Inconclusive History

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INTRODUCTION

People sometimes make the right decision for the wrong reasons.[1] The Supreme Court provided a striking example of this in *United States v. Rahimi*,[2] a case where the Court ultimately reached the right result but chose a misguided and unfortunate route to get there.[3] The Court stretched and strained to come up with historical justifications for its decision rather than simply acknowledging that history was an inconclusive and inadequate basis for deciding the case.

The *Rahimi* decision involved a Second Amendment challenge to the federal law that prohibits people from having guns while under domestic violence restraining orders.[4] Two years earlier, in *New York State Rifle & Pistol Association v. Bruen*,[5] the Supreme Court set the stage for the *Rahimi* case by declaring that a purely historical analysis must be used in Second Amendment cases.[6] In deciding if a modern law violates the right to keep and bear arms, the question can never be whether the law is a smart policy that makes society safer.[7] The only question is whether there were similar

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1 As a fictional character once put it, "[A] good decision, if made for the wrong reasons, can be a wrong decision." PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures 2003) (Governor Weatherby Swann).

2 602 U.S. 680 (2024).

3 *Id.*

4 *See* 18 U.S.C. § 922(g)(8); *Rahimi*, 602 U.S. at 686–90.

5 597 U.S. 1 (2024).

6 *See id.* at 17–33.

7 *See id.* at 19–24 (rejecting the use of "means-ends scrutiny" that would allow courts to consider the extent to which a challenged law has beneficial effects on public safety).

laws in early America at or around the time of the Second Amendment's adoption.[8]

In *Rahimi*, the Court had its first opportunity to apply *Bruen* and confront the troubling results that this approach can produce.[9] Under a strict application of *Bruen*'s purely historical approach to Second Amendment analysis, America's constitutional limits on contemporary policy choices about the regulation of firearms would be governed entirely by what people thought and did several hundred years ago. The Court in *Rahimi* thus faced the disturbing prospect of applying that strictly historical methodology and striking down the challenged law, a reasonable measure aimed at reducing the risks faced by victims of domestic violence, simply because there were no similar laws in America all the way back in the late 1700s when the Second Amendment was ratified.[10] Domestic violence was not a major concern in that bygone era, and while views about it have evolved considerably since that time, a rigid application of *Bruen* would prevent modern society from progressing beyond what eighteenth-century Americans saw fit to do.[11]

Eight of the nine members of the Supreme Court balked at the notion of striking down the challenged law, with Justice Thomas being the lone dissenter who would have ruled in favor of the challenger.[12] Rather than acknowledging the misguided nature of *Bruen*'s approach, the majority pretended that all was well under *Bruen*, embracing tenuous historical analogies that enabled them to reach their desired conclusion in the case while still professing to be following *Bruen*'s commands.[13]

The Supreme Court thus made the right decision in *Rahimi* but gave the wrong reasons for doing so. The Court reached a commendable result but arrived there via tortured, unpersuasive reasoning. Rather than pretending that historical analysis drove its decision, the Court should have simply admitted that history is not everything and that the Court erred in *Bruen* by

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8 *See id.* at 34–35 (asserting that the Second Amendment must be given the meaning it had when it was adopted in 1791 and so the most important historical evidence will be sources from close to that time).

9 *Rahimi*, 602 U.S. at 700–03 (Sotomayor, J., concurring) (noting that the *Rahimi* case was the Supreme Court's first application of the *Bruen* decision).

10 *See* Brief for the United States at 38–41, *Rahimi*, 602 U.S. 680 (No. 22-915) (acknowledging that there were no laws in early America prohibiting gun possession for those subject to civil protective orders but arguing that significant legal and social changes have occurred since 1791).

11 *Id.*

12 *Rahimi*, 602 U.S. at 747–48 (Thomas, J., dissenting) (concluding that "[n]ot a single historical regulation justifies the statute at issue").

13 *See infra* Part II.

insisting that history alone should control the interpretation and application of the Second Amendment.

The Supreme Court is not going to abandon originalism at this point despite the significant problems with that mode of constitutional interpretation.[14] This Essay, therefore, makes a much more modest request. When analyzing issues from a historical perspective, the Court should be willing to admit when history is inconclusive. The Supreme Court candidly acknowledged when it encountered inconclusive history in major cases decided in the past.[15] The Court should return to that tradition and treat historical analysis as a crucially important element of constitutional decision-making—without pretending that inconclusive history provides answers when it really does not.

I. A BRIEF HISTORY OF INCONCLUSIVE HISTORY

The Supreme Court has acknowledged the inconclusive nature of historical evidence in landmark constitutional cases in the past. The foremost example came in *Brown v. Board of Education*,[16] where the Court ruled against racial segregation of public schools.[17] The Court initially heard arguments in the case in December 1952, but Justice Felix Frankfurter pushed for reargument in hopes of postponing the decision, clarifying the issues, and building a stronger consensus among the Justices.[18] He convinced the Court to have the parties do an additional round of briefing focused on the history of the Fourteenth Amendment and original understandings about how the Amendment would affect segregation.[19]

After another round of briefing and oral arguments in the case—and the death of Chief Justice Fred Vinson and the appointment of Earl Warren to be his successor—the Supreme Court issued its decision.[20] The unanimous opinion acknowledged that although the historical record had been "covered exhaustively," it did not yield clear answers: "This discussion and our own investigation convince us that, although these sources cast some light, it is

14 Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 236–37 (2023) (noting that Justices who purport to be originalists "now exert a controlling influence on the Supreme Court").

15 *See infra* Part II.

16 347 U.S. 483 (1954).

17 *Id.* at 495.

18 *See* Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1909 (1991); *see also* RICHARD KLUGER, SIMPLE JUSTICE 590, 603 (1975).

19 Tushnet & Lezin, *supra* note 18, at 1909.

20 *See id.* at 1872, 1876–78, 1912, 1924.

not enough to resolve the problem with which we are faced. At best, they are inconclusive."[21]

With remarkable candor, the Court admitted that the history of the Fourteenth Amendment could be spun in favor of either side of the segregation debate.[22] As the Fourteenth Amendment worked its way through the process toward ratification, people expressed conflicting views about its potential effects.[23] Some thought it would eliminate all racial discrimination, while others did not expect its impact to be so far-reaching.[24] Moreover, the application of the Fourteenth Amendment to public schools was not a question widely discussed in the late 1860s, a time when public education was still in its early stages of development in the North and barely existed in the South.[25] Rather than selectively marshaling and manipulating the available historical evidence, the Court acknowledged that the history was inconclusive and moved on to other grounds for its decision.[26]

A decade later, the Court showed similar restraint and candor in *Loving v. Virginia*,[27] where the Court unanimously invalidated laws prohibiting interracial marriages.[28] In defense of its longstanding racial restrictions on marriage, the Commonwealth of Virginia relied on the history of the Fourteenth Amendment and related legislation enacted by Congress in the era just after the Civil War, pointing to statements by members of Congress who said they did not intend to do away with state laws barring interracial marriages.[29] On the other hand, the challengers raised strong objections to that interpretation of the historical record, pointing out that Virginia put too much weight on "[e]clectic statements" from members of Congress who misunderstood the meaning of equal protection of the laws.[30] According to the challengers, "[a] correct appraisal of the legislative history of the broad guarantees of the Fourteenth Amendment for purposes of constitutional adjudication is that they were open-ended and meant to be expounded in light of changing times and circumstances."[31] As in *Brown*, the Court in *Loving*

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21 *Brown*, 347 U.S. at 489.

22 *See id.*

23 *See id.*

24 *See id.*

25 *See id.* at 489–90.

26 *See id.*

27 388 U.S. 1 (1967).

28 *Id.* at 12.

29 *Id.* at 9; *see also* Brief and Appendix on Behalf of Appellee at 9–31, *Loving*, 388 U.S. 1 (No. 395).

30 *See* Brief for Appellants at 28–31, *Loving*, 388 U.S. 1 (No. 395).

31 *Id.* at 30.

admitted that the historical evidence was inconclusive and, therefore, could not serve as the basis for the Court's decision in the case.[32]

More recently, the Supreme Court recognized the complex and debatable nature of the historical issues surrounding laws that criminalized sexual activity by same-sex couples. In *Bowers v. Hardwick*,[33] decided in 1986, the majority of the Court asserted that historical support for upholding such laws was absolutely solid.[34] "Sodomy" was a crime under English common law; it was a crime in all thirteen of the original American states when they ratified the Constitution and Bill of Rights, and it was still a crime in almost all states when they ratified the Fourteenth Amendment.[35]

Although that history seemed as conclusive as can be, historians continued to examine the matter and found that it was actually far more complicated.[36] When the Court reconsidered the issue in *Lawrence v. Texas*[37] in 2003, the majority of the Court recognized this.[38] While "sodomy" was a crime under English and early American laws, those laws covered nonprocreative heterosexual conduct as well as homosexual relations.[39] Indeed, the Court suggested that asking what the framers of the Constitution thought about homosexuality may be an unhelpful anachronism, given that "according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late nineteenth century."[40] The Court went on to note that while there was no historical tradition of singling out and criminalizing homosexual activity, there was a strong historical tradition of not using criminal laws to punish consenting adults for what they choose to do in private.[41] While the history had seemed to be conclusively in favor of upholding bans on intimate same-sex conduct, the Court recognized that the historical issues were actually more complicated and far from conclusive.[42]

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32 *Loving*, 388 U.S. at 9 (citing Brown v. Bd. of Educ., 347 U.S. 483, 489 (1954)).

33 478 U.S. 186 (1986).

34 *Id.* at 193–94.

35 *Id.* at 192–93 nn.5–6.

36 *See, e.g.*, Brief of Professors of History George Chauncey, Nancy F. Cott, John D'Emilio, Estelle B. Freedman, Thomas C. Holt, John Howard, Lynn Hunt, Mark D. Jordan, Elizabeth Lapovsky Kennedy, and Linda P. Kerber as Amici Curiae in Support of Petitioners at 1–2, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief of the CATO Institute as Amicus Curiae in Support of Petitioners at 9–17, *Lawrence*, 539 U.S. 558 (No. 02-102); Brief Amici Curiae of the American Civil Liberties Union and the ACLU of Texas in Support of Petitioners at 11–26, *Lawrence*, 539 U.S. 558 (No. 02-102).

37 539 U.S. 558 (2003).

38 *Id.* at 567–68.

39 *Id.* at 568.

40 *Id.*

41 *Id.* at 569–70.

42 *Id.* at 571.

The Supreme Court's decision in *Boumediene v. Bush*[43] provides an additional example. Boumediene and others held at the detention facility at Guantanamo Bay in Cuba argued that a federal law unconstitutionally deprived them of the ability to bring habeas corpus claims challenging the legality of their imprisonment.[44] The Court had to decide if the detainees had a right to assert habeas claims even though they were not American citizens and were not detained within the United States.[45]

The U.S. government insisted that the historical evidence on this issue was crystal clear.[46] In the government's view, centuries of British legal history established that the writ of habeas corpus never extended beyond the reach of the territories over which the King of England had sovereignty.[47] Thus, legal authorities from the early modern period indicated that English courts could decide habeas claims from prisoners in places like Ireland or the Isles of Man, Jersey, and Guernsey because the King of England had sovereignty over those places.[48] But the English courts could not issue a writ of habeas corpus for a prisoner in Scotland, a British protectorate in southern Africa, or a British concession in China because those places were outside the Crown's sovereign territory.[49] Those arguing in favor of the detainees asserted that the historical evidence clearly cut in the other direction, claiming that habeas jurisdiction had extended to any situation where someone was being detained by "any agent acting pursuant to the Crown's authority in territory over which the Crown exercised *de facto* control."[50]

The Supreme Court ruled in favor of the detainees, with the majority producing an opinion that carefully examined the history of habeas corpus but candidly acknowledged the limits of that endeavor.[51] The parties' arguments about history assumed "that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before us," but "[t]here are reasons to doubt both assumptions."[52] Although there were no known decisions in which an English court "granted habeas relief to an enemy alien detained abroad," there was also "no evidence that a court refused to do so for lack of jurisdiction."[53] History thus

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43 553 U.S. 723 (2008).

44 *Id.* at 732–33.

45 *Id.* at 739.

46 Brief for the Respondents at 14, *Boumediene*, 553 U.S. 723 (Nos. 06-1195, 06-1196).

47 *See id.* at 14, 26–33.

48 *Id.* at 28–29.

49 *Id.* at 28, 31–32.

50 Brief of Legal Histories as Amici Curiae in Support of Petitioners at 2, *Boumediene*, 553 U.S. 723 (Nos. 06-1195, 06-1196).

51 *Boumediene*, 553 U.S. at 739–52.

52 *Id.* at 752.

53 *Id.*

offered no definitive authority on the issue, and "given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age," the Court would not "infer too much, one way or the other, from the lack of historical evidence on point."[54]

In these landmark cases, the Supreme Court acknowledged the importance of history but was not afraid to admit when the historical evidence available to them was insufficient to control their decision. The Court recognized that historical analysis can be a valuable tool in constitutional interpretation, but did not pretend that it provided answers when it actually did not.

II. INCONCLUSIVE HISTORY IN *UNITED STATES V. RAHIMI*

The Supreme Court had the chance to follow that same path in *United States v. Rahimi*.[55] The Court could have admitted that historical evidence alone did not provide a clear answer and then faced the task of determining and explaining how constitutional interpretation should proceed when history is inconclusive. Instead, the majority chose to pretend that the historical evidence in the case produced the outcome the majority wanted to reach.

The *Rahimi* case involved a volatile mixture of issues about guns and domestic violence. Prosecutors charged the respondent in the case, Zackey Rahimi, with illegally possessing a firearm while under a domestic violence restraining order, and Rahimi asserted that this law violated his Second Amendment rights.[56] Whatever one thinks about that legal issue, Rahimi was not a sympathetic figure. According to the evidence presented in the case, he was a drug dealer who assaulted and threatened his girlfriend.[57] After a court entered a restraining order against him for doing that, he allegedly threatened another woman with a gun and then went on a crime spree that included "at least five additional shootings."[58] Even Rahimi's lawyer conceded that this is not the sort of behavior protected by the Second Amendment.[59]

Rahimi nevertheless had a strong argument that his constitutional rights had been infringed because of the Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen*.[60] There, the Court declared that historical analysis overrides all other considerations in Second Amendment

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54 *Id.*

55 602 U.S. 680 (2024).

56 *Id.* at 686–90.

57 *Id.* at 684–88.

58 *Id.* at 686–88.

59 Transcript of Oral Argument at 74, *Rahimi*, 602 U.S. 680 (No. 22-915).

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

cases.[61] According to *Bruen*, the Constitution "presumptively protects" the right to have and use guns, and so if a law restricts that conduct, "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[62] In other words, the government must search through early American gun laws and find "a well-established and representative historical *analogue*" that is sufficiently similar to the modern regulation that has been challenged.[63] By putting the burden on the government to come up with a sufficient historical analogue, the *Bruen* decision tilted the analysis in favor of challengers, guaranteeing that the government always loses if the relevant historical evidence is hazy, ambiguous, conflicting, or simply nonexistent.

In the *Rahimi* case, this approach meant the government had to show a historical analogue for the federal law that prohibits people from possessing guns while under domestic violence restraining orders.[64] In Rahimi's view, this made it an "easy case."[65] Finding a historical analogue for the challenged law was impossible. People who abused their spouses in the eighteenth century were not prohibited from having guns.[66] No matter how long and hard the government might search the historical record, it would never "find even a single American jurisdiction that adopted a similar ban while the founding generation walked the earth."[67]

That is indisputably true. Indeed, the government conceded that there were no domestic violence restraining orders in early America, let alone laws that barred people from having guns while subject to domestic violence restraining orders.[68] The impossibility of finding a specific historical analogue for the challenged statute is not the least bit surprising, given that attitudes toward domestic violence have evolved quite a bit from what they were in the eighteenth century at the time of the Second Amendment's adoption.[69] Judges and lawmakers at that time believed that husbands had a right to use physical violence to discipline their wives, and "did not recognize intimate-partner violence as a distinctive regulatory concern for the state to solve."[70]

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61 *Id.* at 17–31.

62 *Id.* at 24.

63 *Id.* at 30.

64 18 U.S.C. § 922(g)(8).

65 Brief for Respondent at 1, United States v. Rahimi, 602 U.S. 680 (2024) (No. 22-915).

66 *Id.* at 12–13.

67 *Id.* at 12.

68 Brief for the United States at 40, *Rahimi*, 602 U.S. 680 (No. 22-915).

69 *See id.* at 40–41.

70 Brief of Gun Violence and Domestic Violence Prevention Groups as Amici Curiae in Support of the Government at 13, *Rahimi*, 602 U.S. 680 (No. 22-915).

The lower courts initially ruled against Zackey Rahimi.[71] The district court denied his motion to dismiss the indictment,[72] and the Fifth Circuit also rejected Rahimi's arguments, finding that the burden on Rahimi's Second Amendment rights was outweighed by the "societal benefits" of keeping guns out of the hands of people under domestic violence restraining orders.[73] But *Bruen* barred judges from undertaking any such consideration of public policy and how best to promote safety and reduce risks of lethal violence, so the Fifth Circuit reversed course and ruled for Rahimi.[74] Even though the challenged law "embodies salutary policy goals meant to protect vulnerable people in our society," the law had to be struck down because if one could go back several centuries in time, one would find that "our ancestors" did not have laws like those we have today.[75]

The *Rahimi* case went up to the Supreme Court, and the oral argument left little doubt about the conclusion the Supreme Court majority wanted to reach. The Court wanted to rule against Zackey Rahimi and his Second Amendment claim.[76] Rahimi's lawyer faced tough questioning from conservative and liberal Justices alike.[77] It reached a crescendo when Justice Kagan chided Rahimi's lawyer for "running away from your argument" because "the implications of your argument are just so untenable that you have to say no, that's not really my argument."[78] A strict application of *Bruen*, demanding that the government find close historical analogues for every modern regulation of firearms, would result in a wide array of sensible regulations being struck down.[79] Justice Kagan bluntly observed that "you seem to be running away from it because you can't stand what the consequences of it are."[80]

The situation left the Supreme Court with a difficult choice. The Court could hold its nose, apply *Bruen*, admit there were no laws in early America that closely resembled the challenged enactment, and rule in Rahimi's favor. The Justices surely knew that would produce widespread criticism of the Court, with scathing headlines blasting it for prioritizing the gun rights of

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

72 *Id.* at 449.

73 *Id.* at 461.

74 *Id.*

75 *Id.* (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 30 (2022)).

76 *See, e.g.*, Amy Howe, *Justices Appear Wary of Striking Down Domestic-Violence Gun Restriction*, SCOTUSBLOG (Nov. 7, 2023, 5:47 PM), https://www.scotusblog.com/2023/11/justices-appear-wary-of-striking-down-domestic-violence-gun-restriction [https://perma.cc/6N3N-XKRM]; Robert Barnes, *Gun Bans Related to Orders of Protection May Pass Test*, WASH. POST, Nov. 8, 2023, at A4.

77 *See* Transcript of Oral Argument, *supra* note 59, at 71–89.

78 *Id.* at 88.

79 *Id.* at 89.

80 *Id.*

dangerous, violent abusers over safety interests. Or the Court could try to come up with some way to rule against Rahimi, uphold the challenged law, and reconcile this with *Bruen*.

The Court chose the latter path.[81] But try as it might, the Court's efforts to square its decision with *Bruen* were unconvincing. Chief Justice Roberts's majority opinion watered down *Bruen* considerably, characterizing it as requiring judges to look at history in search of general "principles" and "tradition."[82] Rather than finding a specific historical analogue that actually resembled the challenged regulation, it would be enough to find that there were regulations in early America that burdened gun rights for reasons somewhat similar to the general, underlying rationale of the challenged law.[83] This was awfully weak tea compared to the robust, demanding historical approach laid out in *Bruen*.

The majority opinion in *Rahimi* went on to discuss two strands of early America's legal traditions that supposedly supported the Court's decision to uphold the law banning the possession of guns for those subject to domestic violence restraining orders.[84] Remarkably, neither of these traditions involved domestic violence, restraining orders, or prohibiting anyone from possessing a gun.

First, the Court pointed to "surety laws" in America at the time of the Second Amendment's adoption.[85] These laws "authorized magistrates to require individuals suspected of future misbehavior to post a bond," which would be forfeited if the person subsequently caused trouble.[86] Straining to connect these laws to the statute under which Rahimi faced prosecution, the Court noted that the surety laws could apply to any violent behavior, and that they, therefore, could cover situations involving spousal abuse and misuse of firearms.[87]

Second, the Court noted the historical tradition of "affray laws," which made it a crime to go around terrifying people with dangerous weapons.[88] The punishment for doing so could include forfeiture of the weapon.[89]

The Court acknowledged that surety and affray laws were "by no means identical" to the law challenged in *Rahimi*.[90] But the Court concluded that

81 *See* United States v. Rahimi, 602 U.S. 680, 700–01 (2024).
82 *Id.* at 690–92.
83 *See id.*
84 *Id.* at 693–700.
85 *Id.* at 693–95.
86 *Id.* at 695–97.
87 *See id.*
88 *Id.* at 697–98.
89 *Id.*
90 *Id.*

they were good enough to support a ruling against Rahimi because they fit within a very general and broad tradition of restricting firearms in response to "demonstrated threats" of violence.[91]

Justice Thomas, the sole dissenter in the case, condemned the majority for disregarding what the Court had said in its decision two years earlier in *Bruen*.[92] Justice Thomas spoke with some authority on the matter, having written the opinion for the Court in *Bruen*.[93] The majority in *Rahimi*, Justice Thomas insisted, had twisted and betrayed the framework for Second Amendment analysis that the Court had adopted in *Bruen*.[94] According to Thomas, *Bruen* was meant to require the government to find a historical analogue for the challenged regulation, meaning a "single historical regulation" that imposed a similar burden on gun rights and had a similar policy justification.[95] In Thomas's view, the historical analysis required under *Bruen* cannot consist of "mixing and matching" a variety of old laws and stitching them together to come up with the required historical analogue.[96] The historical analogue must actually be analogous to the challenged regulation, not just part of a broad, loose tradition like the general notion that laws about guns might reflect public safety concerns.[97]

Thomas pointed out that each of the historical analogues cited by the majority in *Rahimi* was a stretch. Surety laws did not prohibit anyone from having guns.[98] A person required to post a surety bond could continue to possess and carry all manner of weaponry, albeit with the possibility of incurring financial penalties for misusing them.[99]

Likewise, affray laws did not bar anyone from having guns.[100] They "prohibited only carrying certain weapons ('dangerous and unusual') in a particular manner ('terrifying the good people of the land' without a need for self-defense) and in particular places (in public)."[101]

The trio of liberal Justices produced concurring opinions in *Rahimi* explaining why *Bruen* was wrong to prioritize historical analysis over public

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91 *Id.*

92 *See id.* at 754, 770–72 (Thomas, J., dissenting).

93 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 6 (2022).

94 *See Rahimi*, 602 U.S. at 770–72 (Thomas, J., dissenting).

95 *See id.* at 771–73.

96 *Id.*

97 See *id.* at 752–61, 771–77 (rejecting the government's arguments concerning historical traditions about disarming dangerous people and allowing only peaceful, law-abiding citizens to have guns).

98 *Id.* at 763–64.

99 *Id.*

100 *Id.* at 768–71.

101 *Id.* at 768–69.

policy and all other considerations.[102] Meanwhile, three of the conservative Justices wrote concurrences to reaffirm and elucidate their commitment to originalism.[103]

The ultimate result of *Rahimi* is that courts are supposed to continue to apply a historical approach to Second Amendment issues.[104] However, it will be the more flexible, less demanding version of that approach used by the majority in *Rahimi*, not the stricter version that *Bruen* seemed to demand.[105] In a somewhat ironic twist, the highly originalist Court chose to move away from what was clearly the original intent of the *Bruen* majority opinion and arguably the original public meaning of that opinion.[106]

As a practical matter, this result means that judges can reach whatever conclusions they want to reach in Second Amendment cases. If they want to uphold a law, they can look back into history and see how the law fits within a broad, general historical tradition.[107] If they want to strike down the law, they can just as plausibly say that history provides no examples of specific early American laws that involved sufficiently similar burdens and justifications.[108] Through careful selection and sculpting of the historical evidence plus subtle manipulation of the required level of generality or specificity of the historical examples being sought, courts can support any outcome they choose and pretend their decision is driven by objective historical analysis rather than ideological or policy preferences.

For example, can governments ban certain military-style "assault" weapons, such as AR-15 rifles, that have been used in many high-profile shootings?[109] One can easily say that the Supreme Court has already effectively endorsed such laws by emphasizing the long historical tradition of allowing governments to ban "dangerous and unusual weapons."[110] On the other hand, one can just as easily pose the historical question in a more specific way and reach the conclusion that there is no historical tradition of

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102 See *id.* at 702 (Sotomayor, J., concurring); *id.* at 741 (Jackson, J., concurring).

103 *See id.* at 708 (Gorsuch, J., concurring); *id.* at 714 (Kavanaugh, J., concurring); *id.* at 737 (Barrett, J., concurring).

104 *See id.* at 690–91 (majority opinion).

105 *See id.* at 692–93.

106 New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 8 (2022).

107 *See Rahimi*, 602 U.S. at 692–93.

108 *Id.* at 699–700.

109 In the time between *Bruen* and *Rahimi*, courts have split on this issue. *Compare, e.g.*, Miller v. Bonta, 699 F. Supp. 3d 956, 1011 (S.D. Cal. 2023) (finding that California's assault weapon ban is unconstitutional), *with* Nat'l Ass'n for Gun Rts. v. Lamont, 685 F. Supp. 3d 63, 71 (D. Conn. 2023) (finding that a challenge to Connecticut's assault weapons ban was unlikely to succeed).

110 *Rahimi*, 602 U.S. at 690–91 (quoting District of Columbia v. Heller, 554 U.S. 570, 627 (2008)).

prohibiting certain firearms because they share some features with and bear some stylistic resemblance to military weapons.

Can governments set minimum age limits for buying or possessing firearms?[111] For example, a federal law prohibits licensed firearm dealers from selling handguns to those under twenty-one years of age.[112] One can argue that this law should be struck down because the prevailing view in eighteenth-century America was that people had a right to keep and bear arms as soon as they were old enough to serve in the militia, an obligation that began at the age of fifteen, sixteen, or eighteen, depending on the colony.[113] On the other hand, following the lead of the *Rahimi* majority, one can turn the dial on one's historical tradition detector to a more general setting and conclude that the Founding Fathers accepted the general idea of age restrictions on access to guns.

Debates will go on about whether an array of other gun regulations, from background check requirements to ammunition magazine capacity limits, are sufficiently similar to the historical analogues and traditions that existed several centuries ago at or around the time of the Second Amendment's adoption. These debates will be interesting, and lawyers and judges will spend a lot of time and effort on them. Perhaps the debates will sometimes shed some useful light on the issues to be decided. But in many instances, the honest answer to the historical question will be that the history is simply inconclusive. Too many years have passed and too many changes have occurred in the world for the limited amount of available historical evidence to yield clear answers about the validity of firearm regulations that our ancestors in the eighteenth century simply never considered one way or another.

The *Rahimi* majority was disingenuous about the inconclusive nature of historical evidence about guns and domestic violence restraining orders, and it was not candid about the fact that it was backtracking from what *Bruen* had said. Nevertheless, the *Rahimi* majority performed a valuable service by tempering *Bruen* and making it easier for reasonable firearm laws to be upheld. Governments at least now have a fighting chance in Second Amendment cases, with a far better chance of prevailing than they would under Justice Thomas's stricter conception of the historical test.

Having significantly diluted *Bruen* already, there is one additional tweak to *Bruen* that the Court should make at its next opportunity. The Court should

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111 A federal appellate court recently struck down Minnesota's law requiring handgun carry permit applicants to be at least 21 years old. *See* Worth v. Jacobson, 108 F.4th 677, 698 (8th Cir. 2024).

112 18 U.S.C. § 922(b)(1).

113 *See, e.g.*, David B. Kopel & Joseph G.S. Greenlee, *Second Amendment Rights of Young Adults*, 43 S. ILL. UNIV. L.J. 495, 535 (2019).

back away from *Bruen*'s assertion that the government always has the burden of proof on the historical analysis.[114] That assertion amounts to saying that if the historical evidence is inconclusive, which it often will be, the government automatically loses. In practice, it means that the government can never be honest and admit when the historical record does not yield clear answers, and judges deciding cases in the government's favor must pretend that the history is on the government's side even when it is really a toss-up. Rather than stacking the deck in favor of challengers in this way, the Court should emphasize that history will be an extremely important part of Second Amendment analysis, but that does not mean there is only one conceivable conclusion that can be reached in cases where the history is inconclusive.

CONCLUSION

History is becoming more critical than ever before in constitutional interpretation. Landmark decisions about issues such as abortion,[115] affirmative action,[116] and religious freedom[117] depend on the Supreme Court's assessments of what rights people believed they had in the eighteenth and nineteenth centuries. The Second Amendment is just one of many subjects for which history has been and will continue to be crucial.

At the oral argument before the Supreme Court in the *Rahimi* case, the lawyer representing the respondent, Zackey Rahimi, observed that historical inquiries could be dangerous because they can be "like . . . looking down a well."[118] He meant that one who looks down a well may see a reflection of themselves, just as those who look down into "the dark well of American history" in search of insight about the Second Amendment may wind up imagining that they see historical analogues and legal traditions that happen to match their policy preferences about firearm regulation.[119]

That may occur, but perhaps it is even more likely that when we look down into the dark well of history, we do not see anything clearly. We see complexity, ambiguity, and uncertainty because history is rarely simple and

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114 New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 33–34 (2022); *see supra* notes 62–63 and accompanying text.

115 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 241–61 (2022) (arguing that there was no historical tradition of people having a right to choose to have an abortion).

116 *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 201–02, 231 (2023); *see also id.* at 232–53 (Thomas, J., concurring) (arguing that there was a historical tradition of requiring all government actions to be colorblind and barring governments from considering race in the pursuit of greater diversity or equity).

117 *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 535–36 (2022) (stating that analysis of Establishment Clause issues must focus on historical practices and understandings).

118 Transcript of Oral Argument, *supra* note 59, at 59.

119 *Id.* at 58–59.

clear when it comes to the kind of profoundly important and highly controversial issues that the Supreme Court addresses.

That does not mean history should have no place in constitutional interpretation. It can and should be one valuable element that courts consider in trying to decide constitutional issues. However, courts should be willing to admit when history does not yield clear answers, and they should be as candid and honest as possible in explaining how they arrive at decisions when history is inconclusive.