reason
FREE MINDS AND FREE MARKETS

The Volokh Conspiracy
Mostly law professors | Sometimes contrarian | Often libertarian | Always independent

GUNS

Second Amendment Roundup: Rahimi Preserves Bruen

The real dissents are the concurrences by Justices Sotomayor and Jackson.

STEPHEN HALBROOK | THE VOLOKH CONSPIRACY | 6.26.2024 11:25 PM

A good faith disagreement exists between the majority in *United States v. Rahimi* and Justice Thomas in dissent on whether the founding-era laws on affrays and sureties are valid historical analogues for the federal gun ban on persons who are subject to domestic violence restraining orders (DVROs). Justice Thomas makes a persuasive case that they do not suffice, while the Chief Justice, writing for the majority, contends that the requirement that the underlying court order includes "a finding that such person represents a credible threat to the physical safety of such intimate partner or child" is amply parallel.

But *Rahimi* is sufficiently consistent with *NY State Rifle & Pistol Ass'n v. Bruen* that three Justices could not contain their rejection of that opinion. They concurred because Rahimi's conviction was upheld, not because they agreed with any of the reasoning.

Justice Sotomayor, joined by Justice Kagan, began by asserting her continued belief "that *Bruen* was wrongly decided." She then held her nose and argued that *Bruen* was correctly applied in *Rahimi*. But she tried to undercut *Rahimi*'s historical approach given that "the weapons in question have evolved dramatically," citing an article about how it took a long time to load 18th century guns. On the contrary, the Chief Justice reiterated that the term "arms" applies, "prima facie, to all instruments that constitute bearable arms, even those that were not [yet] in existence," adding that protection does not apply "only to muskets and sabers." Is this a warmup for the fight over "assault weapon" bans?

Justice Sotomayor added that "I remain troubled by *Bruen*'s myopic focus on history and tradition," yearning for the days of "means-end scrutiny that this Court rejected in *Bruen*." Still, she conceded that "the Second Amendment does not yield automatically to the Government's compelling interest," and we should recall that she did not dissent in the per curiam *Caetano v. Massachusetts* stun gun decision.

Justice Jackson also disagreed with *Bruen*, questioned "the workability of that legal standard," and claimed that the lower courts "say there is little method to *Bruen*'s madness." She decried that "courts must sift through troves of centuries-old documentation looking for supportive historical evidence," even though many First and Fourth

Amendment decisions have also gone through that process. She concluded that the legal standards must "foster stability, facilitate consistency, and promote predictability," but "*Bruen*'s history-focused test ticks none of those boxes."

When compared with this complete rejection of the text-history approach, the differences between the Chief Justice and Justice Thomas look a lot smaller. Their quarrel is about the application of the rule, not the rule itself. There's no hint that any of the six Justices who are favorable to the Second Amendment are backing off from text and history, and they don't even bother to reply to the above remarks. Now a few remarks on the opinions that do matter.

Just on its face, it was a hard sell to get the Court to invalidate 922(g)(8)(C)(i), where the order includes "a *finding* that such person represents a *credible threat* to the *physical safety* of such intimate partner or child," and the optics were even worse based on Rahimi's outrageous misconduct. Attorney General Garland selected a perfect storm of a case for Court review, but ultimately didn't get the outcome he had hoped for, an overturning or major watering down of the *Bruen* text-history approach. That approach survived this maelstrom and the decision offers a basis to challenge bans based on lesser standards or evidence where there is no finding of a credible threat to anyone's physical safely.

The Court declined SG Prelogar's invitation to uphold 922(g)(C)(ii), which only requires an order prohibiting use of force without such a finding. That issue is pending before the Court in one or more cert petitions, which may be GVRed, where they'll have a fighting chance.

Expect many facial challenges to the federal prohibitions to fail. But exceptions to the *Salerno* rule (a mob case) have been recognized where a law is permeated with unconstitutional applications. Justice Scalia wrote in *Johnson v. United States* (2015): "Although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." That rule is not limited to vagueness cases. In *Bruen* itself, the "no set of circumstances" rule did not apply to make the whole of Manhattan a sensitive place, even though there are sensitive places there.

The majority finds the ban to be "relevantly similar" to the founding-era surety and going-armed laws. While those laws didn't disarm the person except when he may have been in prison, neither does 922(g), except when the order is in place, and such orders expire. While the surety laws did not disarm the person who posted bond, the person who failed to find sureties would be imprisoned until he did so. So the "how" is different at the bond-posting stage, but at the prison stage it was actually worse than 922(g)'s gun ban without any incarceration.

That 922(g)(8) is a temporary ban can be used to argue against other bans that aren't limited in time. Of course, conviction for possession while under the order can create a lifetime ban (because some courts have held that civil rights cannot be restored under 921(a)(20) for federal GCA crimes). Conviction of a misdemeanor crime of domestic violence creates a permanent disarming because civil rights are not taken away and thus cannot be restored. This may be low-hanging fruit to challenge.

Due process remains a very live issue, and there are some lower court decisions holding that 922(g)(8)'s procedures weren't followed. Not to mention low state standards to get a DVRO order, such as a mere preponderance of evidence.

The dog that didn't bark was the absence of any need for "expert" opinions of historians. The Court relied on its precedents, historical laws, commentaries on laws, law reviews, the Congressional Globe, and a handful of histories about legal topics. It was the same pattern as in *Heller*, *McDonald*, and *Bruen*. No expert reports were offered or needed. The Court's methodology is what lawyers, not historians, do, notwithstanding the whining from some judges about the difficulty of finding and using historical legal sources.

Now for a few reflections on the other concurrences. Justice Gorsuch made a strong statement in favor of the preexisting arms right even though the founders "understood an arms-bearing citizenry posed some risks," because it is "vital to the preservation of life and liberty." He repeats Judge Bumatay's exposure in *Duncan v. Bonta* (9th Cir. 2021) of the Ninth Circuit's embarrassing, automatic rejection of Second Amendment challenges. (The score was 50 to 0.) As at oral argument, he left open as-applied claims such as those in which there is no judicial finding that a person is a "credible threat" to another, or in which a person is disarmed permanently.

Justice Kavanaugh elaborated further on his text-history project that he began with his dissent in *Heller II*. Read his lips: "But the text of the Constitution always controls. So history contrary to clear text is not to be followed." To uphold bans, we know that some lower courts relegate text to the trash bin and cherry pick bits of history that the founders would have found abhorrent. Look for Kavanaugh to continue on this path and perhaps to author one of the Court's next Second Amendment opinions.

Justice Barrett repeated her insistence from *Bruen* on 1791 over 1868 (now asking "what is the post-1791 cutoff for discerning how the Second Amendment was originally understood?") and her warning against reliance on post-enactment, 19th century laws. She referred to her concurrence in *Vidal* that "evidence of 'tradition' unmoored from original meaning is not binding law," and from *Samia* that "scattered cases or regulations pulled from history may have little bearing on the meaning of the text." She rightly stated that while early applications of a constitutional rule may illuminate its original scope, they "do not themselves have the status of constitutional law." That's important because some early laws like the Alien and Sedition Acts violated the Bill of Rights and don't count against the clear text. This is all good medicine against lower courts that purport to find some isolated fragment of history to be a historical tradition.

Justice Thomas in dissent correctly points out how the surety and affray laws differed from 922(g)(8). But the majority has a point in the fact that aggressors could be imprisoned under these laws and were obviously disarmed at the time. It's true that (g)(8) doesn't require the predicate DVRO to be entered with the protections of the criminal law. But the majority's opinion keeps the *Rahimi* ruling narrow for future cases.

Much of Justice Thomas' dissent was directed against the government's arguments that the majority did not accept either. No member of the Court agreed with the argument that the Second Amendment only protects "law-abiding, responsible citizens," a phrase that appeared as "dicta" in *Heller*. Some lower courts are using that argument to uphold bans. SG Prelogar's argument that "responsible" actually means "not dangerous" found no acceptance. The government's citation of laws disarming slaves and Indians in the court below, to which the majority paid no attention, demonstrates the danger of disarming persons based on such elusive classifications. So while Thomas dissented, a good part of his opinion buttresses the majority opinion.

Thomas repeated Judge Ho's concurring point in the Fifth Circuit that the issue is not whether those who threaten others with violence may be disarmed, as they may and should be criminally prosecuted. But (g)(8) extends its tentacles to those who shouldn't be prosecuted because, for instance, they simply agreed to have an order entered under (ii). This argument will fit nicely with an as-applied challenge to (ii) on behalf of deserving defendants.

Rahimi is a narrow ruling that reaffirms *Bruen*. The Court simply upheld a temporary gun ban against a person about whom a court renders "a finding that such person represents a credible threat to the physical safety of such intimate partner or child." None of the other provisions in (g)(8) require that the person actually poses any kind of current threat, particularly the permanent status classifications of being a convicted felon or being convicted of a misdemeanor crime of domestic violence. As-applied challenges for worthy persons like in *Strange* appear promising. *Rahimi* offers much to use in future challenges.

Those supporting restrictions will seize upon language from *Rahimi* such as the permissibility of analogues that are "relevantly similar," but they will try to stretch the scope and time line of the analogues far out of proportion. This will be a favorite quote: "These precedents were not meant to suggest a law trapped in amber." But if the law at issue requires no finding of a credible threat or something equivalent, they are unlikely to find any historical laws that could properly serve as analogues.

So the bottom line to take from *Rahimi* is that it upheld a law facially in which a court renders "a finding that such person represents a credible threat to the physical safety of such intimate partner or child." That is the key phrase: A *finding* of a *credible threat* to *physical safety* of another person. Most firearm prohibitions have nothing equivalent in substance or by way of historical analogue.

STEPHEN HALBROOK is a Senior Fellow with the Independent Institute. His latest book is *America's Rifle: The Case for the AR-15*, though he has also written over 30 law review articles and several other books on the Second Amendment and firearms law more broadly. He has also litigated extensively in the field, often representing groups such as the NRA, National African American Gun Association, Western States Sheriffs' Association, Congress of Racial Equality, and more. He has argued before the U.S. Supreme Court in *Castillo v. U.S.* (2000), *Printz v. U.S.* (1997), and *U.S. v. Thompson/Center Arms Co.* (1992), as well as in front of many other courts. He filed an amicus curiae brief pro bono in support of petitioners in *Bruen* on behalf of the National African American Gun Association.

GUNS