

Litigating the Second Amendment After *Bruen*, *Rahimi*, and *Hunt*

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Roadmap

1. The *Heller* Era
2. The *Bruen* Revolution
3. *United States v. Rahimi*
4. The Fourth Circuit and § 922(g)(1) Post-*Bruen* (*Hunt*)
5. Overcoming *Hunt*
6. What “Arms” are Protected?

The *Heller* Era

District of Columbia v. Heller (2008)

- The 2A codified a pre-existing individual right to “possess and carry weapons in case of confrontation.”
 - It is “not limited to the carrying of arms in a militia.”
- Purports to be originalist: looks to “the historical background of the Second Amendment,” i.e., Anglo-American legal sources and history from Stuart Restoration (1660) to late 19th century.



Antonin Scalia, author of *Heller*.

Heller's dual rationales

- **Means-ends scrutiny:** “Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family would fail constitutional muster.”
- **History:** “Few laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban. And some of those few have been struck down.”

Heller dicta, part 1

- “[W]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of **law-abiding, responsible citizens** to use arms in defense of hearth and home.”



Anthony Kennedy, source of *Heller*'s dicta?

Heller dicta, part 2

- “Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on **longstanding prohibitions** on the possession of firearms by **felons** and the mentally ill . . .”
- “We identify these **presumptively lawful regulatory measures** only as examples; our list does not purport to be exhaustive.”



Dick Heller.

Means-ends balancing: *Chester* (CA4 2010)

1. Does a law burden or regulate conduct that comes within the scope of the 2A as historically understood?
2. If so, apply means-ends balancing.
 - Strict scrutiny if the law implicates *Heller's* “core” right: the right of a “law-abiding, responsible citizen” to possess a weapon for self-defense in the home.
 - Otherwise, intermediate scrutiny.

The government always won

- Courts frequently “assumed” the 2A protected conduct proscribed by a given firearms regulation, then proceeded to means-ends balancing.
- Courts almost always held statutes survived intermediate or strict scrutiny → “balancing away” the right.



United States v. Moore (CA4 2012)

- In challenge to § 922(g)(1), CA4 says “*Chester* analysis is more streamlined when a presumptively lawful regulatory measure is under review.”
- *Heller*’s “presumptively lawful” dictum “negates a facial challenge to a felon in possession statute like § 922(g)(1).”
- To win as-applied challenge, defendant “must show that his factual circumstances remove his challenge from the realm of ordinary challenges” → i.e., he is a “law-abiding, responsible citizen.”

Hamilton v. Pallozzi (CA4 2017)

- Per se rule: if defendant's predicate § 922(g)(1) conviction is classified as a **felony**, he is not a "law-abiding, responsible citizen," so he cannot win an as-applied challenge.
- But CA4 "leave[s] open the possibility" that a § 922(g)(1) defendant whose prior conviction is "labeled as a **misdemeanor**" could prevail.
 - See 18 U.S.C. § 921(a)(20): § 922(g)(1) does not cover state-law misdemeanors punishable by 2 years or less.

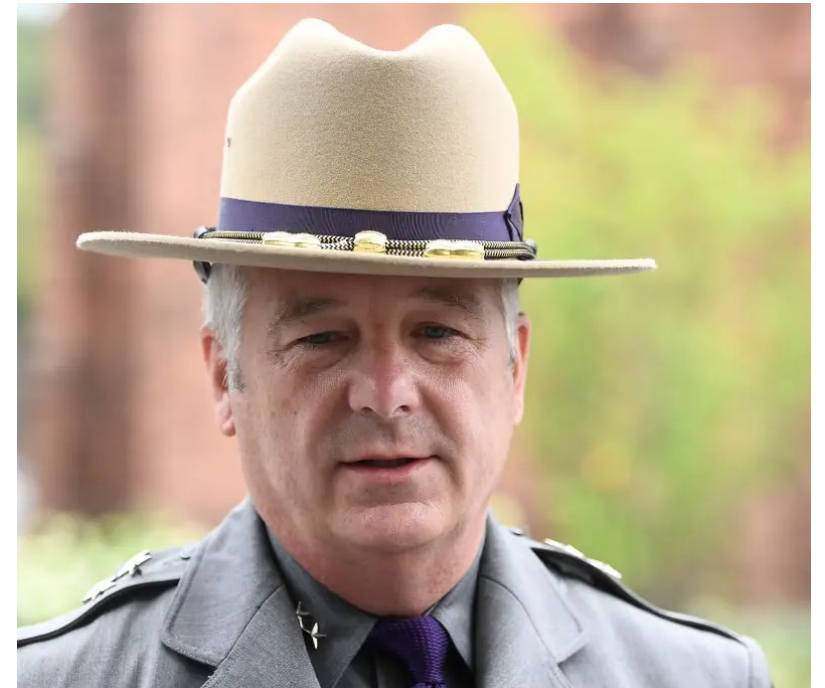


Henry Floyd, author of *Hamilton*.

The *Bruen* Revolution

New York State Rifle & Pistol Association, Inc. v. Bruen (2022)

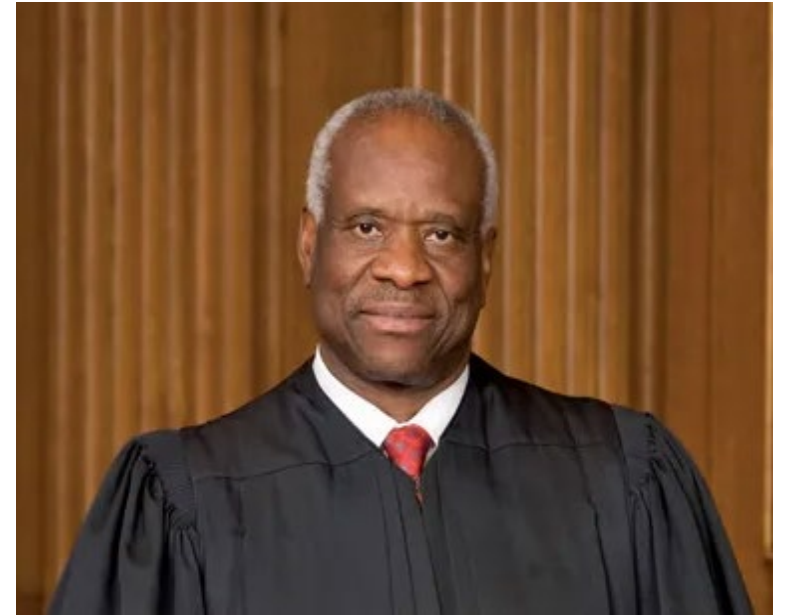
- “May-issue” regime: to obtain a license to carry concealed handgun in public, applicant had to show “proper cause.”
 - 43 states have “shall-issue” regimes.
- Proper cause = “a special need for self-protection distinguishable from that of the general community.”
 - Very demanding standard.



Kevin Bruen, superintendent of New York State Police.

Bruen's burden-shifting framework

- **Step one:** “when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct.”
- **Step two:** govt. bears the burden of “demonstrat[ing] that the regulation is consistent with this Nation’s historical tradition of firearm regulation.”



Clarence Thomas, author of *Bruen*.

Bruen petitioners satisfied step one

1. **“the people”**: it is “undisputed” that petitioners are “two ordinary, law-abiding, adult citizens”;
2. **“keep and bear”**: “Nothing in the Second Amendment’s text draws a home/public distinction with respect to the right to keep and bear arms”;
3. **“arms”**: handguns are “weapons ‘in common use’ today for self-defense.”

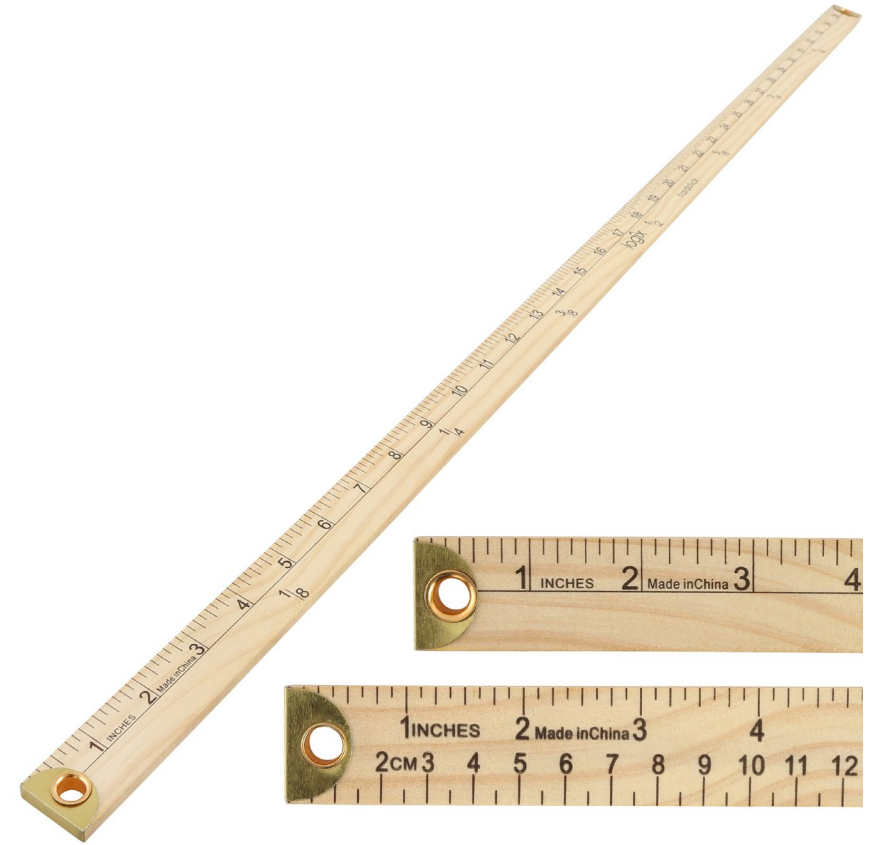
Bruen step two

- Question is “whether historical precedent from before, during, and even after the founding evinces a comparable tradition of regulation.”
- For federal laws, historical baseline is 1791.
 - Unclear how far forward or backward courts can go.
 - Unclear what baseline is for state laws.



At least two “metrics” for step two

- “*Heller* . . . point[s] toward at least two metrics: **how and why** the regulations burden a law-abiding citizen’s right to armed self-defense.”
- “[W]hether modern and historical regulations impose a **comparable burden** on the right of armed self-defense [i.e., how] and whether that burden is **comparably justified** [i.e., why] are central considerations when engaging in an analogical inquiry.”



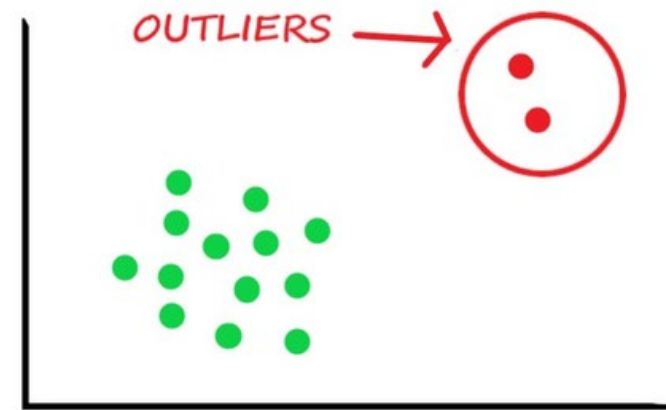
Goldilocks standard at step two

- Analogical inquiry is “neither a regulatory straightjacket nor a regulatory blank check.”
- Govt. must point to a “historical *analogue*, not a historical *twin*” or “a dead ringer.”
- But “courts should not uphold every modern law that remotely resembles a historical analogue, because doing so risks endorsing outliers that our ancestors would never have accepted.”



Historical tradition must be robust

- Govt must point to “a *well-established* and *representative* historical” tradition.
- Court “doubt[ed]” that regulations from *three* of thirteen colonies are enough.
- A few “outliers” are not enough.
- Ambiguities resolved in 2A claimant’s favor. *See* FN 11.



NY failed to carry burden at *Bruen* step two

NY did not demonstrate a tradition of “broadly prohibiting the public carry of commonly used firearms for self-defense” or of “limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense.”



Why no means-ends balancing?

- “[R]eliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate, and more **administrable**, than asking judges to make difficult empirical judgments about the costs and benefits of firearms restrictions, especially given their lack of expertise in the field.”
- “If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of intermediate scrutiny often **defer to the determinations of legislatures**. But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is **not** deference that the Constitution demands here.”

United States v. Rahimi

United States v. Rahimi

- CA5 held 18 U.S.C. § 922(g)(8)—which prohibits firearm possession by people subject to certain domestic-violence restraining orders—violates the Second Amendment on its face.
- Rahimi, who had an extensive history of violence, did not bring as-applied challenge.



Zackey Rahimi.

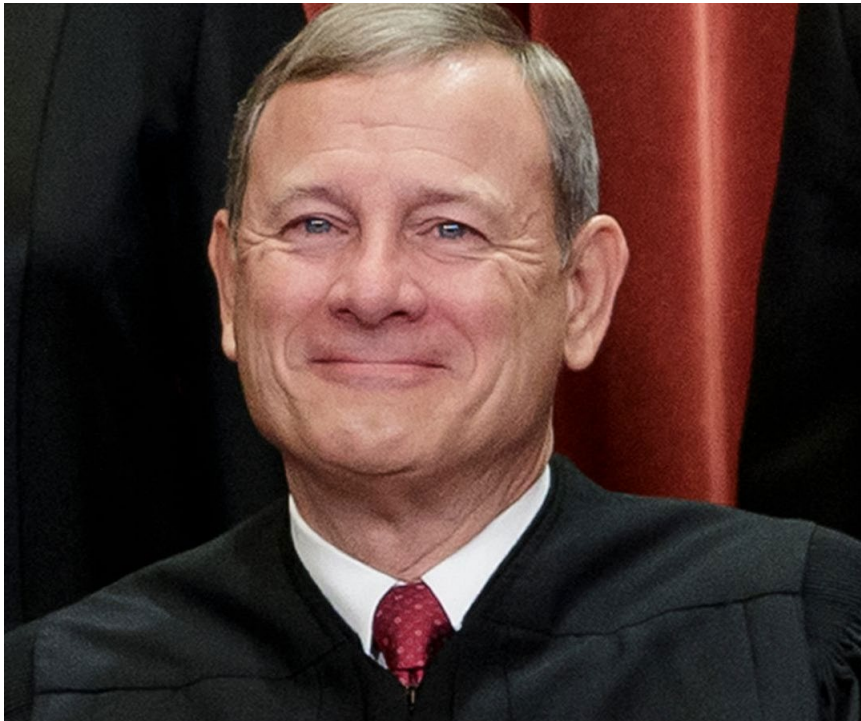
United States v. Rahimi

- Supreme Court reverses, says § 922(g)(8)(C)(i) is constitutional as applied to Rahimi.
 - Requires a “finding that the defendant ‘represents a credible threat to the physical safety’ of his intimate partner or his or his partner’s child.”
- Court does not address 2A’s “plain text.”
- At *Bruen* step two, Court says that, “[t]aken together,” surety and going-armed laws establish a historical tradition of “temporarily” disarming people who have been “found by a court to pose a credible threat to the physical safety of another.”

Rahimi: good formulations of the holding

- Prohibitions on “possession of firearms by those *found by a court* to present a threat to others.”
- Disarming “individuals *found* to threaten the physical safety of another.”
- Disarmament after “*judicial determinations* of whether a particular defendant likely would threaten or had threatened another with a weapon.”
- Disarming those who “*ha[ve] been found* to pose a *credible threat* to the physical safety of others.”
- Effecting a “*temporary* disarmament.”
- Disarming people who “pose[] a *clear threat* of physical violence to another.”

Rahimi: bad formulations of the holding



John G. Roberts, Jr., author of *Rahimi*.

- Laws “preventing individuals who threaten physical harm to others from misusing firearms.”
- Laws disarming “individuals who pose a credible threat to the physical safety of others.”
- “[R]egulations targeting individuals who physically threatened others.”

Rahimi is a retreat from *Bruen*

- SC “cobbled together” different analogues (Thomas dissent).
- Majority: “some courts have misunderstood the methodology of our recent Second Amendment cases. These precedents were not meant to suggest a law trapped in amber.”
 - Law must be “consistent with the *principles* that underpin our regulatory tradition.”



Rahimi is a retreat from *Bruen*



- Court ignores bases on which *Bruen* distinguished surety laws.
 - Rarely enforced.
 - Were not “bans” on public carry.
 - Attaches no significance to self-defense exception.
- Court says historical analogues need only be “relevantly similar” to challenged statute.
 - *But see Bianchi v. Brown* (CA4 2024) (en banc).

Rahimi: the good

- Court “reject[s] the Government’s contention that Rahimi may be disarmed simply because he is not ‘responsible.’”
 - Standard is “vague” and “unclear.”
 - The responsible-irresponsible “line” does not “derive from our case law.”
 - *Bruen* and *Heller* “used the term ‘responsible’ to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right,” but they “said nothing about the status of citizens who were not ‘responsible.’ The question was simply not presented.”
- Barrett concurrence: “a court must be careful not to read a principle at such a high level of generality that it waters down the right.”

The Fourth Circuit and § 922(g)(1) Post-*Bruen*

United States v. Hunt

United States v. Hunt (CA4 2024)

- Hunt is charged under § 922(g)(1), does not file a 2A motion to dismiss. He pleads guilty without a plea agreement.
- On appeal, he raises facial and as-applied challenges to § 922(g)(1).
- Hunt argues for de novo review based on *Class v. United States* (2018), which has nothing to do with forfeiture. Govt. does not respond.



United States v. Hunt—Part 1

- CA4 holds “neither *Bruen* nor *Rahimi* abrogates this Court’s precedent foreclosing as-applied challenges to § 922(g)(1) and those decisions thus remain binding.”
- *Moore* and *Hamilton* “relied on two strands of authority”:
 1. The *Heller* dictum that felon-disarmament laws are “longstanding” and “presumptively lawful.”
 2. A “determination—stemming from *Heller*—that [felons] were, as a group,” not law-abiding, responsible citizens.
- *Moore* and *Hamilton* did not use means-ends scrutiny.

United States v. Hunt—Part 2



Toby Heytens, author of *Hunt*.

- Alternatively, § 922(g)(1) challenge fails at *Bruen* step one.
- For step one, “look to the historical scope of the Second Amendment.” Historical “limitations are inherent in the text of the amendment.”
- *Heller* says 2A right is limited to “law-abiding citizens.”
- Opinion does not include the words “plain text” or “the people.”

United States v. Hunt—Part 3(a)

- Alternatively, § 922(g)(1) is constitutional at *Bruen* step two: “legislatures traditionally possessed discretion to disqualify categories of people . . . who have **demonstrated disrespect for legal norms** of society.”
 - Capital punishment for felons in Founding era.
 - Arms forfeiture for “non-violent hunting offenses.”
 - Dissent from PA constitutional ratifying convention: right to bear arms “unless for crimes committed.”
 - Laws disarming British loyalists.
 - Laws disarming “non-Anglican Protestants who refused to participate in the Church of England.”

United States v. Hunt—Part 3(b)

- Alternatively, § 922(g)(1) constitutional at *Bruen* step two:
“Legislatures historically prohibited possession by categories of persons based on a conclusion that the category as a whole presented **an unacceptable risk of danger if armed.**”
 - “Religious minorities, such as Catholics” and non-Anglican Protestants.
 - Native Americans.
 - British loyalists.

United States v. Hunt—Part 3(b)



- Congress can paint with a very broad brush.
 - “This history demonstrates that there is no requirement for an individualized determination of dangerousness as to each person in a class of prohibited persons.”
 - History demonstrates “there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1).”

United States v. Hunt—Part 3(b)

- *Hunt* seems to endorse total deference to legislative judgments, contra *Bruen*.
 - “Congress *found*” that felons’ access to guns leads to violent crime.
 - “Congress *classified*” felons as potentially irresponsible and dangerous.
 - “[T]he legislature has *determined*” that felons as a whole present an unacceptable risk of danger if armed.



Overcoming *Hunt*

Challenging Other Statutes and Preserving
§ 922(g)(1) Claims

How can we argue around *Hunt*?

- For statutes other than § 922(g)(1), argue that everything in *Hunt* other than its conclusion that *Bruen/Rahimi* did not abrogate *Moore/Hamilton* is dicta.
 - § 922(g)(3) (unlawful user of drugs), § 922(g)(5) (unlawful alien), § 922(g)(9) (misdemeanor crime of domestic violence), § 922(n) (under felony indictment).
- Upholding pre-*Bruen* CA4 cases would have been sufficient to resolve *Hunt*'s challenge.

Arguing around *Hunt*: *Bruen* step one



Do litterers lose their Second Amendment rights?

- The “law-abiding” filter has to have *some* limit. It can’t exclude everyone who has *ever* violated *any* law.
- Pre-*Bruen*, CA4 rejected the notion “that any person committing any crime automatically loses the protection of the Second Amendment.” *United States v. Carpio-Leon* (CA4 2012).
 - Nothing in *Bruen* or *Rahimi* casts doubt on this conclusion.

Arguing around *Hunt*: *Bruen* step 2(a)

- Similar argument: *everyone* “deviate[s] from legal norms,” so there must be a limit on how far that principle extends.
- *Bruen* rejected “judicial deference to legislative interest balancing.” Allowing Congress to apply deviates-from-legal-norms principle without scrutiny would sanction **blind deference**, in violation of *Bruen*.



Arguing around *Hunt*: *Bruen* step 2(b)

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- Similar argument as to dangerousness.
- Courts cannot blindly defer to judicial judgments of what groups are “dangerous.”
- That would grant Congress “a regulatory blank check.”

§ 922(g)(1) claims under *Hunt*?

- *Hunt* said pre-*Bruen* CA4 cases “remain binding.”
- *Hamilton* “le[ft] open the possibility” that a § 922(g)(1) defendant could win an as-applied challenge if his prior conviction is classified as a misdemeanor.
- *Hunt* did not specifically address this portion of *Hamilton*.
 - In *Hunt*, CA4 focused exclusively on “felons” and “felonies.”

Preserving § 922(g)(1) claims post-*Hunt*

- At *Bruen* step one (“plain text”), govt. argues “the people” excludes § 922(g)(1) defendants because the term is limited to “law-abiding citizens.”
- Based on loose language in *Heller* and *Bruen*.



“The people” = “all Americans”

- *Heller* says “the people”:
 - “unambiguously refers to *all* members of the political community, *not an unspecified subset*”;
 - “refers to a class of persons who are part of [the] *national community* or who have otherwise developed sufficient connection with this country to be considered part of that community”;
 - encompasses “*all Americans*”; and
 - is a “term of art” with a uniform meaning in 1A, 2A, 4A, 9A.
- *Bruen*: 2A guarantees right to bear arms to “*all Americans*.”

Bruen step one: argue based on *Rahimi*

Rahimi's rejection of "responsible" entails rejection of "law-abiding."

- In *Rahimi*, govt. argued *Heller* and *Bruen* had already held govt. can disarm anyone who is not a "law-abiding, responsible citizen."
 - Govt: "responsible" prong, not law-abiding prong, applies to § 922(g)(8).
- "Responsible" and "law-abiding" come from same place: stray language in *Heller* and *Bruen*.
- "Law-abiding" is just as vague as "responsible."



Solicitor General Elizabeth Prelogar argued *Rahimi*.

“The people” in other circuits

- Every circuit to squarely address the question has held felons are among “the people.”
 - *Range v. Attorney General* (CA3) (en banc).
 - *United States v. Diaz* (CA5).
 - *United States v. Williams* (CA6).
 - *Worth v. Jacobson* (CA8).
 - *Rocky Mountain Gun Owners v. Polis* (CA10).
- Other circuits have rejected § 922(g)(1) challenges but have not said “the people” excludes felons (CA8, CA10, CA11).



Thomas Hardiman, author of the *Range* majority. All members of the en banc court agreed on “the people.”

Bruen step two—dangerousness

Rahimi's rejection of "responsible" also entails rejection of "dangerous."

- SG's briefs argued "irresponsible" and "dangerous" are synonyms.
- SG repeated this position at oral argument.

B. Section 922(g)(8) Complies With The Second Amendment

This case concerns Congress's power to disarm those who are not "responsible." In this context, a person is not "responsible" if his possession of a firearm would pose a danger of harm to himself or others. That under-

17 CHIEF JUSTICE ROBERTS: Well, just to
18 be clear, you're -- you're using "responsible"
19 as a placeholder for dangerous with respect to
20 the use of firearms?

21 GENERAL PRELOGAR: Correct. So that's

Dangerousness is too broad/vague

- *Bruen*: “the right to keep and bear arms in public has traditionally been subject to *well-defined* restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms.”
- *Bruen* analogizes 2A to 1A, citing *United States v. Stevens* (2010).
 - Historically based categories of unprotected speech must be “*well-defined* and *narrowly limited*,” rather than “highly manipulable.” *Stevens*.
 - Those categories need a “*clear limiting principle*,” lest they extend to “an endless list of subjects.” *United States v. Alvarez* (2012).

Dangerousness is not “well-defined” or “narrowly limited.”



- “The government could quickly swallow the [Second Amendment] right if it had broad power to designate any group as dangerous and thereby disqualify its members from having a gun.” *Kanter v. Barr* (CA7 2019) (Barrett, J., dissenting).”
- “‘Dangerousness’ standard” is too “amorphous . . . to delineate the scope of the Second Amendment.” *Medina v. Whitaker* (CADDC 2019).

Dangerousness is inconsistent with *Bruen*'s rationale

- *Bruen* rejected means-ends balancing, in part, because it is not “administrable.”
- With dangerousness, courts have two choices:
 - Defer to legislative judgments of dangerousness.
 - But *Bruen* rejected “deference to legislative interest balancing,” which gives legislatures a “regulatory blank check.”
 - Make independent assessments of dangerousness.
 - But *Bruen* repudiated “judge-empowering interest-balancing inquiry.”
 - That is “engag[ing] in independent means-end scrutiny under the guise of an analogical inquiry.”

As-applied focus: assess the statute's constitutionality

- The proper question is not whether, theoretically, the 2A permits Congress to pass a statute that prohibits firearm possession by someone whose life includes all the facts and circumstances of your client's life.
- The proper question is whether the 2A permits *the statute that Congress actually passed* to be applied to your client.
- Look to facts that establish liability under that statute—nothing else.
 - Facts of instant case, prior non-felony convictions, etc. are irrelevant.
 - Same with, e.g., § 922(g)(3): only drug use matters.

City of L.A. v. Patel (2015)

- Ordinance requires hotel owners to keep records containing guest information (e.g., name, address, car make, departure date) and permit police to inspect them with no process.
- City argues statute does not facially violate 4A because inspection is lawful when there's a warrant, emergency, or consent.



City of L.A. v. Patel (2015)

- Courts consider only “actual applications of the statute,” i.e., “applications of the statute in which it **actually authorizes or prohibits conduct.**”
- “The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.”
- “Statutes authorizing warrantless searches . . . **do no work** where the subject of a search has consented.”

Good case law on as-applied focus

- “For the purposes of assessing a defendant’s predicate offenses under § 922(g)(1), the court may consider **prior convictions** that are ‘punishable by imprisonment for a term exceeding one year’ but the predicate offense cannot arise from the same indictment as the § 922(g)(1) charge because that charge must instead rely on **previous history**.” *U.S. v. Moore*, 2025 WL 711119 (CA5) (citing *Diaz*).
- “[A] court should ask: has the defendant been convicted of any felonies for dangerous conduct? If so, Congress can constitutionally disarm them. Although the *Williams* court at times phrased the analysis in terms of ‘dangerous persons’ and whether a person ‘is dangerous,’ the analytical framework only asks about the dangerousness of their conduct which resulted in a felony conviction.” *U.S. v. Lyle*, 2024 WL 4819572 (E.D. Mich.).
- *See also U.S. v. Johnson*, 2025 WL 226957, at *3-4 (E.D. Mich.); *United States v. Price*, 111 F.4th 392, 402 n.4 (4th Cir. 2024) (en banc).

Dangerousness of *the client*, not a group



- Require the government to show that the client, in particular, is “dangerous.”
- Do not let the government simply cite the name of the client’s prior felonies.
 - E.g., cocaine distribution, robbery.
 - Remember the categorical approach: dangerous-sounding crimes can be committed in non-dangerous ways!

Distinguishing *Rahimi*—duration

Deprivation under surety and going-armed laws was “temporary.”

- Surety bond could last no more than six months.
- Going-armed law resulted in disarmament only while def. was in prison.
- “[W]e conclude *only* this: An individual found by a court to pose a credible threat to the physical safety of another may be *temporarily* disarmed consistent with the Second Amendment.” *Rahimi*.
 - Gorsuch concurrence: “We do not resolve whether the government may disarm an individual permanently.”

Distinguishing *Rahimi*—duration

- In almost 3 years of *Bruen* litigation, govt. has never identified a law that permanently deprived (living) people of firearms.
- Theoretical possibility of receiving a pardon (*see* 18 U.S.C. § 921(a)(20)) does not render the burden “comparable.”
 - Restoration of rights is “illusory.” *United States v. Neal*, 2024 WL 833607, at *9 n.10 (N.D. Ill. Feb. 7, 2024).
 - Cite statistics.



Distinguishing *Rahimi*—process

- *Rahimi* emphasized that surety laws “often offered the accused significant procedural protections.”
 - Complaint by a witness with “reasonable cause to fear.”
 - Magistrate took evidence, summoned the accused.
 - Accused could respond to the allegations.
- Going-armed laws were criminal, so people could not be disarmed without all the protections of a criminal trial.
- § 922(g)(1) does not offer similar protections.

Distinguishing *Rahimi*—process



- Govt. argues proceedings that led to prior conviction provide similar process.
- But that prior trial or plea addressed the wrong question.
 - Question was: “did the defendant engage in conduct that satisfied the elements of the statute?”
 - Question was *not*: “is the defendant dangerous?”
 - Latter question did not arise at trial, and the jury was not instructed to answer it.

Founding-era estate forfeiture

- *Bruen's* “why” (“comparably justified”) does not align with § 922(g)(1).
 - § 922(g)(1) is about preventing gun violence.
 - Colonial law forfeited *all* of a felon’s property → its breadth shows it was not about public safety.
- Forfeiture laws did not prohibit released felons from acquiring new guns → not a similar “how” (“comparable burden”).
 - *See, e.g., Range*, 124 F.th at 231.



Founding-era capital punishment

- The govt.: because felons were executed at the Founding, they can be stripped of 2A rights today.
- Argument rests on an erroneous premise. *See, e.g., Kanter* dissent.
- The implications of this theory are staggering. If a felon can be denied 2A rights, he can also be denied all other constitutional rights.
 - 1A right to free speech and free exercise of religion. *See Kanter v. Barr* (CA7) (Barrett, J., dissenting).
 - 4A right to be free from warrantless searches and seizures.
 - 5A right to indictment and equal protection.
 - 6A right to jury, speedy trial, effective assistance of counsel.

Apply felon-punishment theory narrowly

Govt. must show that a particular crime was capital in *numerous jurisdictions*.

- A “well-established and representative” tradition. *Bruen*.
- “[W]e doubt that *three* colonial regulations could suffice to show a tradition.” *Bruen*.
- “To the extent there are multiple plausible interpretations” of the historical record, courts should “favor the one that is more consistent with the Second Amendment’s command.” *Bruen*.
- If “history [is] ambiguous at best,” it “is not sufficiently probative to defend” a statute. *Bruen*.

Require a tight crime-to-crime fit

- The proper question is not: “what Founding-era crime is the *best* fit for the client’s prior felony?”
- The proper question is: “is there any Founding-era crime that is a *good* fit for the client’s prior felony?”
 - The answer may be no, e.g., drug possession.
 - See *U.S. v. Luna* (S.D. Tex. Feb. 10, 2025); *U.S. v. Gomez* (N.D. Tex. Mar. 25, 2025).



If the historical analogue don't fit...

No generalizing

- *Bruen* and *Rahimi* do allow for some analogizing, e.g., robbery is like burglary.
- But resist overly general analogies.
 - *Duarte*: “Like burglary or robbery, modern-day drug trafficking plainly poses substantial risks of confrontation that can lead to immediate violence.”
- That was also true of Founding-era crimes that were not capital.
 - Judiciary Act of 1789: manslaughter, malicious maiming, confederacy to become a pirate.



Apply felon-punishment theory narrowly



Pilgrims arriving on the Mayflower.

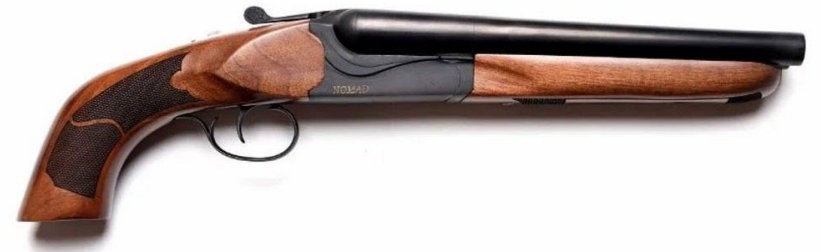
Govt. must show that a particular crime was capital *over time*, and *during the relevant period*.

- “Historical evidence that long predates [1791] may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years.” *Bruen*.
- Afford little weight to “transitory,” “short-lived,” “passing” laws → govt. must point to “enduring American tradition of state regulation.” *Bruen*.

**What “Arms” are
protected?**

United States v. Miller (1939)

- Challenge to federal ban on short-barrel shotguns.
- SC upholds statute:
 - “In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”



United States v. Miller (1939)



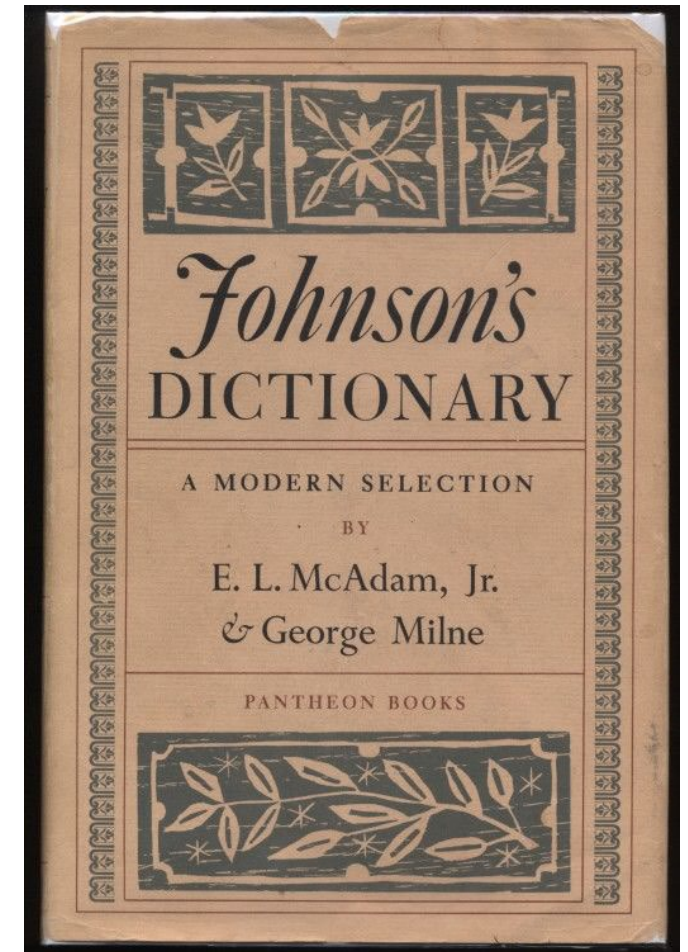
- “Certainly it is not within judicial notice that this weapon is any part of the **ordinary military equipment** or that its use could contribute to the common defense.”
- Historical sources show “that ordinarily when called for service these men [militia members] were expected to appear bearing arms supplied by themselves and of the kind **in common use at the time.**”

Heller interpreting *Miller*

- *Miller* holds “that the Second Amendment does not protect those weapons not **typically** possessed by law-abiding citizens **for lawful purposes**, such as short-barreled shotguns.”
- *Miller* said “that the sorts of weapons protected were those ‘**in common use at the time.**’ We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of ‘**dangerous and unusual weapons.**’”

Heller on the meaning of “Arms”

- Arms = ““weapons of offence, or armour of defence””; ““any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.””
- “[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”



United States v. Price (CA4 2024) (en banc)



- Challenge to 18 U.S.C. § 922(k), which prohibits possessing “any firearm which has had the importer’s or manufacturer’s serial number removed, obliterated, or altered.”
- CA4 upholds statute at *Bruen* step one.

United States v. Price (CA4 2024) (en banc)

CA4 reads *Heller's*/*Miller's* limitations as relevant to step one.

- “*Bruen* confirmed that the limitations on the Second Amendment right identified by *Heller* are inherent in the meaning of ‘the right of the people’ and should be addressed at the first step of its new framework.”
- “[W]e can *only* properly apply step one of the *Bruen* framework by looking to the historical scope of the Second Amendment right.”
- “[T]he meaning of ‘Arms’ within the Second Amendment can only be defined by reference to history; here, the historical context of the ‘traditional militia’” (quoting *Heller*).

United States v. Price (CA4 2024) (en banc)

- Sole focus is on common use: “a weapon must be in common use for a lawful purpose to be protected by [the Second Amendment] right.”
- If a weapon fails that test, it is unprotected even if it is not “dangerous and unusual.”
- Consistent with *Heller*?:
 - “We think that [the ‘in common use’] limitation is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”
 - 2A “extends, prima facie, to all instruments that constitute bearable arms”

United States v. Price (CA4 2024) (en banc)

- “In common use for lawful purposes” does not depend solely on “functional characteristics.”
- Question: “whether a weapon’s common purpose is a lawful one—such as self-defense—or one that would be unlawful for ordinary citizens to engage in—such as concealing the commission of crimes, as with short-barreled shotguns, or waging war, as with machineguns.”



United States v. Price (CA4 2024) (en banc)

How do we answer this question?



- “[C]ourts can look to **statistics** regarding weapons commonly used in crimes versus weapons commonly chosen by law-abiding citizens for self-defense.”
- “If no **common-sense reasons** exist for a law-abiding citizen to prefer a particular type of weapon for a lawful purpose like self-defense, . . . , then courts can conclude that the weapon is not in common use for lawful purposes.”

Bianchi v. Brown (CA4 2024) (en banc)

- Maryland statute forbids selling, purchasing, possessing, etc. “assault weapon[s].”
- “Assault weapon” = “(1) an assault long gun; (2) an assault pistol; or (3) a copycat weapon.”
- “Assault long gun” includes 45 enumerated guns, including semiautomatic rifles such as the AK-47, **AR-15**, Barrett .50 caliber sniper rifle.



Bianchi v. Brown: Bruen step one

- “The Second Amendment codified ‘the right to keep and bear arms’: a specific entitlement with a particular meaning in the ratifying public’s consciousness, with baked-in prerogatives and qualifications alike.”
- “What we must do under *Bruen*, then, is assess the historical scope of the right to keep and bear arms to determine whether the text of the Second Amendment encompasses the right to possess the assault weapons at issue.”



J. Harvie Wilkinson, author of the *Bianchi* majority opinion.

Bianchi v. Brown: Bruen step one

- 2A right is “about amplifying the power of individual citizens to project force greater than they can muster with their own bodies so that they may protect themselves when government cannot.”
- Therefore, “[a]rms typically used by average citizens for **self-defense** are generally within the ambit of the Second Amendment.”
- But “excessively dangerous arms” that are “not reasonably related or proportional to the end of **self-defense**—but [which are] better suited for offensive criminal or military purposes” —are unprotected.

Bianchi v. Brown: Bruen step one

- Facial challenge fails because many regulated firearms “are ‘dangerous and unusual weapons’ that are not ‘in common use today for self-defense.’ Rather, they are weapons ‘most useful in military service’ with firepower far exceeding the needs of the typical self-defense situation.”
- Court discusses military history of AR-15; its firepower, accuracy, and velocity; how bullets “yaw” and pulverize internal organs; firearm’s lack of recoil; how frequently it is used in mass killings; danger to police, etc.

Bianchi v. Brown: Bruen step one

“Common use” not determinative.

- If a weapon is “*not* in common use,” it “can safely be said to be *outside* the ambit of the Second Amendment.”
- But even if a weapon *is* in common use, it may still be unprotected if it is not “typically possessed by average Americans for the purpose of self-preservation” or is “ill-suited and disproportionate to achieving that end.”

Bianchi v. Brown: Bruen step one



Court says AR-15s are not suitable for self-defense, in the home or in public:

- Hold more bullets than necessary.
- Hard to conceal and carry.
- “Compared to a handgun, the AR-15 is heavier, longer, harder to maneuver in tight quarters, less readily accessible in an emergency, and more difficult to operate with one hand.”

Bianchi v. Brown: Bruen step two

- CA4 posits a “tradition of legislatures perceiving threats posed by excessively dangerous weapons and regulating commensurately.”
- Regulating weapons with “potential for widespread criminal abuse or unreasonable capacity to inflict casualties.”
 - “percussion-cap repeating pistols, and breech-loading revolvers, shotguns, and rifles”; “Bowie knives, dirks, sword canes, metal knuckles, slungshots, and sand clubs”; dynamite; semiautomatic firearms; machineguns, etc.



A slungshot (not to be confused with a slingshot).



Bowie knives.

Putting it all together

- A particular arm is protected only if it is:
 - in common use;
 - for self-defense (rather than for an unlawful purpose such as committing crimes); and
 - is reasonably related to or proportional to the end of self-defense (rather than being suited for offensive or military purposes).
- Most weapons regulated by the National Firearms Act are probably unprotected.
 - Shotgun w/ barrel less than 18 inches; shotgun under 26 inches or w/ barrel under 18 inches; rifle w/ barrel under 16 inches; machinegun, etc.

Additional Resources

- Listserv for AFDs and CJA attorneys:
fdo_firearm_lit@listserv.fd.org
- Box folder—“Firearm Litigation”
- Duke Center for Firearms Law’s Repository of Historical Gun Laws



HOTLINE
for CJA Attorneys
800-788-9908



Cullen_Macbeth@fd.org