In Denial about the Obvious: Upending the Rhetoric of the Modern Second Amendment

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[T]here be nothing new, but that, which is, Hath been before.[1]

Introduction

Sixteen years ago, before the U.S. Supreme Court decided *District of Columbia v. Heller*,[2] I published a student note which argued that one had to "explain[] away the obvious" to conclude that the Second Amendment did not protect an individual arms right.[3] The penchant to deny the historical evidence[4] that the Second Amendment protects an individual right ran deep among those believing that "guns are bad"[5] or that "ordinary people are too careless and stupid to own guns."[6]

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[1] William Shakespeare, The Poems of William Shakespeare 45 (William Jones ed., 1791) (Sonnet 59).

[2] 554 U.S. 570 (2008).

[3] George A. Mocsary, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 Fordham L. Rev. 2113 (2008).

[4] As relevant to *Bruen*'s method, "evidence" is not "proof." George A. Mocsary, *Statistically Insignificant Deaths: Disclosing Drug Harms to Investors (and Patients) Under SEC Rule 10b-5*, 82 Geo. Wash. L. Rev. 111, 113 n.7, 138–56 (2013). Much information can evidence a claim, but little can definitively prove it. *See id.*

[5] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 78 (2022) (Alito, J., concurring).

[6] Silveira v. Lockyer, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc).

During the first 114 years after the Second Amendment's ratification, for example, all but one court held that arms rights were individual.[7] Nevertheless, 20th-century courts selectively relied on cases that were likewise rife with selective citations routinely to hold that the Second Amendment protected a collective right.[8] In 2008, after a century of abuse, *Heller* affirmed the individual right to arms.[9] In 2010, the Court incorporated *Heller* against the states in *McDonald v. City of Chicago*.[10] With two smaller exceptions,[11] the Court did not issue another Second Amendment decision until the 2022 case of *New York State Rifle & Pistol Ass'n v. Bruen*, which invalidated New York's may-issue public-carry regime and set forth a test for Second Amendment adjudications.[12]

In this Term's *United States v. Rahimi*, a criminal defendant with a history of violence asserted a Second Amendment right to possess firearms while under a domestic violence restraining order. The Court rejected his challenge and upheld the defendant's conviction by an 8–1 vote.[13] In so doing, the Court illustrated that its Second Amendment jurisprudence is a straightforward application of the centuries-old practice of common-law reasoning that is taught to first-year law students.

Part I of this article surveys the denial that took place between *Heller* and *Bruen*. Part II distills *Rahimi*'s seven opinions. Section II.A discusses the Court's majority opinion, showing that *Rahimi* is a textbook example of common-law adjudication. Section II.B reviews the dissent, which also applies the common-law method but sees *Bruen* differently. Section II.C analyzes *Rahimi*'s *Bruen*-protesting

[7] Mocsary, *supra* note 3, at 2148, 2157 (citing sources and noting that the first instance occurred in 1905).

[8] Nicholas J. Johnson, Heller *as* Miller, *in* 1 Guns and Contemporary Society: The Past, Present, and Future of Firearms and Firearm Policy 83 (Glenn H. Utter ed., 2016).

[9] *See generally Heller*, 554 U.S. 570.

[10] 561 U.S. 742 (2010).

[11] *See infra* notes 19–28 and accompanying text.

[12] *Bruen*, 597 U.S. 1.

[13] United States v. Rahimi, 144 S. Ct. 1889 (2024). The Court also granted certiorari, vacated, and remanded (GVR'd) the remaining Second Amendment cases on its docket. *See* Leo Bernabei, *Thoughts on the Supreme Court's End-of-Term Second Amendment Dispositions*, Firearms Rsch. Ctr. (July 3, 2024), https://firearmsresearchcenter.org/forum/thoughts-on-the-supreme-courts-end-of-term-second-amendment-dispositions/.

concurrences, which acknowledge that *Rahimi* applied *Bruen* correctly but nonetheless find *Bruen* to be unworkable. Section II.D, elaborating on *Rahimi*'s originalism concurrences, discusses the importance of the Constitution's role as a hands-tying document that protects minority rights by restraining government's majoritarian propensities.

I. Post-*Heller* Denial

Soon after *McDonald*, lower courts began applying the "Two-Part Test" to Second Amendment challenges. Under that test, courts first asked whether the regulated activity was within the Second Amendment's scope as determined by history and tradition.[14] If it was not, the challengers lost. If it was, courts applied means-end scrutiny to determine whether the government's regulation was important enough to justify depriving the challengers of their rights.[15] In theory, strict scrutiny applied to regulations at the core of the right. In practice, courts held almost nothing to be within the core of the right and thus usually applied what they called "intermediate scrutiny." This form of intermediate scrutiny was often as or more deferential to the government than rational-basis review. Thus began a quiet defiance of *Heller*.[16] Nearly every regulation was upheld, with judges going as far as to undermine decades of fundamental-rights jurisprudence rather than rule in Second Amendment plaintiffs' favor.[17] The judges often did not hide their contempt for *Heller*.[18]

The Supreme Court did not consider another Second Amendment case until the 2016 case of *Caetano v. Massachusetts*.[19] Jaime Caetano had been convicted of possessing a stun gun that she had acquired after her abusive boyfriend put her into the hospital and she became

[14] *See Bruen*, 597 U.S. at 18–19.

[15] *See* Nicholas J. Johnson et al., Firearms Law and the Second Amendment: Regulation, Rights, and Policy 976 (3d ed. 2021).

[16] George A. Mocsary, *Treating Young Adults as Citizens*, 27 Tex. Rev. L. & Pol. 607, 610–13 (2023) [hereinafter Mocsary, *Young Adults*]; George A. Mocsary, *A Close Reading of an Excellent Distant Reading of* Heller *in the Courts*, 68 Duke L.J. Online 41, 55 (2018) [hereinafter Mocsary, *Distant Reading*].

[17] Mocsary, *Young Adults*, *supra* note 16, at 612–14.

[18] *See* Mocsary, *Distant Reading*, *supra* note 16, at 42 & n.10 (citing sources).

[19] 577 U.S. 411 (2016) (per curiam).

homeless.[20] She used it to scare off her abuser one day after work, when he was waiting for her and screaming at her that she should have been caring for the kids that they had together.[21]

The Massachusetts high court upheld her conviction, rejecting her Second Amendment argument.[22] That court reasoned that stun guns are not protected arms because (1) they "were not in common use at the time of the Second Amendment's enactment"; (2) they are "dangerous and unusual"—dangerous because they are weapons and unusual because they are a "modern invention"; and (3) they are not useful in the military.[23]

A unanimous Court reversed that decision, easily applying *Heller*. The Court reasoned that (1) *Heller* had rejected as "bordering on the frivolous" the argument "that only those arms in existence in the 18th century are protected by the Second Amendment"; (2) guns are also considered dangerous in Massachusetts and *Heller* protects those; and (3) *Heller* rejected the proposition that only military weapons are protected by the Second Amendment.[24]

The trend of judicial defiance continued in *New York State Rifle & Pistol Ass'n v. City of New York*, in which the plaintiffs challenged certain restrictions on New York City's premises handgun licenses. The restrictions barred licensees from taking licensed firearms anywhere except in-city shooting ranges. They could not take licensed firearms to second homes in or outside the City, or to shooting ranges outside the City.[25] The City implausibly argued that it had limited firearm transport to only in-City ranges because it wanted fewer guns on *the City's* streets. This proffered justification survived the trial court and Second Circuit.[26] When the Supreme Court granted certiorari, many of the law's defenders lobbied for its repeal.[27]

[20] *See id.* at 412–13 (Alito, J., concurring).

[21] *See id.* at 413.

[22] *See* Commonwealth v. Caetano, 26 N.E.3d 688, 695 (Mass. 2015).

[23] *See id.* at 692–94.

[24] *See Caetano*, 577 U.S. at 411–12.

[25] 590 U.S. 336, 345–46 (2020) (Alito, J., dissenting).

[26] *See id.* at 348–49.

[27] *See id.* at 349–51; *see also* Suggestion of Mootness, N.Y. State Rifle & Pistol Ass'n v. City of New York, 590 U.S. 336 (2020) (No. 18-280), 2019 WL 3451573.

The law was indeed changed, and the Court then granted the City's request for a dismissal on mootness grounds.[28]

New York State Rifle & Pistol Ass'n. v. Bruen[29] can be viewed as the Court acting to rein in this abuse. *Bruen* rejects the Two-Part Test's second step, the tiered-scrutiny review. *Bruen* instead instructs that when courts determine the constitutionality of firearm regulations, they must base their review on text, history, and tradition.[30] Complaints about *Bruen*'s alleged deficiencies began with its dissenting opinion, appeared online within hours, and have continued since.[31] Based on these complaints—from judges,[32]

[28] *N.Y State Rifle & Pistol Ass'n*, 590 U.S. at 339 (per curiam).

[29] 597 U.S. 1 (2022).

[30] *Id.* at 17–22.

[31] *See* Lisa Vicens & Samuel Levander, *The* Bruen *Majority Ignores Decision's Empirical Effects*, SCOTUSblog (July 8, 2022, 1:14 PM), https://www.scotusblog.com/2022/07/the-bruen-majority-ignores-decisions-empirical-effects/; Esther Sanchez-Gomez, *The Right to Fear, in Public: Our Town Square after* Bruen, SCOTUSblog (June 29, 2022, 1:44 PM), https://www.scotusblog.com/2022/06/the-right-to-fear-in-public-our-town-square-after-bruen/; *see also* Ry Rivard & Daniel Han, *Murphy Vows to 'Do Everything in Our Power to Protect' New Jerseyans after Supreme Court's Gun Ruling*, Politico (June 23, 2022, 3:24 PM), https://www.politico.com/news/2022/06/23/murphy-new-jersey-supreme-court-strikes-down-gun-laws-00041745 (New Jersey governor calling *Bruen* a "deeply flawed" and "dangerous decision" that "will make America a less safe country"); *Mayor Adams' Statement on Bruen Supreme Court Decision*, NYC (June 23, 2022), https://www.nyc.gov/office-of-the-mayor/news/426-22/mayor-adams-on-bruen-supreme-court-decision (New York City mayor arguing that *Bruen* "will put New Yorkers at further risk of gun violence"); Gavin Newsom (@GavinNewsom), X (June 23, 2022, 11:27 AM), https://twitter.com/GavinNewsom/status/1539993469644447744 [https://perma.cc/H2HN-W5A6] (California governor implying that the decision would lead to people "being gunned down" in public).

[32] *See, e.g.*, Barris v. Stroud Township, 310 A.3d 175, 215 (Pa. 2024) (Dougherty, J.) ("[T]o many, the *Bruen* Court's word that the Second Amendment is meant 'to be adapted to the various crises of human affairs' largely rings hollow since the Court has frozen its meaning in time[.]") (quoting *Bruen*, 597 U.S. at 28); State v. Wilson, 543 P.3d 440, 453 (Haw. 2024) (Eddins, J.) (arguing that the Court "distorts and cherry-picks historical evidence" and "shrinks, alters, and discards historical facts that don't fit"); United States v. Bullock, 679 F. Supp. 3d 501, 530–31 (S.D. Miss. 2023) (Reeves, J.) (arguing that *Bruen* contains "no accepted rules for what counts as evidence," that it "remains susceptible to accusations of political bias," and that "the Justices who decided *Bruen* wrote off the history they didn't like by declaring it 'ambiguous at best'") (quoting *Bruen*, 597 U.S. at 39); United States v. Love, 647 F. Supp. 3d 664, 670 (N.D. Ind. 2022) (Brady, J.) (referring to "*Bruen*'s game of historical Where's Waldo").

legal scholars,[33] and historians[34]—one would think it no longer possible to adjudicate Second Amendment cases. The defiance also continued.[35]

Part II discusses *Rahimi*'s seven opinions and shows that *Rahimi* proved wrong the allegations that *Bruen* could not be administered.

II. *Rahimi*

In February 2020, Zackey Rahimi was made subject to a temporary civil restraining order for allegedly assaulting and battering his

[33] *See, e.g.*, Brief of Second Amendment Law Scholars as Amici Curiae in Support of Petitioner at 4, United States v. Rahimi, 144 S. Ct. 1889 (2024) (No. 05-1631) ("To date, the lower courts' application of *Bruen*'s approach has not produced consistent, principled results"); Eric J. Segall, *Originalism,* Bruen*, and Constitutional Insanity*, 51 Fordham Urb. L.J. Online 1, 1 (2024) (calling *Bruen* "the most aggressive, consequential, and hopelessly anti-originalist decision interpreting the Second Amendment in American history").

[34] *See, e.g.*, Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes:* Bruen*'s Originalist Distortions*, SCOTUSblog (June 27, 2022; 5:05 PM), https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/ (opining that "the Bizarro constitutional universe inhabited by Thomas is bonkers," that "[t]he court's right-wing originalist supermajority, including Thomas, Alito, and their ideological co-conspirators, are making up the rules of evidence and historical interpretation on the fly," and that Justices "Gorsuch and Barrett" are "ideological warriors and political hacks" for perpetuating a "historical charade").

[35] Mocsary, *Young Adults*, *supra* note 16, at 616–17 & nn.61–62 (citing cases). The first case citing *Bruen* dismissed via a footnote its applicability to a California law barring persons confined to a mental-health facility within the previous five years from possessing firearms. The court merely cited Justice Brett Kavanaugh's concurrence, which restated *Heller*'s blessing of laws that disarm the mentally ill. *See* Pervez v. Beccerra, No. 18-CV-2793, 2022 WL 2306962, at *2 n.2 (E.D. Cal. June 27, 2022). Many courts have dismissed *Bruen*'s applicability to 18 U.S.C. § 922(g)(1)'s lifelong felon-in-possession ban on the ground that *Bruen* concerned law-abiding citizens, while convicted felons are not law abiding. *See, e.g.*, United States v. Riley, 635 F. Supp. 3d 411, 424 (E.D. Va. 2022). Other courts have adhered to pre-*Bruen* circuit precedent that did not rely on history and instead treated *Heller*'s "presumptively lawful" regulations, such as laws disarming felons and the mentally ill, as *unrebuttably* lawful. *See, e.g.*, United States v. Dubois, 94 F.4th 1284, 1293 (11th Cir. 2024); Vincent v. Garland, 80 F.4th 1197, 1202 (10th Cir. 2023), *cert. granted, judgment vacated*, No. 23-683, 2024 WL 3259668 (U.S. July 2, 2024); *cf. infra* note 78 and accompanying text.

Post-*Rahimi*, the U.S. Court of Appeals for the Tenth Circuit again concluded that its post-*Heller* decision categorically upholding § 922(g)(1) remained valid despite its lack of historical analysis. *See* United States v. Curry, No. 23-1047, 2024 WL 3219693, at *4 n.7 (10th Cir. June 28, 2024). The Supreme Court GVR'd *Vincent* for reconsideration in light of *Rahimi*, effectively forcing the Tenth Circuit to consider § 922(g)(1)'s validity with more than a citation to *Heller*'s "presumptively lawful" language.

girlfriend, the mother of his child.[36] When he noticed a bystander observing the incident, he retrieved a firearm from his car and fired toward his girlfriend and the bystander.[37] He later called his girlfriend and threatened to shoot her if she reported the incident.[38]

The restraining order included a finding that Rahimi committed "'family violence'" that was "'likely to occur again'" and that he "posed 'a credible threat' to the 'physical safety'" of his girlfriend and child.[39] The order explicitly prohibited him from "'[c]ommitting family violence,'" "possessing a firearm," or engaging in various other harassing behaviors.[40]

Between November 2020 and January 2021, Rahimi allegedly assaulted another woman with a gun and was involved in five rage-driven shootings (none of which apparently resulted in injury).[41] After a lawful search of his home, police discovered firearms. Rahimi was then indicted and convicted for violating 18 U.S.C. § 922(g)(8), which bars firearm possession by one who is subject to a court order that—

> (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
> (C)
>> (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.[42]

[36] *See Rahimi*, 144 S. Ct. at 1894–95.

[37] *Id.* at 1895.

[38] *Id.*

[39] *Id.* (quoting order)

[40] United States v. Rahimi, 61 F.4th 443, 449 (5th Cir. 2023) (quoting order).

[41] *Rahimi*, 144 S. Ct. at 1895; *Rahimi*, 61 F.4th at 449.

[42] 18 U.S.C. § 922(g)(8); *Rahimi*, 144 S. Ct. at 1895–96.

A. The Opinion of the Court

Chief Justice John G. Roberts authored the opinion for the Court, writing for every Justice except Justice Clarence Thomas. The Court's opinion first notes some basic propositions from *Heller*, *McDonald*, and *Bruen*: The Second Amendment was a fundamental right applicable to the states through the Fourteenth Amendment, it protected ordinary citizens, it was not unlimited, regulations are lawful under the Second Amendment if they fit within the "historical tradition of firearm regulation," and the burden is on the government to justify its regulations.[43]

1. Common-law "principles"

The Court's opinion characterizes some lower courts as having "misunderstood" the Court's Second Amendment methodology. Using a phrase that is already catching on, the opinion notes that historical regulations did not create "law trapped in amber."[44] Rather, as *Bruen* dictates, adjudicating a Second Amendment challenge requires examining whether "'relevantly similar'" analogous regulations were permitted by the American tradition of firearm regulation.[45] Importantly, a court must determine whether "the challenged regulation is consistent with the *principles* that underpin our regulatory tradition. . . . The law must comport with the *principles* underlying the Second Amendment," but it need not be a clone of a permissible earlier regulation.[46] The Court repeated that such analogizing is "a commonplace task for any lawyer or judge."[47] As it did in *Bruen*, the Court declined to opine on the relative weights of comparator laws from around the Founding (when the Second Amendment was ratified in 1791) or Second Founding (when the Fourteenth Amendment was ratified in 1868).[48]

[43] *Rahimi*, 144 S. Ct. at 1897.

[44] *Id. Cf. Bruen*, 597 U.S. at 27–28, 30.

[45] *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 597 U.S. at 29).

[46] *Id.* (emphases added).

[47] *Id.* (quoting *Bruen*, 597 U.S. at 28).

[48] *See id.* at 1898 n.1. The Justices referred to both eras in their analyses. For an early discussion of this potential difference in interpretation, see Clayton E. Cramer et al., *'This Right Is Not Allowed by Governments That Are Afraid of the People': The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified*, 17 Geo. Mason L. Rev. 823, 824 (2010) ("[T]he public understanding in 1866 of the right to arms protected by the Fourteenth Amendment might be different from the public understanding in 1791[.]").

The Court's reference to "principles," coupled with its reminder that modern laws need not be twins of earlier laws, reflects a straightforward common-law method to Second Amendment adjudication.[49] As Professors William Baude and Robert Leider have shown, common-law adjudication involves discerning the "scope of the right as reflected in legal materials such as statutes and court decisions."[50] A common-law judge looks to a wide range of such materials from different jurisdictions, sets aside outliers, and distills general principles.[51]

Bruen instructs courts to use a method of interpolation and extrapolation,[52] and *Rahimi* applies this method. It is nothing new. "[A]pplying old law to new facts . . . is the stuff of first-year law classes the world over."[53] *Bruen*'s "how and why" are "*at least* two [of the] metrics" that go into a Second Amendment common-law analysis.[54] But as the Court's words suggest, these need not be the only metrics. How long regulations have burdened one's right to armed self-defense can also matter, for example. This is basic common-law reasoning.

Bruen dictates that comparator laws from the First and Second Foundings merit particular attention. That is appropriate when interpreting constitutional provisions, which *are* supposed to be trapped in amber. Doing so removes majoritarian decision-making from future legislators and judges.[55] It is also appropriate that the 1791-versus-1868 question has not yet been resolved, given that the common law is built out by cases as they arise in

[49] William Baude & Robert Leider, *The General Law Right to Bear Arms*, 99 Notre Dame L. Rev. 1466, 1486 (2023).

[50] *Id.* at 1484; *accord id.* at 1485.

[51] *See id.* at 1470–73, 1485–86.

[52] *See id.* at 1483–96. It's also what gun-rights scholars have been doing for decades.

[53] William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 Law & Hist. Rev. 809, 817–18 (2019).

[54] *Bruen*, 597 U.S. at 29 (emphasis added).

[55] *Id.* at 34–38; *Rahimi*, 144 S. Ct. at 1908 (Gorsuch, J., concurring); *see also* Mocsary, *Young Adults*, *supra* note 16, at 608 (discussing the Constitution's anti-majoritarian function).

a system where judicial authority is bounded by actual cases or controversies.[56]

The "historical" analysis required by *Bruen* is lawyer's work. It is entirely within lawyerly competence to look at constitutional provisions and statutes and any cases that interpreted them.[57] These are legal questions, not esoteric historical inquiries requiring historians. These cases do not require determining whether King Arthur actually existed or what happened to the vanished Roanoke colonists.[58] The Court, unsurprisingly, did not need to rely on expert reports or testimony.

Of course, common-law analogizing can be done too loosely. Analogizing necessarily requires reliance on principles. One cannot properly analogize without some basis for determining what are the relevantly similar analogical metrics. One way to analyze *Rahimi*, then, is to ask whether it properly applied common-law reasoning as cabined by the rules set forth in *Bruen*.

That the decision was 8–1 exemplifies the proposition. The eight in the majority represent the common (law) view. The one is the outlier. As is normal in common-law adjudication, each side asserted that the other was wrong about the law that they believe to be "out there," as defined by original meaning, precedent, treatises, scholarship, and the like.[59]

As offered below, both the majority's and the dissent's common-law analyses fit within *Bruen*'s boundaries. But one prevailed. *Rahimi*, in other words, is an example of the common law working as it should. *Bruen* is a natural step in the Second Amendment's development, albeit one giving more instruction on common-law analysis than jurists should need.

[56] *See* U.S. Const. art. III, § 2, cl. 1; Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240–41 (1937).

[57] Regulations may also be part of this inquiry, though the regulatory state arose well after the dates of constitutional relevance to the Second Amendment.

[58] *See* Owen Jarus, *20 Biggest Historical Mysteries That Will Probably Never Be Solved*, LiveScience (Mar. 18, 2024), https://www.livescience.com/11361-history-overlooked-mysteries.html.

[59] *See* Baude & Leider, *supra* note 49, at 1466–68, 1470–72.

2. The facial challenge standard

The *Rahimi* Court first noted that under its *Salerno* precedent, a facial challenge can only succeed if the challengers show that the law fails in all its applications.[60] Interestingly, few merits-stage briefs cited this basic rule, and the Fifth Circuit glossed over arguments about whether the *Salerno* rule has "fallen out of favor."[61]

This point is important because it allowed the court to begin and end its analysis at § 922(g)(8)(C)(i). That subsection prohibits possession of a firearm if the defendant is subject to a restraining order that made an explicit finding that the defendant was a danger to an intimate partner or child. This dangerousness requirement puts this subsection on relatively firm starting ground in the constitutional analysis, at least given *Rahimi*'s analysis.[62] But the next subsection, § 922(g)(8)(C)(ii), provides an alternate ground for prohibiting firearm possession by the subject of a restraining order. It does so if the restraining order prohibits the use of physical force likely to cause bodily injury.[63] This subsection is infirm because, as Fifth Circuit Judge James Ho pointed out, protective orders are often issued in divorce proceedings in the absence of perceived danger. They are often issued simply because "[f]amily court judges may face enormous pressure to grant [and] no incentive to deny" such orders.[64]

[60] *Rahimi*, 144 S. Ct. at 1898–99 (citing United States v. Salerno, 481 U.S. 739, 745 (1987)).

[61] *See* United States v. Rahimi, 61 F.4th 443, 453 (5th Cir. 2023) (citations omitted), *rev'd* 144 S. Ct. 1889 (2024); *see also, e.g.*, Brief of Amici Curiae Professors of Second Amendment Law et al. in Support of Respondent and Affirmance, United States v. Rahimi, 144 S. Ct. 1889 (2024) (No. 05-1631) (joined by this author) [hereinafter Professors' Brief]. Exceptions were the government's Reply, Texas Advocacy Project, Prosecutors Against Gun Violence, American Civil Liberties Union, and California Legislative Women's Caucus briefs, out of 70 accepted briefs. All briefs are available on the Supreme Court's website, https://www.supremecourt.gov/search.aspx?filename=/docket/DocketFiles/html/Public/22-915.html.

[62] *See generally* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249 (2020).

[63] *See, e.g.*, United States v. Perez-Gallan, 640 F. Supp. 3d 697, 699 & n.2 (W.D. Tex. 2022), *aff'd*, 2023 WL 4932111 (5th Cir. Aug. 2, 2023), *cert. granted, judgment vacated*, 2024 WL 3259665 (U.S. July 2, 2024) (challenge brought under (C)(ii)).

[64] United States v. Rahimi, 61 F.4th 443, 465–67 (Ho, J., concurring); Professors' Brief, *supra* note 61, at 29.

3. Surety and "going armed" laws

The *Rahimi* Court began its analysis of historical laws with an important point: Although English and colonial law routinely disarmed political opponents who were characterized as dangerous, such practices were not proper grounds for justifying modern disarmament.[65] By implication, other laws that were later made unconstitutional by equal-protection doctrines, such as those targeting oppressed racial minorities, would be similarly inappropriate.[66]

The majority found historical support for § 922(g)(8) in surety and "going armed" laws "[t]aken together."[67] To the Court, these laws established a tradition of disarming those who "pose a clear threat of physical violence to another." These laws were relevant even though they were not the twins of § 922(g)(8), which the majority believed the dissent and lower court wrongly demanded.[68]

Surety laws allowed magistrates, "upon complaint of any person having reasonable cause to fear an injury, or breach of the peace," to require the subject of the complaint to appear and post a good-behavior bond. Exceptions could be made if the subject of the complaint had "reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property."[69] Sureties were available in domestic-abuse situations.[70] Failure to post the bond resulted in the subject of the complaint being jailed for up to six months.[71] At the next term of court, the subject of the complaint could appeal the magistrate's decision or be required to post further

[65] *Rahimi*, 144 S. Ct. at 1899.

[66] *See* Johnson et al., *supra* note 15, at 210–12, 455–77; Mocsary, *Young Adults*, *supra* note 16, at 615 (stating that *Bruen*'s "why" inquiry "should cause laws passed for later unconstitutional reasons . . . to face a greater hurdle in their justification").

[67] *Rahimi*, 144 S. Ct. at 1901.

[68] *Id.* at 1901, 1903.

[69] *Id.* at 1899–1900 (citing 4 William Blackstone, Commentaries on the Laws of England 251–53 (10th ed. 1787)); *e.g.*, Mass. Rev. Stat., ch. 134, § 16; *see id.* §§ 1–15 (codifying the common-law surety powers of justices of the peace).

[70] *See Rahimi*, 144 S. Ct. at 1900.

[71] *See* Mass. Rev. Stat., ch. 134, §§ 2, 16.

sureties for a longer term, as the court decreed.[72] Several states adopted such statutes, including around the time of the Fourteenth Amendment's adoption.[73]

"Going armed" laws, a subset of affray laws, prohibited going about with "dangerous and unusual weapons in such a manner, as will naturally cause a terror to the people."[74] Conviction under such laws resulted in "forfeiture of arms . . . and imprisonment."[75]

The Court found in these laws a "relevantly similar" legal tradition of temporarily prohibiting arms possession by those judicially determined to be a violent threat to others on the basis of their past conduct.[76] The burden imposed was also similar. Like sureties, § 922(g)(8) imposed only a temporary restriction on Rahimi. Indeed, "going armed" laws allowed for *imprisonment*, so § 922(g)(8)'s lesser penalty of temporary disarmament was acceptable.[77]

The Court thus elucidated for jurists the level of generality for this inquiry (as common-law courts do). Laws that disarm people based on their being found dangerous can comply with the Second Amendment. And the finding of dangerousness can come from a civil proceeding, without proof beyond a reasonable doubt. Future cases before the Supreme Court and lower courts will determine questions like how much evidence and what kind of determination of dangerousness is required. In the process, they will create common-law data points for future adjudications. The majority's analysis also

[72] *See id.*

[73] *E.g.*, *Rahimi*, 144 S. Ct. at 1900; 1869 Wyo. Terr. Laws, ch. 74, §§ 1–12.

[74] *Rahimi*, 144 S. Ct. at 1901; State v. Huntly, 25 N.C. 418, 420–23 (N.C. 1843) ("For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun."). Huntly's conduct resembles Rahimi's outrageous post-restraining order behavior. *See id.* at 418–19. Presumably, only Rahimi's pre-order conduct is relevant to whether he can be disarmed under § 922(g)(8).

[75] *Rahimi*, 144 S. Ct. at 1901 (quoting 4 BLACKSTONE, *supra* note 69, at 149) (ellipsis in *Bruen*).

[76] *Id.* at 1901–2.

[77] *Id.* at 1902.

strengthened the perhaps-obvious intuition that as-applied challenges can rebut *Heller*'s "presumptively lawful" regulations.[78]

The Court made four points about what it was *not* doing. First, it was not opining (appropriately, since the question was not before it) on whether the Second Amendment allowed legislatures to ban arms possession by groups they deem especially dangerous (presumably subject to other constitutional limits).[79] Second, it distinguished the law stricken in *Bruen*, which presumptively barred public carry by nearly everyone, with severe penalties for carry violations.[80] Third, it rejected the proposition that Rahimi could be disarmed because he was not "responsible," noting that this term was vague.[81] As recognized by the dissent, the government could classify practically anyone as dangerous under such a standard. Fourth, it made clear that due-process questions were not before the Court and thus not addressed (but one detects a strong undercurrent of due-process considerations).[82] These questions are likely to return in similar cases or later iterations of this case.

[78] District of Columbia v. Heller, 554 U.S. 570, 626–27 & n.26 (2008); *see In re* Cendant Corp. Litig., 264 F.3d 201, 282 (3d Cir. 2001) ("Saying that there is a presumption necessarily assumes that it can be overcome in some cases."); *Presumption*, Black's Law Dictionary (11th ed. 2019) (noting that an adversely affected party may "overcome[] [a presumption] with other evidence"); *see* Catherine L. Carpenter, *Panicked Legislation*, 49 J. Legis. 1, 43 (2022) (noting that the Supreme Court has "invalidated statutes that relied on false irrebuttable presumptions to confer or deny a right to a specific group of people"); *cf.* 4 John Henry Wigmore, Evidence § 1353 (4th ed. 1972) ("[C]onclusive evidence is not a rule of evidence at all, but rather a rule of substantive law[.]"). *But see* United States v. Jackson, 69 F.4th 495, 505 n.3 (8th Cir. 2023), *cert. granted, judgment vacated*, No. 23-6170, 2024 WL 3259675 (U.S. July 2, 2024) ("Some have taken the phrase 'presumptively lawful' to mean that the Court was suggesting a presumption of constitutionality that could be rebutted on a case-by-case basis. That is an unlikely reading, for it would serve to cast doubt on the constitutionality of these regulations in a range of cases despite the Court's simultaneous statement that 'nothing in our opinion should be taken to cast doubt' on the regulations. . . . We think it more likely that the Court presumed that the regulations are constitutional because they are constitutional, but termed the conclusion presumptive because the specific regulations were not at issue in *Heller*.") (quoting *Heller*, 554 U.S. at 626, 627 n.26).

[79] *See Rahimi*, 144 S. Ct. at 1901; *id.* at 1902 (discussing *Heller*'s "presumptively lawful" regulations); *supra* text accompanying notes 65–66.

[80] *Rahimi*, 144 S. Ct. at 1901–2.

[81] *Id.* at 1903.

[82] *See id.* at 1903 n.2.

B. The Dissent

Justice Thomas's disagreement with the majority was about *Bruen*'s application, not *Bruen*'s method. The dissent's theme is protectiveness of the right to arms from governmental—including judicial—overreach. Stating that the Second Amendment "is a barrier, placing the right to keep and bear arms off limits to the Government," it reminds readers that the government bears the burden of justifying arms restrictions.[83] This approach is unsurprising given earlier defiance of the right, Justice Thomas's earlier life amidst Jim Crow violence, and this nation's history of Black disarmament.[84]

Due-process concerns are a strong undercurrent in the dissent. It notes, for example, that § 922(g)(8) does not require a criminal conviction or a finding that the defendant committed domestic violence. It notes that the law provides no due process other than that provided for the issuance of the underlying order, which can vary wildly.[85] It notes that despite this lack of a due-process guarantee, violation of the law is a felony punishable by 15 years' imprisonment and permanent disarmament.[86]

The dissent thus would hold that, while modern laws need not be "exact cop[ies]" of historical analogues (despite what the majority asserted Justice Thomas demands), the comparators proffered by the government were "worlds—not degrees—apart from § 922(g)(8)."[87]

1. Holding the government to its burden

Justice Thomas noted that § 922(g)(8) touches core Second Amendment conduct, and that Rahimi is among "the people" protected by

[83] *Rahimi*, 144 S. Ct. at 1931 (Thomas, J., dissenting).

[84] *See* Clarence Thomas, My Grandfather's Son: A Memoir 161 (2008); Johnson et al., *supra* note 15, at 195–96, 439–42, 455–77.

[85] California, for example, has varying evidentiary standards for issuing restraining orders that result in the suspension of arms rights. The dissent's example, Cal. Civ. Proc. Code Ann. § 527.6(i)—*Rahimi*, 144 S. Ct. at 1943 (Thomas, J., dissenting)—is to a civil harassment regime aimed at rowdy disputes between neighbors and the like. It requires the relatively stiff standard of clear-and-convincing evidence to disarm one's neighbor. The more relevant analogue from California is Cal. Fam. Code §§ 6251 (emergency orders) and 6300(a) (*ex parte* and orders after hearing), which merely require the party seeking an order to prove "to the satisfaction of the court, reasonable proof of a past act or acts of abuse."

[86] *See Rahimi*, 144 S. Ct. at 1930–31 (Thomas, J., dissenting).

[87] *Id.* at 1941; *accord id.* at 1943; *see supra* text accompanying note 68.

that amendment because he is a citizen who possessed a firearm. With this in mind, Justice Thomas then examined the evidence proffered by the government to justify its statute. Citing *Bruen*'s instructions, he concluded that none of the government's comparators were "relevantly similar"—none "'impos[ed] a comparable burden' that [was] 'comparably justified.'"[88]

Justice Thomas's analysis of English laws disarming those deemed "'dangerous' to the peace of the kingdom"[89] illustrates his skepticism of citizen disarmament and, more generally, government monopolies on implements of violence. He correctly noted that the Second Amendment was an explicit response to English monarchs' disarming of political enemies, religious undesirables (which varied with the sovereign's religion), and other nonconformists via wanton dangerousness classifications.[90] Because these laws were about rendering enemies of the Crown helpless rather than about "preventing interpersonal violence," they were inapposite support for § 922(g)(8).[91]

The dissent also rejects comparisons to a pair of failed Bill of Rights proposals from Massachusetts and Pennsylvania and to Civil War–era Union disarmament orders. All of these sources referred to both "peaceable" citizens' right to be armed and to the legitimate disarmament of those who, for example, presented "a real danger of public injury."[92] The dissent levels a similar criticism against the Union orders as it does against the English dangerousness laws, although it acknowledges that the Union orders targeted the violent.[93] But the commentary and failed amendments, although not regulations or judicial opinions on them, are evidence of the Second Amendment's original meaning.[94] *Heller* appropriately relied on such commentary.[95]

The dissent dispenses with the government's remaining comparators, like early firearm storage laws and laws targeting minors and the intoxicated. Justice Thomas argues that these fail *Bruen*'s "how"

[88] *Rahimi*, 144 S. Ct. at 1933 (Thomas, J., dissenting) (quoting *Bruen*, 597 U.S. at 29).

[89] *Id.*

[90] *See id.* at 1933–35.

[91] *Id.* at 1935.

[92] *Id.* at 1936.

[93] *See id.* at 1936–37.

[94] *See supra* text accompanying notes 44–59.

[95] *See* District of Columbia v. Heller, 554 U.S. 570, 598–604 (2008).

and "why" tests, particularly focusing on the burdens those comparator laws placed on the arms right.[96] There is a difference between regulating and eliminating the right: "between having *no* Second Amendment rights and having *some* Second Amendment rights."[97]

2. Surety and "going armed" laws

Justice Thomas implicitly included surety and "going armed" laws among the rejected comparators. This rejection demonstrated his commitment to *Bruen*'s requirement that courts properly enforce the Second Amendment by holding the government to its burden. Although the government did reference these laws in its brief, its discussion of them was strikingly short—a paragraph and a sentence—and was intertwined with its discussion of disarming the "irresponsible."[98] Although a brisk discussion was arguably sufficient given the extent to which the laws were discussed in *Bruen* and the brief's citations to that case for the surety laws (but not the "going armed" laws), the brief said practically nothing about the "how" and "why" of these laws.

Justice Thomas added that while "surety laws shared a common justification with § 922(g)(8)," they "imposed a materially different burden," and thus did not survive *Bruen*'s "how" requirement.[99] Sureties allowed accused individuals *who posted bonds* to continue to exercise the full panoply of Second Amendment rights.[100] If they then breached the peace, they forfeited the surety. Section 922(g)(8), by comparison, is a complete right deprivation that punishes violations with up to 15 years of imprisonment and lifetime disarmament.[101] And § 922(g)(8) is made the worse by zealous courts in behavior reminiscent of *Heller*-to-*Bruen*-era judicial defiance. Courts have, for example, upheld its applicability when someone sat on a firearm or cohabited with someone who possessed ammunition.[102] Justice Thomas's analysis would have been more complete if he had noted that accused

[96] *See Rahimi*, 144 S. Ct. at 1937–38 & n.5 (Thomas, J., dissenting).

[97] *Id.* at 1937.

[98] *See* Brief for the United States at 23–24, United States v. Rahimi, 144 S. Ct. 1889 (2024) (No. 22-915); *see also supra* note 81 and accompanying text; Mocsary, *Young Adults*, *supra* note 16, at 615–16 (describing *Bruen* as the Court policing lower-court defiance of *Heller*).

[99] *Rahimi*, 144 S. Ct. at 1939 (Thomas, J., dissenting).

[100] *See id.* at 1939, 1941.

[101] *Id.* at 1939–41.

[102] *See id.* at 1939–40.

individuals who did not post sureties were jailed, and thus disarmed of *all* civil rights, while § 922(g)(8) revokes only the arms right of those subject to a restraining order covered by § 922(g)(8).[103]

Justice Thomas argued, first, that "going armed" laws failed *Bruen*'s "why" mandate. Unlike § 922(g)(8), they applied only to public conduct involving actual violence or going about with dangerous and unusual weapons so as to cause "'terror to the people.'"[104] Second, their "how" burdens were markedly different, leaving in-home possession and peaceable public carry untouched, and providing self-defense exceptions, unlike § 922(g)(8)'s total prohibition.[105] Relatedly, affray laws' penalties could only be imposed after a criminal conviction, providing defendants with all the constitutional protections required in criminal cases, like proof beyond a reasonable doubt, confrontation rights, double jeopardy, and hearsay bans. None of these protections are mandated in hearings to determine whether to issue a restraining order, "which are not even about § 922(g)(8)."[106]

Finally, Justice Thomas objected to the Court's use of surety laws to satisfy *Bruen*'s "why"—protecting against future interpersonal violence—and affray laws to provide the "how"—disarmament as a lesser included penalty of imprisonment.[107] He feared that, because imprisonment existed at the Founding, the government need only find a "why"-satisfying law to disarm someone, taking the law back to its pre-*Bruen* "'regulatory blank check'" state.[108] This concern has merit if one agrees with Justice Thomas that affray laws address a different societal problem from § 922(g)(8). But the majority, despite its "[t]aken together" language, saw both the surety and "going armed" laws as meeting *Bruen*'s "why" and at least some of the "how" at the level of generality it selected: laws disarming individuals "found to threaten the physical safety of another" to mitigate threats of physical violence.[109]

[103] *See supra* text accompanying note 71.

[104] *Rahimi*, 144 S. Ct. at 1942 (Thomas, J., dissenting) (quoting 1 Richard Burn, The Justice of the Peace, and Parish Officer 13 (2d ed. 1756)).

[105] *See id.* at 1942–43.

[106] *Id.* at 1943.

[107] *Id.* at 1943–44; *see supra* text accompanying note 77.

[108] *Rahimi*, 144 S. Ct. at 1944 (Thomas, J., dissenting) (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 30 (2022)).

[109] *Id.* at 1899–1901 (majority opinion).

Determining what a legislature considered a single act versus multiple acts may be difficult. For example, a legislature addressing bad public behavior might have passed separate surety and affray laws. Or it might instead have passed a single law, with two components, to secure good behavior: a surety component for one type of behavior with a peace bond sanction, and an affray component with an imprisonment penalty for truly bad behavior.[110] Such a unified comparator should neither automatically validate nor automatically invalidate a challenged modern law. A "more nuanced,"[111] analysis would be required, in which the court should ask the difficult questions about levels of generality, applicability of other constitutional rights, and the like. These questions were asked and answered by all the Justices in *Rahimi*.

3. Majoritarian dangerousness determinations

Justice Thomas, in closing, agreed with the Court's rejection of the government's argument that Congress can disarm anyone it deems not responsible or law abiding.[112] As with ancient English dangerousness determinations, he noted that such reasoning was used against "freed blacks following the Civil War" to make them helpless. Justice Thomas recognized these to be easy cover for policy choices (at best) or majoritarian attacks against outgroups (more likely).[113] His thorough analysis rightly captured the Second Amendment's essence, nicely stated by the Fifth Circuit in another case, that "the legislature cannot have unchecked power to designate a group of persons as 'dangerous' and thereby disarm them."[114]

It would have been nice to see such a thorough explication in the majority opinion. Such a discussion would have gone a long way toward allaying the worry expressed in the dissent and in multiple concurrences (and shared by this author) that the mere

[110] Going out on multiple rides armed "with pistols, guns, knives, and other dangerous and unusual weapons" while declaring an intent "to beat, wound, kill, and murder" someone is a good candidate for such behavior. State v. Huntly, 25 N.C. 418, 418 (N.C. 1843). Something less extreme might justify only a surety.

[111] *Bruen*, 597 U.S. at 27.

[112] *See supra* text surrounding notes 81–82.

[113] *Rahimi*, 144 S. Ct. at 1944–47 (Thomas, J., dissenting).

[114] *See id.* at 1945–46; United States v. Daniels, 77 F.4th 337, 353 (5th Cir. 2023), *cert. granted, judgment vacated*, No. 23-376, 2024 U.S. LEXIS 2910 (U.S. July 2, 2024).

mention of principles might one day countenance judicial enforcement of "unenacted policy goals lurking behind the Second Amendment."[115]

C. The Bruen-*Protesting Concurrences*

Justice Sonia Sotomayor filed a concurrence, joined by Justice Elena Kagan. Justice Ketanji Brown Jackson also filed a concurrence, writing only for herself. Both concurrences agree that the majority opinion "fairly applies" *Bruen* in a way "calibrated to reveal something useful and transferable to the present day."[116] In applying Second Amendment "principles" and "clarifying" *Bruen*, they assert, the Court correctly concluded "that 'the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others.'"[117] The dissent's rigid approach would be "a too-sensitive alarm" that invalidates too many modern laws not "identical to ones that could be found in 1791."[118]

So far, one might read the concurrences as acknowledging that *Bruen* is a workable precedent. After all, *Bruen*'s common-law method does not require "a critical mass of historical firearm regulations that look precisely (or almost precisely) like the challenged law."[119] *Bruen* makes clear that the presence or absence of a given historical law or precedent is "evidence"—not proof—of the challenged law's constitutionality.[120] Rather, *Bruen* repeatedly says that its test requires a "historical *analogue*, not a historical *twin*";[121] that comparators need not be "dead ringer[s]" of modern laws; that "cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach";[122] that the Second Amendment was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs";[123]

[115] *Daniels*, 77 F.4th at 353.

[116] *Rahimi*, 144 S. Ct. at 1904 (Sotomayor, J., concurring); *id.* at 1926 (Jackson, J., concurring).

[117] *Id.* at 1904–5 (Sotomayor, J., concurring); *id.* at 1926 (Jackson, J., concurring).

[118] *Id.* at 1904–5 (Sotomayor, J., concurring); *id.* at 1926 (Jackson, J., concurring).

[119] Baude & Leider, *supra* note 49, at 1489–90.

[120] *Bruen*, 597 U.S. *passim*; *see supra* note 45.

[121] *Bruen*, 597 U.S. at 30; *see also Rahimi*, 144 S. Ct. at 1898.

[122] *Bruen*, 597 U.S. at 27.

[123] *Id.* at 28.

and that "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated."[124] These quotations and others like them in *Bruen* are basic statements of what a constitution must be able to accommodate. There is no clarifying happening in *Rahimi* other than that which normally happens as new cases and controversies are adjudicated under the common law.

Recognizing that "history has a role" in Second Amendment adjudication, both concurrences nevertheless proceed to criticize *Bruen*'s rejection of means-end scrutiny. Justice Sotomayor wrote that means-end scrutiny properly gives "full consideration to the real and present stakes of the problems facing our society today."[125] Justice Jackson added that *Bruen*'s history-and-tradition method is too difficult to apply, leaves too many "unresolved questions," and creates inconsistent judicial outcomes—"chaos," in short.[126]

1. Getting to Bruen

Two meta points are apt before addressing the concurrences in detail.

First, *Bruen* likely turned out as it did because lower courts were so openly abusing means-end scrutiny to uphold firearm restrictions.[127] Some judges essentially admitted their defiance.[128] The propriety of applying heightened scrutiny in Second Amendment cases may never have been questioned had courts applied it in a way that respected plaintiffs' rights. Before the Two-Part Test's abuse, gun-rights advocates regularly considered the Second Amendment in terms of the First Amendment's means-end-scrutiny categories. The Court did away with this implement of abuse and set forth basic rules about analogizing and constitutional adjudication. Lower courts, in other words, *worked for Bruen*.

[124] *Id.*

[125] *Rahimi*, 144 S. Ct. at 1905–6 (Sotomayor, J., concurring); *id.* at 1928 (Jackson, J., concurring).

[126] *Rahimi*, 144 S. Ct. at 1927–29 & n.3 (Jackson, J., concurring). Justice Sotomayor's concurrence suggests this about the dissent's approach but otherwise opines that means-end scrutiny is better because it is more flexible. *See id.* at 1905–7 (Sotomayor, J., concurring).

[127] *See* Mocsary, *Young Adults*, *supra* note 16, at 610–11 & nn.24–26 (citing sources from commentators, academics, Congress, and Justices); *see also supra* Part I.

[128] *See* Mocsary, *Distant Reading*, *supra* note 16, at 42 & n.10 (citing examples of open judicial hostility to arms rights).

Second, no one complaining post-*Bruen* about the allegedly insurmountable problems of relying on history and tradition[129] had criticized the use of history under the pre-*Bruen* Two-Part Test. Before *Bruen*, the Two-Part Test's history-based step served only to filter out cases from Second Amendment protection. One explanation for the newfound protests is that many judges and scholars favor narrower gun rights. Now that history is a basis for *affirming* gun rights and upsetting gun regulation, critics claim that it is unmanageable.

If a history-and-tradition guidepost is truly unworkable, as many now claim, then it should also be unworkable in at least some applications of the Two-Part Test. One would expect someone now criticizing *Bruen*'s method to have made similar complaints before it was divorced from step two. The closest pre-*Bruen* complaints were courts "assuming without deciding" (and similar language) that the conduct at issue was protected by the Second Amendment, before ruling that the regulation passed step two.[130]

2. Misunderstandings, inconsistency, confusion, and madness?

Justice Jackson expressed concern that lower courts' "'misunderst[andings]'" evinced "'confusion'" among lower courts about "*Bruen*'s [methodological] madness" that is manifesting itself in inconsistency among Second Amendment adjudications.[131] But claims of "chaos" and inconsistency among lower courts "struggl[ing]" to apply *Bruen* are, at best, overstated.[132] More likely, they are efforts, sometimes by the struggling courts themselves, to undermine arms rights by undermining *Bruen*. "[T]he blame" for lower court "misunderstandings"—often, but not always, a courteous characterization by the majority—does not lie with *Bruen*.[133]

[129] *See, e.g.*, *Rahimi*, 144 S. Ct. at 1928–29 (Jackson, J., concurring) (citing sources); *supra* notes 31–34 and accompanying text (same).

[130] *See* Joseph Greenlee, *Text, History, and Tradition: A Workable Test That Stays True to the Constitution*, Duke Ctr. Firearms L. (May 4, 2022), https://firearmslaw.duke.edu/2022/05/text-history-and-tradition-a-workable-test-that-stays-true-to-the-constitution.

[131] *Rahimi*, 144 S. Ct. at 1926–27 (Jackson, J., concurring) (quoting sources, including the majority; first alteration in original).

[132] *Id.* at 1927, 1929 n.3

[133] *Id.* at 1926 ("[T]he blame may lie with us, not with them[.]"); *see United States v. Duarte*, 108 F.4th 786, 788 (9th Cir. 2024) (VanDyke, J., dissenting from denial of rehearing en banc).

To set the baseline, lower courts have been quite consistent in applying *Bruen*. A well-known 2018 study showed that under the two-part test, Second Amendment claims succeeded in 19 percent of strict-scrutiny claims and 10 percent of intermediate-scrutiny claims, with an overall success rate of 9 percent.[134] For other rights, one study found a 70 percent success rate for strict-scrutiny claims, and another found success rates of 88 and 74 percent for strict and intermediate scrutiny.[135] A newer 2023 study of the first year of post-*Bruen* claims found that 12 percent of Second Amendment claims succeeded.[136]

A comparison of the types of claims examined in the 2018 and 2023 studies shows that challenges to laws disqualifying firearm possession based on criteria like criminality, false statements in firearm purchases, the federal prohibited-person criteria in § 922(g), and machineguns—together a supermajority of the claims in both data sets—succeeded at similar single-digit rates pre- and post-*Bruen*.[137] Similar results were found in a collection of post-*Bruen* cases created for a continuing-legal-education program in April 2023.[138] Courts are not merely agreeing with each other on the main issues post-*Bruen*; they are agreeing with their pre-*Bruen* selves.

[134] *See* 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, 1496, 1472 (2018) (finding that, between the date *Heller* was decided and February 2016, only 108 of 1,153 Second Amendment challenges "were not rejected, for an overall success rate of 9 percent"). These figures likely overestimate the number of successful challenges because they measure claims rather than final case outcomes. *See* Mocsary, *Distant Reading*, *supra* note 16, at 49–52. They also do not speak to how far the laws being challenged infringe the core of the right.

[135] *See* Mocsary, *Distant Reading*, *supra* note 16, at 54 (citing sources).

[136] *See* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 Duke L.J. 67, 126 (2023).

[137] *Compare id.* at 126–27 & n.349 (citing spreadsheet with detailed data), *with* Ruben & Blocher, *supra* note 134, App. C at xxiv-xxvi. Although parsing all data to a low level is difficult because the studies' categories do not overlap, some categories, like machinegun bans, are succeeding at a *lower* rate post-*Bruen*.

[138] *See* David B. Kopel, *Second Amendment Cases after* Bruen *Part I: Prohibitions on Types of People and Types of Arms*, Lawline (May 1, 2023), https://www.lawline.com/course/second-amendment-cases-after-bruen-part-i-prohibitions-on-types-of-people-and-types-of-arms.

The claims with larger changes pre- versus post-*Bruen*, and with less consistency between courts post-*Bruen*—with success rate ranges going from zero to 17 percent, to 33 to 60 percent—include age-based restrictions, license requirements, "assault weapon" bans, and location restrictions.[139] This is to be expected and shows that *Bruen* has been at least partially successful in curbing decisions based on judicial hostility to arms rights. Age-based restrictions, for example, are especially unjustified and morally questionable.[140] The term "assault weapon" was popularized by a 1980s strategy report by a gun-control group to leverage some "weapons' menacing looks coupled with the *public's confusion*" about whether they were machineguns to garner support for banning those weapons.[141]

More likely, that the success rates for these types of claims are not higher is a sign that *Bruen* has been only partially successful in curbing post-*Heller* defiance.[142] Some post-*Bruen* inconsistency has been the result of "uncivil obedience," in which "lower courts 'take the Supreme Court's opinions at face value and pursue the logic of the opinions to their ends'" to arrive at unreasonable and attention-grabbing results to criticize those opinions.[143] Defiant and uncivilly obedient opinions, combined with good-faith attempts to apply *Bruen*, create decisional inconsistency by design.

[139] *Compare* Charles, *supra* note 136, at 126–27 & n.349 (citing spreadsheet with detailed data), *with* Ruben & Blocher, *supra* note 134, App. C at xxiv-xxviii.

[140] *See* Mocsary, *Young Adults*, *supra* note 16, at 621–25 (citing sources and statistics).

[141] Robert J. Cottrol & George A. Mocsary, *Guns, Bird Feathers, and Overcriminalization: Why Courts Should Take the Second Amendment Seriously*, 14 Geo. J.L. & Pub. Pol'y 17, 35–36 (2016) (citing Josh Sugarman, *Assault Weapons and Accessories in America: Conclusion*, Violence Policy Ctr. (1988), https://www.vpc.org/studies/awaconc.htm).

[142] *See* Brannon P. Denning & Glenn H. Reynolds, *Retconning* Heller: *Five Takes on* New York State Rifle & Pistol Association, Inc. v. Bruen, 65 Wm. & Mary L. Rev. 79, 112–16 (2023) (citing cases); Mocsary, *Young Adults*, *supra* note 16, at 616–17 & nn.61–62 (same); *supra* note 35 (same).

[143] Denning & Reynolds, *supra* note 142, at 120 (quoting Brannon P. Denning, *Can Judges Be Uncivilly Obedient?*, 60 Wm. & Mary L. Rev. 1, 14 (2018)); *see also id.* at 120–25 (citing cases).

In addition, some inconsistent and unusual decisions in developing areas of law are to be expected.[144] As is normal, much of the (actual, but not necessarily manufactured) inconsistency between district courts will be resolved by appeals courts. Unusual and outlier decisions from appeals courts are eventually resolved by the Supreme Court. This is the common law settling. *Rahimi* is a case in point. The district court upheld Rahimi's conviction, as most thought it would. The Fifth Circuit, surprisingly, reversed. The Supreme Court reversed 8–1, easily applying *Bruen* to correct an unusual decision. This is the opposite of "a prime example of the pitfalls of *Bruen*'s approach."[145]

[144] *Cf.* Leo Bernabei, Bruen *as* Heller*: Text, History, and Tradition in the Lower Courts*, 92 Fordham L. Rev. Online 1, 21 (2024) ("Inevitably, some degree of confusion in the lower courts is to be expected after the Supreme Court announces a new legal standard."). One example occurred after the Third Circuit granted relief from § 922(g)(1)—the felon-in-possession ban—to an individual whose predicate offense was a decades-old conviction for food stamp fraud committed to feed his family. The dissent and commentators then claimed that the majority's standard would prove unworkable and render § 922(g)(1) unconstitutionally vague. *See* Range v. Att'y Gen. U.S., 69 F.4th 96, 129 (Krause, J., dissenting) (claiming that the majority's approach was "so standardless as to render [the ban] void for vagueness in any application"), *vacated sub nom.* Garland v. Range, No. 23-374, 2024 WL 3259661 (U.S. July 2, 2024); Andrew Willinger, *Litigation Highlight: En Banc Third Circuit Holds Felon Prohibitor Unconstitutional in Certain Applications*, Duke Ctr. Firearms L. (June 21, 2023), https://firearmslaw.duke.edu/2023/06/litigation-highlight-en-banc-third-circuit-holds-felon-prohibitor-unconstitutional-in-certain-applications ("I ultimately don't believe that the majority's approach is tenable.").

But far from causing an avalanche of successful challenges to § 922(g)(1), district courts in the Third Circuit have had no trouble distinguishing *Range*. One court, rejecting a vagueness challenge, noted that "any confusion regarding the scope of the statute following *Range* is undermined by the near unanimous treatment of the issue in this circuit." *See* United States v. Hedgepeth, No. CR-22-377, 2023 WL 7167138, at *9 (E.D. Pa. Oct. 31, 2023). Out of the hundreds of challenges to § 922(g)(1) in the Third Circuit since *Range*, only two (before the same judge) appear to have succeeded. *See* United States v. Harper, 689 F. Supp. 3d 16 (M.D. Pa. 2023); United States v. Quailes, 688 F. Supp. 3d 184 (M.D. Pa. 2023). And their rationale has been rejected by other Third Circuit district courts. *See*, *e.g.*, United States v. Laureano, No. 23-CR-12, 2024 WL 838887, at *8 (D.N.J. Feb. 28, 2024); United States v. Dockery, No. CR-23-068, 2023 WL 8553444, at *8 (E.D. Pa. Dec. 11, 2023) (referring to them as "outlier opinions"); United States v. Santiago, No. 23-CR-00148, 2023 WL 7167859, at *4 n.8 (E.D. Pa. Oct. 31, 2023).

[145] *Rahimi*, 144 S. Ct. at 1928 (Jackson, J., concurring).

Neither *Bruen* nor *Heller* emerged "in a vacuum," demanding historical evidence (which all Justices agree "has a role") in Second Amendment cases by "conscript[ing] parties and judges into service as amateur historians."[146] As discussed, lawyers are better suited to the task than historians.[147] Moreover, over 40 years of scholarship has elucidated the matter and will continue to do so.[148] *Rahimi* shows that judges are perfectly capable of interpreting and applying the evidence required by *Bruen*. So did *Heller*, which did not "newly unearth[]" an individual Second Amendment right after "'over two centuries,'" but rather synthesized cases and other legal sources (appropriately rejecting outliers) from around the First and Second Foundings which, on the whole, evince an individual right.[149] A non-individual Second Amendment is a 20th-century invention.[150]

A charitable view of the "confusion" surrounding the application of *Bruen*'s common-law method to novel regulations is that judges no longer know how to do it.[151] The more realistic view is that the "confusion" is an exercise in willful blindness manifested through defiance, uncivil obedience, and "concern trolling"[152] about what *Bruen* has (appropriately[153]) not yet answered.[154]

D. The Originalism Concurrences

Separate concurrences by Justices Neil M. Gorsuch, Brett M. Kavanaugh, and Amy Coney Barrett discuss originalism and achieving a constitution's role of tying the government's hands to protect minorities in a common-law system.

[146] *Id.* at 1926, 1928 n.2; *see supra* text accompanying note 125. *See generally Rahimi*, 144 S. Ct. 1889.

[147] *See supra* text following notes 56–58.

[148] Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204 (1983), is famous for being the first major Second Amendment law review article. Today at least two law school centers are devoted to developing the field. *See* Firearms Rsch. Ctr., https://firearmsresearchcenter.org; *see also* Duke Ctr. Firearms L., https://firearmslaw.duke.edu.

[149] *Rahimi*, 144 S. Ct. at 1928 (Jackson, J., concurring) (quoting *Heller*, 554 U.S. at 676 (Stevens, J., dissenting)); *Heller*, 554 U.S. at 598–604.

[150] *See supra* notes 77–88 and accompanying text.

[151] *See* Baude & Leider, *supra* note 49, at 1491.

[152] The author thanks Martin Edwards for this poignant phrase.

[153] *See supra* note 56 and accompanying text.

[154] *See Rahimi*, 144 S. Ct. at 1929 (Jackson, J., concurring).

The Constitution is an anti-majoritarian instrument that protects rights by restraining the "tyranny of the majority" by "tak[ing] certain policy choices off the table."[155] Judges, like the political branches, are not immune to majoritarian impulses.[156] Alexander Hamilton hoped that judges would resist this impulse via "an uncommon portion of fortitude."[157] In the case of Second Amendment adjudication, they have often fallen short.[158]

These Justices—especially Gorsuch and Kavanaugh—believe that a test to determine original meaning using text, history, and tradition is better than interest balancing at preventing judicial majoritarianism or acquiescence to legislative majoritarianism.[159] The Constitution would not be an anti-majoritarian document if judges' policy preferences controlled, and balancing "is policy by another name."[160] Balancing is a majoritarian exercise that "forces judges to act more like legislators who decide what the law should be, rather than judges who 'say what the law is,'" because balancing "requires judges to weigh the benefits of a law against its burdens—a value-laden and political task."[161]

Instead, "[c]onstitutional interpretation should reflect 'the principles adhered to, over time, by the American people, rather than those favored by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court.'"[162] A historical approach focuses on "laws, practices, and understandings" from the relevant periods to discern textual meaning and embodied principles, thus

[155] *Heller*, 554 U.S. at 636; John Stuart Mill, On Liberty 13 (London, John W. Parker & Son 1859); *accord* The Federalist No. 10 at 42 (James Madison) (George W. Carey & James McClellan eds., 2001) ("[M]easures are too often decided, not according to the rules of justice, and the rights of the minor party, but by the superior force of an interested and overbearing majority[.]").

[156] *See* Mocsary, *Young Adults*, *supra* note 16, at 629–30 & n.148 (discussing and citing sources).

[157] The Federalist No. 78 at 406 (Alexander Hamilton).

[158] *See Rahimi*, 144 S. Ct. at 1909 (Gorsuch, J., concurring); *see also supra* note 127 (citing sources).

[159] *See Rahimi*, 144 S. Ct. at 1907–09 (Gorsuch, J., concurring); *id*. at 1912 (Kavanaugh, J., concurring); *id*. at 1924 (Barrett, J., concurring).

[160] *Id*. at 1920–21 (Kavanaugh, J., concurring).

[161] *Id*.

[162] *Id*. at 1917.

excluding from consideration the judge's biases—at least to where human fortitude permits.[163]

Yet "a court must be careful not to read a principle at such a high level of generality that it waters down the right."[164] Too far an extrapolation risks replacing the right that the provision in question was "originally understood to protect"—that which was important enough to make immune to future policy determinations—with judges' values.[165]

Of course, complex questions inherent in common-law adjudication do come up.[166] But "[p]ulling principle from precedent, whether case law or history, is a standard feature of legal reasoning, and reasonable minds sometimes disagree about how broad or narrow the controlling principle should be."[167] Judicial precedent, although not all from the relevant historical time frames, includes judges' "accumulated wisdom" about a legal point—a kind of Burkean adherence to tradition, tempered by text and history.[168] But none of this countenances judges substituting their policy preferences, in the guise of balancing, for common-law analysis.[169] Similarly, "evidence of 'tradition' unmoored from original meaning is not binding law."[170]

Some have nevertheless argued that *Bruen*'s test gives too much discretion to judges.[171] No test is immune to interpretation, but a history-based one is more constraining than means-end scrutiny. That is especially true of the watered-down version of intermediate scrutiny used as part of the Two-Part Test, which allowed judges to include in their balancing anything they wanted, including history.[172]

[163] *Id.* at 1912; *see supra* text accompanying note 157.

[164] *Rahimi*, 144 S. Ct. at 1926 (Barrett, J., concurring); *accord id.* at 1908 (Gorsuch, J., concurring).

[165] *Id.* at 1908 (Gorsuch, J., concurring); *see id.* at 1909.

[166] *See id.* at 1916 n.4 (Kavanaugh, J., concurring); *id.* at 1925 (Barrett, J., concurring).

[167] *Rahimi*, 144 S. Ct. at 1926 (Barrett, J., concurring).

[168] *Id.* at 1920 (Kavanaugh, J., concurring); *see generally* Edmund Burke, Reflections on the Revolution in France (1790) (making the case for gleaning wisdom from long-lasting traditions).

[169] *See Rahimi*, 144 S. Ct. at 1923–24 (Kavanaugh, J., concurring).

[170] *Id.* at 1925 (Barrett, J., concurring).

[171] *See, e.g.*, Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 Yale L.J. 99, 105 (2023) (arguing that *Bruen*'s method is "wildly manipulable"); *supra* notes 32–34 (citing sources).

[172] *See Rahimi*, 144 S. Ct. at 1909 (Gorsuch, J., concurring); Mocsary, *Distant Reading*, *supra* note 16, at 53.

"[H]istory tends to narrow the range of possible meanings"[173] because it is grounded in *what is* (or was) rather than judges' varying and changing proclivities.

One might rejoin that a history-based test, to the extent that it relies on the absence of a historical twin as *proof* of a modern regulation's unconstitutionality, can too easily result in legislatures losing authority that they originally had, but did not exercise.[174] But as *Rahimi* shows, *Bruen* neither requires a twin nor makes the absence (or presence) of a historical analog conclusive.[175]

Courts have good reasons, in the nature of Madisonian liquidation and desuetude,[176] to consider the absence of legislation in the past as evidence of unconstitutionality. Or preferably, such absence would establish a presumption of unconstitutionality, which would "favor liberty."[177] The Constitution is a tyranny-control document that exists to protect individuals from overbearing government. A legislature's nonexercise of an alleged power to restrict freedom is evidence that it does not need that power. Moreso if no "governments (local, state, or federal) ever extended their power . . . to the extent the government currently being challenged has."[178]

Allowing a legislature a given power provides it with another tool to make people less free. When the legislation invokes the sanction of criminal law, as firearm regulations typically do, the potential for destructive consequences to individuals is all the greater. Although "no one acquires a vested or protected right in violation of

[173] *Rahimi*, 144 S. Ct. at 1922 (Kavanaugh, J., concurring).

[174] *See id.* at 1925 (Barrett, J., concurring); Charles, *supra* note 136, at 111.

[175] *See supra* notes 4, 120 and surrounding text.

[176] Madisonian liquidation is the settlement of constitutional text's meaning in post-Founding practices. *See generally* William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1 (2019); *see also*, *e.g.*, Anderson v. Magistrates, Mor. 1842, 1845 (Ct. Sess. 1749) ("[A] statute can be abrogated . . . by a contrary custom, inconsistent with the statute, consented to by the whole people; . . . When we say, therefore, that a statute is in desuetude, the meaning is, that a contrary universal custom has prevailed over the statute[.]").

[177] Greenlee, *supra* note 130 (challenging the proposition that historical analogizing should "be based on evidence of widespread understanding that a past practice was *protected as a right*, not simply that it existed without regulation" on the ground that this would inappropriately "[p]lace[] the burden on the people to prove the existence of their constitutional rights").

[178] *Id.*

the Constitution by long use . . . '[i]f a thing has been practised for two hundred years by common consent,'" in right-protecting fashion, it "is not something to be lightly cast aside" in constitutional interpretation.[179]

Conclusion

Rahimi shows that *Bruen* is easy to apply if one does so in good faith. Post-*Heller* denial and defiance may have done more for the advancement of originalism than anything else since originalism became a distinct legal theory. To channel Winston S. Churchill, "No one pretends that [originalism] is perfect or all-wise. Indeed . . . [originalism] is the worst form of [constitutional interpretation] except for all those other forms that have been tried."[180]

[179] Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 677 (1970) (quoting Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922)).

[180] Winston S. Churchill, Prime Minister, Address at the House of Commons (Nov. 11, 1947) (replacing "democracy" with "originalism" and "government" with "constitutional interpretation").