BY SCALPEL OR CHAINSAW: THE STATUS OF PRE-*BRUEN* CASE LAW IN THE LOWER COURTS

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ABSTRACT

The Second Amendment is in a state of flux. After the U.S. Supreme Court decided District of Columbia v. Heller*, the lower federal courts coalesced around a means-end scrutiny test to judge the constitutionality of gun control laws. But enter* New York State Rifle & Pistol Association v. Bruen*. The analysis now centers around a test that focuses on text, history, and tradition. Courts have a new test with few guidelines about how to apply it.*

*Given the lack of guidance, courts have struggled to answer a key question: What pre-*Bruen *case law is still valid? Utilizing the undocumented immigrant prohibitor, 18 U.S.C. § 922(g)(5), this Note answers that question. Before* Bruen*, eight federal courts of appeals had the opportunity to address the constitutionality of § 922(g)(5), and all of them upheld the statute using three different methods. After* Bruen*, some courts have treated each method differently, demonstrating the particularity with which they analyze* Bruen *and its implications—what this Note calls the "scalpel approach." Others have abrogated all pre-*Bruen *precedent, thus starting the Second Amendment analysis anew—the "chainsaw approach." In the end, this Note argues that the scalpel approach better reflects core judicial values like uniformity and institutional legitimacy and thus is the correct path for courts applying* Bruen *to take.*

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INTRODUCTION

> [T]he Court's unanswered question is whether [*New York State Rifle & Pistol Association v. Bruen*][1] demands lower courts manicure the Second Amendment's landscape by *scalpel or chainsaw*.[2]

Heriberto Carbajal-Flores had achieved the American dream. He had lived in Chicago since 2002, almost twenty years.[3] He received his education at local Chicago schools, married a U.S. citizen, and had three children, all of whom are also citizens.[4] And he was employed full-time as a carpenter, making enough to support his wife, three children, and mother.[5] But in May 2020, when protests erupted across the nation in the aftermath of the murder of George Floyd,[6] his world turned upside down.

Mr. Carbajal-Flores was a member of his neighborhood watch.[7] Like the Supreme Court had instructed him to do in *District of Columbia v. Heller*,[8] he took up arms to "defend his community."[9] When a business in his neighborhood was looted, he stood watch to prevent further damage.[10] But because he was an undocumented immigrant, possessing a firearm was illegal.[11] This is despite the fact

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

2. United States v. Perez-Gallan, 640 F. Supp. 3d 697, 698 (W.D. Tex. 2022) (emphasis added).

3. Motion for Dismissal of Indictment at 1, United States v. Carbajal-Flores, No. 20-613 (N.D. Ill. May 3, 2021).

4. *Id.* at 1, 4.

5. *Id.* at 2.

6. Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020, 6:49 AM), https://time.com/5847967/george-floyd-protests-trump [https://perma.cc/ELN4-GWES].

7. Motion for Dismissal of Indictment, *supra* note 3, at 3.

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

9. Motion for Dismissal of Indictment, *supra* note 3, at 3; *see also Heller*, 554 U.S. at 628 ("[T]he inherent right of self-defense has been central to the Second Amendment right.").

10. Motion for Dismissal of Indictment, *supra* note 3, at 3.

11. *Id.* at 4; *see* 18 U.S.C. § 922(g)(5) (making it illegal for an "alien . . . illegally or unlawfully in the United States" to possess a firearm). Although the statute, 18 U.S.C. § 922(g)(5), references illegal "alien[s]," this Note uses "undocumented immigrant" or "undocumented persons" to avoid the pejorative implications of the word "alien." *See* Gerald M. Rosenberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 303 ("With regard to the possible stigmatizing effect of the classification, the aliens' claim is a good deal stronger. The very word, 'alien,' calls to mind someone strange and out of place, and it has often been used in a distinctly pejorative way."). However, quotes from other sources are not altered to reflect this stylistic choice.

that he had lived in the United States for almost twenty years, was in the process of becoming a legal permanent resident, and was eligible to stay in the country through the Deferred Action for Childhood Arrivals ("DACA") program.[12]

Mr. Carbajal-Flores's case is largely governed by the Second Amendment, an area of law that is at a moment of rapid change. Before the Supreme Court decided *Bruen* during the 2022 Term, the courts of appeals had largely coalesced around a means-end scrutiny test.[13] Under the *Heller* test, a court first had to answer whether the Second Amendment provided coverage to the relevant person, arm, and/or activity.[14] If the Second Amendment provided coverage, then intermediate or strict scrutiny applied.[15] *Bruen* expressly repudiated such an analysis and replaced it with a test based in text, history, and tradition.[16] Now, to uphold modern legislation implicating the Second Amendment, the court must go back in history and find a "well-established and representative historical analogue."[17] Or, put differently, "if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations."[18] It is very unusual for the Supreme Court to suddenly disrupt circuit consensus and impose a new test,[19] and courts have been delegated the task of answering "the many unanswered questions left in *Bruen*'s wake."[20]

The judicial response to this sudden change has been overwhelming. Lower courts have a brand-new test to apply without clear guidelines about how to do so. One judge noted that "one could easily imagine a scenario where separate courts can come to different conclusions on a law's constitutionality, but both courts would be right

12. Motion for Dismissal of Indictment, *supra* note 3, at 1–2.

13. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022).

14. *See infra* notes 38–41.

15. *See infra* note 42 and accompanying text.

16. *See Bruen*, 597 U.S. at 17 ("[T]he government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.").

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

18. United States v. Rahimi, 602 U.S. 680, 692 (2024). For example, laws from the Founding demonstrate that "[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* at 698. Therefore, a federal statute prohibiting firearms possession by someone found by a court to present a threat to the physical safety of an intimate partner is constitutional. *Id.*

19. *Bruen*, 597 U.S. at 103 (Breyer, J., dissenting).

20. United States v. Sing-Ledezma, 706 F. Supp. 3d 650, 655 (W.D. Tex. 2023).

under *Bruen*."[21] Another pointed out that "Second Amendment jurisprudence now focuses a lens entirely on the choices made in a very different time, by a very different American people."[22] It is clear that "courts, operating in good faith, are struggling at every stage of the *Bruen* inquiry."[23] Simply, "there is little method to *Bruen*'s madness."[24]

Likewise, scholars have been quick to criticize the new test. Commentators have called *Bruen* a "constitutional kaleidoscope,"[25] "a problematic shift in Second Amendment doctrine,"[26] and an opinion that "turns outcomes on ad hoc blips of historical data and embodies no coherent or comprehensible objective or principal."[27] There is no shortage of criticism of the Court's decision.

The judicial and scholarly critique is all well and good, but a more pressing question remains for on-the-ground advocates: What pre-*Bruen* precedent is still valid? Using the "undocumented immigrant prohibitor," 18 U.S.C. § 922(g)(5), this Note analyzes how courts after

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21. United States v. Perez-Gallan, 640 F. Supp. 3d 697, 713 (W.D. Tex. 2022). For example, Fourth Circuit Chief Judge Albert Diaz, concurring in an en banc Second Amendment case, commented that both the majority and dissenting opinions "[were] written by a thoughtful colleague, who engaged in an exhaustive sweep of history, only to reach diametrically opposed conclusions about what that history means." Bianchi v. Brown, 111 F.4th 438, 474 (4th Cir. 2024) (en banc) (Diaz, J., concurring). Likewise, a district judge, acknowledging that she reached the opposite conclusion about the constitutionality of § 922(g)(5) as another judge, noted the "all-too-real concern that judges looking at the same history (or lack thereof) are now forced to make consequential pronouncements on historical 'truths,'" but that "the chasm between these 'truths' can be vast." United States v. Rebollar Osorio, No. 2:24-cr-00040-NT, 2024 WL 4476005, at *13 n.21 (D. Me. Oct. 11, 2024) (quoting United States v. Pierret-Mercedes, No. 22-430 (ADC), 2024 WL 1672034, at *24 (D.P.R. Apr. 18, 2024)).

22. Worth v. Harrington, 66 F. Supp. 3d 902, 926 (D. Minn. 2023). *See generally* Clara Fong, Kelly Percival & Thomas Wolf, *Judges Find Supreme Court's* Bruen *Test Unworkable*, BRENNAN CTR. FOR JUST. (June 26, 2023), https://www.brennancenter.org/our-work/research-reports/judges-find-supreme-courts-bruen-test-unworkable [https://perma.cc/PWG7-BKQR] (collecting quotes from judges commenting on their difficulty applying the *Bruen* test).

23. United States v. Daniels, 77 F.4th 337, 358 (5th Cir. 2023) (Higginson, J., concurring); *see also* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 78 (2023) [hereinafter Charles, *Dead Hand of a Silent Past*] ("[L]ower courts have received *Bruen*'s message to supercharge the Second Amendment, but they have not yet located its Rosetta Stone. Their collective decisions in the months since the ruling have been scattered, unpredictable, and often internally inconsistent.").

24. United States v. Rahimi, 602 U.S. 680, 742 (2024) (Jackson, J., concurring).

25. Charles, *Dead Hand of a Silent Past*, *supra* note 23, at 78.

26. Darrell A.H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49, 60.

27. Albert W. Alschuler, *Twilight-Zone Originalism: The Peculiar Reasoning and Unfortunate Consequences of* New York State Pistol & Rifle Association v. Bruen, 32 WM. & MARY BILL RTS. J. 1, 8 (2023).

Bruen have reacted to the monumental change in Second Amendment doctrine.

Section 922(g)(5) prohibits "an alien . . . illegally or unlawfully in the United States" from possessing a firearm.[28] Prior to *Bruen*, eight circuit courts addressed § 922(g)(5) in three methodologically different ways: (1) by applying means-end scrutiny; (2) by conducting a purely textual analysis; and (3) by applying a text, history, and tradition analysis. But all roads lead to Rome; each court upheld the statute. As challenges to the statute have rolled in, post-*Bruen* courts have dealt with each type of precedent differently, demonstrating the particularity with which some courts have analyzed precedent. They carefully tailored previous cases, so analysis that did not rely on the now-prohibited means-end scrutiny remains on the books. This Note calls this approach the "scalpel approach." On the other hand, the Fifth Circuit and two of its district courts have cut Second Amendment jurisprudence back down to its roots and have started the analysis anew, ignoring all previous precedent. This is the "chainsaw approach." In the end, utilizing precedential principles, this Note argues that in the wake of *Bruen*, the scalpel approach is proper, and the chainsaw approach will wreak havoc in the lower courts.

Part I of this Note provides a general overview of the development of Second Amendment jurisprudence and constitutional methods in the decades since the Supreme Court's seminal decision in *Heller*. Specifically, it discusses the creation and utilization of the two-part means-end scrutiny test developed in *Heller*'s wake. It also highlights the Court's rejection of that test in *Bruen*. Part II argues that the Court's decision in *Bruen* supports step one of the *Heller* test, despite its rejection of the test as a whole. Part III explains that the undocumented immigrant prohibitor is a particularly good lens to analyze the issue because it prevents courts from taking certain analytical shortcuts common in Second Amendment cases. Part IV analyzes the scalpel approach by looking at the three methods courts used before *Bruen* to uphold § 922(g)(5) and how courts have treated each approach after *Bruen*. Part V analyzes the chainsaw approach. Finally, Part VI utilizes precedential principles to argue that the scalpel approach is more faithful to the rule of law.

28. 18 U.S.C. § 922(g)(5).

I. THE SECOND AMENDMENT IN THE SUPREME COURT

The Second Amendment commands that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[29] This single sentence has been greatly complicated by almost two decades of Supreme Court precedent. First came *Heller*, where the Court invalidated a District of Columbia law that restricted the possession of firearms inside the home.[30] *Heller* is significant in many respects, but seminally, it recognized that the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation."[31]

Next, in *McDonald v. City of Chicago*,[32] the Court incorporated the Second Amendment to the states through the Due Process Clause of the Fourteenth Amendment.[33] In doing so, Justice Samuel Alito, writing for the majority, determined that the Second Amendment—more specifically the right "to use [handguns] for the core lawful purpose of self-defense"[34]—is a right "deeply rooted in this Nation's history and tradition."[35]

In the wake of *Heller* and *McDonald*, the lower courts were left to "the formidable task of defining the scope of permissible regulations"[36] and had little guidance from the Supreme Court. In the vacuum, they turned to the constitutional bread and butter: the oft-used means-end scrutiny test familiar to any 1L who has studied constitutional law.[37] As always, the first step was a threshold question. The court had to determine whether "the regulated activity f[ell] within the scope of the Second Amendment."[38] It was a "textual and historical inquiry" to

29. U.S. CONST. amend. II.

30. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

31. *Id.* at 592.

32. McDonald v. City of Chicago, 561 U.S. 742 (2010).

33. *Id.* at 778; *see* U.S. CONST. amend XIV, § 1.

34. *McDonald*, 561 U.S. at 768 (quoting *Heller*, 554 U.S. at 630).

35. *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

36. *Heller*, 554 U.S. at 679 (Stevens, J., dissenting).

37. *See* United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010) (announcing the means-end scrutiny test). For the sake of simplicity, this Note refers to this means-end test as the "*Heller* test," even though the Court in *Bruen* clarified that *Heller* in no way endorsed such a test. This Note refers to the initial text and history analysis as "*Heller* step one" and the application of scrutiny as "*Heller* step two."

38. Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019) (quoting Ezell v. City of Chicago, 846 F.3d 888, 892 (7th Cir. 2017), *abrogated by* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022)).

determine "the scope of the right as originally understood."[39] At this first step, "[t]he most straightforward way for the government to win . . . [was] to carry its burden of proving that the type of arm, person, or activity has historically been considered outside the scope of the Second Amendment right."[40] If the arm, person, or activity was outside that original scope, the inquiry stopped, and the court would uphold the law as constitutional.[41] If it was inside the scope, the court moved to step two and applied a level of scrutiny—either strict or intermediate—determined by the law's proximity to the core of the Second Amendment.[42]

Although *Heller* and *McDonald* thoroughly expanded the scope of the Second Amendment, still, "the vast majority of Second Amendment claims fail[ed]."[43] In fact, according to an empirical study that analyzed eight years of post-*Heller* case law,[44] challengers had just a 9 percent success rate.[45] The dataset shows that the most common challenges were to prohibitions on possession by certain persons, known as "who" bans, making up 43 percent of the dataset,[46] though still, they were "generally losers," succeeding in just 4 percent of the cases.[47] Further, during this time period, only 16 percent of cases cited historical sources.[48] More significantly, of the 1,153 challenges, only 29 cited to pre-1791 sources (time of the Founding)[49] and only 42 to 1791–1868 sources (ratification of the Fourteenth Amendment),[50] despite the time periods' significance to *Bruen*'s history and tradition test.[51] And

39. *Id.* (quoting *Ezell*, 846 F.3d at 892).

40. David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 229 (2017).

41. *Kanter*, 919 F.3d at 441.

42. *Id.* at 441–42; *see, e.g.*, *Marzzarella*, 614 F.3d at 97 (applying intermediate scrutiny to a ban on the possession of a firearm with an obliterated serial number because the "burden imposed by the law does not severely limit the possession of firearms").

43. Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms after* Heller, 67 DUKE L.J. 1433, 1472 (2018).

44. *See id.* at 1437 (analyzing all Second Amendment cases "from the day *Heller* was decided [June 26, 2008] until February 1, 2016").

45. *Id.* at 1472.

46. *Id.* at 1481.

47. *Id.*

48. *Id.* at 1492.

49. *Id.* at 1492 tbl.13.

50. *Id.*

51. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 34 (2022) (stating that when "interpreting the Constitution, not all history is created equal" and prioritizing 1791, when the Second Amendment was adopted, and 1868, when the Fourteenth Amendment was adopted).

even when Founding-era sources were cited, the study finds no statistically significant relationship between citation and success.[52] These statistics point to a single conclusion: After *Heller* and *McDonald*, the Second Amendment still did not have teeth, and courts were not applying the types of history invoked in each case, adding credence to the claim that the Second Amendment was a "second-class right."[53]

In *Bruen,* Justice Clarence Thomas, writing for the majority, suddenly halted the circuit courts' attempts to fill the void. He determined that the two-step framework was "one step too many,"[54] and instead, replaced it with a test "rooted in the Second Amendment's text, as informed by history."[55] Thus, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[56] To meet this burden, the government must only identify a "well-established and representative historical *analogue*, not a historical *twin*."[57]

Since the Court announced the *Bruen* test, courts have applied it in two steps. For instance, the Third Circuit described the test in *Range v. Attorney General of the United States*[58] as follows:

> After *Bruen*, we must first decide whether the text of the Second Amendment applies to a person and his proposed conduct. If it does, the government now bears the burden of proof: it "must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[59]

52. Ruben & Blocher, *supra* note 43, at 1501.

53. McDonald v. City of Chicago, 561 U.S. 742, 780 (2010).

54. *Bruen*, 597 U.S. at 19.

55. *Id.*

56. *Id.* at 24.

57. *Id.* at 30.

58. Range v. Att'y Gen., 69 F.4th 96 (3d Cir. 2023) (en banc).

59. *Id.* at 101 (quoting *Bruen*, 597 U.S. at 19) (citation omitted). Because courts applying *Bruen* have treated this test as having two steps, this Note will, too. *But see Bruen*, 597 U.S. at 19 (describing the two-step framework as "one step too many"). This Note refers to the initial textual analysis as "*Bruen* step one" and the following history and tradition analysis as "*Bruen* step two."

In that case, the en banc Third Circuit considered an as-applied challenge to 18 U.S.C. § 922(g)(1), the "felon-in-possession" law.[60] The defendant had been convicted of "making a false statement to obtain food stamps," a crime punishable by up to five years in prison, thus pulling him into the purview of § 922(g)(1), which prohibits firearm possession by anyone "who has been convicted . . . of, a crime punishable . . . for a term exceeding one year."[61] The court at the first step split the inquiry into two categories: person and conduct.[62] First, the court determined that despite his conviction, the defendant nevertheless fell under the "people" protected by the Second Amendment.[63] This argument is often effective for the government to make—rather than engaging in any historical analysis, the government may win on a purely textual basis.[64] The government has won on this argument in other courts.[65] Here, though, the Third Circuit rejected the government's claim that the Second Amendment has "historically extended to the political community of *law-abiding, responsible citizens.*"[66] Rather, it determined that allowing the government to decide who is included in "the people" gives it "unreviewable power to manipulate the Second Amendment by choosing a label,"[67] which cannot be reconciled with *Heller*'s command that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table."[68] Second, it determined that it was an "easy question" as to whether his conduct was covered: The answer was yes.[69] Then, at step

60. *Id.* at 98; *see* 18 U.S.C. § 922(g)(1) (making it unlawful for "any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to "possess in or affecting commerce, any firearm or ammunition").

61. *Range*, 69 F.4th at 98; 18 U.S.C. § 922(g)(1).

62. *See Range*, 69 F.4th at 101 ("[W]e must first decide whether the text of the Second Amendment applies to a person and his proposed conduct.").

63. *Id.* at 103; *see* U.S. CONST. amend. II ("[T]he right of *the people* to keep and bear Arms . . . ." (emphasis added)).

64. *Cf.* Kopel & Greenlee, *supra* note 40, at 229 (observing that under the *Heller* framework, the "most straightforward way for the government to win" was to prove that the "person" subject to regulation was "considered outside the scope of the Second Amendment").

65. *See, e.g.*, United States v. Bess, 699 F. Supp. 3d 437, 448 (D.S.C. Oct. 25, 2023) ("[A]s a convicted, three-time felon, Defendant is not one of the 'law-abiding' people to which the Second Amendment applies.").

66. En Banc Brief for Appellees at 2, Range v. Att'y Gen., 69 F.4th 96 (3d Cir. 2023) (No. 21-2835) (emphasis added).

67. *Range*, 69 F.4th at 102–03 (quoting Folajtar v. Att'y Gen., 980 F.3d 897, 912 (3d Cir. 2020) (Bibas, J., dissenting)).

68. *Id.* at 103 (quoting District of Columbia v. Heller, 554 U.S. 570, 636 (2008)).

69. *Id.*

two, the government could not point to a historical analogue, and thus, the statute was unconstitutional as applied to the defendant.[70]

To be sure, there are issues with the two-step reading. In the undocumented immigrant context, "the theoretical separation between a textual inquiry and a historical one collapses into one . . . . At either stage of the inquiry . . . the same historical evidence would motivate decisions to exclude noncitizens."[71] That, on top of the fact that it goes directly against the command of the Supreme Court, makes it a doubtful reading. But it also does not make sense to have a single-step constitutional test. Necessarily, conduct must fall within protected activity for the amendment to apply. For example, a statement must first be "speech" before it is protected by the First Amendment.[72] This reality suggests that a constitutional analysis *must* include at least two steps. This Gordian Knot of a test is one full of internal contradictions and inconsistency, but unfortunately, *Bruen* did not provide lower courts with the sword to unravel it.

Range is just one of the many successful challenges to gun control statutes in the wake of *Bruen*. Unlike wins after *Heller*, which "trickled in like a stream," wins after *Bruen* have "come on like a tidal wave."[73] In fact, in the first eight months after *Bruen*, courts struck down more gun laws than they did in the first few *years* after *Heller*.[74] Specifically, after *Heller*, not one of the first seventy challengers succeeded in their Second Amendment lawsuit in the first six months after the decision, and only 11 of 327 won in the two-and-a-half years after.[75] By contrast, in the first year after *Bruen*, forty-four claims were successful.[76] Successful claims included those challenging prohibitions on the

70. *Id.* at 106.

71. Pratheepan Gulasekaram, *The Second Amendment's "People" Problem*, 76 VAND. L. REV. 1437, 1467 (2023) [hereinafter Gulasekaram, *The Second Amendment's "People" Problem*]; *see also* United States v. Sing-Ledezma, 706 F. Supp. 3d 650, 659 (W.D. Tex. 2023) ("[T]he step zero analysis and the step two analysis are functionally identical, collapsing into a single inquiry.").

72. *See* Texas v. Johnson, 491 U.S. 397, 403 (1989) ("We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction.").

73. Jacob D. Charles, *By the Numbers: How Disruptive Has* Bruen *Been?*, DUKE CTR. FOR FIREARMS L. (Mar. 27, 2023) [hereinafter Charles, *By the Numbers*], https://firearmslaw.duke.edu/2023/03/by-the-numbers-how-disruptive-has-bruen-been [https://perma.cc/T6EV-BHX].

74. *Id.*

75. Charles, *Dead Hand of a Silent Past*, *supra* note 23, at 128.

76. *Id.*

possession of firearms by people subject to a civil protection order[77] and under indictment.[78] Courts also found the undocumented immigrant prohibitor, the subject of this Note, unconstitutional.[79] The reviewing court often had to overrule or work around some pre-*Bruen* case protecting the statute in light of *Bruen*'s new test.[80] The aftermath of *Bruen* has been "extremely disruptive" for federal gun safety legislation.[81]

Finally, the Court attempted, somewhat feebly, to clarify the *Bruen* test in *United States v. Rahimi*.[82] Like in *Bruen*, the majority in *Rahimi* continued to emphasize that "[t]he [challenged] law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin'"[83]; that "[w]hy and how the regulation burdens the right are central to th[e] inquiry"[84]; and that the correct analysis is whether "the challenged regulation is consistent with the principles that underpin our regulatory tradition."[85] Indeed, *Bruen* was not meant to suggest that the Second Amendment is "a law trapped in amber."[86] Unfortunately, though, *Rahimi* did not provide advocates with much, if any, of the clarification they requested regarding the application of the *Bruen* test.[87] Justice Ketanji Brown Jackson commented in concurrence that even after *Rahimi*, "[c]onsistent analyses . . . are likely to remain elusive" because of the many questions left unresolved, such as "[w]ho is protected by the Second Amendment, from a historical perspective?" and "[t]o what

77. United States v. Rahimi, 61 F.4th 443, 449, 461 (5th Cir. 2023), *rev'd*, 602 U.S. 680 (2024).

78. United States v. Quiroz, 629 F. Supp. 3d 511, 527 (W.D. Tex. 2022).

79. United States v. Sing-Ledezma, 706 F. Supp. 3d 650, 673 (W.D. Tex. 2023); United States v. Benito, No. 3:24-CR-26-CWR-ASH, 2024 WL 3296944, at *1 (S.D. Miss. July 3, 2024); United States v. Rebollar Osorio, No. 2:24-cr-00040-NT, 2024 WL 4476005, at *13 (D. Me. Oct. 11, 2024).

80. *See, e.g.*, *Rahimi*, 61 F.4th at 450–51 (overturning two cases that had held § 922(g)(8) constitutional); *Sing-Ledezma*, 706 F. Supp. 3d at 660 (finding existing circuit precedent "unavailing" in light of *Bruen*).

81. Charles, *By the Numbers*, *supra* note 73.

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

83. *Id.* at 692 (quoting *Bruen*, 597 U.S. at 30).

84. *Id.*

85. *Id.*

86. *Id.* at 691.

87. *See, e.g.*, Transcript of Oral Argument at 38, *Rahimi*, 602 U.S. 680 (No. 22-915) (U.S. argued Nov. 7, 2023) (statement of Elizabeth Prelogar, United States Solicitor General) (commenting that the case "provides an opportunity for the Court to clarify" *Bruen*).

conduct does the Second Amendment's plain text apply?"[88] Although *Rahimi* "inches th[e] ball forward," "there are miles to go."[89]

II. *BRUEN*'S ENDORSEMENT OF *HELLER*'S STEP-ONE TEXT AND HISTORY ANALYSIS

Writing for the *Bruen* majority, Justice Thomas explicitly repudiated the circuit courts' application of means-end scrutiny but endorsed the step-one text and history approach, calling it "consistent with *Heller*."[90] His acceptance is also apparent in the wording of his description of the *Bruen* test. *Heller*'s step-one text and history analysis was described by the Fourth Circuit as a "historical inquiry seek[ing] to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification."[91] If this sounds familiar, it should. Indeed, Justice Thomas almost identically describes the *Bruen* test as one "rooted in . . . text, as informed by history" to determine if the "Second Amendment's plain text covers an individual's conduct."[92] This "scope of the right as informed by text and history" approach was used in *Heller* and has largely been endorsed by the conservative members of today's Court.[93] Significantly, *Bruen* only explicitly overturned means-end scrutiny while leaving the scope of the right analysis intact, preserving step one.[94] Thus, applying the *Bruen* test, the government will still prevail if it can prove that "the type of

88. *Rahimi*, 602 U.S. at 745 (Jackson, J., concurring).

89. *Id.* at 746 (Jackson, J., concurring).

90. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 19 (2022) ("Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history.").

91. United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010) (citing District of Columbia v. Heller, 554 U.S. 570, 625 (2008)), *abrogated by Bruen*, 597 U.S. 1.

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

93. *See id.*; *Heller*, 554 U.S. at 634–35 ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them . . . ."); Heller v. District of Columbia, 670 F.3d 1244, 1280 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("[T]he scope of the [Second Amendment] was determined by text, history, and tradition, and such longstanding laws were within the historical understanding of the scope of the right."). *But see* Kanter v. Barr, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting) ("[O]ne [approach] uses history and tradition to identify the scope of the right, and the other uses that same body of evidence to identify the scope of the legislature's power to take it away. In my view, the latter is the better way to approach the problem."), *abrogated by Bruen*, 597 U.S. 1.

94. *Compare Bruen*, 597 U.S. at 19 ("Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history."), *with id.* at 24 ("[T]he Courts of Appeals' second step is inconsistent with *Heller*'s historical approach and its rejection of means-end scrutiny.").

arm, person, or activity has historically been considered outside the scope of the Second Amendment right."[95] If the government wins here, it does not have to reach the step-two historical analysis of the *Bruen* test.

Preserving *Heller*'s step-one text and history analysis is also consistent with the Court's qualifications in other Second Amendment cases. In each of the major modern Second Amendment cases, the Court has been careful to qualify its decision to protect "longstanding" gun laws.[96] Significantly, certain restrictions on *who* may possess a firearm have always been specifically shielded from the Court's decisions. To start, in the famous *Heller* exceptions' paragraph in the majority opinion, Justice Antonin Scalia specified that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," both people restrictions.[97] Justice Brett Kavanaugh, joined by Chief Justice John Roberts, reprinted the entirety of the exceptions' paragraph in his *Bruen* concurrence.[98] The dissenting liberal Justices also agreed with this premise.[99] All in all, there is a general understanding among the Justices on the Roberts Court that, as Justice Alito put it, *Bruen* "decides nothing about *who* may lawfully possess a firearm."[100]

III. 18 U.S.C. § 922(G)(5) AS AN ANALYTICAL TOOL

The undocumented immigrant prohibitor states in relevant part that "[i]t shall be unlawful for any person . . . who, being an alien . . . is illegally or unlawfully in the United States . . . [to] possess in or

95. Kopel & Greenlee, *supra* note 40, at 229; *see, e.g.*, *infra* notes 182, 188 and accompanying text.

96. *Heller*, 554 U.S. at 626.

97. *Id.* at 626–27; *see also Bruen*, 597 U.S. at 30 ("[A]nalogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check."); *id.* at 80 (Kavanaugh, J., concurring) ("Properly interpreted, the Second Amendment allows a 'variety' of gun regulations." (quoting *Heller*, 554 U.S. at 636)); McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) ("[I]ncorporation does not imperil every law regulating firearms.").

98. *Bruen*, 597 U.S. at 81 (Kavanaugh, J., joined by Roberts, C.J., concurring).

99. *Id.* at 129 (Breyer, J., joined by Sotomayor & Kagan, JJ., dissenting) ("Like Justice Kavanaugh, I understand the Court's opinion today to cast no doubt on [the exceptions' paragraph] of *Heller*'s holding."); *see also* United States v. Rahimi, 602 U.S. 680, 741 (2024) (Jackson, J., concurring) ("I would have joined the dissent [in *Bruen*] had I been a Member of the Court at that time.").

100. *Bruen*, 597 U.S. at 72 (Alito, J., concurring) (emphasis added); *see also id.* at 73 ("Our decision, as noted, does not expand the categories of people who may lawfully possess a gun . . . .").

affecting commerce, any firearm or ammunition."[101] Section 922(g)(5) is a good framework to analyze the validity of pre-*Bruen* case law because undocumented immigrants do not fall cleanly into any category of people or regulation laid out as an exception in *Heller*, forcing courts to substantively grapple with the *Heller* and *Bruen* tests, rather than fall back on the Court's language in *Heller*. This happens in two ways.

First, the *Heller* majority listed in the exceptions' paragraph a few "longstanding" firearms restrictions that were presumptively constitutional, including prohibitions on possession by felons and the mentally ill, restrictions in sensitive places, and conditions and qualifications on firearm sales.[102] After *Heller*, and even *Bruen*, courts have relied on this list—arguably dicta—to uphold these gun restrictions, so challenges to these statutes were "relatively weak."[103] For example, in *Kanter v. Barr*,[104] the Seventh Circuit upheld the felon prohibitor, noting that "[r]elying on the 'presumptively lawful' language in *Heller* and *McDonald*, every federal court of appeals to address the issue has held that § 922(g)(1) does not violate the Second Amendment on its face."[105] Challenges to the law prohibiting possession by a "mental defective"[106] have failed also due to reliance on the exceptions' paragraph.[107] Even after *Bruen*, some courts rely on the same method. In *United States v. Tribble*,[108] the Northern District of Indiana upheld the felon prohibitor because the Supreme Court has "repeatedly underscored that . . . the rights guaranteed by the Second Amendment should not be construed to cast any doubt on 'prohibitions on the possession of firearms by felons.'"[109] The judge,

101. 18 U.S.C. § 922(g)(5).

102. *Heller*, 554 U.S. at 626–27.

103. *See* Ruben & Blocher, *supra* note 43, at 1480 ("Both *Heller* and *McDonald* expressly affirmed the constitutionality of certain restrictions—like firearm bans for convicted felons—which thus present relatively weak claims.").

104. Kanter v. Barr, 919 F.3d 437 (7th Cir. 2019), *abrogated by Bruen*, 597 U.S. 1.

105. *Id.* at 442. *But see id.* at 451–69 (Barrett, J., dissenting) (applying a text, history, and tradition analysis akin to *Bruen*).

106. 18 U.S.C. § 922(g)(4).

107. *See, e.g.*, Mai v. United States, 952 F.3d 1106, 1114 (9th Cir. 2020) ("The government has presented a strong argument that both of those inquiries support the conclusion that § 922(g)(4) does not burden Second Amendment rights. The Supreme Court identified as presumptively lawful the 'longstanding prohibitions on the possession of firearms by felons and the mentally ill.'" (quoting *Heller*, 554 U.S. at 626)).

108. United States v. Tribble, No. 2:22-CR-085-PPS-JEM, 2023 WL 2455978 (N.D. Ind. Mar. 10, 2023).

109. *Id.* at *1 (quoting McDonald v. City of Chicago, 561 U.S. 742, 786 (2010)).

therefore, "decline[d] to evaluate whether felon-in-possession statutes have sufficient grounding in the nation's historical tradition of firearm regulation to pass muster under the second prong of the *Bruen* framework."[110]

Second, and relatedly, *Heller* and *Bruen* each confine the right to bear arms to the "law-abiding."[111] Courts after *Heller* leaned on this language, like the exceptions' paragraph, to uphold felon-in-possession laws.[112] But how and to what degree the phrase does any work differs from case to case. First, "law-abiding" remains undefined, though there seem to be two strains of thought. One theory conceptualizes it as "virtuous citizenry,"[113] a theory "drawn from 'classical republican political philosophy' [that] stresses that the 'right to [bear] arms does not preclude laws disarming the unvirtuous (i.e. criminals) or those who, like children or the mentally imbalanced, are deemed incapable of virtue."[114] The other ties "law-abiding" to dangerousness.[115] Second, courts disagree over whether the language is dicta,[116] and even if it is, whether it should nevertheless have precedential power because it comes from the Supreme Court.[117]

Undocumented immigrants do not cleanly fall into either theory of "law-abiding," forcing courts to engage in a constitutional analysis

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110. *Id.* at *3.

111. *See Heller*, 554 U.S. at 625 ("For most of our history . . . the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens."); *Bruen*, 597 U.S. at 31–32 ("It is undisputed that petitioners Koch and Nash—two ordinary, law abiding, adult citizens—are part of 'the people' whom the Second Amendment protects.").

112. *See, e.g.*, United States v. Vongxay, 594 F.3d 1111, 1118 (9th Cir. 2010) (holding that § 922(g)(1) does not violate the Second Amendment because "we observe that most scholars of the Second Amendment agree that the right to bear arms was 'inextricably . . . tied to' the concept of a 'virtuous citizen[ry]'" (quoting Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 146 (1986)) (alterations in original))).

113. *See id*. (tying the Second Amendment to the "virtuous citizenry" concept).

114. Medina v. Whitaker, 913 F.3d 152, 159 (D.C. Cir. 2019) (quoting United States v. Rene E., 583 F.3d 8, 15 (1st Cir. 2009)).

115. *See* Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) ("History . . . demonstrates that legislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are *dangerous*."), *abrogated by Bruen*, 597 U.S. 1.

116. *See* Vincent v. Garland, 80 F.4th 1197, 1201 n.4 (10th Cir. 2023) ("Judges elsewhere disagree on whether this ['law-abiding'] language in *Heller* had constituted dicta or part of the Supreme Court's holding.").

117. Even though dicta is not part of a court's holding, "[s]ome courts describe [Supreme Court dicta] as 'highly persuasive' and some claim it generally 'must be treated as authoritative.'" Judith M. Stinson, *Why Dicta Becomes Holding and Why it Matters*, 76 BROOK. L.R. 219, 245 n.126 (2010) (internal citations omitted).

of the statute, rather than rely on the Supreme Court's language. Unlike felons, undocumented immigrants are not explicitly mentioned in the *Heller* exceptions' paragraph, or in any subsequent iteration of it, so a *Kanter*-esque analysis is not possible. Similarly, under either theory of "law-abiding,"[118] undocumented immigrants are not per se excluded from the "law-abiding," to the extent the term actually influences Second Amendment cases. To address the "virtuous citizenry" concept, which is often tied to criminality,[119] "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States."[120] Particularly, "undocumented presence is not necessarily a criminal violation."[121] For example, 8 U.S.C. § 1325(a) makes unsanctioned *entry* into the United States a crime.[122] But if someone were to overstay a work or student visa—such that their *entry* was sanctioned, but their *continued presence* was not—they would not be subject to criminal sanctions, but rather to civil penalties.[123] Similarly, it would be demonstrably wrong to say that undocumented immigrants, as a group, are dangerous.[124] Due to these two factors,

118. *See supra* notes 113, 115 and accompanying text.

119. *See* United States v. Vongxay, 594 F.3d 1111, 1118 (9th Cir. 2010) ("[T]he right to bear arms does not preclude laws disarming the unvirtuous citizens (*i.e. criminals*) . . . ." (emphasis added) (internal quotation marks omitted)); Royce de R. Barondes, *The Odious Intellectual Company of Authority Restricting Second Amendment Rights to the "Virtuous"*, 25 TEX. REV. L. & POL. 245, 248 (2021) ("Courts have relied on the view that one who has committed a requisite predicate act—current unlawful use of controlled substances or conviction for any felony—is not 'virtuous,' and the non-virtuous for that alone can be deprived of [the right to bear arms].").

120. Arizona v. United States, 567 U.S. 387, 407 (2012); *cf.* Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot. et al., (June 15, 2012) (establishing the DACA program, in which the Department of Homeland Security declined to remove eligible and registered undocumented immigrants).

121. Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1523 n.11 (2010) [hereinafter Gulasekaram, "*The People" of the Second Amendment*]; *see also* State v. Martinez, 165 P.3d 1050, 1057 (Kan. Ct. App. 2007) ("[I]f Martinez entered the country in violation of 8 U.S.C. § 1325 but has not previously been deported, his ongoing presence is not a crime . . . ."); RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 16:1 (2023 ed.) ("The immigration process, including removal, is civil. While removal involves both procedural and substantive similarities to the criminal process, it has been repeatedly held to be civil.").

122. 8 U.S.C. § 1325(a).

123. *See Visa Overstay and Illegal Presence in the U.S.*, TEMP. UNIV., https://isss.temple.edu/students/current-students/f-1-student/maintaining-legal-status/visa-overstay-and-illegal-presence-us [https://perma.cc/58PW-3HEG] ("If an alien is determined to be a 'visa overstay' . . . they are subject to . . . cancellation of visa [and] restriction on place of future visa applications . . . .").

124. *See* Miriam Jordan, *A Decade After DACA, the Rise of a New Generation of Undocumented Students*, N.Y. TIMES (June 15, 2022), https://www.nytimes.com/2022/06/15/us/dac

courts before *Bruen* had no explicit language to rely on to uphold § 922(g)(5). They are forced to apply the two-step *Heller* test in detail.

Further, the complexity of the historical record in this context incentivizes courts to engage in *Bruen*'s step-one textual analysis. Often, courts will dodge hard questions and decide cases under an easier analysis.[125] But under *Bruen*, it is hard for courts to take this route.[126] *Bruen* directs courts to look to the Founding and Reconstruction eras for historical support, but modern immigration law did not begin to take shape until the late nineteenth century.[127] Similarly, academics find "little to no evidence" that undocumented immigrants were considered a "societal problem" in the eighteenth or nineteenth centuries.[128] It is hard to find historical support from the Founding or Reconstruction eras because such policies did not exist. But *Bruen* only requires an analogue, not a twin, so the lack of immigration law is not fatal. Unfortunately, "[m]any, perhaps most, gun laws enacted between 1789 and 1940 were influenced at least in part by racism."[129] This has been called the "Dilemma in *Bruen*'s History and Tradition Test."[130] These "sordid" sources[131] include laws banning Catholic, Indigenous, and enslaved persons from possessing

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a-dreamers-immigration-reform.html [https://perma.cc/YBW2-GCC2] (describing Tommy Esquivel as a "graduate[] from Hollywood High School . . . with awards honoring his determination, his record of service and the highest average grade in his Advanced Placement environmental science class" but who is nevertheless "without legal immigration status"); Stephanie Kulke, *Immigrants are Significantly Less Likely to Commit Crimes Than the U.S.-Born*, NW. NOW (Mar. 12, 2024), https://news.northwestern.edu/stories/2024/03/immigrants-are-significantly-less-likely-to-commit-crimes-than-the-us-born [https://perma.cc/VSC6-4S5T] ("[I]t has never been the case that immigrants as a group have been more incarcerated than the U.S.-born . . . .").

125. *See, e.g.*, United States v. Huitron-Guizar, 678 F.3d 1164, 1169 (10th Cir. 2012) (assuming without deciding that undocumented immigrants fall under the Second Amendment's "people" because answering that question seemed "large and complicated"); *cf.* Jennings v. Rodriguez, 583 U.S. 281, 286 (2018) (discussing the constitutional-avoidance cannon of statutory interpretation, whereby a court will "shun an interpretation that raises serious constitutional doubts and instead . . . adopt an alternative that avoids those problems").

126. Of course, this is not to say courts after *Bruen* have not done so. *See, e.g.*, United States v. Escobar-Temal, No. 3:22-cr-00393, 2023 WL 4112762, at *3, *6 (M.D. Tenn. June 21, 2023) ("[B]ecause the Court can resolve Defendant's motion based on whether history and tradition supports the challenged regulation, the Court will not come to a definitive conclusion regarding whether Defendant is a member of 'the people' and will assume arguendo that he is.").

127. Gulasekaram, *The Second Amendment's "People" Problem*, *supra* note 71, at 1470.

128. *Id.*

129. Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. F. 537, 542 (2022).

130. Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE 30, 31 (2023) [hereinafter Charles, *On Sordid Sources*].

131. *Id.* at 30.

firearms,[132] all of which would certainly be unconstitutional today.[133] Even if one were to cite to the earliest instances of immigration law, those, too, had racial motivations. Some of the first immigration laws were meant to exclude Chinese laborers, most notably the Chinese Exclusion Act.[134] If *Bruen* requires a court to ask "why" a historical law was passed to assist in the analogical analysis,[135] it would be strange if "racism" was a suitable answer.[136] But as Justice Jackson noted, "I'm a little troubled by having a history and traditions test that also requires some sort of culling of the history so that only certain people's history counts. So what do we do with that?"[137] Avoiding history allowed courts to sidestep that difficult question.

The application of the *Heller* test was a choose-your-own-adventure of a sort: Eight courts of appeals upheld § 922(g)(5), albeit in different ways. The Second, Ninth, and Tenth Circuits assumed without deciding that an undocumented immigrant could satisfy *Heller*'s step-one text and history analysis, but nonetheless determined that § 922(g)(5) passed intermediate scrutiny, deciding the issue at *Heller* step two.[138] Similarly, the Seventh Circuit decided that some undocumented immigrants did qualify as "the people" protected under the Second Amendment but, again, held that the statute passed

132. *See* United States v. Perez, 6 F.4th 448, 462 (2d Cir. 2021) (Menashi, J., concurring) (citing to these laws).

133. *See* United States v. Gil-Solano, 699 F. Supp. 3d 1063, 1069 (D. Nev. 2023) ("The enacting legislatures' justifications for these status-based prohibitions on firearms possession are . . . blatantly unconstitutional.").

134. Gulasekaram, *The Second Amendment's "People" Problem*, *supra* note 71, at 1470.

135. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 29 (2022) ("While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that *Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense.").

136. *See* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 165 (2023) ("[I]t would be absurd to conclude that *today* the Second Amendment permits the government to disarm Black Americans and Native Americans but not domestic abusers.").

137. Transcript of Oral Argument at 84, United States v. Rahimi, 602 U.S. 680 (2024) (No. 22-915) (argued Nov. 7, 2023) (statement of Jackson, J.); *see also* Charles, *On Sordid Sources*, *supra* note 130, at 34–36 (proposing three approaches—renounce, abstract, and embrace—to deal with sordid history).

138. *See* United States v. Huitron-Guizar, 678 F.3d 1164, 1169 (10th Cir. 2012) (assuming that undocumented immigrants fall under "the people," but determining § 922(g)(5) passed intermediate scrutiny); United States v. Torres, 911 F.3d 1253, 1261, 1264 (9th Cir. 2019) (same); United States v. Perez, 6 F.4th 448, 453, 455 (2d Cir. 2021) (same).

intermediate scrutiny.[139] The Fifth and Eighth Circuits ended the inquiry at *Heller* step one through a purely textual analysis and found that undocumented immigrants were not included in "the people" of the Second Amendment.[140] The Fourth Circuit, Eleventh Circuit, and Second Circuit Judge Steven J. Menashi's influential concurrence conducted textual and historical analysis akin to *Bruen*'s step-two history and tradition analysis.[141] The treatment of each of these types of decisions allows this Note to analyze how lower courts have used scalpels to carefully trim pre-*Bruen* case law.

IV. THE SCALPEL APPROACH

As laid out above, pre-*Bruen* courts had taken three approaches to upholding § 922(g)(5): (1) applying intermediate scrutiny at *Heller* step two; (2) utilizing textual analysis at *Heller* step one to determine that undocumented immigrants are not part of "the people"; and (3) conducting a textual *and* historical analysis at either step. Now, after *Bruen*, each of these approaches has been utilized by district courts in different ways, evidence of the scalpel approach. This Part analyzes how.

A. Means-End Scrutiny: Cases Decided at Heller Step Two

Even though *Bruen* expressly repudiated means-end scrutiny, decisions made applying *Heller*'s textual and historical inquiry remain good law. In a pre-*Bruen* case, *United States v. Meza-Rodriguez*,[142] the Seventh Circuit rejected a § 922(g)(5) challenge applying intermediate

139. United States v. Meza-Rodriguez, 798 F.3d 664, 672–73 (7th Cir. 2015) (holding that at least some undocumented immigrants qualify as "the people," but nonetheless upholding the statute under intermediate scrutiny).

140. *See* United States v. Portillo-Munoz, 643 F.3d 437, 442 (5th Cir. 2011) (holding that undocumented immigrants are not part of the Second Amendment's "people," making § 922(g)(5) constitutional); United States v. Flores, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curiam) (same) (citing *Portillo-Munoz*, 643 F.3d at 437).

141. United States v. Carpio-Leon, 701 F.3d 974, 979 (4th Cir. 2012) ("[W]e can employ the historical analysis [*Heller*] prescribed to apply its observations to this case and thus to reach the conclusion . . . that illegal aliens do not belong to the class of law-abiding members of the political community to whom the Second Amendment gives protection." (citation omitted)); United States v. Jimenez-Shilon, 34 F.4th 1042, 1050 (11th Cir. 2022) ("[C]onsistent with the Second Amendment's text and history, [undocumented immigrants] do not enjoy the right to keep and bear arms. Accordingly, we hold that 18 U.S.C. § 922(g)(5)(A) passes constitutional muster."); *Perez*, 6 F.4th at 463 (Menashi, J., concurring) (utilizing text, history, and tradition to conclude that "illegal aliens lack protection under the Second Amendment").

142. United States v. Meza-Rodriguez, 798 F.3d 664 (7th Cir. 2015).

scrutiny.[143] At *Heller* step one, however, it could not find a "principled way to carve out the Second Amendment and say that the unauthorized . . . are excluded," thus holding that at least some undocumented immigrants fall within the scope of the Second Amendment.[144] Although many courts had latched onto *Heller*'s "law-abiding" language,[145] the Seventh Circuit refused such a reading. "Those passages," it ruled, "did not reflect an attempt to define the term 'people.'"[146] Thus, it was "reluctant to place more weight on these passing references than the Court itself did."[147] It continued, "Other language in *Heller* supports the opposite result." Specifically, *Heller*'s citation of *United States v. Verdugo-Urquidez*[148] suggested that immigrants could "receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."[149] *Verdugo-Urquidez* was a Fourth Amendment case, but because *Heller* "impl[ied] that the phrase 'the people' . . . has the same meaning in [the Second and Fourth Amendments],"[150] it was "reasonable to look to *Verdugo-Urquidez* to determine whether [the defendant was] entitled to invoke the

143. *Id.* at 672–73.

144. *Meza-Rodriguez*, 798 F.3d at 672. Judge James L. Dennis, part of the Fifth Circuit panel in *United States v. Portillo-Munoz,* would have taken the same approach. *See* 643 F.3d at 448 (Dennis, J., concurring in part and dissenting in part) ("Because Portillo-Munoz has substantial connections with this country . . . I dissent from the majority's dismissal of Portillo-Munoz's Second Amendment claim."). Because *Portillo-Munoz* was decided at step one, Judge Dennis would have remanded to the district court to apply means-end scrutiny. *Id.* at 443 (Dennis, J., concurring in part and dissenting in part). The other circuits upheld § 922(g)(5) using means-end scrutiny by assuming, but not deciding, that undocumented immigrants were part of "the people." *See* United States v. Huitron-Guizar, 678 F.3d 1164, 1169 (10th Cir. 2012) (assuming that undocumented immigrants fall under "the people," but determining § 922(g)(5) passed intermediate scrutiny); United States v. Torres, 911 F.3d 1253, 1261, 1264 (9th Cir. 2019) (same); United States v. Perez, 6 F.4th 448, 453, 456 (2d Cir. 2021) (same). They did so because they cautioned against "read[ing] an unwritten holding into *Heller*" because "the question seems large and complicated." *Huitron-Guizar*, 678 F.3d at 1169.

145. *See, e.g.*, United States v. Vongxay, 594 F.3d 1111, 1118 (9th Cir. 2010) (holding that § 922(g)(1) does not violate the Second Amendment because "we observe that most scholars of the Second Amendment agree that the right to bear arms was 'inextricably . . . tied to' the concept of a 'virtuous citizen[ry]'" (quoting Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 146 (1986))).

146. *Meza-Rodriguez*, 798 F.3d at 669.

147. *Id.*

148. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

149. *Id.* at 271.

150. *Meza-Rodriguez*, 798 F.3d at 669.

protections of the Second Amendment."[151] Determining that the defendant met both of the *Verdugo-Urquidez* requirements, and thus qualified for Second Amendment protection, the court proceeded to means-end scrutiny.[152]

At step two, the Seventh Circuit applied intermediate scrutiny,[153] which requires that a law be "substantially related to the achievement of an important governmental interest."[154] The government identified "keep[ing] guns out of the hands of presumptively risky people" and "suppress[ing] armed violence" as its important government interests.[155] Once the government established an interest, § 922(g)(5) easily survived intermediate scrutiny because undocumented immigrants "are able purposefully to evade detection by law enforcement"[156] and "live 'largely outside the formal system of registration,'"[157] making it "more difficult to keep tabs on [them] than the general population."[158] Section 922(g)(5) passed constitutional muster.

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151. *Id.* at 670; *see also* United States v. Portillo-Munoz, 643 F.3d 437, 443–44 (5th Cir. 2011) (Dennis, J., concurring in part and dissenting in part) ("[A]s the Supreme Court recognized in [*Heller*] . . . , the same set of 'people' protected by the Second Amendment are also protected by the First and Fourth Amendments.").

152. *Meza-Rodriguez*, 798 F.3d at 672; *see also Portillo-Munoz*, 643 F.3d at 447 (Dennis, J., concurring in part and dissenting in part) ("Portillo-Munoz plainly satisfies both criteria of the substantial connections test under *Verdugo-Urquidez* . . . ."). The topic of this Note is not to determine whether the Seventh Circuit's reading is correct, though it is an important question highly relevant to § 922(g)(5) litigation and to constitutional law as a whole. Professor Pratheepan Gulasekaram thinks that *Meza-Rodriguez*'s "people" holding "has the potential to be quite significant," because "[t]his framework suggests that unlawfully present individuals could be able to establish their level of connectedness in an individualized hearing. Having done so, they could seek protection under several provisions of the Constitution." Gulasekaram, *The Second Amendment's "People" Problem*, *supra* note 71, at 1459. Similarly, Judge Dennis, dissenting in *Portillo-Munoz*, argued that a holding to the contrary "renders [undocumented immigrants] vulnerable—to governmental intrusions on their homes and persons, as well as interference with their rights to assemble and petition the government for redress of grievances—with no recourse." 643 F.3d at 445 (Dennis, J., concurring in part and dissenting in part).

153. *See Meza-Rodriguez*, 798 F.3d at 672 (concluding that intermediate scrutiny is appropriate).

154. United States v. Perez, 6 F.4th 448, 453 (2d Cir. 2021) (quoting N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 261 (2d Cir. 2015)).

155. *Meza-Rodriguez*, 798 F.3d at 673 (quoting United States v. Yancey, 621 F.3d 681, 683–84 (7th Cir. 2010)).

156. *Id.*

157. *Id.* (quoting United States v. Huitron-Guizar, 678 F.3d 1164, 1170 (10th Cir. 2012)).

158. *Id.*

Because *Bruen* expressly overruled the use of means-end scrutiny,[159] it would be fair to assume that these cases are therefore abrogated. Surprisingly, that is not necessarily the case. To be sure, the district courts in these circuits have had to apply the historical analysis at *Bruen* step two instead of applying intermediate scrutiny.[160] However, legal holdings made at *Heller* step one remain binding on district courts even if scrutiny was applied at step two. Recall that the Seventh Circuit determined that undocumented immigrants were part of "the people" protected by the Second Amendment.[161] After *Bruen*, the Northern District of Illinois, which sits in the Seventh Circuit, addressed § 922(g)(5).[162] In an interesting reversal of roles, the government questioned *Meza-Rodriguez*'s status after *Bruen*, because "the Supreme Court signaled its approval of statutes regulating non-law-abiding individuals' ability to possess firearms."[163] The court instead stood by the *Meza-Rodriguez* court's rationale, stating that "[s]imilar arguments were made and rejected in *Meza-Rodriguez*" and that because "*Bruen* similarly did not address the meaning of 'the people,'" nothing in *Bruen* changes the Seventh Circuit's conclusion.[164] Thus, despite *Meza-Rodriguez*'s application of intermediate scrutiny, its holding that undocumented immigrants are part of the Second Amendment's "people" remains good law.

Similarly, the approaches taken by courts before *Bruen* may be precedential or persuasive to district courts after. Notably, in *United States v. Leveille*,[165] the District of New Mexico "follow[ed] the Tenth Circuit's lead and assume[d] purely for the sake of argument, but clearly without . . . deciding, that the Second Amendment's reference

159. *See supra* notes 54–55 and accompanying text.

160. *See, e.g.*, United States v. Leveille, 659 F. Supp. 3d 1279, 1283–85 (D.N.M. 2023) (applying the *Bruen* "historical tradition" test). However, the Northern District of Oklahoma, a Tenth Circuit district court, held that "*Huitron-Guizar* is not expressly overruled by *Bruen*. Therefore, the Court is bound to apply *Huitron-Guizar* and find that § 922(g)(5)(A) is not facially unconstitutional." United States v. Morales-Gonzalez, No. 23-CR-129-JFH-1, 2023 WL 6612480, at *2 (N.D. Okla. Oct. 10, 2023). Based on *Bruen*'s command that means-end scrutiny is overruled, it seems as if this court got it wrong. The court should have reevaluated *Huitron-Guizar*, and still easily could have upheld § 922(g)(5) by applying a textual and historical analysis. *See, e.g.*, *Leveille*, 659 F. Supp. 3d at 1282–85 (upholding § 922(g)(5) under *Bruen*'s text, history, and tradition test).

161. *See supra* notes 144–52 and accompanying text.

162. United States v. Carbajal-Flores, No. 20-cr-00613, 2022 WL 17752395, at *1–2 (N.D. Ill. Dec. 19, 2022), *overruled on other grounds by* 2024 WL 1013975 (N.D. Ill. Mar. 8, 2024).

163. *Id.* at *2.

164. *Id.* at *3.

165. United States v. Leveille, 659 F. Supp. 3d 1279 (D.N.M. 2023).

to the right of 'the people' to bear arms includes 'at least some aliens unlawfully here.'"[166] Likewise, the Middle District of Tennessee, without Sixth Circuit precedent, found persuasive some circuit courts' pre-*Bruen* approach of assuming without deciding that undocumented immigrants were part of the "people," but nevertheless upheld the statute at step two.[167]

These cases epitomize the scalpel approach. Despite the Supreme Court's clear repudiation of means-end scrutiny, courts applying the scalpel approach make clear that anything that is *not* some sort of interest balancing remains good law.

B. Text: Cases Decided at Heller Step One

Pre-*Bruen* case law decided at *Heller* step one utilizing a text-only approach remains valid. Prior to *Bruen*, the Fifth and Eighth Circuits utilized this analysis.[168] The key at this first step is the term "the people."[169] The difficulty of such an analysis was that *Heller* itself did not nail down who was included. As mentioned previously, *Heller* favorably cites *Verdugo-Urquidez*, a case about an undocumented immigrant's protections under the Fourth Amendment, for its definition of "the people."[170] In doing so, the Court determined that "'the people' seems to have been a term of art . . . refer[ring] to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[171] Presumptively, felons and the mentally ill did not count.[172] However, throughout the opinion, Justice Scalia referred to "the people" in a variety of ways, including: "all

166. *Id.* at 1283 (quoting United States v. Huitron-Guizar, 678 F.3d 1164, 1169 (10th Cir. 2012)).

167. *See* United States v. Escobar-Temal, No. 3:22-cr-00393, 2023 WL 4112762, at *3, *6 (M.D. Tenn. June 21, 2023) ("[B]ecause the Court can resolve Defendant's motion based on whether history and tradition supports the challenged regulation, the Court will not come to a definitive conclusion regarding whether Defendant is a member of 'the people' and will assume arguendo that he is." (citing United States v. Perez, 6 F.4th 448 (2d Cir. 2021); United States v. Torres, 911 F.3d 1253 (9th Cir. 2019); United States v. Jimenez-Shilon, 34 F.4th 1042 (11th Cir. 2022))).

168. *See supra* note 140 and accompanying text.

169. U.S. CONST. amend. II. For an in-depth scholarly article about courts' treatment of "the people" in this context, see Gulasekaram, *The Second Amendment's "People" Problem*, *supra* note 71.

170. *See supra* notes 148–50 and accompanying text.

171. District of Columbia v. Heller, 554 U.S. 570, 580 (2008) (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)).

172. *See Heller*, 554 U.S. at 626 ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . .").

members of the political community"[173]; "all Americans"[174]; and "law-abiding, responsible citizens."[175] With only this language to work from, these two courts determined that "the people" does not include undocumented immigrants.

Textual analysis conducted under *Heller*'s text and history prong is still valid under the new *Bruen* test. Before *Bruen*, the Fifth Circuit was the first circuit court to tackle the issue in *United States v. Portillo-Munoz*.[176] It determined that "[i]llegal aliens are not 'law-abiding, responsible citizens' or 'members of the political community,' and aliens who enter or remain in this country illegally and without authorization are not Americans as that word is commonly understood."[177] This conclusion is based upon text and precedent. Specifically, the court found that *Verdugo-Urquidez* did not support the proposition that the Second Amendment extended to an undocumented immigrant.[178] Nor did the Fourth Amendment's protection of undocumented immigrants from illegal search and seizure because "[a]ttempts to *precisely* analogize . . . these two amendments [are] misguided, and [the court found] it reasonable that an affirmative right [the Second Amendment] would be extended to fewer groups than would a protective right [the Fourth Amendment]."[179] Further, it noted that "the Supreme Court has long held that Congress has the authority to make laws governing the conduct of aliens that would be unconstitutional if made to apply to citizens."[180] In sum, the Fifth Circuit found the textual interpretations of the Second Amendment persuasive and did not need to reach a historical analysis.

After *Bruen*, courts have determined that the Fifth Circuit's analysis in *Portillo-Munoz* is still consistent under the *Bruen* test, despite its lack of historical analysis. In *United States v. Sitladeen*,[181] the Eighth Circuit relied on its prior precedent to decide the question at *Bruen* step one. That pre-*Bruen* case was *United States v. Flores*,[182] a

173. *Id.* at 580.
174. *Id.* at 581.
175. *Id.* at 635.
176. United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011).
177. *Id.* at 440.
178. *Id.*
179. *Id.* at 441.
180. *Id.*
181. United States v. Sitladeen, 64 F.4th 978 (8th Cir. 2023).
182. United States v. Flores, 663 F.3d 1022 (8th Cir. 2011).

four sentence per curiam opinion that relied solely on *Portillo-Munoz* for its analysis.[183] The defendant questioned the validity of *Flores*, arguing that "*Bruen* is . . . an intervening Supreme Court opinion that 'raises serious questions about [its] continued validity'"[184] because the previous panel "understandably *did not engage in this requisite text and history analysis*. . . . And neither did [*Portillo-Munoz*]."[185] The Eighth Circuit firmly rejected the argument. Instead, it explained that "it is unmistakable that our holding in *Flores* is about the plain text of the Second Amendment .... [W]e did not reach our conclusion that § 922(g)(5)(A) is constitutional by engaging in means-end scrutiny or some other interest-balancing exercise."[186] Thus, "*Flores* is undisturbed by *Bruen*, and we therefore remain bound by it."[187]

However, cases decided on the text lack persuasive value outside of their circuit because of the uncertainty surrounding the *Bruen* test. *Portillo-Munoz* was decided at *Heller* step one solely based on the text.[188] The only cases to significantly grapple with *Portillo-Munoz* after *Bruen* were in courts required to follow it as circuit precedent.[189] Outside of the circuit, the only cases that mention *Portillo-Munoz* did so only to note the circuit split of approaches.[190] It was rarely substantively analyzed outside of the Fifth Circuit, and no court found its approach or conclusions persuasive. Similarly, *Flores* was only substantively cited by *Sitladeen*, again as circuit precedent.[191] Like *Portillo-Munoz*, *Flores* was given almost no weight outside of the Eighth Circuit.

This trend might seem strange because on its face, a text-only approach appears to be 100 percent in line with the *Bruen* test, for the first step is whether "the Second Amendment's *plain text* covers an

183. *See id.* at 1023 (8th Cir. 2011) ("Agreeing with the Fifth Circuit . . . we affirm." (citing *Portillo-Munoz*, 643 F.3d 437)).

184. Supplemental Brief of Appellant at 4, *Sitladeen*, 64 F.4th 978 (No. 22-1010).

185. *Id.* (emphasis added).

186. *Sitladeen*, 64 F.4th at 985.

187. *Id.* at 987.

188. *Portillo-Munoz*, 643 F.3d at 442.

189. *See, e.g.*, United States v. D'Luna-Mendez, SA-22-CR-00367-OLG, 2023 WL 4535718, at *3 (W.D. Tex. July 13, 2023) ("In *Portillo-Munoz*, the Fifth Circuit did not reach the second step of the governing framework and therefore did not engage in the means-end scrutiny repudiated by the Supreme Court in *Bruen*.").

190. *See, e.g.*, United States v. Pierret-Mercedes, No. 22-cr-430 (ADC/BJM), 2023 WL 2957728, at *3 (D.P.R. Apr. 14, 2023) ("The Fourth, Fifth, and Eighth Circuits have found that Second Amendment protections do not extend to undocumented immigrants.").

191. *See Sitladeen*, 64 F.4th at 983–87 (citing *Flores*).

individual's conduct."[192] However, "*Bruen* leaves the step-one 'plain text' inquiry unspecified."[193] Indeed,

> Does the textual interpretation take place apart from historical inquiry? Or, as *Bruen* suggested . . . does this inquiry allow interpreting "the Second Amendment's text, *as informed by history*"? But if that is right, and history pervades the threshold textual inquiry, what work is left for the second-stage inquiry into the government's proffered historical sources?[194]

The confusion is understandable for a few reasons.

First, Justice Thomas explains the *Bruen* test as one step, one that looks at text, history, and tradition.[195] But if the one-step test is being applied as two steps, it is unclear where each inquiry falls.

Second, "for other fairly specific constitutional provisions, courts and commentators have long rejected the notion that the bare, literal text provides all the answers."[196] For instance, Justice Hugo L. Black attempted to rely on the bare text of the First Amendment and viewed any law that implicated the right to free speech to be unconstitutional.[197] Such an approach was untenable because it "placed enormous pressure on how to define 'speech'" and did not make cases any easier to decide.[198]

Third, fundamentally, the *Bruen* test is a textualist analysis, but what exactly that means is certainly not clear. Some propose that there are twelve steps to a textual analysis, each of which contain a variety of choices.[199] Step two, for example, is "Which Date."[200] At this step, one must decide: (1) whether to use the text's current or historical meaning[201]; (2) if the historical meaning is chosen, which year(s) to

192. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022) (emphasis added).

193. Charles, *Dead Hand of a Silent Past*, *supra* note 23, at 95.

194. *Id.* at 96 (quoting *Bruen*, 597 U.S. at 19).

195. *See Bruen*, 597 U.S. at 19 (describing the two-step framework as "one step too many").

196. Charles, *Dead Hand of a Silent Past*, *supra* note 23, at 117–18.

197. *Id.*; *see, e.g.*, Breard v. City of Alexandria, 341 U.S. 622, 650 (1951) (Black, J., dissenting) ("It is my belief that the freedom of the people of this Nation cannot survive even a little governmental hobbling of religious or political ideas, whether they be communicated orally or through the press.").

198. Charles, *Dead Hand of a Silent Past*, *supra* note 23, at 118.

199. William Eskridge Jr., Brian Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1623 (2023).

200. *Id.* at 1630.

201. *Id.*

focus on[202]; and (3) whether to utilize an extensional or intentional approach.[203] Using this formula in a Second Amendment context means that there are seven separate paths one could take to use history to analyze the plain text.[204] That has been so in practice. The majority in *Bruen* only looked to modern understandings of the phrase "keep and bear."[205] But it likely did so because it was a relatively easy case.[206] Conversely, in *Heller*, Justice Scalia cited Founding-era dictionaries to define "arms."[207] He also looked to Founding-era historical sources and laws to confirm his interpretation.[208] Further support for a history-informed "plain text" analysis is the Court's insistence that the Second Amendment codified a "pre-existing" right, suggesting that jurists should look at how the term was understood at ratification.[209]

Fourth, *Bruen* specifically asked whether the "*conduct*" is covered by the plain text of the amendment.[210] Does this mean that only the "conduct" must be implicated, leaving people and arms determinations

202. *Id.* at 1632.

203. *Id.* at 1633–35.

204. This was calculated by first deciding whether to consider history at all (step one). If the answer is no, that is one option. If the answer is yes, then a textualist must decide which time period to use: Bill of Rights, Fourteenth Amendment ratification, or both (step two). Then, for each time period, there is the option to use the extensional or intentional approach (step three), another six options. This adds up to a total of seven options. *See id.* at 1630–35 (laying out these steps).

205. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 32–33 (2022) (analyzing the natural meaning of "bear" in modern parlance).

206. Charles, *Dead Hand of a Silent Past*, *supra* note 23, at 95.

207. *See* District of Columbia v. Heller, 554 U.S. 570, 581 (2008) (looking to the 1773 edition of Samuel Johnson's dictionary and Timothy Cunningham's 1771 legal dictionary to define "arms").

208. *See id.* at 600–01 ("Our interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment.").

209. *See id.* at 592 ("[I]t has always been widely understood that the Second Amendment . . . codified a pre-existing right."); McDonald v. City of Chicago, 561 U.S. 742, 809 (2010) (Scalia, J., concurring) ("[T]he Framers codified the right to bear arms in the Second Amendment—its nature as an inalienable right that pre-existed the Constitution's adoption . . . ."); *Bruen*, 597 U.S. at 25 ("[T]ext meant to codify a pre-existing right . . . .").

210. *Bruen*, 597 U.S. at 17 (emphasis added); *see also* Charles, *Dead Hand of a Silent Past*, *supra* note 23, at 97 ("*Bruen* also did not expressly specify *what* must fall within the plain text.").

to step two?[211] Or does it include all three?[212] Given this confusion, it is no wonder courts are hesitant to give cases based solely on textual analysis substantial persuasive power; there are countless ways for them to potentially go awry, and whether and how history plays into the analysis remains murky.[213] Simply, it seems risky for a court after *Bruen* to decide a case on a solely textual basis.

Fifth and finally, there is further reason to be skeptical of *Portillo-Munoz* because it treats the Second Amendment as distinct from other parts of the Bill of Rights. A main part of the Fifth Circuit's holding was that "[a]ttempts to *precisely* analogize [the Second and Fourth Amendments are] misguided, and we find it reasonable that an affirmative right [the Second Amendment] would be extended to fewer groups than would a protective right [the Fourth Amendment]."[214] However, *Bruen* purports to put the Second Amendment on equal footing with other rights in the Bill of Rights.[215] By *Bruen*'s logic, *Verdugo-Urquidez*, as a Fourth Amendment case, might now have more persuasive strength. However, *Portillo-Munoz* "subject[s] [the Second Amendment] to an entirely different body of rules"[216] by distinguishing it as "an affirmative right."[217] Like Judge James L. Dennis pointed out in dissent, "[t]he majority's characterization of the

211. *See* United States v. Quiroz, 629 F. Supp. 3d 511, 516 (W.D. Tex. 2022) ("*Bruen*'s first step, however, requires only that 'the Second Amendment's plain text cover the *conduct*.' . . . [W]hether the Government can restrict that specific conduct for a specific group would fall under *Bruen*'s second step . . . ."); United States v. Bullock, 679 F. Supp. 3d 501, 525 (S.D. Miss. 2023) ("*Bruen* step one requires us to look at the 'conduct' being regulated, not the status of the person performing the conduct." (citing *Bruen*, 597 U.S. at 17)).

212. *See Bruen*, 597 U.S. at 31–32 (deciding that the challengers were part of "the people," that handguns qualified as arms, and that carrying was covered conduct under the Second Amendment).

213. *Compare* Bevis v. City of Naperville, 85 F.4th 1175, 1194 (7th Cir. 2023) ("When interpreting the text of a constitutional provision or a statute, we often resort to contemporaneous dictionaries or other sources of context to ensure that we are understanding the word in the way its drafters intended."), *with id.* at 1222 (Brennan, J., dissenting) ("Per *Bruen*, whether firearm regulations were historically grounded in a military versus civilian distinction is to be performed as part of the history and tradition analysis, not in the plain text review, as the majority opinion does.").

214. United States v. Portillo-Munoz, 643 F.3d 437, 441 (5th Cir. 2011).

215. *See Bruen*, 597 U.S. at 70 ("The constitutional right to bear arms . . . is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.' We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need." (quoting McDonald v. City of Chicago, 561 U.S. 742, 780 (2010) (citation omitted))).

216. *Id.* (quoting *McDonald*, 561 U.S. at 780).

217. *Portillo-Munoz*, 643 F.3d at 441.

Second Amendment . . . is contradicted by *Heller*,"[218] which itself draws its definition of the people from the Fourth Amendment context.[219] He also characterizes the holding as "wholly unsupported by the applicable precedents," citing *Verdugo-Urquidez* and other Fourth and Fourteenth Amendment cases.[220] Should *Bruen*'s holding be precisely followed, attempts to distinguish the Second Amendment from other constitutional rights are prohibited. This part of the Fifth Circuit's analysis, the foundation upon which it built its holding, is hard to square with *Bruen*.

C. Text, History, and Tradition

Finally, the Fourth and Eleventh Circuits, as well as Second Circuit Judge Menashi in his concurring opinion in *United States v. Perez*,[221] conducted textual and historical analysis akin to *Bruen* to uphold § 922(g)(5).[222] In a lengthy concurrence, Judge Kevin Newsom in *United States v. Jimenez-Shilon*[223] explained why the court conducted a text, history, and tradition test, rather than means-end scrutiny—an analysis that largely reflects the majority's decision in *Bruen*, which was published exactly one month later.[224] Like Justice Thomas,[225] Judge Newsom was "on board with step one [of the *Heller* test], which calls for an originalist inquiry."[226] Also like Justice Thomas, he "view[ed] step two as problematic—not only because it elevates the normative views of 'we the judges' over 'We the People' through an ill-defined balancing test, but also because it stands in significant tension with Supreme Court precedent."[227] Unsurprisingly, he and the Eleventh Circuit reached the same bottom line as *Bruen*: "We should instead 'conclude[] that text, history, and tradition . . . are dispositive in

218. *Id.* at 444 (Dennis, J., concurring in part and dissenting in part).

219. *See* District of Columbia v. Heller, 554 U.S. 570, 580 (2008) (looking to *Verdugo-Urquidez* for its definition of "the people").

220. *Portillo-Munoz*, 643 F.3d at 445 (Dennis, J., concurring in part and dissenting in part).

221. United States v. Perez, 6 F.4th 448 (2d Cir. 2021).

222. *See supra* note 141 and accompanying text.

223. United States v. Jimenez-Shilon, 34 F.4th 1042 (11th Cir. 2022).

224. *See id.* at 1050–52 (Newsom, J., concurring) (advocating for an "originalist inquiry" to determine Second Amendment cases, much like the *Bruen* majority).

225. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 19 (2022) ("Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history.").

226. *Jimenez-Shilon*, 34 F.4th at 1050 (Newsom, J., concurring).

227. *Id.*; *see Bruen*, 597 U.S. at 24 ("In sum, the Courts of Appeals' second step is inconsistent with *Heller*'s historical approach and its rejection of means-end scrutiny.").

determining whether a challenged law violates the right to keep and bear arms.'"[228]

In not so many words, the Fourth Circuit in *United States v. Carpio-Leon*[229] and Judge Menashi in his concurrence in *Perez* reached the same conclusion.[230] Each decision cited historical sources from the time of the Founding to uphold § 922(g)(5). Sources cited by these courts were largely from the eighteenth century, including laws banning Catholic,[231] Indigenous,[232] and enslaved persons,[233] and those who failed to pledge loyalty to the country[234] from possessing firearms. This legal history was all to support the proposition that "'an early feature of the emerging republic' [was] the selective 'disarmament of groups associated with foreign elements.'"[235]

District courts after *Bruen* have most often turned to these three decisions for guidance when deciding challenges to § 922(g)(5). They remain binding precedent within their respective circuits. To illustrate, a district court in the Eleventh Circuit found that "*Jimenez-Shilon* remains binding precedent," because its analysis was "in perfect keeping with *Bruen* and sufficient to sustain the constitutionality of Section 922(g)(5) under the *Bruen* methodology."[236]

Further, courts generally look to text, history, and tradition cases as persuasive authority. After *Bruen*, most district courts that have upheld § 922(g)(5) at *Bruen*'s step-two history and tradition analysis substantively cited to one of these cases. One of the earliest post-*Bruen* § 922(g)(5) cases, *United States v. DaSilva*,[237] heavily relied on all three opinions to conclude that restrictions of undocumented immigrants

228. *Jimenez-Shilon*, 34 F.4th at 1052 (Newsom, J., concurring) (quoting Rogers v. Grewal, 140 S. Ct. 1865, 1866 (2020) (mem.) (Thomas, J., joined by Kavanaugh, J., dissenting from the denial of certiorari)).

229. United States v. Carpio-Leon, 701 F.3d 974 (4th Cir. 2012).

230. *See id.* at 979 ("[W]e can employ the historical analysis [*Heller*] prescribed to apply . . . ."); *Perez*, 6 F.4th at 462 (Menashi, J., concurring) ("That the Second Amendment codifies a right belonging to members of the political community is further confirmed by examining its historical antecedents and the practice of 'founding-era legislatures.'").

231. *Perez*, 6 F.4th at 462 (Menashi, J., concurring).

232. *Jimenez-Shilon*, 34 F.4th at 1047; *Perez*, 6 F.4th at 462 (Menashi, J., concurring).

233. *Jimenez-Shilon*, 34 F.4th at 1047.

234. *Carpio-Leon*, 701 F.3d at 980; *Jimenez-Shilon*, 34 F.4th at 1047; *Perez*, 6 F.4th at 462 (Menashi, J., concurring).

235. *Jimenez-Shilon*, 34 F.4th at 1048 (quoting Gulasekaram, *"The People" of the Second Amendment*, *supra* note 121, at 1548–49).

236. United States v. Ruiz, CRIM. ACTION 23-0105-WS, 2023 WL 7171451, at *2 (S.D. Ala. Oct. 31, 2023).

237. United States v. DaSilva, 3:21-CR-267, 2022 WL 17242870 (M.D. Pa. Nov. 23, 2022).

were consistent with the country's historical tradition of restricting firearms, deciding the case at *Bruen* step two.[238] The court took notice of the various ways the circuits had dealt with § 922(g)(5) but identified *Jimenez-Shilon*, *Carpio-Leon*, and Judge Menashi's *Perez* concurrence as highly persuasive authority.[239] It concluded that all three cases "present a persuasive and overall uniform agreement" that undocumented immigrants were not included in "the people."[240]

Since then, most district courts have cited to at least one of the pre-*Bruen* text, history, and tradition cases, or to *DaSilva*, which itself relied on one of them.[241] Even a case that did not cite one—*Leveille*—cited the same source as two of the opinions that conducted a historical analysis. In particular, *Leveille* relied solely on an article that chronicles the legal and historical context of the Second Amendment to support its conclusion that "historical restrictions on individuals who did not swear an oath of allegiance . . . is sufficiently similar to Section 922(g)(5)."[242] *Jimenez-Shilon* and Judge Menashi's concurrence also cite this source.[243] Even courts that decided cases at *Bruen* step one have cited to these cases as a belt-and-suspenders tactic.[244]

This Note has discussed a few of the many doctrinal issues *Bruen* created.[245] As this new test is fleshed out, the historical analysis will remain persuasive.[246] Like then-Judge Amy Coney Barrett noted when she was on the Seventh Circuit,

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238. *Id.* at *7–10.

239. *See id.* at *10 (writing that it "finds the Eleventh Circuit's detailed historical analysis to be highly persuasive and incorporates that historical analysis in full [and finds] the Fourth Circuit's reasoning and Second Circuit Judge Menashi's concurring opinion, both of which underscore the comprehensive analysis and historical accuracy of the Eleventh Circuit's opinion").

240. *Id.*

241. *See, e.g.*, United States v. Gil-Solano, 699 F. Supp. 3d 1063, 1068–71 (D. Nev. 2023) (citing United States v. Jimenez-Shilon, 34 F.4th 1042, 1045 (11th Cir. 2022); United States v. Perez, 6 F.4th 448, 462 (2d Cir. 2021) (Menashi, J., concurring); *DaSilva*, 2022 WL 17242870; United States v. Vizcaíno-Peguero, 671 F. Supp. 3d 124, 129 (D.P.R. 2023) (citing *DaSilva,* 2022 WL 17242870).

242. United States v. Leveille, 659 F. Supp. 3d 1279, 1284 (D.N.M. 2023).

243. *Jimenez-Shilon*, 34 F.4th at 1048; *Perez*, 6 F.4th at 462 (Menashi, J., concurring).

244. *See, e.g.*, United States v. Pineda-Guerava, 685 F. Supp. 3d 380, 386–87 (S.D. Miss. 2023) (citing *Perez*, 6 F.4th at 462 (Menashi, J., concurring); *DaSilva,* 2022 WL 17242870).

245. *See supra* notes 62–72.

246. This is assuming that the historical analogues drawn by the text, history, and tradition cases are adequate analogues to § 922(g)(5). This Note does not address that complicated question. For more information, see generally Gulasekaram, *The Second Amendment's "People" Problem*, *supra* note 71.

> There are competing ways of approaching the constitutionality of gun dispossession laws. Some maintain that there are certain groups of people—for example, violent felons—who fall entirely outside the Second Amendment's scope. Others maintain that all people have the right to keep and bear arms but that history and tradition support Congress's power to strip certain groups of that right.[247]

These cases are the perfect example of this phenomenon. *Carpio-Leon* and the *Perez* concurrence utilize text, history, and tradition to hold that undocumented immigrants are not part of "the people," resolving the case at *Heller*'s text and history inquiry.[248] On the other hand, *Jimenez-Shilon* found the sufficient historical analogue to § 922(g)(5), applying *Bruen*'s text, history, and tradition analysis prior to the announcement of the test.[249] Thus far, every district court analyzing the undocumented immigrant prohibitor has taken the second approach, because the only cases that have decided challenges at *Bruen* step one have done so on a purely textual basis.[250] However, outside of § 922(g)(5) cases, courts have taken the first approach.[251] In fact, in *Bevis v. City of Naperville*,[252] the Seventh Circuit utilized history in both steps of the analysis.[253] It is by no means a stretch to assume such a case might come in the § 922(g)(5) context. After all, as Justice Oliver Wendell Holmes once wrote, "a page of history is worth a volume of logic."[254]

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247. Kanter v. Barr, 919 F.3d 437, 451–52 (7th Cir. 2019) (Barrett, J., dissenting) (citation omitted), *abrogated by* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

248. *See* United States v. Carpio-Leon, 701 F.3d 974, 979 (4th Cir. 2012) ("[W]e can employ the historical analysis [*Heller*] prescribed to apply its observations to this case . . . and thus to reach the conclusion . . . that illegal aliens do not belong to the class of law-abiding members of the political community to whom the Second Amendment gives protection" (citation omitted)); *Perez*, 6 F.4th at 463 (Menashi, J., concurring) (utilizing text, history, and tradition to conclude that "illegal aliens lack protection under the Second Amendment").

249. *See* United States v. Jimenez-Shilon, 34 F.4th 1042, 1050 (11th Cir. 2022) ("[C]onsistent with the Second Amendment's text and history, [undocumented immigrants] do not enjoy the right to keep and bear arms. Accordingly, we hold that 18 U.S.C. § 922(g)(5) passes constitutional muster.").

250. *See supra* Part IV.B (analyzing cases decided on a textual analysis).

251. *See, e.g.*, United States v. Flores, 652 F. Supp. 3d 796, 801 (S.D. Tex. 2023) ("Defendant's historical evidence is too sparse and too weak to justify recognizing an unwritten right to commercially sell arms.").

252. Bevis v. City of Naperville, 85 F.4th 1175 (7th Cir. 2023).

253. *See id.* at 1201 ("Harking back to our examination of covered Arms [at step one], we find the distinction between military and civilian weaponry to be useful for *Bruen*'s second step . . . . [T]he distinction between the two uses is one well rooted in our history.").

254. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

* * *

The scalpel approach demonstrates the particularity with which most lower courts after *Bruen* have analyzed pre-*Bruen* precedent. Those courts do a close read of *Bruen*, determine which parts of the analysis remain good law, and then apply whatever is left to the case at hand. This approach is starkly different from the chainsaw approach.

V. THE CHAINSAW APPROACH

In contrast to the careful analysis exemplified by the scalpel approach, some courts have used more abrasive tactics to address pre-*Bruen* precedent. In *United States v. Rahimi*,[255] the Fifth Circuit proclaimed that *Bruen* "fundamentally change[d] our analysis of laws that implicate the Second Amendment rendering our prior [Second Amendment] precedent *obsolete*."[256] In another case, the Fifth Circuit chastised other courts for "rel[ying] reflexively on pre-*Bruen* caselaw or . . . loose analogues" when deciding Second Amendment cases.[257] It instructed courts to start the Second Amendment analysis anew, rather than strip away at prior cases piece by piece, thereby abrogating *all* Second Amendment precedent within its jurisdiction. [258] This is the wrong approach.

It is first worth diving into *Rahimi* itself. There, the Fifth Circuit ruled that 18 U.S.C. § 922(g)(8) was unconstitutional, although it was later overturned by the Supreme Court.[259] In doing so, the court jettisoned precedent upholding the statute because it had used means-end scrutiny.[260] To be sure, this approach was correct. The then-existing precedent had utilized means-end scrutiny, so the court was right in conducting the history and tradition analysis that *Bruen* requires.[261] However, in doing so, it made a broad proclamation: "*Bruen* clearly 'fundamentally change[d]' [courts'] analysis of laws that implicate the

255. United States v. Rahimi, 61 F.4th 443, 450–51 (5th Cir. 2023).

256. *Id.* at 450–51 (citation omitted) (emphasis added), *rev'd* 602 U.S. 680. Although the Supreme Court reversed the Fifth Circuit, it did nothing to rebuke the court's chainsaw approach. *See generally Rahimi*, 602 U.S. 680 (2024) (reversing the Fifth Circuit but not commenting on its abrogation of all pre-*Bruen* Second Amendment precedent).

257. United States v. Daniels, 77 F.4th 337, 355 n.44 (5th Cir. 2023).

258. *Rahimi*, 61 F.4th at 450–51.

259. *Id.* at 461.

260. *Id.* at 450.

261. *See id.* ("[T]he Court expressly repudiated the circuit courts' means-end scrutiny—the second step embodied in *Emerson* and applied in *McGinnis*.").

Second Amendment, rendering [the Fifth Circuit's] prior precedent obsolete."[262] This statement is the basis for lower courts in the Fifth Circuit deciding to utilize the chainsaw approach.

This brings us to *United States v. Sing-Ledezma*[263] and *United States v. Benito*,[264] both of which ruled § 922(g)(5) unconstitutional.[265] Of course, that outcome in and of itself is significant, for they were the first courts to hold that the statute violated the Second Amendment. But methodologically, they are the only § 922(g)(5) cases to utilize the chainsaw approach.

Both cases addressed and cast aside the Fifth Circuit's pre-*Bruen* decision upholding § 922(g)(5): *Portillo-Munoz*.[266] Their treatment of *Portillo-Munoz* was starkly different from other pre-*Bruen* district court cases in the Fifth Circuit. By way of example, take *United States v. D'Luna-Mendez*.[267] In *D'Luna-Mendez*, the court upheld § 922(g)(5), distinguishing *Portillo-Munoz* from the cases *Rahimi* overturned because those cases relied on means-end scrutiny, and because "[t]he Fifth Circuit did not engage in any of this prohibited analysis in *Portillo-Munoz*."[268] Put another way:

> At most, *Bruen* implicitly overruled all Second Amendment precedent engaging in means-end or similar scrutiny. *Portillo-Munoz* did not conduct this type of analysis and remains binding precedent. This Court is therefore not authorized to revisit whether illegal aliens are a part of "the people" in the Second Amendment, as this question has already been decided

262. *Id.* at 450–51.

263. United States v. Sing-Ledezma, 706 F. Supp. 3d 650 (W.D. Tex. 2023).

264. United States v. Benito, No. 3:24-CR-26-CWR-ASH, 2024 WL 3296944 (S.D. Miss. July 3, 2024).

265. *Sing-Ledezma*, 706 F. Supp. 3d at 673; *Benito*, 2024 WL 3296944, at *6. The U.S. District Court for the District of Maine also ruled that § 922(g)(5) was unconstitutional as applied. United States v. Rebollar Osorio, No. 2:24-cr-00040-NT, 2024 WL 4476005, at *13 (D. Me. Oct. 11, 2024). However, because its circuit court, the First Circuit, did not have pre-*Bruen* case law, the district court's analysis is less relevant to this Note.

266. *See supra* notes 176–80 and accompanying text (discussing *Portillo-Munoz*).

267. United States v. D'Luna-Mendez, SA-22-CR-00367-OLG, 2023 WL 4535718 (W.D. Tex. July 13, 2023). Two other Fifth Circuit district court cases upheld § 922(g)(5) applying *Portillo-Munoz* using largely the same analysis. *See* United States v. Pineda-Guerva, No. 5:23-CR-2-DCB-LGI, 2023 WL 4943609 (S.D. Miss. Aug. 2, 2023); United States v. Andrade-Hernandez, No. 3:23-CR-26-DCB-LGI, 2023 WL 4831408 (S.D. Miss. July 27, 2023).

268. *D'Luna-Mendez*, 2023 WL 4535718, at *4.

> in this Circuit. Nothing in the Fifth Circuit's decision in *Rahimi* dictates otherwise.[269]

This is quintessentially the scalpel approach. The court carefully looked at the language of *Bruen* and refused to trim away any holding that was not expressly overruled.

Conversely, in *Sing-Ledezma*, the court swiftly cast *Portillo-Munoz* aside as "unavailing."[270] The court followed *Rahimi*'s lead and abrogated all pre-*Bruen* case law.[271] In utilizing the chainsaw approach, the court started the analysis from a blank canvas. It acknowledged that every other post-*Bruen* court upheld the statute,[272] but nevertheless, "the Court [could not] in good faith join this consensus because 'the vast majority [of those courts] relied reflexively on pre-*Bruen* caselaw or the same loose analogies that the [G]overnment advances in this case.'"[273] Rather, "[e]ngag[ing] carefully with the historical sources and the strictures of *Bruen* . . . leads inexorably to a finding that the Government has not met its burden"[274] *Benito*'s analysis largely accords with *Sing-Ledezma*. Important to note, though, is the *Benito* court's observation that "the Supreme Court's latest decision in *Rahimi* didn't disagree with [the] premise" that "prior precedent [is] obsolete" "in the slightest."[275] In other words, despite the opportunity to do so, the Supreme Court did not reject the chainsaw approach.[276]

The chainsaw approach may lead to inconsistent rulings. Most of the time, this inconsistency is not because judges have alternative

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269. *Id.*

270. *Sing-Ledezma*, 706 F. Supp. 3d at 660.

271. *Id.* at 659–60.

272. *Id.* at 672.

273. *Id.* at 672–73 (second and third alterations in original).

274. *Id.* at 673 (second alteration in original).

275. United States v. Benito, No. 3:24-CR-26-CWR-ASH, 2024 WL 3296944, at *3 (S.D. Miss. July 3, 2024) (quoting *Sing-Ledezma*, 706 F. Supp. 3d at 660).

276. Following *Sing-Ledezma* and *Benito*, the Fifth Circuit considered and upheld the constitutionality of § 922(g)(5). United States v. Medina-Cantu, 113 F.4th 537, 542 (5th Cir. 2024) (per curiam). In doing so, the court followed the scalpel approach and ruled that *Portillo-Munoz* had not been overturned by *Bruen* or *Rahimi*. *See id.* ("The majority opinions in *Bruen* and *Rahimi* did not . . . unequivocally abrogate our holding in *Portillo-Munoz*."). However, this was a narrow holding. Indeed, the court questioned the continued validity of *Portillo-Munoz*, writing that "there are reasonable arguments as to why *Portillo-Munoz* should be reconsidered post-*Bruen* and *Rahimi*" because it did not "include a historical analysis." *Id.* Thus, it remains possible that the Fifth Circuit will reconsider *Portillo-Munoz* in an en banc setting in the near future.

agendas, but simply because history is hard.[277] How is a court meant to analogize Founding-era firearms regulation to carrying a weapon on an airplane?[278] Or what does historical silence mean?[279] Of course, the history and tradition analysis is often unavoidable,[280] but the chainsaw approach *forces* courts to engage with it when they do not have to.

VI. THE WAY FORWARD

On balance, the scalpel approach is more faithful to both the law of precedent and the ideas underlying it and thus better reflects the status of pre-*Bruen* case law. Circuit courts are bound by their own precedent absent a Supreme Court ruling "contradicting or invalidating" the analysis.[281] This exception is typically "resort[ed] to . . . cautiously," because a "less-than-stringent application of the standards . . . increases uncertainty in the law by revisiting precedent without cause."[282] One circuit has already found that *Bruen* does not "indisputably and pellucidly abrogate" prior precedent, so it does not constitute a contradicting or invalidating Supreme Court decision.[283] A proper application of the foregoing case law points to the scalpel approach being proper. Indeed, the wholesale abrogation of Second Amendment precedent advocated for in *Rahimi* and applied in *Sing-Ledezma* is the opposite of a "cautious[]" application of the law.[284]

Underlying courts' hesitance is a variety of rationales, including uniformity and institutional legitimacy.[285] These, too, support the scalpel approach.

277. And seemingly, the Supreme Court itself does not fully understand how to apply the *Bruen* test. Justice Thomas, who wrote the majority in *Bruen* and thus should know best how it works, was the sole dissent in *Rahimi*. *See generally* United States v. Rahimi, 602 U.S. 680, 747 (2024) (Thomas, J., dissenting) (disagreeing with the majority's application of the test he crafted).

278. *See* Miller & Blocher, *supra* note 26, at 63 (analyzing this hypothetical).

279. *Id.* at 70.

280. *See supra* Part IV.A (discussing situations in which courts must engage in the analysis).

281. Vincent v. Garland, 80 F.4th 1197, 1200 (10th Cir. 2023).

282. United States v. Peguero, 34 F.4th 143, 158 (2d Cir. 2022) (quoting Dale v. Barr, 967 F.3d 133, 143 (2d Cir. 2020)).

283. *Vincent*, 80 F.4th at 1202.

284. *See Peguero*, 34 F.4th at 158 (holding that abrogation based on intervening Supreme Court precedent should be resorted to "cautiously").

285. Henry J. Dickman, Note, *Conflicts of Precedent*, 106 VA. L. REV. 1345, 1364–68 (2020).

A. Uniformity

Uniformity is the principal rationale of vertical precedent.[286] Both the Framers and Supreme Court have recognized its importance to the rule of law.[287] Important here, "[m]any laws are designed in large part to encourage individuals . . . to engage in socially desirable conduct . . . . '[I]t is impossible for law to influence primary behavior when individuals are subjected to inconsistent and conflicting signals about the law's meaning.'"[288] Uniformity, or the rule of law, "thrives on legal standards that foster stability, facilitate consistency, and promote predictability."[289] That is lacking here. In a time when Second Amendment law is in flux, firearm owners are already subject to a lack of clarity regarding their responsibilities. This is especially so now that the Court has turned to a text, history, and tradition test.[290]

Bruen has already led to differing lower court opinions about the constitutionality of gun control statutes. For example, courts have upheld and struck down laws restricting firearms possession for undocumented immigrants,[291] felons,[292] and users of controlled substances.[293] And there is nothing to suggest that those courts applied the *Bruen* test in anything but good faith. This trend is likely to continue without further Supreme Court clarification, for judicial confusion will continue.[294] And the lack of continuity in U.S. gun

286. *Id.* at 1346.

287. Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 849 (1994)

288. *Id.* (quoting Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991, 995 (1987)).

289. United States v. Rahimi, 602 U.S. 680, 746 (2024) (Jackson, J., concurring).

290. *Id.* at 747 (Jackson, J., concurring) ("So far, *Bruen*'s history-focused test ticks none of those boxes."); *cf.* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2225 (2015) (commenting that a test that forces "courts to determine the constitutional value of speech by means of a historical test . . . [might] create a set of doctrinal distinction that rest . . . on hidden value judgments—value judgments that are, as a result, very difficult to understand, engage with, or critique").

291. *Compare* United States v. Sitladeen, 64 F.4th 978, 987 (8th Cir. 2023) (upholding 18 U.S.C. § 922(g)(5)(A) as constitutional), *with* United States v. Sing-Ledezma, 706 F. Supp. 3d 650, 673 (W.D. Tex. 2023) (striking down the statute).

292. *Compare* United States v. Jackson, 69 F.4th 495, 501 (8th Cir. 2023) (upholding 18 U.S.C. § 922(g)(1) as constitutional), *vacated* 2024 WL 3768055 (8th Cir. Aug. 8, 2024), *with* Range v. Att'y Gen., 69 F.4th 96, 106 (3d Cir. 2023) (en banc) (striking the statute down as applied).

293. *Compare* United States v. Le, 669 F. Supp. 3d 754, 760 (S.D. Iowa 2023) (upholding 18 U.S.C. § 922(g)(3) as constitutional), *with* United States v. Harrison, 654 F. Supp. 3d 1191, 1222 (W.D. Okla. 2023) (striking down the statute as applied).

294. *See supra* notes 21–24 and accompanying text (discussing cases in which courts commented on their confusion about the *Bruen* test).

culture, and history in general, will lead to judges essentially guessing what the history dictates.[295]

Take *Sing-Ledezma* as an example. The court's analysis there assumes that concerns about foreigners stepping onto U.S. soil are not new and thus that the absence of similar historical laws renders § 922(g)(5) unconstitutional.[296] But the court reaches that conclusion despite the fact that, in its own words, "there was no concept of illegal immigration when the Bill of Rights was enacted, and only a limited notion of illegal immigration developed during the nineteenth century."[297] Further, "in the early nineteenth century, foreigners who arrived in the United States were not deemed 'illegal' upon entry and were not subject to inspection."[298] Congress did not create the first category of inadmissible immigrants until 1882.[299] But despite the lack of law, the influx of immigrants during the eighteenth and nineteenth centuries must mean that the government was concerned about illegal immigration, making it relevant to the *Bruen* analysis.[300] Other courts can hardly be expected to replicate this analysis. It is emblematic of the inconsistency and lack of clarity that *Bruen* has created in the lower courts.

The consequences of this lack of clarity are dire. "[L]egal rules facilitate . . . certain choices."[301] The choice at issue here is to possess a firearm. At a time when gun homicides in the United States are

295. *See* Brian DeLay, *The Myth of Continuity in American Gun Culture*, 113 CAL. L. REV. (forthcoming 2025) at 6 ("Yet opponents of firearm regulation intone a myth of continuity in American gun culture."); *see also id.* at 5 ("Offices of Attorneys General across the country, scrambling to defend established or new laws, are consequently turning to professional historians with expertise in eighteenth- and nineteenth-century firearms."). And further, courts have confessed to their inadequacy in conducting historical analysis. *See, e.g.*, United States v. Rebollar Osorio, No. 2:24-cr-00040-NT, 2024 WL 4476005, at *13 (D. Me. Oct. 11, 2024) ("I am not a historian . . . .").

296. *See Sing-Ledezma*, 706 F. Supp. 3d at 666 ("The concern, then, about unknown foreigners stepping onto American soil, potentially with firearms, and certainly with unknown intentions, is not a new one.").

297. *Id.*

298. *Id.* at 665.

299. *Id.*

300. *See id.* at 666 ("So, although 'illegal immigration' did not exist when the Second Amendment was ratified in 1791, there had been and continued to be a large influx of foreigners coming to the United States without having been previously vetted and without having their belongings searched or weapons seized.").

301. Caminker, *supra* note 287, at 850.

disproportionately high,[302] firearm-related injuries are the leading cause of death for U.S. children,[303] and mass shootings are becoming increasingly common,[304] the question of who can and cannot possess a weapon is critical to public safety. As *Bruen* brews chaos in the lower courts, adding the wholesale abrogation of Second Amendment precedent under the chainsaw approach could lead to further inconsistent rulings.

B. Institutional Legitimacy

The scalpel approach is also consistent with the promotion of institutional legitimacy of the courts. There is no question that in recent years, the U.S. public has questioned the Supreme Court's adherence to the rule of law,[305] a trend to which *Bruen* undoubtedly contributed.[306] To many, the judiciary is now "viewed as biased partisans rather than faithful adherents to the law."[307]

Institutional legitimacy is vital to the functioning of the court system. Like the Court stated itself,

> [T]he Court cannot buy support for its decisions by spending money and . . . cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the

302. *See* Katherine Leach-Kemon, Rebecca Sirull & Scott Glenn, *On Gun Violence, the United States is an Outlier*, INST. FOR HEALTH METRICS & EVALUATION (Oct. 31, 2023), https://www.healthdata.org/news-events/insights-blog/acting-data/gun-violence-united-states-outlier [https://perma.cc/SW3J-RG97] ("Among 65 high-income countries and territories, the United States stands out for its high levels of gun violence.").

303. Jason E. Goldstick, Rebecca M. Cunningham & Patrick M. Carter, *Current Causes of Death in Children and Adolescents in the United States*, 386 NEW ENG. J. MED. 1955, 1955 (2022).

304. *See* Kiara Alfonseca, *There Have Been More Mass Shootings than Days in 2023, Database Shows*, ABC NEWS (Dec. 4, 2023, 11:04 AM), https://abcnews.go.com/US/mass-shootings-days-2023-database-shows/story?id=96609874 [https://perma.cc/AC8Q-LLYH].

305. *See, e.g.*, Lee Rawles, *SCOTUS Faces 'A Catastrophic Loss of Institutional Legitimacy,' Warns Author*, ABA J. (June 7, 2023, 7:55 AM), https://www.abajournal.com/books/article/podcast-episode-196 [https://perma.cc/MYM3-Z2M5]; Sara Savat, *WashU Expert: Post-*Dobbs*, Supreme Court's Legitimacy at Risk*, SOURCE (Oct. 12, 2022), https://source.wustl.edu/2022/10/washu-expert-post-dobbs-supreme-courts-legitimacy-at-risk [https://perma.cc/DQA5-LGDZ].

306. *See* Dahlia Lithwick, *How the Supreme Court Has Denigrated Its Own Legitimacy*, SLATE (July 12, 2022, 3:24 PM), https://slate.com/news-and-politics/2022/07/supreme-court-dobbs-end-of-term-bruen-guns-abortion-prayer-tiered-rights.html [https://perma.cc/VDQ3-4SVF] ("We kick the legs out of *Heller* in the *Bruen* case.").

307. Dickman, *supra* note 285, at 1365.

> people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.[308]

This belief goes back to the Founding. Like Alexander Hamilton famously wrote, "The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever . . . . [It] must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[309] Thus, "the judiciary is beyond comparison the weakest of the three departments of power."[310]

Much of the criticism surrounding the Supreme Court follows the "Politicians in Robes" rhetoric—that is, a Court acting according to political preferences rather than the law.[311] And the Court has historically been concerned about this characterization. For example, Chief Justice Roberts was the deciding vote in *NFIB v. Sebelius*.[312] Of course, that case was politically charged, for it represented an existential threat to Democratic President Barack Obama's crowning legislative achievement: the Affordable Care Act.[313] The Chief Justice initially intended to vote with the conservative bloc to strike down the law but switched his vote at the last minute to save it.[314] This change was reportedly prompted by his perception of "how the court is perceived by the public" and his belief that courts should cede to the legislature such policy decisions.[315] All this to say that when confronted with a potential crisis in legitimacy, the Court has a history of being minimalist in its methods. But the Court has bucked this trend in recent

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308. Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992) (plurality opinion).

309. THE FEDERALIST NO. 78 (Alexander Hamilton) (Avalon Project ed., 2008), https://avalon.law.yale.edu/18th_century/fed78.asp [https://perma.cc/9EPT-DU5G].

310. *Id.*

311. Levendusky, Winneg & Jamieson, *'Politicians in Robes': How a Sharp Right Turn Imperiled Trust in the Supreme Court*, UNIV. PENN. ANNENBERG PUB. POL'Y CTR. (Mar. 6, 2024), https://www.annenbergpublicpolicycenter.org/politicians-in-robes-how-a-sharp-right-turn-imperiled-trust-in-the-supreme-court [https://perma.cc/78TP-FGV8].

312. NFIB v. Sebelius, 567 U.S. 519 (2012).

313. *See id.* at 530 ("Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act . . . .").

314. Jan Crawford, *Roberts Switched Views to Uphold Healthcare Law*, CBS NEWS (July 2, 2012, 9:43 PM), https://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law [https://perma.cc/U4F7-Z8M4].

315. *Id.*; *see also* Benjamin S. Softness, *Preserving Judicial Supremacy Come* Heller *High Water*, 161 U. PA. L. REV. 623, 626 (2013) (listing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and *Brown v. Board of Education*, 347 U.S. 483 (1954) as other opinions where the Court considered its legitimacy in issuing a decision).

years with decisions like *Bruen*. The broad, sweeping proclamation contradicts the Chief Justice's minimalist approach in *Sebelius*.

Without institutional legitimacy, there are no courts. And "the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[316] Thus far, the chainsaw approach fails to adhere to precedent and thus cannot be considered "legally principled."

To free the courts from a partisan veil, courts must use the scalpel approach. Using the scalpel approach to carefully tailor precedent to conform with a brand-new test, like that in *Bruen*, is a better approach for several reasons. First, in certain circumstances, the scalpel approach allows courts to avoid undergoing a complicated and unpredictable historical analysis. Second, and more importantly, it gives existing gun control legislation a better chance of surviving. Relying on prior precedent that did not utilize means-end scrutiny provides gun control advocates with an effective argument to protect those laws from the onslaught that has, and will, occur.[317] Otherwise, the courts may face fundamental institutional reform.[318]

CONCLUSION

Whether Mr. Carbajal-Flores should be able to possess a firearm is a tangled mess of policy, politics, and law that this Note will not begin to answer. But courts' lack of consistency in answering this question is concerning. When striking down § 922(g)(5), the *Sing-Ledezma* court was not without its doubts. Before beginning its analysis, "the Court pause[d] to join the choir of lower courts urging the Supreme Court to

316. Planned Parenthood v. Casey, 505 U.S. 833, 866 (1992) (plurality opinion), *abrogated by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

317. *See* Charles, *By the Numbers*, *supra* note 73 (chronicling the influx of successful Second Amendment challenges after *Bruen*).

318. *See, e.g.*, *Fact Sheet: President Biden Announces Bold Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, WHITE HOUSE (July 29, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/07/29/fact-sheet-president-biden-announces-bold-plan-to-reform-the-supreme-court-and-ensure-no-president-is-above-the-law [https://perma.cc/62JG-ZN2M] (proposing institutional reform to the court system following controversial decisions like *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), and *Trump v. United States*, 603 U.S. 593 (2024)); John Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine"*, 73 OKLA L. REV. 229, 230–31 (2021) (describing President Franklin Delano Roosevelt's threats to pack the Supreme Court during the *Lochner* era and the subsequent shift in the Court's jurisprudence).

resolve the many unanswered questions left in *Bruen*'s wake."[319] It later commented that *Bruen* "sends jurists on a quixotic journey through history."[320] Adopting the scalpel approach to pre-*Bruen* precedent better reflects existing law, allows attorneys and courts to avoid this journey, and provides for a more consistent application of the nation's gun control laws.

319. United States v. Sing-Ledezma, 706 F. Supp. 3d 650, 655 (W.D. Tex. 2023).

320. *Id.* at 672.