Second Amendment — 18 U.S.C. § 922(g)(8) — History and Tradition — United States v. Rahimi

More than fifteen years after the Supreme Court's decision in *District of Columbia v. Heller*,[1] "the right of the people to keep and bear Arms"[2] is no longer "a 'second-class' right."[3] As the focus of popular,[4] scholarly,[5] and judicial[6] attention, perhaps no constitutional provision is as hotly contested today as the Second Amendment — and the Supreme Court is still working through the ramifications of its originalist turn in Second Amendment jurisprudence.[7] Last Term, in *United States v. Rahimi*,[8] the Court held that 18 U.S.C. § 922(g)(8), which prohibits persons subject to qualifying domestic violence restraining orders from possessing firearms, did not violate the Second Amendment.[9] *Rahimi* is best read as a course correction in the Court's Second Amendment jurisprudence, retreating from the position taken in *New York State Rifle & Pistol Ass'n v. Bruen*.[10] However, the Court's failure to definitively address the level-of-generality question means that many state and federal gun regulations still exist in a state of limbo. The Court's Second Amendment jurisprudence will remain unsettled until the Court speaks more conclusively in the future.

In December 2019, Zackey Rahimi had an argument with his girlfriend C.M. in a parking lot.[11] When C.M. tried to leave, "Rahimi grabbed her by the wrist, dragged her back to his car, and shoved her in."[12] Noticing a bystander witnessing the interaction, he retrieved a gun from his car, during which time C.M. was able to escape.[13] Rahimi

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[1] 554 U.S. 570 (2008).

[2] U.S. CONST. amend. II.

[3] United States v. Bullock, 679 F. Supp. 3d 501, 504 (S.D. Miss. 2023) (quoting Robert J. Cottrol, *Structure, Participation, Citizenship, and Right: Lessons from Akhil Amar's Second and Fourteenth Amendments*, 87 GEO. L.J. 2307, 2324 (1999) (book review)). *See generally* Eric Ruben & Joseph Blocher, *"Second-Class" Rhetoric, Ideology, and Doctrinal Change*, 110 GEO. L.J. 613 (2022).

[4] *See, e.g.*, Linda Greenhouse, Opinion, *We're About to Find Out How Far the Supreme Court Will Go to Arm America*, N.Y. TIMES (Mar. 29, 2023), https://www.nytimes.com/2023/03/29/opinion/guns-supreme-court.html [https://perma.cc/UXX6-AVPJ].

[5] *See generally, e.g.*, JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* (2018); Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67 (2023).

[6] *See generally, e.g.*, *Bullock*, 679 F. Supp. 3d 501; Worth v. Jacobson, 108 F.4th 677 (8th Cir. 2024).

[7] *See* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 102–05 (2023).

[8] 144 S. Ct. 1889 (2024).

[9] *Id.* at 1895–98.

[10] 142 S. Ct. 2111 (2022).

[11] Brief for the United States at 2, *Rahimi*, 144 S. Ct. 1889 (No. 22-915), 2023 WL 5322645, at *2.

[12] *Rahimi*, 144 S. Ct. at 1895.

[13] *Id.*

fired his gun as she ran away, "although it is unclear whether he was aiming at C. M. or the witness."[14] C.M. reported the incident, and in February 2020, a Texas state court granted C.M. a protective order,[15] "finding that Rahimi posed a credible threat to C.M.'s physical safety."[16] The order prohibited Rahimi from communicating with C.M. for two years and also suspended his gun license.[17]

But Rahimi quickly violated the order's terms: Just three months later, "he approached [C.M.'s] house in the middle of the night, prompting police to arrest him."[18] Then, in December 2020 and January 2021, Rahimi "participated in a series of five shootings," including one arising out of a drug deal and two during road rage incidents.[19] After police identified him as a suspect in those shootings, they obtained a search warrant for his house; upon executing the warrant, "they discovered a pistol, a rifle, ammunition — and a copy of the restraining order."[20]

Rahimi was indicted under 18 U.S.C. §§ 922(g)(8) and 924(a)(2),[21] which together prohibit the "possess[ion]" of "any firearm or ammunition" by a person subject to a domestic violence restraining order meeting certain conditions.[22] Rahimi moved to dismiss the indictment, arguing that 18 U.S.C. § 922(g)(8) violated the Second Amendment.[23] The district court denied Rahimi's motion, finding his argument foreclosed by Fifth Circuit precedent.[24] "Rahimi then pleaded guilty."[25]

On appeal, the Fifth Circuit initially affirmed.[26] In an unpublished per curiam opinion, the court disposed of Rahimi's constitutional argument in a footnote, noting that it was foreclosed by circuit precedent.[27] Rahimi then petitioned for rehearing en banc; while his petition was pending, the Supreme Court decided *Bruen*, upending the lower courts'

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[14] *Id.*

[15] *Id.*

[16] Brief for the United States, *supra* note 11, at 4–5.

[17] *Rahimi*, 144 S. Ct. at 1895.

[18] Brief for the United States, *supra* note 11, at 3.

[19] *Id.*

[20] *Rahimi*, 144 S. Ct. at 1895.

[21] Indictment at 1–2, United States v. Rahimi, No. 21-CR-00083 (N.D. Tex. Apr. 14, 2021), ECF No. 3.

[22] 18 U.S.C. § 922(g)(8). The order must have been issued after a hearing of which the person subject to the order received notice and an opportunity to be heard; the order must have "restrain[ed]" the person from "harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person"; and, as relevant to Rahimi's case, must have "include[d] a finding that such person represent[ed] a credible threat to the physical safety of such intimate partner or child." *Id.*

[23] *Rahimi*, 144 S. Ct. at 1896,

[24] Order at 2–3, *Rahimi*, No. 21-CR-00083 (N.D. Tex. June 3, 2021), ECF No. 27; *see* United States v. McGinnis, 956 F.3d 747, 758–59 (5th Cir. 2020) (holding that § 922(g)(8) survived intermediate scrutiny), *overruled by* United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023).

[25] *Rahimi*, 144 S. Ct. at 1896.

[26] United States v. Rahimi, No. 21-11001, 2022 WL 2070392, at *2 (5th Cir. June 8, 2022) (per curiam).

[27] *Id.* at *1 n.1. The panel consisted of Judges King, Costa, and Ho.

approaches to Second Amendment cases.[28] In light of *Bruen*, the panel withdrew its earlier opinion and ordered supplemental briefing "addressing the effect of [*Bruen*] on this case."[29]

On rehearing, the Fifth Circuit reversed.[30] Writing for the panel, Judge Wilson[31] first rejected the "[g]overnment's argument that Rahimi [was] not among those citizens entitled to the Second Amendment's protections."[32] While acknowledging that Rahimi was not a "model citizen," Judge Wilson found that he was still "among 'the people' entitled to the Second Amendment's guarantees."[33] Because Rahimi's conduct — possessing a firearm — fell within the plain text of the Second Amendment, the analysis turned to whether § 922(g)(8) was "consistent with the Nation's historical tradition of firearm regulation."[34] The court found that it was not, rejecting three categories of analogues proposed by the government.[35] Laws prohibiting firearm possession by "dangerous" persons were not relevant because they disarmed people for "the preservation of political and social order," not to protect specific persons from domestic abuse.[36] "Going armed" laws, which "prohibited 'riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land,'"[37] were of little help because few imposed forfeiture of firearms as a penalty, and even those that did required a criminal conviction.[38] Finally, surety laws, which empowered magistrates to demand bonds from potential troublemakers who would otherwise be jailed,[39] were not analogous because they prohibited possession of firearms only where the target failed to post a surety.[40]

The Supreme Court reversed.[41] Writing for the Court, Chief Justice Roberts[42] found that "[s]ince the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms."[43] Therefore, the Court held that "[w]hen a restraining order contains a finding that an individual

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[28] *Rahimi*, 61 F.4th at 448.

[29] Order at 1, United States v. Rahimi, No. 21-11001 (5th Cir. July 7, 2022).

[30] *Rahimi*, 61 F.4th at 461.

[31] Judge Wilson was joined by Judges Jones and Ho. *Id.* at 443.

[32] *Id.* at 451.

[33] *Id.* at 453.

[34] *Id.* (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022)).

[35] *See id.* at 456–60.

[36] *Id.* at 457.

[37] *Rahimi*, 144 S. Ct. at 1901 (alterations in original) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *148).

[38] *Rahimi*, 61 F.4th at 458–59.

[39] *See Rahimi*, 144 S. Ct. at 1899–900.

[40] *Rahimi*, 61 F.4th at 460.

[41] *Rahimi*, 144 S. Ct. at 1903.

[42] The Chief Justice was joined by Justices Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, and Jackson. Only Justice Thomas, author of the Court's opinion in *Bruen*, dissented. *See id.* at 1930 (Thomas, J., dissenting).

[43] *Id.* at 1896 (majority opinion).

poses a credible threat to the physical safety of an intimate partner, that individual may — consistent with the Second Amendment — be banned from possessing firearms while the order is in effect."[44]

The Chief Justice began by noting that the right to bear arms had been subject to numerous restrictions throughout history.[45] It was for that reason that the *Bruen* Court "directed [lower] courts to examine our 'historical tradition of firearm regulation' to help delineate the contours of the right."[46] "Nevertheless," the Chief Justice wrote, "some courts have misunderstood the methodology of our recent Second Amendment cases," which "were not meant to suggest a law trapped in amber."[47] Rather, "the appropriate analysis involves considering whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition," focusing on "[w]hy and how the regulation burdens the right" to keep and bear arms.[48] Although a modern regulation "must comport with the principles underlying the Second Amendment, . . . it need not be a 'dead ringer' or a 'historical twin.'"[49]

Turning to the specifics of the case, the Chief Justice looked to two particular categories of regulations as historical analogues for § 922(g)(8): surety laws and "going armed" laws. Surety laws could be used to "prevent all forms of violence, including spousal abuse," and they "also targeted the misuse of firearms."[50] Paralleling the approach taken in § 922(g)(8), they offered "significant procedural protections" to the accused, including requiring a hearing before an individual could be disarmed.[51] Relatedly, the "going armed" laws operated against those who used firearms to threaten others, with violations punishable by "forfeiture . . . and imprisonment."[52]

"Taken together," these two sets of laws "confirm[ed] what common sense suggests: . . . an individual [who] poses a clear threat of physical violence to another . . . may be disarmed."[53] The Chief Justice found that § 922(g)(8) was "'relevantly similar'" to these historical analogues "in both why and how it burdens the Second Amendment right."[54] Section 922(g)(8) also offered similar procedural protections to the surety and "going armed" laws by requiring an individualized determination that a defendant "'represents a credible threat to the physical safety' of another."[55] The temporary nature of § 922(g)(8)'s disarmament — like

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[44] *Id.*
[45] *Id.* at 1897.
[46] *Id.* (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022)).
[47] *Id.* at 1897.
[48] *Id.* at 1898 (emphasis added).
[49] *Id.* (quoting *Bruen*, 142 S. Ct. at 2133 (emphasis omitted)).
[50] *Id.* at 1900.
[51] *Id.*
[52] *Id.* at 1901 (quoting 4 BLACKSTONE, *supra* note 37, at *149).
[53] *Id.*
[54] *Id.* (quoting *Bruen*, 142 S. Ct. at 2132).
[55] *Id.* at 1901–02 (quoting 18 U.S.C. § 922(g)(8)(C)(i)).

the surety laws — and its use of imprisonment as a penalty — like the going armed laws — further supported its constitutionality.[56]

Justice Sotomayor concurred, joined by Justice Kagan.[57] Although still critical of the Court's decision in *Bruen*,[58] she supported the *Rahimi* Court's focus on historical principles rather than "precise historical analogue[s]."[59] She strongly critiqued Justice Thomas's dissent, arguing that his reading of *Bruen* would create a "one-way ratchet"[60] preventing any meaningful gun regulations.[61] Though she agreed that "[h]istory has a role to play in Second Amendment analysis," the Founding era's starkly different views on gender and domestic abuse cautioned against "a rigid adherence to history."[62] Finally, noting the troubling correlation between access to firearms and fatal domestic violence, she argued that "the Government has a compelling interest in keeping firearms out of the hands of domestic abusers," and that § 922(g)(8) therefore should have been upheld under any of the Court's traditional tiers of scrutiny.[63]

Justice Gorsuch concurred.[64] He emphasized the high burden Rahimi faced in mounting a facial challenge to § 922(g)(8), and agreed that, "at least in some cases," § 922(g)(8) was relevantly similar to the surety and going armed laws.[65] Justice Gorsuch also defended the Court's originalist Second Amendment jurisprudence and argued that any form of interest-balancing test would necessarily require judicial policymaking rather than evenhanded adjudication.[66] Finally, he noted the limited reach of the Court's holding and expressed some skepticism about the constitutionality of other restrictions not before the Court.[67]

Justice Kavanaugh concurred.[68] He sought to lay out a comprehensive theory for the Court's originalist jurisprudence, including the proper roles of "pre-ratification history, post-ratification history, and precedent."[69] He particularly sought to defend the use of post-ratification history from criticism, arguing that, "[f]or more than two centuries," the Court had "look[ed] to post-ratification history . . . to interpret vague constitutional text."[70] He characterized the majority

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[56] *Id.* at 1902.
[57] *Id.* at 1903 (Sotomayor, J., concurring).
[58] *See id.* at 1906 (critiquing "*Bruen*'s myopic focus on history and tradition").
[59] *Id.* at 1904.
[60] *Id.* at 1905 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2180 (2022) (Breyer, J., dissenting)).
[61] *Id.*
[62] *Id.*
[63] *Id.* at 1906.
[64] *Id.* at 1907 (Gorsuch, J., concurring).
[65] *Id.* at 1908.
[66] *See id.* at 1908–09.
[67] *See id.* at 1909–10.
[68] *Id.* at 1910 (Kavanaugh, J., concurring).
[69] *Id.* at 1913.
[70] *Id.* at 1918.

opinion as "carefully build[ing] on *Heller*, *McDonald*, and *Bruen*."[71] His main takeaway was that, "in Second Amendment cases as in other constitutional cases, text, history, and precedent must remain paramount."[72]

Justice Barrett concurred, raising two primary points.[73] First, consistent with some of her previous writings,[74] she critiqued the use of post-ratification history and tradition in constitutional analysis. To her, such evidence is worthless where it is not directly connected to uncovering the original meaning of a given provision; therefore, its use requires greater justification than "originalism simpliciter."[75] Second, she noted the difficulties faced by lower courts in applying *Bruen*'s method of "'original contours' history": looking to historical regulations to determine the contours of the preexisting right enshrined in the Second Amendment.[76] Justice Barrett urged courts to evaluate historical analogues at a higher level of generality than the Fifth Circuit did.[77] To her, "[h]istorical regulations reveal a principle, not a mold."[78]

Justice Jackson concurred.[79] She also focused on the difficulties faced by lower courts applying *Bruen*'s test,[80] noting their divergent results on Second Amendment questions.[81] Justice Jackson further noted the plethora of questions left unanswered, including "[h]ow many analogues add up to a tradition" and "[h]ow much support . . . nonstatutory sources [can] lend."[82] Ultimately, she argued, both lower courts and the public "deserve[] clarity when this Court interprets our Constitution."[83]

Justice Thomas dissented.[84] In his view, "[n]ot a single historical regulation justifie[d] the statute at issue."[85] Most fundamentally, Justice Thomas disagreed that surety laws provided support for § 922(g)(8)'s constitutionality. In his view, although the surety laws addressed the same problem as § 922(g)(8) — "the risk of interpersonal violence" — they did so through drastically different means, and did not entirely revoke a person's Second Amendment right under threat of imprisonment.[86] Justice Thomas also rejected the majority's analogy to "going

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71 *Id.* at 1923.

72 *Id.* at 1924.

73 *Id.* (Barrett, J., concurring).

74 *See, e.g.*, Vidal v. Elster, 144 S. Ct. 1507, 1531–32 (2024) (Barrett, J., concurring in part).

75 *Rahimi*, 144 S. Ct. at 1924 (Barrett, J., concurring); *see id.* at 1924–25.

76 *Id.* at 1925.

77 *Id.*

78 *Id.* at 1925–26 (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022); *Bruen*, 142 S. Ct. at 2133–34; *Elster*, 144 S. Ct. at 1527–29 (Barrett, J., concurring in part); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 386 (2013)).

79 *Id.* at 1926 (Jackson, J., concurring).

80 *Id.*

81 *Id.* at 1927.

82 *Id.* at 1929.

83 *Id.* at 1930.

84 *Id.* (Thomas, J., dissenting).

85 *Id.*

86 *Id.* at 1933.

armed" laws, arguing that they differed from § 922(g)(8) in both "burden *and* justification."[87] Laws targeting "dangerous persons" for disarmament and Founding-era proposals to limit the carrying of arms to "'peaceable' citizens" likewise could not justify § 922(g)(8).[88] He criticized the majority for "tak[ing] pieces from" various historical analogues to support § 922(g)(8)'s constitutionality.[89] In his view, under *Bruen*, the proper question was "whether a *single* historical law has both a comparable burden and justification as § 922(g)(8), not whether several laws can be cobbled together to qualify."[90]

Rahimi represents a retreat from the maximalist position on the Second Amendment that the Court staked out in *Bruen*. However, unresolved uncertainties about the proper level of generality at which to evaluate historical analogues mean that the Court's Second Amendment jurisprudence will remain unsettled in the years to come.

Although eight Justices characterized *Rahimi* as consistent with *Bruen*'s methodology, on closer inspection *Rahimi*'s test differs both in its wording and application.[91] Start with wording. The canonical formulation of *Bruen*'s test, applied by myriad lower courts,[92] is that, if an individual's conduct falls within the plain text of the Second Amendment, "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[93] *Rahimi*, by contrast, held that "the appropriate analysis" for Second Amendment questions "involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition."[94] Although *Rahimi* said that this formulation was "[a]s [the Court] explained in *Bruen*,"[95] the shift from looking to tradition alone to the *principles underlying* that tradition is significant. That the *Bruen* opinion never used the term "principle" in this context further indicates that *Rahimi* effected a meaningful change.

This difference was not merely semantic — it shows that the two cases applied two different tests. The *Bruen* Court leveraged minor differences to distinguish the government's historical analogues: Statutes

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87 *Id.* at 1941.

88 *See id.* at 1933–37.

89 *Id.* at 1944.

90 *Id.* (emphasis added).

91 To be sure, some commentators disagree with this view and take the Court at its word. *See, e.g.*, Stephen Halbrook, *Second Amendment Roundup:* Rahimi *Preserves* Bruen, REASON: VOLOKH CONSPIRACY (June 26, 2024, 11:25 PM), https://reason.com/volokh/2024/06/26/second-amendment-roundup-rahimi-largely-preserves-bruen [https://perma.cc/AV3M-GSVC]; Mark W. Smith, *Much Ado About Nothing:* Rahimi *Reinforces* Bruen *and* Heller, HARV. J.L. & PUB. POL'Y: PER CURIAM, Summer 2024, No. 26, at 1, 1–2.

92 *See, e.g.*, United States v. Rahimi, 61 F.4th 443, 453 (5th Cir. 2023); Capen v. Campbell, No. 22-11431, 2023 WL 8851005, at *7 (D. Mass. Dec. 21, 2023).

93 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129–30 (2022).

94 *Rahimi*, 144 S. Ct. at 1898 (citing *Bruen*, 142 S. Ct. at 2131–34).

95 *Id.*

that regulated only concealed carry were distinguishable because they did not also regulate open carry;[96] surety laws were distinguishable because they applied only in limited contexts;[97] and a statute restricting pistol carrying to those who had "reasonable grounds for fearing an unlawful attack on [their] person"[98] was distinguishable as a historical "outlier[]."[99] *Rahimi*, by contrast, papered over differences between the historical analogues and § 922(g)(8), including that the surety laws only allowed imprisonment if a person failed to post a bond, or that the "going armed" laws were apparently intended only to prevent conduct that would injure the public at large.[100] Furthermore, the *Rahimi* Court pulled from multiple analogues that together supported the challenged regulation,[101] while *Bruen* questioned whether even three direct analogues could "show a tradition of public-carry regulation."[102] Indeed, applying *Bruen*'s test in *Rahimi* likely would have led the Court to strike down § 922(g)(8), as Justice Thomas's dissent argued.[103] Applying *Rahimi*'s test in *Bruen* may well have led to a different result as well. *Rahimi*, then, is better read as a course correction in the Court's Second Amendment jurisprudence than the clarification it purports to be.[104]

Still, this course correction left open a number of methodological questions, chiefly at what level of generality courts should evaluate the relationship between a challenged regulation and relevant historical principles.[105] The uncertainty around this question may stem in part from disagreements within the Court around the proper role of tradition. Some of the Court's decisions look to tradition as an independent source of authority, meaning that, if a modern regulation or practice comports with tradition, it is (at least presumptively) constitutional.[106] But some members of the Court — notably, Justice Barrett[107] — strongly reject that tradition has any independent force. To them, its only value is to shed light on the original meaning of a given constitutional provision.

If tradition has independent force, it would make sense to seek a tighter analogy between a challenged regulation and a specific historical

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96 *See Bruen*, 142 S. Ct. at 2146–47.

97 *See id.* at 2148–49.

98 *Id.* at 2153 (quoting 1871 Tex. Gen. Laws 25).

99 *Id.*

100 Justice Thomas noted both of these distinctions in dissent. *See Rahimi*, 144 S. Ct. at 1941–42 (Thomas, J., dissenting).

101 *See id.* at 1901 (majority opinion).

102 *Bruen*, 142 S. Ct. at 2142.

103 *Rahimi*, 144 S. Ct. at 1933–44 (Thomas, J., dissenting).

104 Some lower courts, however, have not even treated *Rahimi* as a clarification. *See, e.g.*, Worth v. Jacobson, 108 F.4th 677, 688, 698 (8th Cir. 2024) (failing to apply an updated *Bruen* test in light of *Rahimi* and striking down a law prohibiting issuance of carry permits to those under twenty-one).

105 *See Rahimi*, 144 S. Ct. at 1926 (Barrett, J., concurring).

106 *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565, 576–77 (2014); Vidal v. Elster, 144 S. Ct. 1507, 1522 (2024).

107 *See Vidal*, 144 S. Ct. at 1531–32 (Barrett, J., concurring in part).

regulation or practice and to evaluate the relevant principles at a lower level of generality. But if tradition is relevant only insofar as it sheds light on original meaning, then it would not stand alone in the constitutional inquiry. Therefore, it would be acceptable to look to the principles underlying a given historical regulation at a higher level of generality — as long as those principles appear probative of the Second Amendment's original meaning.

Some of the Court's difficulties in resolving the level-of-generality question are no doubt attributable to the difficulty of articulating a general principle for something so inherently nonquantifiable.[108] But these difficulties may also stem from disagreements on the Court as to what end the historical-analogical method serves in constitutional analysis. Whatever the reason for the Court's difficulty resolving this question, lower courts are still left with little guidance going forward.

More Second Amendment cases are sure to follow, including challenges to 18 U.S.C. § 922(g)(1), which prohibits firearm possession by persons convicted of "a crime punishable by imprisonment for a term exceeding one year."[109] That law is especially important because, as of 2010, roughly nineteen million Americans had a felony conviction.[110]

Despite *Rahimi* seemingly easing the government's burden to demonstrate the constitutionality of a given regulation, § 922(g)(1) differs in two important ways from § 922(g)(8). First, § 922(g)(1) permanently disarms those to whom it applies, while § 922(g)(8) is a temporary restriction, applying only so long as a person "'is' subject to a restraining order."[111] Second, unlike § 922(g)(8), § 922(g)(1) does not require an individualized "[finding] by a court" that a person "pose[s] a credible threat to the physical safety of another."[112] Each of those distinctions make surety laws — which required an individual order by a magistrate and imposed restrictions of a limited duration — a poor analogue for § 922(g)(1). The "going armed" laws also offer little support for § 922(g)(1) for the same reasons, especially given that the Court evaluated the two categories of laws together.[113] Indeed, although applying *Bruen*'s stricter test, several courts have found the felon-in-possession ban unconstitutional as applied to those convicted of nonviolent felonies,[114] and even as applied to those convicted of certain violent ones.[115]

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[108] *Cf.* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1067–68 (1990) (noting the difficulty of identifying "a single dimension along which abstraction [of constitutional rights] must be measured").

[109] 18 U.S.C. § 922(g)(1).

[110] Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1806 (2017).

[111] *Rahimi*, 144 S. Ct. at 1902 (quoting 18 U.S.C. § 922(g)(8)).

[112] *Id.* at 1903.

[113] *See id.* at 1901–02.

[114] *See, e.g.*, Range v. Att'y Gen., 69 F.4th 96, 98, 101 (3d Cir. 2023) (en banc), *cert. granted, vacated, and remanded*, No. 23-374, 2024 WL 3259661, at *1 (U.S. July 2, 2024) (mem.).

[115] *See, e.g.*, United States v. Bullock, 679 F. Supp. 3d 501, 537 (S.D. Miss. 2023).

There may be other ways to support § 922(g)(1)'s constitutionality. Notably, dicta in *Heller* and *McDonald v. City of Chicago*,[116] as well as Justice Kavanaugh's concurrence in *Bruen*, emphasized the continued constitutionality of "longstanding prohibitions on the possession of firearms by felons and the mentally ill."[117] The *Rahimi* Court also seemingly endorsed this dictum.[118] But, as detailed above, lower courts actually applying *Bruen*'s methodology have reached a different result. To the extent that *Rahimi*'s project was to ensure that judicial interpretation of the Second Amendment comports with "what common sense suggests,"[119] important challenges still loom on the horizon.

Other provisions of federal firearms law similarly appear under threat even after *Rahimi*. Section 922(g)(9), which prohibits the possession of a firearm by anyone who "has been convicted in any court of a misdemeanor crime of domestic violence,"[120] faces the same challenges as § 922(g)(1). Section 922(g)(3), which applies to anyone "who is an unlawful user of or addicted to any controlled substance,"[121] may be on surer ground because of its limited duration. But § 922(g)(5), which prohibits possession of firearms by those illegally present in the United States, effects a permanent disarmament; indeed, district courts have held that law unconstitutional as applied to particular defendants.[122]

Although *Rahimi* will provide some constraints on the ability of judges to strike down gun regulations for lack of historical precedent, many challenges still remain. These include determining which categories of modern-day weapons are "Arms" categorically protected by the Second Amendment;[123] how long after ratification history remains relevant to determine the original contours of the right; and continuing fights over the proper level of generality at which to analyze a given restriction. While *Rahimi* is a victory for those who support more restrictive gun laws, it is clear that the larger confrontation will persist.

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116 561 U.S. 742 (2010).

117 District of Columbia v. Heller, 554 U.S. 570, 626 (2008); *see McDonald*, 561 U.S. at 786 (plurality opinion); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2162 (Kavanaugh, J., concurring).

118 *Rahimi*, 144 S. Ct. at 1901 (citing *Heller*, 554 U.S. at 626). In dissent, however, Justice Thomas further emphasized that *Heller*'s "discussion" of "laws banning felons and others from possessing firearms" was merely "dicta." *Id.* at 1944 n.7 (Thomas, J., dissenting) (citing *Heller*, 554 U.S. at 626–27 & 627 n.26).

119 *Id.* at 1901 (majority opinion); *see also* Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) ("History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns."), *abrogated by Bruen*, 142 S. Ct. 2111.

120 18 U.S.C. § 922(g)(9).

121 *Id.* § 922(g)(3).

122 United States v. Benito, No. 24-CR-26, 2024 WL 3296944, at *1, *8 (S.D. Miss. July 3, 2024); United States v. Carbajal-Flores, No. 20-cr-00613, 2024 WL 1013975, at *1, *4 (N.D. Ill. Mar. 8, 2024).

123 *See, e.g.*, Bevis v. City of Naperville, 85 F.4th 1175, 1182 (7th Cir. 2023), *cert. denied sub nom.* Harrel v. Raoul, 144 S. Ct. 2491 (2024).