that the government must instead justify a modern firearm regulation "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[9] In doing so, the government must identify a "historical analogue."[10] With such limited instruction, the lower courts struggled to delineate the parameters of the historical analogue inquiry, resulting in inconsistent—and sometimes erroneous—applications of *Bruen*.[11] And although the Court has since applied *Bruen*'s test through *United States v. Rahimi*,[12] courts remain in dire need of clarity.[13]

Promisingly, *Bruen* sanctioned "a more nuanced approach" to its historical analogue inquiry when "unprecedented societal concerns or dramatic technological changes" are implicated.[14] This Note offers such a nuanced approach. In doing so, Part I first identifies the flaws of reasoning by analogy to demonstrate why *Bruen*'s historical analogue inquiry must adopt the nuance it licensed.[15] Part II recognizes that public safety was fiercely protected by the Founders and has since been invoked countlessly by the Court under what this Note coins the "principled approach" to constitutional interpretation, which is devoid of any historical analogue component.[16] Finally, in response to *Bruen* endorsing a "more nuanced approach,"[17] Part III attempts to reconcile *Bruen*'s historical analogue inquiry with the Court's principled approach[18] in order to provide a means of applying *Bruen* moving forward

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7. *Id.* at 24 (quoting *Konigsberg*, 366 U.S. at 49 n.10).
8. *Id.*
9. *Id.*
10. *Id.* at 30 (emphasis omitted).
11. *Compare, e.g.*, United States v. Diaz, 116 F.4th 458, 472 (5th Cir. 2024) (holding 18 U.S.C. § 922(g)(1) facially constitutional under the Second Amendment), *with* United States v. Cherry, No. 23-cr-30112-SMY, 2024 WL 379999, at *5 (S.D. Ill., Feb. 1, 2024) (holding § 922(g)(1) facially unconstitutional under the Second Amendment).
12. 602 U.S. 680 (2024).
13. *See* Ian Millhiser, *The Supreme Court Refuses to Accept Blame for Its Worst Guns Decision*, VOX (June 21, 2024, 10:25 AM), https://www.vox.com/scotus/356267/supreme-court-us-rahimi-domestic-abuse-guns-second-amendmen [https://perma.cc/DFX3-QZ73] (explaining how *Rahimi* "does nothing to clear up the mass confusion created by the Court's 2022 decision in [*Bruen*]"); *see also* Bianca Corgan, *Conundrums of Constraint:* United States v. Rahimi *and the Future of the* Bruen *Test*, HARV. L. REV. BLOG (July 21, 2024), https://harvardlawreview.org/blog/2024/07/conundrums-of-constraint-united-states-v-rahimi-and-the-future-of-the-bruen-test/ [https://perma.cc/2WT6-PMGE] (explaining that "*Rahimi* is emblematic of the struggle that lower courts have faced in applying *Bruen*," and that "while *Rahimi* is a step towards improving the test, it is no panacea").
14. *Bruen*, 597 U.S. at 27.
15. *See infra* Part I.
16. *See infra* Part II.
17. *Bruen*, 597 U.S. at 27.
18. *See infra* Part III.

that promises consistency in its results, practicality in its application, and fidelity to the nation's historical understanding of the Second Amendment.

I. UNREASON BY ANALOGY

A. Bruen*'s Historical Analogue Inquiry*

In *Bruen*, the Court established a two-step test for adjudicating Second Amendment challenges.[19] First, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."[20] Second, to justify its regulation, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[21] Of importance, *Bruen*'s second step obligates the government to identify a "historical analogue" for the challenged firearm regulation, which must boast a "comparable burden" on the Second Amendment that is "comparably justified."[22] Put another way, the government must show "*how* and *why*" the historical and modern firearm regulations comparatively burden the right to armed self-defense.[23]

The Court gave a cursory instruction on the breadth of the analogy, explaining that "analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin."[24] As such, "even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster."[25] Importantly, to withstand *Bruen*'s inquiry, a "law must comport with the principles underlying the Second Amendment."[26]

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19. *See Bruen*, 597 U.S. at 17.

20. *Id.*

21. *Id.* While there has been equal part confusion with the lower courts as to what conduct is covered under the Second Amendment's plain text, this Note is limited to challenging the historical analogue inquiry of *Bruen*'s test, which involves only the second step. Nor does this Note address whether *Heller*'s presumption-of-constitutionality regarding felons-in-possession statutes survives *Bruen*, which is a question that has plagued many courts when undertaking the historical analogue inquiry. *See, e.g.*, McRorey v. Garland, 99 F.4th 831, 836 (5th Cir. 2024) ("*Bruen* and *Heller* make clear that background checks preceding firearm sales are presumptively constitutional."). *But see* United States v. Duarte, 101 F.4th 657, 668 (9th Cir. 2024) ("'Simply repeat[ing] *Heller*'s language' about the 'presumptive[ ] lawful[ness]' of felon firearm bans will no longer do after *Bruen*." (alterations in original)).

22. *Bruen*, 597 U.S. at 29–30 (emphasis omitted).

23. *Id.* at 29 (emphasis added). Specifically, the second step of *Bruen*'s test obligates courts to ask "whether modern and historical regulations impose a comparable burden on the right of armed self-defense [the 'how'] and whether that burden is comparably justified [the 'why']." *Id.*

24. *Id.* at 30 (emphasis omitted).

25. *Id.*

26. United States v. Rahimi, 602 U.S. 680, 692 (2024).

Faced with the spaciousness of *Bruen*'s historical analogue inquiry, the lower courts understandably fell into disarray.[27] Application of *Bruen* resulted in misinterpretations of the test, inconsistent holdings, and strained analogies.[28] In response, the Court reiterated *Bruen*'s standard in *United States v. Rahimi*[29]:

> [T]he appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. A court must ascertain whether the new law is "relevantly similar" to laws that our tradition is understood to permit, "apply[ing] faithfully the balance struck by the founding generation to modern circumstances." . . . Why and how the regulation burdens the right are central to this inquiry.[30]

Thereafter, *Rahimi* applied *Bruen*'s test in a challenge to 18 U.S.C. § 922(g)(8), a federal statute prohibiting firearm possession by those subject to a restraining order.[31] In doing so, *Rahimi* identified surety and going-armed laws as the historical analogues evidencing the constitutionality of § 922(g)(8) under the Second Amendment.[32]

Despite its laudable application of *Bruen*, *Rahimi* conceded that identifying the historical analogues to § 922(g)(8) was "common sense" and "an easy case."[33] *Bruen* similarly noted that the historical analogies were "relatively simple to draw" and distinguish in that instance.[34] Thus, the Court is yet to apply its historical analogue inquiry to a modern firearm regulation that has a less evident resolution. When it eventually does, the "more nuanced approach" *Bruen* licensed will need to be employed.[35] Until then, a resounding question still plagues the lower courts. *What are the limits of reasoning by analogy as applied to the Second Amendment?*

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27. *See* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 122 (2023) (noting that "lower court decisions in the months after *Bruen* . . . have reached inconsistent conclusions about what the test requires and how it works in practice" and demonstrate "how the test fails to constrain judicial decisionmaking, obscures value judgments that drive the reasoning, leaves conscientious lawmakers uncertain about the scope of their authority, and creates disuniform legal rules across the country as courts reach irreconcilable judgments"). For an empirical review of cases applying *Bruen*, see Jacob Charles, *One Year of* Bruen*'s Reign: An Updated Empirical Analysis*, DUKE CTR. FOR FIREARMS L. (July 7, 2023), https://firearmslaw.duke.edu/2023/07/one-year-of-bruens-reign-an-updated-empirical-analysis [https://perma.cc/3NSQ-ET7Q].

28. *See* Mark W. Smith, *Dangerous, but Not Unusual: Mistakes Commonly Made by Courts in Post*-Bruen *Litigation*, 22 GEO. J.L. & PUB. POL'Y 599, 624–44 (2024).

29. *Rahimi*, 602 U.S. at 692.

30. *Id.* (citations omitted). Applying the test for a second time in *Rahimi*, the Court held that individuals who make threats to public safety may be constitutionally disarmed. *Id.* at 698. The Court identified historical surety statutes and going-armed statutes as the historical analogue of 18 U.S.C. § 922(g)(8), with those historical regulations boasting the comparable burden of disarmament and the comparable justification of public safety. *See id.*

31. *See id.* at 688.

32. *Id.* at 698 ("When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed.").

33. *Id.* at 698, 703 (Sotomayor, J., concurring).

34. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 27 (2022).

35. *Id.*

B. Three Flaws of Reasoning by Analogy

Part III offers a nuanced approach to *Bruen*'s historical analogue inquiry that this Note contends is a more coherent model for Second Amendment interpretation. But first, the fundamental flaws of reasoning by analogy must be identified to recognize why a more nuanced approach is needed.

1. Similarity Versus Analogy

First, the complex nature of analogical reasoning is its connection to, but ultimate conflation with, similarity.[36] When two things are analogous, "they must be in some respects similar, but if they are similar, they are not necessarily analogous. Analogy requires a certain type of similarity: a similarity based on relations, and not simply on features."[37] As an outlandish example, consider a kiwifruit and a tennis ball. Arguably, the kiwifruit is highly *similar* to the tennis ball—both are spherical, green, and furry.[38] Yet, no one would dispute that the kiwifruit is more analogous, albeit less similar to, a banana—the banana is not spherical, green, or furry,[39] but much like the kiwifruit, it is indeed a fruit. Thus, while the kiwifruit shares abundant superficial similarities with the tennis ball, the similarity relative to the analogy lies with the banana. So similarity and analogy, although sometimes overlapping, are distinct and separate concepts.

Yet "superficial similarity" and "relative analogy" are often conflated in *Bruen*'s historical analogue inquiry, likely because the Court only loosely defined the relevant points of analogy—the "how" and the "why" of the burden on the Second Amendment.[40] Modern and historical firearm regulations may be similar, but are they analogous where it *matters*? Of concern, the proximity of superficial similarities and relative analogies risks the two being conflated. In turn, modern and historical firearm regulations may be either erroneously distinguished based on superficial dissimilarities or erroneously analogized based on superficial similarities, resulting in the modern firearm regulation being ultimately invalidated or upheld on questionable analogical grounds.

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36. *See generally* Frederick Schauer & Barbara A. Spellman, *Guns, Analogies, and Constitutional Interpretation Across Centuries*, 99 NOTRE DAME L. REV. 1565 (2024).

37. *Id.* at 1567.

38. *See Fruit of the Month: Kiwifruit*, HARV. HEALTH PUBL'G (May 1, 2021), https://www.health.harvard.edu/heart-health/fruit-of-the-month-kiwifruit [https://perma.cc/9SUG-3C24] (describing a kiwifruit as having "green flesh," being "fuzzy," and "egg-sized"); *see also Why Are Tennis Balls Fuzzy?*, BASHA TENNIS (July 19, 2023), https://bashatennis.com/why-are-tennis-balls-fuzzy/ [https://perma.cc/N79Q-6SQA] (describing a tennis ball as a "yellow-green fuzzy sphere").

39. *See* Sania Malik, *Banana Fruit: Types, Nutrition, Health Benefits, Uses*, BANANA DOSE, https://bananadose.com/introduction-to-banana-fruit/ [https://perma.cc/W53D-QAJ3] (last visited July 20, 2024) (describing a banana as "yellow and curved" and "covered in a thin, pliable skin").

40. *Bruen*, 597 U.S. at 29 (explaining that whether a "regulation [is] relevantly similar under the Second Amendment" requires considering "at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense"); *see also* United States v. Rahimi, 602 U.S. 680, 692 (2024) (committing only a single paragraph to describe the "how" and "why" of *Bruen*).

2. Breadth of Analogy

A second concern of analogical reasoning is that the open-ended nature of relative points of analogy "makes an analogical argument—any analogical argument—highly manipulable."[41] In turn, because analogies are highly manipulable, that "makes the alleged analogy an illusion."[42] After all, any two things can be analogized if the goalposts are moved to manipulate what is the relative point of analogy.[43] As another outlandish example, consider a kiwifruit and a panda. Patently, overtly dissimilar at first glance. Yet thanks to the open-ended nature of relative points of analogy,[44] a kiwifruit and a panda can be analogized—both are furry, originate from China, and are composed of living cells.[45] Plainly, the malleability of reasoning by analogy ensures commonality can always be reached, which renders all analogies illusionary.

Importantly, in the context of the Second Amendment, the manipulability of reasoning by analogy "permits the decisionmaker to make the decision on other grounds not constrained by the analogy at all."[46] That is, policy decisions can effectively dictate the analogical path that is taken to ensure a modern firearm regulation fits within or is cast from history and tradition. Thus, "the seeming analogy is being used not only to suggest more constraint than actually exists"[47]—that a modern firearm regulation must boast a historical analogue purports constraint—but the analogy also "obscure[s] the role of the judge as a policymaker."[48] After all, the judge can still reach the same outcome by manipulating the relative point of analogy. So *Bruen*'s historical analogue inquiry does not escape the "window dressing" of means-end scrutiny.[49] It merely allows interest balancing to be cloaked by an analogy that claims historical fidelity by way of textual constraint, but ultimately can be used to reach the same policy decision.

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41. Schauer & Spellman, *supra* note 36, at 1573.
42. *Id.*
43. *Id.*
44. *See id.*
45. *See* David P. Richardson et al., *The Nutritional and Health Attributes of Kiwifruit: A Review*, 57 EUR. J. NUTRITION 2659, 2659–60, 2665 (2018) (explaining "[k]iwifruit are native to . . . China," have "hairy skin," and are composed of "plant cell walls" and "fruit cell walls"); *see also Giant Panda*, SMITHSONIAN'S NAT'L ZOO & CONSERVATION BIOLOGY INST., https://nationalzoo.si.edu/animals/giant-panda [https://perma.cc/9M6X-FG22] (last visited July 20, 2024) (describing "[g]iant pandas a[s] native to central China" and having a "thick, wooly coat"); Yuliang Liu et al., *The Establishment of Giant Panda (Ailuropoda Melanoleuca) Fibroblast Cell Line*, 58 IN VITRO CELLULAR & DEVELOPMENTAL BIOLOGY – ANIMAL 194, 194 (2022) (discussing the composition of a panda's "living cells").
46. Schauer & Spellman, *supra* note 36, at 1573.
47. *Id.*
48. *Id.*
49. *See* Duncan v. Bonta, 19 F.4th 1087, 1147–48 (9th Cir. 2021), *judgment vacated*, 142 S. Ct. 2895 (2022), *vacated and remanded*, 49 F.4th 1228 (9th Cir. 2022) (Bumatay, J., dissenting) ("Intermediate scrutiny, we fear, is just window dressing for judicial policymaking.").

3. Gaps in Knowledge

A third concern of analogical reasoning is that the sufficiency of an analogy is highly dependent on the depth of knowledge held.[50] "Drawing analogies is a knowledge-dependent process, such that people with a certain kind of knowledge will see analogies that those without that knowledge will not."[51] Thus, the more expertise held about a topic, the more proficiently relevant similarities can be identified to successfully analogize. Yet where *Bruen* demands analogies that draw upon both modern and historical firearm regulations, it requires knowledge of both firearms and history, which goes beyond the legal expertise of jurists charged with Second Amendment challenges.[52] As such, even if *Bruen*'s historical analogue inquiry were a flawless test in theory, it lacks sufficiently qualified manpower to apply it in practice.

The pitfall of gaps in knowledge must not be understated. Neither the government that must identify the historical analogue,[53] nor the judge who must decide whether the challenged gun regulation passes "constitutional muster,"[54] is typically qualified to analyze historical sources as demanded by *Bruen*. Crucially, courts need only resolve the Second Amendment challenge based on the record.[55] And while historians can file amicus briefs or be employed as experts, neither is obligated by the courts. Tellingly, courts are acknowledging the sparse historical record from where they must conduct the *Bruen* historical analogue inquiry.[56] Even still, the manifest differences between modern and historical society have already revealed gaps in historical regulations that no depth of knowledge or record can

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50. *See* Schauer & Spellman, *supra* note 36, at 1577.

51. *Id.*

52. See *id.* at 1578–79 ("Analogizing contemporary firearms or contemporary methods of firearms control to those existing in the distant past requires judges to go beyond their judicial qualifications, their judicial training, and their judicial experience and into the realm of empirically grounded knowledge and experience that judges do not necessarily share just by virtue of being judges.").

53. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022).

54. *Id.* at 30.

55. *Id.* at 25 n.6 ("Courts are . . . entitled to decide a case based on the historical record compiled by the parties.").

56. *See, e.g.*, United States v. Freeman, 701 F. Supp. 3d 716, 729 n.7 (N.D. Ill. 2023) (noting that "[t]he government's unmet burden [wa]s compounded by its decision not to offer any expert historian," and that "[i]t is not the court's burden to demonstrate history and tradition in this case by appointing its own independent expert"), *appeal filed* (7th Cir. Nov. 14, 2023); United States v. Harper, 689 F. Supp. 3d 16, 22 n.2 (M.D. Pa. 2023) ("The court notes that it will resolve the motion to dismiss based on the parties' presentations in their briefs. Neither party has presented an expert report from a historian or requested that the court appoint an expert historian."), *appeal filed* (3d Cir. Sept. 6, 2023); United States v. Bullock, 679 F. Supp. 3d 501, 519–21 (S.D. Miss. 2023) ("In this case, as in the sampled cases, . . . the government did not designate a single person to provide an expert report on [the challenged firearm regulation]."), *rev'd*, No. 23-60408, 2024 WL 4879467 (5th Cir. Nov. 25, 2024).

overcome.[57] Ultimately, *Bruen*'s historical gloss on reasoning by analogy obligates analysis that neither the government nor courts are qualified to undertake, which further brings into question the accuracy of Second Amendment challenges post-*Bruen*.

C. Bruen*'s Analogical Approach in Practice*

Having discussed the three flaws of analogical reasoning in theory, consulting judicial decisions applying *Bruen* demonstrates these flaws in practice. This inquiry reveals that the flaws of reasoning by analogy culminate in inconsistencies, subjectiveness, and inaccuracies that attenuate Second Amendment challenges from constitutional fidelity and stonewall the very "common sense" outcomes endorsed by *Rahimi*.[58]

1. Breadth of Analogy

Consulting first the malleability of analogical reasoning, this inquiry starts with *Rahimi*,[59] the Court's own application of *Bruen*.[60] As held by *Rahimi*, surety laws and going-armed laws are worthy analogues for § 922(g)(8).[61] Yet their aptness is directly correlated to how broadly the historical tradition was framed, which dictates the relative points of analogy. The Court broadly identified that "[s]ince the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms."[62] In turn, the Court held that surety laws, going-armed laws, and § 922(g)(8) all permit disarmament when an individual makes a threat of violence to another.[63] Thus, because § 922(g)(8) shares with its historical analogues a comparable burden (disarmament and the penalty of imprisonment) and justification for those burdens (public safety), it fits within history and tradition.[64]

Importantly, *Rahimi* broadly framed the historical tradition to identify surety and going-armed laws as suitable historical analogues.[65] Yet, a narrower framing of the historical tradition refines the relative analogical points—which, in turn, renders surety laws and going-armed laws unsuitable historical analogues. Consider how surety laws permitted posting bond to avoid disarmament despite a

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57. *See, e.g.*, United States v. Alaniz, 69 F.4th 1124, 1128 (9th Cir. 2023) (noting the prevalence of "modern regulations that were unimaginable at the founding"); United States v. Baker, No. 24-CR-00160-GKF, 2024 WL 3972995, at *8 (N.D. Okla. Aug. 28, 2024) ("The court acknowledges that Possession of Cocaine with Intent to Distribute is '"a largely modern crime" with no direct historical analogue.'").

58. *See* United States v. Rahimi, 602 U.S. 680, 698 (2024).

59. *See generally id.*

60. *Bruen*, 597 U.S. 1.

61. To be clear, this Note does not claim to undertake a vigorous inquiry into whether surety laws and going-armed laws are sufficient historical analogues for § 922(g)(8). It serves only to flag manifest distinctions between the historical analogue and modern firearm regulation to evidence the inconsistencies, subjectiveness, and impracticability of historical reasoning by analogy.

62. *Rahimi*, 602 U.S. at 690.

63. *See id.* at 698.

64. *See id.* at 698–99.

65. *See id.* at 698 (framing the historical tradition as "[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed").

showing of dangerousness,[66] whereas § 922(g)(8) provides no means to avoid disarmament.[67] Further, a surety law violation constituted a misdemeanor offense with a comparable term of imprisonment,[68] whereas § 922(g)(8) is a felony offense imposing a potential 15-year sentence.[69] With these distinctions in mind, the historical tradition can be framed narrower than it was in *Rahimi*: "[s]ince the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms"[70] by subjecting them to a misdemeanor penalty unless they could post bond. Under this narrower framing of the historical tradition, § 922(g)(8) no longer boasts a historical analogue.

Similarly, consider going-armed laws, which prohibited going armed offensively in public,[71] whereas § 922(g)(8) prohibits keeping arms peacefully in private—that is, liability attaches under § 922(g)(8) for possessing a firearm when subject to a restraining order, even if the firearm is never brandished or brandished only nonviolently.[72] Thus, going-armed laws provide a separate historical tradition altogether: "[s]ince the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms"[73] in public spaces. Again, the narrower framing of the historical tradition forecloses a historical analogue for § 922(g)(8).

In sum, at least three distinctions can be made between § 922(g)(8) and its historical analogues. The historical analogues prohibited going armed offensively in public,[74] permitted bond to avoid disarmament,[75] and were misdemeanor offenses.[76] In contrast, § 922(g)(8) prohibits possessing arms peacefully in private, offers no bond, and is a felony offense imposing a potential 15-year sentence.[77] Thus, § 922(g)(8) and its historical analogues can be distinguished, which argues against

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66. *See id.* at 695; *see also* 2 SEYMOUR D. THOMPSON & THOMAS M. STEGER, A COMPILATION OF THE STATUTE LAWS OF THE STATE OF TENNESSEE 90 (1873) (providing an example surety bond where "[e]very such offender may be required to find sureties for his good behavior" and thus avoid disarmament (quoting Art. II, Act 1801, ch. 22, § 4753–54)).

67. *See* 18 U.S.C. § 922(g)(8).

68. *See Rahimi*, 602 U.S. at 695 ("If an individual failed to post a bond, he would be jailed."); *see, e.g.*, THOMPSON & STEGER, *supra* note 66, at 90 (discussing a surety law where an individual who failed to post bond could be "commit[ed] . . . to jail for not exceeding ten days," and if the individual "continue[d] so to offend," he or she would be "guilty of a misdemeanor" (quoting Art. II, Act 1801, ch. 22, § 4755–56)).

69. 18 U.S.C. § 924(a)(8).

70. *Rahimi*, 602 U.S. at 690.

71. *Id.* at 697 ("[G]oing armed laws prohibited 'riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land.' Such conduct . . . 'le[d] almost necessarily to actual violence.'" (citation omitted)).

72. *See* § 922(g)(8).

73. *Rahimi*, 602 U.S. at 690.

74. *See id.* at 697 ("[T]he going armed laws prohibited 'riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land.'").

75. *See id.* at 695 (explaining how surety laws "authorized magistrates to require individuals suspected of future misbehavior to post a bond").

76. *See, e.g.*, THOMPSON & STEGER, *supra* note 66, at 90 (discussing a surety law where if the individual "continue[d] so to offend," he or she would be "guilty of a misdemeanor" (quoting Art. II, Act 1801, ch. 22, § 4755–56)).

77. *See* § 922(g)(8); 18 U.S.C. § 924(a)(8).

the analogy and underscores the malleability of *Bruen*'s historical analogue inquiry. Evidently, how broadly or narrowly the historical tradition is framed largely dictates whether a modern firearm regulation will boast a historical analogue.

2. Similarity Versus Analogy

The conflation of similarity and analogy is demonstrated in the First Circuit opinion *Ocean State Tactical, LLC v. Rhode Island*.[78] In *Ocean State*, the court upheld Rhode Island's large capacity magazine ban under *Bruen*, finding a historical tradition of "passing laws severely restricting access to certain dangerous weapons."[79] The *Ocean State* court cited historical laws regulating gunpowder possession as "an especially apt analogy" to the modern magazine ban,[80] noting their shared burden of breaking down aggregated arms and shared justification of protecting the public "against the greater dangers posed by some weapons."[81] Specifically, the historical gunpowder regulations prohibited storing large volumes of gunpowder, "which could kill many people at once if ignited," and the modern magazine ban prohibited feeding large volumes of ammunition into a firearm, which were attributed to "mass killings by lone individuals."[82] Thus, the gunpowder regulations and modern magazine ban were apparently analogous.

Yet the similar burdens between the modern magazine ban and historical gunpowder regulations are not necessarily indicative of analogy. Notably, the modern magazine ban outright prohibits the possession of large-capacity magazines.[83] In contrast, the gunpowder regulations only regulated the volume of gunpowder that could be possessed or stored.[84] Further, the penalty for violating

78. *See* 95 F.4th 38, 48 (1st Cir. 2024).
79. *Id.*
80. *Id.* at 49.
81. *Id.*
82. *Id.*
83. *Id.* at 41 (explaining how the large capacity magazine ban "prohibit[s] possession of certain large capacity feeding devices or magazines . . . , defined as those that hold more than ten rounds of ammunition").
84. *Id.* at 49 (explaining how historical gunpowder regulations "limited the quantity of gunpowder that a person could possess, and/or limited the amount that could be stored in a single container," and citing a historical gunpowder regulation that "limit[ed] individuals to 28 pounds of gunpowder apiece, which they were required to separate into four different canisters" (citing 1784 N.Y. Laws 627)); *see, e.g.*, 1786 N.H. Laws 383–84 (imposing a fine on an individual who "keep[s] in any dwelling-house, store or other buildings . . . more than ten pounds of gun-powder at any one time"); 1784 N.Y. Laws 627 (imposing a fine on an individual who "ha[s] or keep[s] any quantity of gun powder exceeding twenty-eight pounds weight, in any one place"); Act of Dec. 6, 1783, ch. 1059, 11 Pa. Stat. 209 ("[N]o person whatsoever . . . shall . . . keep in any house, shop or cellar, store or place whatsoever . . . any more or greater quantity at any one time than thirty pounds weight of gun-powder, under the penalty of forfeiture of the whole quantity . . . together with a fine of twenty pounds for every such offense."); 1806 Ky. Acts 122 § 3 (prohibiting "any quantity of gun powder which might in case of fire be dangerous"). These regulations were cited by *Ocean State*. *See* 95 F.4th at 49 & n.16.

historical gunpowder regulations typically amounted to a *de minimis* fine,[85] whereas the modern magazine ban imposes up to five years of imprisonment.[86] Thus, while the historical gunpowder regulations and modern magazine ban share a similar burden in the sense that they broke down aggregated arms,[87] the dissimilarity of prohibition and regulation, and their respective penalties, does not lend itself to a fitting analogy. No matter their similarities, regulation and prohibition are not analogous burdens nor is a small fine and substantial imprisonment, which exemplifies the conflation of similarity and analogy.

3. Gaps in Knowledge

While a qualitative analysis of *Rahimi* and *Ocean State* demonstrated the first two flaws of analogical reasoning, a quantitative approach reveals the implications of gaps in knowledge as applied to *Bruen*'s historical analogue inquiry.

Numerous judges have warned that the judiciary is unqualified to undergo historical analogical reasoning. In the Fourth Circuit, Judge Keenan stressed that "like most judges," she was "not a historian or a linguist capable of considering the full reach" of the Second Amendment "in its historical context."[88] In the Seventh Circuit, Judge Wood remarked that remanding the Second Amendment challenge to the district court equated to "saddling it with a Ph.D.-level historical inquiry that necessarily [would] be inconclusive."[89] Crucially, Judge Higginson of the Fifth Circuit acknowledged that unlike the Supreme Court, which was replete with amicus briefs in *Bruen* and *Rahimi* to inform the historical inquiry, lower courts would "rarely receive that amount of independent interest in [their] cases."[90] As such, "courts, operating in good faith, are struggling at every stage of the *Bruen* inquiry."[91]

Additionally, courts have underscored the unworkability of historical analogical reasoning. In the Western District of Texas, Judge Counts likened

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85. *See, e.g.*, 1798-1813 R.I. Pub. Laws 85 ("[E]very person . . . who shall hereafter keep or deposit gunpowder, in a greater quantity than twenty eight pounds . . . shall forfeit and pay the sum of twenty dollars, for each and every such offence . . . ."). This regulation was cited by the First Circuit. *See Ocean State*, 95 F.4th at 49 n.16.

86. *Ocean State*, 95 F.4th at 42 (citing 11 R.I. GEN. LAWS § 11-47.1-3(a) (2022)).

87. *Id.* at 49.

88. Md. Shall Issue, Inc. v. Moore, 86 F.4th 1038, 1057 (4th Cir. 2023) (Keenan, J., dissenting), *reh'g en banc granted*, No. 21-2017 (L), 2024 WL 124290 (4th Cir. Jan. 11, 2024).

89. Atkinson v. Garland, 70 F.4th 1018, 1025 (7th Cir. 2023) (Wood, J., dissenting).

90. *See* United States v. Daniels, 77 F.4th 337, 360 n.15 (5th Cir. 2023) (Higginson, J., concurring), *judgment vacated*, 144 S. Ct. 2707 (2024); *see also* United States v. Hill, 703 F. Supp. 3d 729, 745, 748 (E.D. Va. 2023), *aff'd*, No. 24-4194, 2025 WL 314159 (4th Cir. Jan. 28, 2025) (warning that "judges are not the proper persons to undertake the historical evaluation *Bruen* demands," where trial courts have "nothing comparable to the extensive historical and academic information presented to the Supreme Court in *Bruen*," and that "trial courts simply cannot conduct an academically rigorous scholarly and exhaustive evaluation" as instructed by *Bruen*, especially under the time constraints of speedy trial concerns).

91. *Daniels*, 77 F.4th at 358–59 (Higginson, J., concurring) (warning that "courts are laboring to give meaning to the *Bruen* requirement of 'historical inquiry'").

Bruen's historical analogue inquiry to "a predicament similar to Plato's allegory of the cave,"[92] noting that "finding similar historical analogies is an uphill battle because of how much this Nation has changed."[93] "If the Government must prove a historical tradition for every regulation restricting a specific subgroup," he opined, "*Bruen*'s framework creates an almost insurmountable hurdle."[94] In the same district, Judge Cardone urged that *Bruen*'s "present framework for assessing Second Amendment challenges is difficult to apply. Indeed, it sends jurists on a quixotic journey through history."[95] Such concerns were echoed by Judge Lauck of the Eastern District of Virginia, who criticized *Bruen* as an "unwieldy rubric" that morphs judgments "from nuanced to, essentially, unattainable."[96]

Crucially, courts have warned of the inconsistent law that will develop from *Bruen*. In the Northern District of Illinois, Judge Ellis urged that "the *Bruen* inquiry will lead to undesirable and inconsistent results due to the different sources on which the government will rely in different cases, competing readings of the historical record, and divergent views of what *Bruen* dictates."[97] Relatedly, Judge Lauck urged that where historians continue to disagree about historical interpretation, *Bruen*'s focus on historical analysis could not promise "consistent and uniform development and application of the law."[98] In turn, "the scores of *Bruen* analyses will defy consistent application, resulting in unreliable and confusing law."[99] Tellingly, Judge Hollander of the District of Maryland acknowledged that inconsistent law was already unfolding from *Bruen*, where "fractured rulings reflect that there is no one conclusive interpretation of the Nation's historical tradition with regard to firearm regulation."[100] As such, "a history-only test is not readily administrable."[101]

The collective remarks of the judiciary evidence judicial reservation in undertaking historical analogical reasoning. Judges feel not only unqualified to conduct *Bruen*'s historical analogue inquiry,[102] but they are concerned with the unworkability of historical analogical reasoning and the inconsistent body of law that will result from its applications.[103] Ultimately, the judicial outcry against *Bruen*

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92. United States v. Quiroz, 629 F. Supp. 3d 511, 513 (W.D. Tex. 2022).
93. *Id.* at 522.
94. *Id.*
95. United States v. Sing-Ledezma, 706 F. Supp. 3d 650, 672 (W.D. Tex. 2023).
96. United States v. Hill, 703 F. Supp. 3d 729, 743, 746 (E.D. Va. 2023), *aff'd*, No. 24-4194, 2025 WL 314159 (4th Cir. Jan. 28, 2025).
97. United States v. Neal, 715 F. Supp. 3d 1084, 1091 (N.D. Ill. 2024).
98. *Hill*, 703 F. Supp. 3d at 752.
99. *Id.* Notably, Judge Lauck observed that judges within his district have conducted respective *Bruen* analyses for the same modern firearm regulation but "d[id] not rely on the same written expert historical analyses" and built their respective analyses "on different—perhaps materially different—underlying academic support." *Id.* at 750.
100. United States v. Jackson, 661 F. Supp. 3d 392, 407–08 (D. Md. 2023), *appeal filed* (4th Cir. Feb. 28, 2024).
101. *Id.* at 407.
102. *See, e.g.*, United States v. Quiroz, 629 F. Supp. 3d 511, 513 (W.D. Tex. 2022).
103. *See, e.g.*, *Hill*, 703 F. Supp. 3d at 750.

highlights the many pitfalls of historically based reasoning by analogy, and it implores a more nuanced approach to Second Amendment challenges.

II. THE PRINCIPLED APPROACH TO CONSTITUTIONAL INTERPRETATION

As demonstrated by the three flaws of analogical reasoning,[104] *Bruen*'s reliance on historical analogical reasoning fosters inconsistency, subjectivity, and impracticality. Continuing *Bruen*'s inquiry will only further attenuate lower court decisions from historical fidelity and the "common sense" outcomes endorsed by *Rahimi*.[105] But *Bruen* licensed "a more nuanced approach" when "unprecedented societal concerns or dramatic technological changes" demand as much.[106] This Note contends that such societal concerns and technological changes are already upon us.[107] Thus, a "nuanced approach"[108] to *Bruen*'s historical analogue inquiry must be proposed.

Importantly, *Bruen* laid the foundation for a more nuanced approach through its references to constitutional principles. As instructed by *Bruen* and re-urged by *Rahimi*, a modern firearm regulation need only "comport with the principles underlying the Second Amendment" and be "consistent with the principles that underpin our regulatory tradition."[109] Thus, underlying *Bruen*'s demand for a historical analogue is an adherence to constitutional principles, which have long informed the Court.[110] *So why the complication of historical analogical reasoning?* While historical analogies may purport constraint—as desired by a

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104. *See supra* Section I.B.

105. United States v. Rahimi, 602 U.S. 680, 698 (2024).

106. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 27 (2022).

107. For example, gang violence and mass shootings are pressing societal issues not faced by the Framers, and technological changes such as high-capacity magazines and bump stocks were nonexistent during the Founding Era. *See* Megan Walsh & Saul Cornell, *The Expansion of Historical Analogues for Age-Based Firearms Restrictions in the Era of the 14th Amendment (Part 2)*, DUKE CTR. FOR FIREARMS L. (Sept. 13, 2024), https://firearmslaw.duke.edu/2024/09/the-expansion-of-historical-analogues-for-age-based-firearms-restrictions-in-the-era-of-the-14th-amendment-part-2 [https://perma.cc/34HP-C96T] (discussing how "the problems that arms posed to American society evolved as changes in technology, the economy, and society spawned new gun-related societal harms and concerns").

108. *Bruen*, 597 U.S. at 27.

109. *Rahimi*, 602 U.S. at 692; *see also Bruen*, 597 U.S. at 26–31.

110. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) (explaining the "Court's duty" is "the elaboration of constitutional principles" and "to make certain that those principles have been constitutionally applied"); *see also* Gosa v. Mayden, 413 U.S. 665, 673 (1973) (discussing the application of a "new constitutional principle" crafted by a Supreme Court decision); Solem v. Stumes, 465 U.S. 638, 643–45 (1984) (explaining when "retroactive application" of a "new constitutional principle" is appropriate); Brown v. Bd. of Educ. of Topeka, 349 U.S. 294, 300 (1955) (explaining "the vitality of . . . constitutional principles cannot be allowed to yield simply because of disagreement with them"); Couch v. United States, 409 U.S. 322, 336 (1973) ("It is important, in applying constitutional principles, to interpret them in light of the fundamental interests of personal liberty they were meant to serve. Respect for these principles is eroded when they leap their proper bounds to interfere with the legitimate interest of society . . . .").

majority originalist Court—as canvassed in Part I, historical analogical reasoning is highly malleable.[111] Thus, to say *Bruen*'s historical analogue inquiry adheres to originalism is a misnomer.

To achieve constitutional fidelity and avoid the pitfalls of analogical reasoning, *Bruen* must adopt the nuance it licensed by eschewing case-by-case historical analogues and instead acknowledge the longstanding constitutional principle of public safety that has historically justified categorical burdens on the Second Amendment. Importantly, such a nuanced approach retains the "why" and "how" of *Bruen* while aligning with the Court's principled approach to constitutional interpretation, which considers original public meaning to apply historical principles to modern circumstances.[112] Importantly, such an approach is far from novel. The historical principle of public safety has been habitually employed by the Court to delineate the outer boundaries of various constitutional provisions, which applies with equal force to the Second Amendment.

A. The Historical Principle of Public Safety

Public safety has always been a priority of the nation. First appearing as a substantive right in Founding Era state constitutions, the public safety principle was later raised numerously during the debates of the Constitutional Convention, and it survived as an object in the Constitution's Preamble.[113] Thereafter, the public safety principle has been invoked countlessly by the Court to craft doctrines that recognize the principled curtailment of enumerated rights. Consulting the evolution of the public safety principle reveals how it is a cornerstone of the Constitution and, as such, has historically and traditionally been a fierce justification for delineating the outer boundaries of enumerated rights, including the right to keep and bear arms.

1. Founding Era State Constitutions' Inalienable Right to Safety

Canvassing the historical public safety principle begins with Founding Era state constitutions, which were of great influence upon the U.S. Constitution.[114]

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111. *See supra* Subsection I.B.2.

112. *See infra* Sections II.A–B (discussing the original public meaning of "domestic tranquility" to identify the historical principle of public safety that has since been applied to modern constitutional challenges to delineate the outer boundaries of multiple constitutional provisions). Importantly, *Bruen* did not disavow the principled approach, which seemingly underlies *Bruen*'s historical analogue inquiry. *See Rahimi*, 602 U.S. at 692 (explaining "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition" and that "[t]he law must comport with the principles underlying the Second Amendment" (citing *Bruen*, 597 U.S. at 26–31)).

113. Where *Bruen* confirmed that "'examination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification' [is] 'a critical tool of constitutional interpretation,'" 597 U.S. at 20, consulting state constitutions and the *Federalist Papers*—both typically authored by the Founders—recognize a Founding Era public understanding that public safety justifiably limited any enumerated right in the Constitution.

114. *See* THE CONSTITUTION AND THE STATES: THE ROLE OF THE ORIGINAL THIRTEEN IN THE FRAMING AND ADOPTION OF THE CONSTITUTION, at x (Patrick T. Conley &

Notably, the overlapping language of state constitutions and the U.S. Constitution urges revisiting the former to understand the meaning of the latter.[115] As a non-exhaustive list, consider the Massachusetts, Pennsylvania, and Virginia Constitutions. Each enumerated safety as an inalienable right, thus demonstrating its historical importance.

Authored predominantly by Founder John Adams in 1780,[116] the Massachusetts Constitution recognized that the fundamental goal of government was to protect the people's "power of enjoying, in safety and tranquility, their natural rights."[117] Its Preamble further acknowledged that "the people have a right . . . to take measures necessary for their safety."[118] Most crucially, the Massachusetts Constitution instructed that the people have a "natural, essential, and unalienable" right of "obtaining their safety," thus acknowledging safety as a substantive right akin to life, liberty, and property.[119]

Similarly, the Pennsylvania Constitution, co-authored by Founder Benjamin Franklin in 1776,[120] adopted language that bolstered the people's right to safety. Its Preamble recognized that "government ought to be instituted . . . for the security and protection of the community," and that "the people have a right" to take measures "necessary to promote their safety."[121] Safety was also substantively vested in the Pennsylvania Constitution, which instructed that all people have a "natural, inherent and inalienable" right to "pursuing and obtaining . . . safety."[122]

As a final example, authored in 1776 and drafted by a committee that included Founder James Madison,[123] the Virginia Constitution recognized that a fundamental goal of government is the "protection[] and security of the people," and that it must be "capable of producing the greatest degree of . . . safety."[124] Importantly, the Virginia Constitution again placed safety on equal footing with life, liberty, and property in its instruction that all people have the "inherent right[]" to "obtaining . . . safety."[125]

John P. Kaminski eds., 1988) ("Not only was the role of the states central in framing, ratifying, and revising the Constitution, but the new federal Constitution was permeated with the influence of state constitutions and local precedents . . . . 'The states are mentioned explicitly or by direct implication 50 times in 42 separate sections of the U.S. Constitution.'").

115. *Id.* (noting how "anyone attempting to do a close textual analysis of the [Constitution] is driven time and again to the state constitutions to determine what is meant or implied by the national constitution").

116. CHRISTOPHER PETER LATIMER, CIVIL LIBERTIES AND THE STATE: A DOCUMENTARY AND REFERENCE GUIDE 23 (2010) (ebook).

117. MASS. CONST. of 1780, pmbl.

118. *Id.*

119. *Id.* art I.

120. *See* Adam Lebovitz, *Franklin Redivivus: The Radical Constitution, 1791-1799*, 57 AM. J. LEGAL HIST. 1, 1–2 (2017).

121. PA. CONST. of 1776, pmbl.

122. *Id.* art. I.

123. Stephan A. Schwartz, *George Mason: Forgotten Founder, He Conceived the Bill of Rights*, SMITHSONIAN MAG., May 2000, at 143, 148–49.

124. VA. CONST. of 1776, § 3.

125. *Id.* § 1.

In sum, through their respective state constitutions, the Founders vested in the people the natural right to safety and acknowledged the government's role in its preservation.[126] To be clear, the deference afforded to public safety by state constitutions does not justify curtailing the Second Amendment. The roadmap for the public safety principle begins here to acknowledge that public safety was originally an inalienable right,[127] which demonstrates the constitutional protection historically afforded to public safety that informed the U.S. Constitution.

2. Public Safety Informing the Constitutional Convention Debates

The debates of the Constitutional Convention further demonstrate that public safety informed the founding of the U.S. Constitution. Notably, public safety was raised numerously during the debates as a prevailing competing interest against other ends of the Constitution. Founder Alexander Hamilton instructed that there was a "duty imposed on every man to contribute his efforts for the public safety."[128] Relatedly, Founder James Madison declared that the delegates had a "duty of sacrificing local considerations and favorite opinions to the public safety."[129] As such, Madison opined, "all the necessary means for attaining," among other ends, "the safety" of the public "must, however reluctantly, be submitted to."[130] In turn, it was urged that the people "must give up a share of liberty" to ensure the "safety of all."[131]

The interest in public safety was raised in the context of specific constitutional provisions, too. In discussing the mode of Senate appointments, one delegate remarked that the Senate should seek qualities that would check the "excesses against . . . personal safety" that frequented Congress.[132] When discussing qualifications of the legislature, another delegate warned against excluding non-property bearing monied interest from eligibility because their "aids may be essential in particular emergencies to the public safety."[133] Another debate proposed suspending the right to a writ of habeas corpus when "in cases of rebellion or invasion, the public safety may require it."[134]

In sum, the debates of the Constitutional Convention demonstrate the keen interest in public safety that informed the scope of constitutional rights. Notably, public safety was often cited to justify limiting liberty in various contexts, which

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126. *See supra* notes 114–25 and accompanying text.

127. *See supra* notes 119, 122, 125 and accompanying text. Notably, *Bruen* observed the significance of state constitutions in delineating the meaning of the Second Amendment. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 37 (2022) (explaining that "*Heller* considered [other] evidence 'only after surveying what it regarded as a wealth of authority for its reading—including the text of the Second Amendment and state constitutions'").

128. JOURNAL OF THE FEDERAL CONVENTION KEPT BY JAMES MADISON 176 (E. H. Scott ed., The Lawbook Exchange, Ltd. 2003) (1840) [hereinafter MADISON'S JOURNAL].

129. *Id.* at 32.

130. *Id.* at 83.

131. *Id.* at 713.

132. *Id.* at 285.

133. *Id.* at 439.

134. *Id.* at 706; *see also id.* at 619.

underscores how public safety has historically been a justification for curtailing individual rights.

3. The U.S. Constitution's Goal of Domestic Tranquility

As acknowledged by the Anti-Federalist paper *Brutus XII*, "the spirit of the constitution" is found in the "principal ends and designs it has in view," which "are expressed in the preamble."[135] To memorialize public safety as an end of federal government, the Founders crafted a Preamble ensuring "domestic Tranquility."[136] Notably, historical support demonstrates that the object of domestic tranquility was intended to defend against the threat of domestic firearms. As such, where the Court has since numerously cited the Preamble's object of domestic tranquility to defend curtailment of constitutional rights, it should inform the conclusion that the historical interest in public safety applies with equal force to the Second Amendment.

In the *Federalist Papers*, Founder Alexander Hamilton remarked of his "entire confidence" that the proposed Constitution had proven to be "necessary to the public safety."[137] To enshrine the constitutional interest in public safety, Founder John Jay declared that "[a]mong the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their safety seems to be the first."[138] As such, "the preservation of peace and tranquility" included ensuring the "safety of the people."[139] Demonstrably, then, the Preamble's object of domestic tranquility[140] ensures public safety under the Constitution.

Of importance, the Founders acknowledged that "[t]he safety of the people doubtless has relation to a great variety of circumstances and considerations,"[141] including domestic firearms. Founder James Madison stressed that in addition to foreign defense,[142] the Constitution offered "[p]rotection against domestic

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135. *Essays of Brutus, XII*, *in* 2 THE COMPLETE ANTI-FEDERALIST 422, 424 (Herbert J. Storing ed., 1981) (1788). Today, there are competing opinions on the Preamble's force. *See generally* David S. Schwartz, *Reconsidering the Constitution's Preamble: The Words That Made Us U.S.*, 37 CONST. COMMENT. 55 (2022) (discussing the competing interpretations of the Constitution's Preamble). Many scholars contend it identifies our "political ideals that are worthy of continued adherence." *See* Colleen Walsh, *Panelists Debate the Merits and Shortcomings of the Constitution*, HARV. UNIV.: HARV. L. TODAY (Sept. 23, 2009) (quoting Mark Tushnet, William Nelson Cromwell Prof. of L.), https://hls.harvard.edu/today/panelists-debate-the-merits-and-shortcomings-of-the-constitution/ [https://perma.cc/UX5U-MF7Y]. This Note considers only its historical significance to align with the Founders' intent.

136. U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, . . . [e]nsure domestic Tranquility.").

137. *See* THE FEDERALIST NO. 85, at 522–23 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

138. THE FEDERALIST NO. 3, *supra* note 137, at 42 (John Jay) (emphasis omitted).

139. *Id.* (emphasis omitted).

140. U.S. CONST. pmbl.

141. THE FEDERALIST NO. 3, *supra* note 137, at 42 (John Jay) (emphasis omitted).

142. *See, e.g.*, THE FEDERALIST NO. 34, *supra* note 137, at 208 (Alexander Hamilton). Founder Alexander Hamilton wrote at length about the threat of foreign attack:

violence . . . with equal propriety."[143] Relatedly, Founder John Jay remarked that the Constitution needed to provide security "against dangers from foreign arms" and the "like kind arising from domestic causes."[144] Notably, although the Founders contemplated the threat of domestic firearms in the context of insurrection,[145] the delegates instructed that they were "providing a Constitution for future generations, and not merely for the peculiar circumstances of the moment."[146] Thus, while modern firearm violence may differ from that of the Founding Era, the threat of domestic firearms upon public safety was plainly within the contemplation of the Founders.

The conclusion that the Founders intended the Preamble's object of domestic tranquility to meet the government end of public safety, including protection from domestic firearms, is not novel. To the contrary, the Court has shared this sentiment by citing the Preamble to underscore the overarching goals of government. Numerous justices have cited domestic tranquility as "an object in founding a Federal Government,"[147] one of the "principal goals" of government,[148] a "promise [the] Constitution makes,"[149] and one of the "motivating purposes" of the Founders.[150] Further, the Court has acknowledged the relationship between the

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"[W]e ought not to disable [the government] from guarding the community against the ambition or enmity of other nations." *Id.* Founder James Madison wrote to the same effect: "Security against foreign danger is one of the primitive objects of civil society." *See* THE FEDERALIST NO. 41, *supra* note 137, at 256 (James Madison).

143. THE FEDERALIST NO. 43, *supra* note 137, at 276 (James Madison).

144. THE FEDERALIST NO. 3, *supra* note 137, at 42 (John Jay).

145. *See* THE FEDERALIST NO. 43, *supra* note 137, at 276 (James Madison).

146. MADISON'S JOURNAL, *supra* note 128, at 441. This notion was re-urged by *Bruen*, which acknowledged that "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 28 (2022) (citation omitted).

147. Terminiello v. City of Chicago, 337 U.S. 1, 34 (1949) (Jackson, J., dissenting).

148. Estelle v. Jurek, 450 U.S. 1014, 1020 (1981) (Rehnquist, J., dissenting); *see also* Von Moltke v. Gillies, 332 U.S. 708, 741 (1948) (Burton, J., dissenting) (asserting that the Constitution "was adopted," among other reasons, to "[e]nsure domestic tranquility").

149. Gregory v. City of Chicago, 394 U.S. 111, 113 (1969) (Black, J., concurring).

150. EEOC v. Wyoming, 460 U.S. 226, 267 (1983) (Powell, J., dissenting) (quoting the Preamble); *see also* Bell v. State of Maryland, 378 U.S. 226, 346 (1964) (Black, J., dissenting) ("Our Constitution, noble work of wise men, was designed—all of it—to . . . 'establish Justice, [e]nsure domestic Tranquility . . . and secure the Blessings of Liberty to ourselves and our Posterity.'"); Duncan v. Kahanamoku, 327 U.S. 304, 358 (1946) (Burton, J., dissenting) ("In order to recognize the full strength of our Constitution, . . . it is necessary to protect the authority of our legislative and executive officials, as well as that of our courts, in the performance of their respective obligations to help to 'establish Justice, [e]nsure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'"); Lichter v. United States, 334 U.S. 742, 782 & n.34 (1948) (instructing that "the constitutional structure and controls . . . must be read with the realistic purposes of the entire instrument fully in mind," including "[e]nsur[ing] domestic Tranquility"); Frisby v. Schultz, 487 U.S. 474, 486 (1988) (warning that while the social harm at issue was "psychological, not physical," it was "not, for that reason, less inimical to . . . domestic tranquility"); Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (invoking the Preamble to support overturning a law that it determined prohibited conduct that did not disturb "domestic tranquility").

Preamble and enumerated rights, instructing that the Constitution "must be read with the realistic purposes of the entire instrument fully in mind," including to "[e]nsure domestic Tranquility."[151] Crucially, the Court has even observed the priority of public safety over constitutional rights, remarking that "no mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from . . . threatening conduct that disturbs the tranquility."[152]

Consensus from the Founders and the Court underscores the salience of the Preamble and its preservation of government ends. Crucially, as articulated by Founder John Jay, of all the ends of the Constitution necessary for the people, "safety seems to be the first."[153] Since then, the Court has defended the proposition that the government has a constitutional obligation to promote, and enumerated rights may be curtailed to ensure, domestic tranquility.[154] Thus, unlike means-end scrutiny, invoking the historical interest of public safety is not "deference to *legislative* interest balancing."[155] It is deference to the Founders' interest balancing. Public safety, as the quintessential government end, was enshrined in the Constitution as a historical justification for curtailing constitutional rights.

B. The Court's Application of the Principled Approach

Beyond invoking the Preamble's object of domestic tranquility to observe the Constitution's goal of ensuring public safety, the Court has memorialized the public safety principle in various doctrines that remain in effect today.[156] Such doctrines recognize how the Court has long asserted the justification of public safety to curtail constitutional rights and absent *Bruen*'s demand for exacting analogical reasoning.

First, the true threat doctrine limits the First Amendment by prohibiting speech or expression that conveys an intent to "commit an act of unlawful violence."[157] The true threat doctrine reflects a Founding Era commitment to prohibiting speech that was perceived as threatening toward public welfare, including speech that promoted obscenity or incitement,[158] as well as speech that

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151. *Lichter*, 334 U.S. at 782 & n.34 (instructing that "the constitutional structure and controls . . . must be read with the realistic purposes of the entire instrument fully in mind," including "[e]nsur[ing] domestic Tranquility").

152. *Gregory*, 394 U.S. at 118 (Black, J., concurring).

153. *See* THE FEDERALIST NO. 3, *supra* note 137, at 42 (John Jay) (emphasis omitted) ("Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their *safety* seems to be the first.").

154. *See supra* notes 147–52 and accompanying text.

155. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 26 (2022) (emphasis added).

156. *See infra* notes 157–85 and accompanying text.

157. Counterman v. Colorado, 600 U.S. 66, 74 (2023) (quoting Virginia v. Black, 538 U.S. 343, 359 (2003)); *see also* Watts v. United States, 394 U.S. 705, 708 (1969) ("[W]hatever the 'willfullness' requirement implies, the statute initially requires the Government to prove a true 'threat.'").

158. United States v. Stevens, 559 U.S. 460, 468 (2010) (citing Roth v. United States, 354 U.S. 476, 483 (1957)); Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969).

would "incite an immediate breach of the peace."[159] As such, "[t]rue threats of violence, everyone agrees, lie outside the bounds of the First Amendment's protection."[160]

Second, the public safety doctrine limits the Fourth Amendment's right to be free from unreasonable searches and seizures by permitting warrantless entries into the home,[161] as does the lower burden of proof required for *Terry* frisks.[162] While the home has historically been a fiercely constitutionally protected area,[163] warrantless entry is permitted when an officer reasonably believes there is a threat to a person's safety.[164] Further, although probable cause must typically be established before a person can be searched, a frisk may be conducted when an officer reasonably believes "his safety or that of others [is] in danger."[165] As such, "the right to frisk may be justified as an incident to inquiry upon grounds of elemental safety."[166] Conclusively, "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."[167]

Third, the Fifth Amendment's right to be free from self-incrimination, which is typically protected by *Miranda* warnings,[168] is limited by the public safety exception.[169] While suspects cannot typically be subjected to custodial interrogation without being informed of their *Miranda* rights,[170] law enforcement may question a suspect absent *Miranda* warnings when doing so is "reasonably prompted by a concern for the public safety."[171] Thus, "the need for answers to questions in a

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159. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (citing CHAFEE, FREE SPEECH IN THE UNITED STATES 149 (1941)).

160. *Counterman*, 600 U.S. at 72.

161. *See* Brigham City v. Stuart, 547 U.S. 398, 398 (2006).

162. *See* Terry v. Ohio, 392 U.S. 1, 10 (1968).

163. *See, e.g.*, Johnson v. United States, 333 U.S. 10, 14 (1948) ("The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.").

164. *Stuart*, 547 U.S. at 400; *see also What Does the Fourth Amendment Mean?*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does-0 [https://perma.cc/4U3Y-KWAA] (last visited Jan. 28, 2024) ("Whether a particular type of search is considered reasonable in the eyes of the law, is determined by balancing two important interests. On one side of the scale is the intrusion on an individual's Fourth Amendment rights. On the other side of the scale are legitimate government interests, such as public safety.").

165. *Terry*, 392 U.S. at 27.

166. *Id.* at 11 n.5.

167. Warden v. Hayden, 387 U.S. 294, 298–99 (1967).

168. *See* Miranda v. Arizona, 384 U.S. 436, 467–68 (1966).

169. *See* New York v. Quarles, 467 U.S. 649, 654–56 (1984).

170. Edwards v. Arizona, 451 U.S. 477, 485–86 (1981) ("The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation.").

171. *Quarles*, 467 U.S. at 656.

situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[172]

As a final example, the Eighth Amendment's qualified right to bail is limited by the public threat doctrine.[173] While the right to bail is typically constitutionally protected,[174] pretrial detention may be imposed when the accused "presents an identified and articulable threat to an individual or the community."[175] Further still, the public safety justification for pretrial detention was extended to justify conditions of release.[176] Accordingly, a court may impose release conditions that curtail a defendant's liberty interest under the justification of maintaining public safety.[177] As such, the Supreme Court has been "unwilling to say" that this "primary concern of every government—a concern for the safety and indeed the lives of its citizens—on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment."[178]

In sum, the Court has countlessly invoked the public safety principle to curtail constitutional rights in response to perceived threats of harm, and absent any historical analogue inquiry as demanded by *Bruen*. Crucially, while public safety has not so expressly informed Second Amendment jurisprudence, the public safety principle has implicitly justified every doctrine limiting the Second Amendment. As articulated in *District of Columbia v. Heller*,[179] the limitations on the Second Amendment can be summarized as follows. First, the right to keep and bear arms is limited to "law-abiding, responsible citizens."[180] Second, it is limited by the "prohibitions on the possession of firearms by felons and the mentally ill."[181] Third, it is limited by "laws forbidding the carrying of firearms in sensitive places."[182] Lastly, the right to keep and bear arms is limited by "prohibiting the carrying of 'dangerous and unusual weapons.'"[183]

Accumulating these doctrines, the Court has long acknowledged that the right to keep and bear arms does not extend to felons, the mentally ill, sensitive places, or dangerous and unusual weapons; and it is instead reserved for responsible, law-abiding citizens.[184] Plainly, these doctrines demonstrate the Court's longstanding awareness of the innate threat to public safety that is married to

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172. *Id.* at 657.
173. *See* United States v. Salerno, 481 U.S. 739, 755 (1987).
174. *See* Harris v. United States, 404 U.S. 1232, 1232 (1971) ("While there is no automatic right to bail after convictions, '[t]he command of the Eighth Amendment that "Excessive bail shall not be required . . ." at the very least obligates judges passing upon the right to bail to deny such relief only for the strongest of reasons.'" (citations omitted)).
175. *Salerno*, 481 U.S. at 751.
176. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3967(B)(4) (2024).
177. *Id.* § 13-3967(D)(4)–(5).
178. *Salerno*, 481 U.S. at 755.
179. 554 U.S. 570 (2008).
180. *Id.* at 635.
181. *Id.* at 626.
182. *Id.*
183. *Id.* at 627.
184. *See supra* notes 180–83 and accompanying text.

firearms in certain contexts.[185] Importantly, *Heller* advised that the doctrines limiting the Second Amendment were only examples and did "not purport to be [an] exhaustive" list.[186] Thus, the Court left open the door to other Second Amendment limiting doctrines that are similarly rooted in the justification of public safety. It is not too late to craft such a doctrine after *Bruen*,[187] but the Court must be prepared to loosen its grip on historical analogical reasoning.

III. A MORE NUANCED APPROACH

As alluded to by many courts, "lower courts would benefit from some modification or clarification of the *Bruen* test."[188] Having identified the flaws of analogical reasoning and outlined the Court's principled approach to constitutional interpretation,[189] this Note proposes modifying *Bruen*'s historical analogue inquiry by adopting a "nuanced approach" as licensed by *Bruen*.[190] In short, *Bruen*'s inquiry must be modified by taking steps away from historical analogical reasoning and toward the principled approach.

Crucially, the nuanced approach proposed herein invokes the historical principle of public safety,[191] which resolves the justification for historical firearm regulations or the "why" of *Bruen*.[192] Further, identifying a historical tradition of disarming and imprisoning individuals and groups; prohibiting certain arms; and imposing time, place, and volume restrictions on arms[193] resolves the burden

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185. While the Court never expressly cites public safety to justify limiting the right to keep and bear arms, the need to uphold public safety is the common denominator of all doctrines limiting the Second Amendment. *See, e.g.*, *Heller*, 554 U.S. 570 (mentioning "safety" 17 times); McDonald v. City of Chicago, 561 U.S. 742 (2010) (mentioning "safety" 17 times); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (mentioning "safety" 17 times).

186. *Heller*, 554 U.S. at 627 n.26.

187. The validity of *Heller*'s presumptive doctrines become uncertain after *Bruen*. *See, e.g.*, United States v. Duarte, 101 F.4th 657, 668 (9th Cir.), *vacated*, 108 F.4th 786 (9th Cir. 2024) (mem.) ("'Simply repeat[ing] *Heller*'s language' about the 'presumptive[] lawful[ness]' of felon firearm bans will no longer do after *Bruen*." (alterations in original)). However, adopting the proposed nuanced approach would not disturb Second Amendment precedent, including *Heller*. *See infra* Section III.B.

188. United States v. Hill, 703 F. Supp. 3d 729, 743 n.22 (E.D. Va. 2023), *aff'd*, No. 24-4194, 2025 WL 314159 (4th Cir. Jan. 28, 2025); *see also* United States v. Claybrooks, 90 F.4th 248, 256 (4th Cir. 2024) ("The contours of *Bruen* continue to solidify in district and appellate courts across the nation, and yet there is no consensus."); United States v. Quiroz, 629 F. Supp. 3d 511, 527 (W.D. Tex. 2022) ("[T]he new standard creates unknown unknowns, raising many questions. This Court does not know the answers . . . ."); United States v. Combs, 654 F. Supp. 3d 612, 631 (E.D. Ky. 2023), *appeal dismissed*, No. 23-5153, 2023 WL 9785711 (6th Cir. Sept. 12, 2023), *rev'd*, No. 23-5121, 2024 WL 4512533 (6th Cir. Oct. 17, 2024) (explaining how "until the appellate courts have a chance to clarify *Bruen*'s new framework, it falls on district courts to try to find some principled way to apply *Bruen*'s framework").

189. *See supra* Parts I–II.

190. *Bruen*, 597 U.S. at 27.

191. *See supra* Part II.

192. *See infra* Section III.A.

193. *See infra* Section III.A.

imposed by historical firearm regulations or the "how" of *Bruen*. In turn, the nuanced approach answers *Bruen*'s "how" and "why" but without duplicative, case-by-case historical analogical reasoning that breeds inconsistency, subjectivity, and impracticality, all that ultimately frustrate constitutional fidelity.

A. Bruen*'s "How" and "Why" Answered by the Nuanced Approach*

Since *Rahimi*, courts have continued their rigorous and competing applications of *Bruen*.[194] Notably, while there is discord in the judicial analysis of *Bruen*, there is commonality in the historical firearm regulations being cited. Briefly canvassing commonly cited historical firearm regulations identifies a non-exhaustive list of categorical burdens historically imposed upon the Second Amendment.[195] Importantly, this brief canvass demonstrates two points. First, the most significant burdens of disarmament and imprisonment were habitually imposed upon individuals and groups by historical firearm regulations. Second, public safety was a universal justification for historical firearm regulations. Together, these observations resolve *Bruen*'s "how" and "why" to provide a nuanced approach. So long as modern firearm regulations impose burdens not beyond those historically imposed (the "how") and are similarly justified by public safety (the "why"), they are commensurate with our historical understanding of the Second Amendment.

First, there is a historical tradition of disarming and imprisoning individuals who threatened public safety.[196] As observed in *Rahimi*,[197] surety laws and going-armed laws disarmed and imprisoned individuals who posed threats of violence.[198] Similarly, the common law offense of affray disarmed and imprisoned individuals

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194. *See* Andrew Willinger, Rahimi *and the Trend of Excessive Concurrences*, DUKE CTR. FOR FIREARMS L. (Sept. 18, 2024), https://firearmslaw.duke.edu/2024/09/rahimi-and-the-trend-of-excessive-concurrences [https://perma.cc/L8NS-UK54] ("In the lower courts, *Rahimi* has not changed much and perhaps even deepened judicial division about the constitutionality of certain types of gun laws.").

195. For a more exhaustive inquiry into historical firearm regulations, see generally Saul Cornell, *The Long Arc of Arms Regulation in Public: From Surety to Permitting, 1328–1928*, 55 U.C. DAVIS L. REV. 2545 (2022), and NEW HISTORIES OF GUN RIGHTS AND REGULATION: ESSAYS ON THE PLACE OF GUNS IN AMERICAN LAW AND SOCIETY (Joseph Blocher et al. eds., 2023) [hereinafter NEW HISTORIES OF GUN RIGHTS AND REGULATION].

196. *See generally* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249 (2020).

197. United States v. Rahimi, 602 U.S. 680, 698 (2024) ("Taken together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed.").

198. *See, e.g.*, An Act for Punishing Criminal Offenders ch. 2, 1795 Mass. Acts 436 (subjecting those who "go armed offensively, to the fear or terror of the good citizen" to arrest and imprisonment); THOMPSON & STEGER, *supra* note 66, at 90 (quoting Act 1801, ch. 22 § 6 (subjecting those who "go armed to the terror of the people" and "privately carry[ing] any . . . pistol . . . to the fear or terror of any person" to arrest and imprisonment)); Act of 1887, ch. 6, § 983, Wyo. Sess. Laws 297, https://archive.org/details/esrp681517281/page/297/mode/2up [https://perma.cc/W4F4-CM4K] (subjecting those who "exhibit any kind of fire-arms . . . in a rude, angry or threatening manner" to imprisonment).

who threatened harm to others even when "there [was] no actual violence."[199] Some states disarmed individuals who were transients and subjected them to felony-level imprisonment.[200] Individuals deemed "disaffected" were presumed untrustworthy, thus dangerous, and were also disarmed.[201]

Second, there is a historical tradition of disarming groups who threatened public safety and imprisoning those who armed them.[202] Indigenous groups were historically disarmed, where such groups were deemed dangerous in light of colonial conquest.[203] Similarly, slaves were categorically disarmed due to the threat they posed to their oppressors.[204] Additionally, those who armed Indigenous groups or slaves were imprisoned and subject to corporal punishment.[205] Beyond categorically disarming subjugated groups,[206] historical riot statutes disarmed groups of typically

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199. RICHARD BURN, THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE, HIGH-SHERIFFS, UNDER-SHERIFFS, CORONERS, CONSTABLES, GAOLERS, JURY-MEN, AND OVERSEERS OF THE POOR 10–12 (1788), link.gale.com/apps/doc/CB0127002595/ECCO?u=uarizona_main&sid=summon&xid=b3962365&pg=25 [https://perma.cc/T5LV-4YDX] (providing historical commentary on the common law offense of affray).

200. *See, e.g.*, An Act to Punish Tramps, ch. 38, § 2, 1878 N.H. Laws 170 ("Any tramp who shall . . . be found carrying any fire-arm or other dangerous weapon . . . shall be punished by imprisonment at hard labor in the state-prison not more than two years.").

201. *See, e.g.*, Act of 1779, Pa. Laws 198, ch. 101, § 4, https://firearmslaw.duke.edu/laws/1779-pa-laws-193 [https://perma.cc/P2CD-ZCEF] ("[I]t is very improper and dangerous that persons disaffected to the liberty and independence of this state shall possess or have in their keeping, or elsewhere, any firearms, or other weapons used in war, or any gun powder . . . .").

202. *See generally* Joseph Blocher & Caitlan Carberry, *Historical Gun Laws Targeting "Dangerous" Groups and Outsiders*, *in* NEW HISTORIES OF GUN RIGHTS AND REGULATION, *supra* note 195, at 131, 131–48.

203. *See* Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607–1794*, 16 LAW & HIST. REV. 567, 574 (1998) (discussing how many "legislatures passed universal bans on Indians purchasing or carrying firearm" in response to "Indians resist[ing] the conquest of their land").

204. *Id.* at 576 (discussing how, compared to indentured servants, "[i]n several of the colonies slaves and free blacks posed an even greater danger to the elite," which resulted in a "a complete prohibition of gun ownership strictly enforced" against slaves).

205. *See, e.g.*, Act of Oct. 22, 1763, ch. 506, § 1, Pa. Laws 319 (instructing that any person who armed indigenous groups "shall . . . be whipped with thirty-nine lashes on his bare back, well laid on, and be committed to the common goal [jail]"); An Act Making It Penal to Sell or Furnish Slaves of Freepersons of Color with Weapons of Offense and Defense, tit. 19, No. 64, § 1, 1860 Ga. Laws 56 ("[A]ny person . . . who shall sell or furnish to any slave or free person of color, any gun, pistol, bowie knife, slung shot, sword cane, or other weapon used for the purpose of offence or defense, shall . . . [be] imprisoned in the common Jail . . . ."); An Act to Prohibit the Sale of Arms and Ammunition to Indians, ch. 38, § 1, 1853 Or. Laws 257 (imposing misdemeanor liability if any "other person than an Indian shall sell, barter, or give to any Indian in this territory any gun, rifle, pistol or other kind of firearms, any powder, lead, percussion caps or other ammunition whatever").

206. This Note acknowledges that disarmament of certain minority groups was intended to disempower them, which is beyond its scope. For background scholarship, see generally Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. F. 537 (2022).

three or more who threatened violence.[207] Felony-level imprisonment was also sometimes imposed upon rioting groups.[208] Further, some states categorically disarmed minors and imprisoned those who furnished arms to minors,[209] as minors were historically understood to lack judgment and thus threaten public safety in the context of bearing arms.[210] As a final example, during a period of religious persecution, Catholics were deemed dangerous and were similarly categorically disarmed.[211]

Third, there is a historical tradition of regulating what arms could be possessed, how they could be stored, and when and where arms could be used to ensure public safety.[212] Certain arms that were linked to violent crimes were historically prohibited,[213] as were certain types of arms cartridges.[214] Possessing or

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207. *See, e.g.*, Act of June 14, 1852, ch.6, § 4, 1852 Ind. Acts 424 (subjecting rioters to imprisonment for any act committed "in a violent and tumultuous manner" and explaining in the annotations that such acts include "the show of armor" irrespective of whether "personal violence should have been committed").

208. *See, e.g.*, CAL. PENAL CODE tit. XI, §§ 404–05 (1881), https://heinonline.org/HOL/P?h=hein.sstatutes/pfornte0001&i=169 [https://perma.cc/WL4T-D367] (subjecting rioters who "disturb[] the public peace" or "threat[en] to use such force or violence, if accompanied by immediate power of execution" to up to two years of imprisonment).

209. *See, e.g.*, Act of Feb. 2, 1856, No. 26, § 1, 1856 Ala. Laws 17, https://archive.org/details/alabama-acts-1855-1856/Acts_1855_1856/page/n15/mode/2up [https://perma.cc/R294-PZ6M] (prohibiting furnishing "to any male minor, a bowie knife, . . . or air gun or pistol"); Act of Feb. 4, 1881, ch. 3285, Fla. Laws 87 (prohibiting furnishing "any minor under sixteen years of age any pistol . . . or a gun or rifle used for hunting, without the permission of the parent of such minor, or the person having charge to such minor").

210. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES, *452 ("Infants have various privileges, and various disabilities: but their very disabilities are privileges; in order to secure them from hurting themselves by their own improvident acts."); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 233 (3d ed. 1836) (noting minors' varying "capacity to discern right and wrong"). The age of majority has historically varied across jurisdictions. *See* BLACKSTONE, *supra*, at *451–52; KENT, *supra*, at 232–33.

211. *See, e.g.*, An Act for Disarming Papists, ch. 4, §§ 1–9, 1756 Va. Acts 35, https://firearmslaw.duke.edu/laws/an-act-for-disarming-papists-and-reputed-papists-refusing-to-take-the-oaths-to-the-government-ch-4-1-9-va-code-franklin-press-1820-law-passed-1756 [https://perma.cc/5YLP-EB58] (codifying that "it is dangerous at this time to permit Papists to be armed" and thus authorizing their disarmament); *id.* (disarming Papists where "it is dangerous at this time to permit Papists to be armed").

212. *See also* Mark Frassetto, Firearms and Weapons Legislation up to the Early Twentieth Century 7–8, 34–36 (Jan. 15, 2013), https://ssrn.com/abstract=2200991 [https://perma.cc/8LRG-X2W2].

213. *See, e.g.*, Act of 1901, ch. 19, § 1003, 1901 Kan. Sess. Laws 233 ("The council may prohibit and punish the carrying of fire arms or other deadly weapons, concealed or otherwise . . . .").

214. *See, e.g.*, Act of Apr. 1, 1881, ch. 96, § 1909, 1881 Ark. Acts 192 ("Any person who shall sell, barter or exchange, . . . or in any manner furnish to any person . . . any kind of cartridge for any pistol, or any person who shall keep any such arms or cartridges for sale, shall be guilty of a misdemeanor.").

furnishing a prohibited arm often amounted to imprisonment.[215] Further, the storage of gunpowder was regulated to limit the risk of explosions.[216] Historical regulations also restricted when a firearm could be used to prevent false alarms of invasion, and imprisonment and corporal punishment were imposed for violations.[217] Finally, many states historically prohibited firing arms in heavily populated public areas to preserve public safety.[218]

In sum, while not an exhaustive list, this brief canvass alone answers the "how" of *Bruen* by demonstrating that historical firearm regulations imposed burdens spanning from disarming and imprisoning individuals and groups and prohibiting certain arms, to a range of lesser burdens including time, place, and volume restrictions.[219] It further answers the "why" of *Bruen* by recognizing that historical firearm regulations were universally justified by the interest of public safety.[220] So long as modern firearm regulations are similarly justified by an articulable threat to public safety and impose burdens not beyond those historically imposed, they "comport with the principles underlying the Second Amendment."[221] The Court need look no further to uphold firearm regulations under the Second Amendment.

Assuredly, while the proposed nuanced approach may feel spacious, this is only compared to *Bruen*'s exacting (and often unattainable[222]) historical analogical

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215. *See, e.g.*, Acts of the General Assembly of Virginia, ch. 101, § 1, 1838 Va. Acts 76 (imposing a fine or imprisonment for "any person [who] shall hereafter habitually or generally keep or carry about his person any pistol, dirk, bowie knife, or any other weapon of the like kind, from this use of which the death of any person might probabily [sic] ensue"); Tenn. Act of Jan. 27, 1838, ch. 137, § 1, 1838 Tenn. Pub. Acts 200 ("[A]ny merchant, . . . shall sell, or offer to sell . . . any Bowie knife or knives, or Arkansas tooth picks . . . such merchant shall be guilty of a misdemeanor and shall be fined . . . and imprisoned.").

216. *See, e.g.*, Act of 1786, 1786 N.H. Laws 383–84 (imposing a fine on an individual who "shall keep in any dwelling-house, store or other buildings . . . more than ten pounds of gun-powder at any one time"); Act of 1806, § 3, 1806 Ky. Acts 122 (prohibiting "any quantity of gun powder which might in case of fire be dangerous").

217. *See, e.g.*, Act of 1714, 1714 Conn. Acts 3 (subjecting to imprisonment or corporal punishment those who, without cause, create "any Alarm, by firing any gun or guns or otherwise" at any plantation "at any time between the shutting in the evening or break of the Day"); Act of 1759, 1759 N.H. Laws 115 ("No person . . . shall during the time of war . . . discharge or shoot off any gun or guns after sun-setting, or before the sun rising, unless in case of alarm, approach of an enemy, or other necessary defense.").

218. *See, e.g.*, Act of 1862, ch. 49, § 9, 1862 N.C. Sess. Laws 60 (prohibiting "the firing of guns, pistols, crackers, gun powder or other explosive, combustible or dangerous materials in the streets, public grounds, or elsewhere within the city").

219. *See supra* notes 196–218 and accompanying text.

220. *See supra* notes 196–218 and accompanying text.

221. United States v. Rahimi, 602 U.S. 680, 692 (2024).

222. *See, e.g.*, United States v. Hill, 703 F. Supp. 3d 729, 746 (E.D. Va. 2023), *aff'd*, No. 24-4194, 2025 WL 314159 (4th Cir. Jan. 28, 2025) (referring to *Bruen* when concluding that "when a district court is called (after a plain text analysis) to turn its analysis into an entirely historical one, the judgments morph from nuanced to, essentially, unattainable"); United States v. Jackson, 661 F. Supp. 3d 392, 407 (D. Md. 2023), *appeal*

reasoning. First, as surveyed in Part II, the public safety principle has countlessly curtailed constitutional rights without the complication of historical reasoning by analogy. Such doctrines offer flexibility through the principled approach to achieve both constitutional fidelity and common-sense outcomes. Similarly, through prioritizing historical principle over pedantic analogical reasoning, the nuanced approach is "consistent with the principles that underpin our regulatory tradition,"[223] thus achieving constitutional fidelity, while facilitating the very "common sense" outcomes endorsed by *Rahimi*.[224] Thus, the nuanced approach aligns with, and is no more spacious than, the long line of principled doctrine stemming from the Court.

Second, any flexibility in the nuanced approach comports with the need to "apply[] faithfully the balance struck by the founding generation to modern circumstances," as acknowledged by *Bruen* and *Rahimi*.[225] Thus, where the Founders urged that "[t]he safety of the people doubtless has relation to a great variety of circumstances and considerations," what is considered an articulable threat to public safety to justify a modern firearm regulation under the nuanced approach must be entrusted to the judgment of two branches. First, the bicameral legislature, informed by public opinion, must be trusted to enact bipartisan "common sense" firearm regulations.[226] Second, the judiciary must be trusted to strike down regulations that do not comport with the historical traditions underlying the Second Amendment identified here and more exhaustively by a plethora of other sources.[227] Only with such an approach can we ensure adherence to *Bruen*'s instruction that the "Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated."[228]

Crucially, more exacting inquiries into the justifications and burdens of firearm regulations upon the Second Amendment do not foster constitutional fidelity but frustrate it. Constitutional fidelity is not achieved by individualized analogizing of modern and historical firearm regulations because each responded to materially different worlds.[229] As such, the specific justifications or burdens imposed by

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filed (4th Cir. Feb. 28, 2024) (concluding that "the conflicting lower court decisions that have applied *Bruen*'s test . . . give reason to suggest that a history-only test is not readily administrable").

223. *Rahimi*, 602 U.S. at 692.

224. *Id.* at 698.

225. *Id.* at 692 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 29 n.7 (2022)).

226. As endorsed by Rahimi. *See id.* at 698.

227. *See supra* note 195.

228. *Bruen*, 597 U.S. at 28 (citation omitted). This notion is supported by historical sources, too. *See* MADISON'S JOURNAL, *supra* note 128, at 441 ("We should consider that we are providing a Constitution for future generations, and not merely for the peculiar circumstances of the moment.").

229. *See* Hanson v. District of Columbia, 671 F. Supp. 3d 1, 16–17 (D.D.C. 2023) ("*Bruen* acknowledged that in today's world, centuries after the ratification of the Second Amendment, it is not unusual to see 'modern regulations that were unimaginable at the founding.' Thus, 'cases implicating unprecedented societal concerns or dramatic technological changes' require 'nuanced' consideration." (citation omitted)); *see also* United States v. Kelly, No. 3:22-CR-00037, 2022 WL 17336578, at *2 (M.D. Tenn. Nov. 16, 2022)

historical firearm regulations say more about the world they responded to and less about what may or may not constitute a constitutionally faithful firearm regulation today.[230] Instead, focusing on the overarching justification of public safety and the categorical burdens imposed by historical firearm regulations reveals the outer boundaries of the Second Amendment as it was historically understood. To inquire any further is to supplant principle with pedanticism.

B. Defending the Nuanced Approach

Through the proposed nuanced approach, the historical principle of public safety justifies the Founding Era tradition of disarmament, imprisonment, and a span of lesser restrictions on arms. At first blush, such an unconstrained approach may appear antagonistic to *Bruen*, *Rahimi*, and constitutional fidelity. To the contrary, the nuanced approach reconciles with all three.

First, the nuanced approach does not abandon *Bruen*'s historical analogue inquiry. The "how" and the "why" at the heart of *Bruen*[231] are retained—the Second Amendment may be burdened by disarmament, imprisonment, or any lesser restriction on gun possession (the "how") only when such a burden is justified by an articulable threat to public safety (the "why"). The "how" and the "why" are reached, however, without requiring case-by-case historical analogical reasoning, thus stripping from Second Amendment challenges much of the inconsistency, subjectivity, and impracticability that emerges from *Bruen*'s test.

Second, the nuanced approach does not disturb *Rahimi*.[232] While *Rahimi* offered a largely on-point historical analogue for § 922(g)(8) and conducted a more exacting application of *Bruen* than obligated by the nuanced approach,[233] the Court acknowledged that *Rahimi* was an "easy case."[234] Crucially, *Rahimi* re-urged *Bruen*'s caution that a "more nuanced approach" would be needed in future applications.[235] As courts are faced with challenges to modern firearm regulations that implicate "unprecedented societal concerns" and "dramatic technological

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("The modern world is different from the world of the founding, not just in the facts of everyday life but also in the basic norms and assumptions that underlie policymaking."); United States v. Neal, 715 F. Supp. 3d 1084, 1103 (N.D. Ill. 2024) ("Until the Supreme Court [modifies *Bruen*], . . . it must reckon with the knowledge that every day that *Bruen* requires courts to give primacy to the 18th-century history of gun regulation over the present-day consequences of gun violence is another day that the people of this Nation will bear the cost of its constitutional misadventure . . . .").

230. As an example, consider the historical tradition of prohibiting firing a weapon on the Sabbath. Act of March 3, 1642, Act XXXV, 1642 Va. Acts 261 https://archive.org/details/statutesatlargeb01virg/page/n5/mode/2up [https://perma.cc/TA8T-R54K] ("Be it further enacted and confirmed, for the better observation of the Sabbath and for the restraint of diverse abuses committed in the colony by unlawful shooting on the Sabbath day as aforesaid . . . .").

231. *Bruen*, 597 U.S. at 29.

232. United States v. Rahimi, 602 U.S. 680 (2024).

233. *See id.* at 693–99.

234. *Id.* at 703 (Sotomayor, J., concurring) ("Even under *Bruen*, this is an easy case.").

235. *Bruen*, 597 U.S. at 27.

changes,"[236] it will become increasingly difficult to identify a historical analogue as plainly as in *Rahimi*, and the "nuanced approach" becomes increasingly necessary. Such an approach does not disturb *Rahimi*, but merely subsumes it, as evolving doctrine naturally does.

Third, the nuanced approach shows greater constitutional fidelity by focusing on the underlying historical principle of public safety that has informed the outer boundaries of so many constitutional rights.[237] In contrast, case-by-case analogical reasoning belies constitutional fidelity through its malleability that allows subjectivity to permeate Second Amendment challenges, as well as the inconsistent results that manifest through competing broad and narrow analogies.[238] Further, that a modern regulation may comport with the principles underlying the Second Amendment, yet lacks a historical analogue as a result of responding to modern circumstances not within the purview of the Founding Era, underscores the falsehood of historical analogical reasoning.[239] As such, constraint by way of analogical reasoning does not equate to constitutional fidelity but instead threatens to distort our present-day understanding of the Second Amendment's historical meaning. Adherence to long-enduring constitutional principles such as that of public safety promises to keep enumerated rights, including the right to keep and bear arms, within the historical context in which they were originally understood.

To be clear, this Note does not disavow analogical reasoning in its entirety. Reasoning by analogy has been widely employed in constitutional interpretation.[240] But analogical reasoning has long been treated as an interpretative tool, not a standalone test. To hinge the constitutionality of modern firearm regulations on analogies as pedantic as those exacted by *Bruen* takes analogical reasoning too far, which ultimately loses sight of the historical principle of public safety that has informed so much constitutional doctrine and demonstrably underlies the Second Amendment.[241]

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236. *Id.*

237. *See supra* Part II.

238. *See, e.g.*, Range v. Att'y Gen., 69 F.4th 96, 116 (3d Cir. 2023), *vacated sub nom.* Garland v. Range, 144 S. Ct. 2706 (2024) (mem.) (Schwartz, J., dissenting) (arguing that the majority's ruling was "not cabined in any way" and "reject[ed] all historical support for disarming any felon," which resulted in "a broad ruling" that was "contrary to both the sentiments of the Supreme Court and our history").

239. *See, e.g.*, Mintz v. Chiumento, 724 F. Supp. 3d 40, 64 (N.D.N.Y. 2024) (noting that, in consideration of a modern regulation prohibiting firearms at summer camps, "any Second Amendment analysis regarding summer camps must be a flexible one, recognizing that summer camps as an institution were not substantially present during the historical period that the Court must consider under *Bruen*").

240. *See* KENT GREENAWALT, *Reasoning by Analogy*, *in* STATUTORY AND COMMON LAW INTERPRETATION 217, 217–43 (2013).

241. *See supra* notes 180–85 and accompanying text (identifying how Second Amendment doctrines thus far all comport with the public safety principle); *see also* United States v. Rahimi, 602 U.S. 680, 692 (2024) (explaining "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition" and that "[t]he law must comport with the principles underlying the Second Amendment." (citing *Bruen*, 597 U.S. at 26–31)).

CONCLUSION

In its pursuit of constitutional fidelity, *Bruen* resorts to analogical pedanticism. Contrary to *Bruen*'s demand for exacting analogical reasoning, however, the Court has long turned to flexible constitutional principles to determine the scope of constitutional rights.[242] Notably, *Bruen* itself licensed a "more nuanced approach"[243] when future applications of its historical analogue inquiry demand as such. This Note contends that such nuance can be found by invoking the constitutional principle of public safety to delineate the outer boundaries of the Second Amendment. In doing so, history reveals a Founding Era tradition of disarmament, imprisonment, and a span of lesser restrictions on gun possession in response to an articulable threat to public safety.

This nuanced approach fits within history and tradition, as commanded by *Bruen*, but it circumvents *Bruen*'s requirement of identifying a historical analogue on a case-by-case basis.[244] In turn, the nuanced approach negates the inconsistency, subjectivity, and impracticability that permeate *Bruen*'s historical analogue inquiry, all that ultimately attenuate Second Amendment challenges from constitutional fidelity. Crucially, spearheading *Bruen*'s test with the public safety principle comports with the Court's principled approach, which focuses on the underlying historical principles of any given constitutional provision and faithfully applies those principles to our modern society, as endorsed by *Rahimi*.[245] As such, principle must supplant pedanticism to restore the Second Amendment to its historical and traditional meaning.

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242. *See supra* notes 157–78 (discussing cases that apply constitutional principles).

243. *Bruen*, 597 U.S. at 27.

244. *See id.* at 30 ("[T]he government [must] identify a well-established and representative historical analogue . . . ." (emphasis omitted)).

245. *Rahimi*, 602 U.S. at 692.