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Between a Rock and a Gun

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ABSTRACT. The Roberts Court has methodically expanded the scope of Second Amendment rights. But in its first Second Amendment case involving a criminal defendant, *United States v. Rahimi*, the Court blinked. This Essay examines some of the deeper issues that lurk behind the Court's seemingly inconsistent treatment of Second Amendment rights and what *Rahimi* portends for racial justice, gender justice, and criminal-defense lawyering going forward.

INTRODUCTION

Criminal-defense lawyers are Charlie Brown, the Supreme Court is Lucy, and the Court's Second Amendment jurisprudence is the football.[1] At least, that is the image stuck in my head after reading *United States v. Rahimi*.[2] If you aren't familiar with this recurring *Peanuts* gag, Lucy tells Charlie Brown that she will hold the football for him as he runs up to kick it. She assures him that she can be trusted. Ever gullible, Charlie Brown goes to kick the ball. As he cocks back his leg and lets it rip, Lucy yanks the ball away, causing Charlie Brown to fly into the air and fall flat on his back. The classic scene usually ends with Lucy looking

1. This Essay takes no position on just how "originalist" the Supreme Court's Second Amendment jurisprudence is. *See, e.g.*, Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 102 (2023) (noting that the Court's Second Amendment jurisprudence "appears to depart from—or at least extend beyond—standard public meaning originalism"); Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy: *The Role of History and Tradition*, 118 NW. U. L. REV. 433, 439 (2023) (arguing that *Bruen* did not "fully employ[] the originalist methods outlined [in the article]").

2. 144 S. Ct. 1889 (2024).

down on a dazed Charlie Brown and, with a wry grin on her face, telling him that he shouldn't have trusted her.[3]

In its modern Second Amendment jurisprudence, the Court has told us that history is key.[4] The Court first looked to history in *District of Columbia v. Heller* to determine that the Second Amendment includes a right to keep guns in the home for self-defense.[5] The Court then looked to history in *McDonald v. City of Chicago* to determine that this newly recognized Second Amendment right is so deeply rooted in our history that it must be incorporated against the states.[6] And in the final chapter of this gun-rights trinity, the Court in *New York State Rifle & Pistol Ass'n v. Bruen* looked to history to hold that the Second Amendment includes a right to carry arms in public for self-defense.[7] But *Bruen* did not stop there. The Court announced a test by which to judge all gun regulations: for a gun law to be constitutional, it must be "consistent the Nation's historical tradition of firearm regulation," with the government bearing the burden of proof.[8] If the government cannot meet its burden, then the law must fall.[9]

The natural question following *Bruen* was what the decision meant for the many gun laws and regulations on the books today. To state the obvious, present-day guns and gun regulation look nothing like they did at the Founding (or during Reconstruction—which history matters is still unclear[10]). And if one must look to "history and tradition" to figure out which modern gun regulations

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3. For a deep dive into the history of Lucy pulling away the football, see Eric Schulmiller, *All Your Life, Charlie Brown. All Your Life*, SLATE (Oct. 8, 2014, 9:33 AM), https://slate.com/culture/2014/10/the-history-of-lucys-pulling-the-football-away-from-charlie-brown-in-peanuts.html [https://perma.cc/V4D9-TTX3].

4. Not all of the Justices are happy with the Roberts Court's trend of considering constitutional questions, both in and outside of the Second Amendment context, through the lens of history and tradition. *See, e.g.*, Vidal v. Elster, 600 U.S. 286, 327 (2024) (Sotomayor, J., concurring) ("[P]erhaps the biggest surprise (and disappointment) of today's five-Justice majority opinion is its reliance on history and tradition as a dispositive test to resolve this case.").

5. 554 U.S. 570, 593-94 (2008). There are many who challenge whether the *Heller* Court got the history right. *See, e.g.*, Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L.J. 625, 626-31 (2003) (outlining historical objections to the methods of the *Heller* majority).

6. 561 U.S. 742, 750 (2010).

7. 597 U.S. 1, 70 (2022).

8. *Id.* at 24.

9. *Id.*

10. *See id.* at 82 (Barrett, J., concurring) (noting that there are "a few unsettled questions" over which historical practices from which periods are relevant).

are constitutional, a faithful approach to that test seemed to require that many of the laws on the books fall by the wayside.[11]

Once the Court handed down *Bruen*—and to no real surprise—Second Amendment enthusiasts set about challenging gun-licensing requirements, firearm-type restrictions, and public-carry limitations.[12] And in many cases, these litigants were successful.[13]

At the same time, criminal-defense lawyers went to work challenging their clients' charges for violating various gun laws. Following *Bruen*'s playbook, defenders looked to "history and tradition" to argue that a raft of modern gun laws were unconstitutional—both on their face and as applied to their clients. And although they were not as successful as civil litigants,[14] *Bruen* proved a useful decision for criminal defendants. For instance, a Texas criminal defendant convinced a federal district court to dismiss his charge for buying a gun while under indictment.[15] A Mississippi defendant successfully moved the Fifth Circuit to dismiss an indictment charging him with possessing a firearm while being an unlawful user of a controlled substance.[16] And a Mississippi federal judge dismissed a defendant's felon-in-possession charge.[17] *Bruen* has been a useful weapon in the criminal-defense arsenal.

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11. *See* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen, *Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 124-27 (2023) (presenting empirical evidence for the high success rate of *Bruen* claims in invalidating gun regulations); Matt Valentine, *Clarence Thomas Created a Confusing New Rule That's Gutting Gun Laws*, POLITICO MAG. (July 28, 2023), https://www.politico.com/news/magazine/2023/07/28/bruen-supreme-court-rahimi-00108285 [https://perma.cc/Z87N-TPR6].

12. *See* Charles, *supra* note 11, at 127 (listing the various types of Second Amendment challenges post-*Bruen*); *see also FPC Celebrates First Year of Post*-Bruen *Legal Wins*, FIREARMS POL'Y COAL. (June 23, 2023), https://www.firearmspolicy.org/fpc_celebrates_first_year_of_post_bruen_legal_wins [https://perma.cc/7KJU-5PPQ] (listing the Firearms Policy Coalition's win since the Court's decision in *Bruen*).

13. *See* Eric Ruben, Rosanna Smart & Ali Rowhani-Rahbar, *One Year Post*-Bruen*: An Empirical Assessment*, 110 VA. L. REV. ONLINE 20, 33 (2024) (showing that 82 of 150 civil cases analyzed resulted in relief for plaintiffs challenging gun regulations).

14. *See id.* (showing that 16 of 214 criminal cases analyzed resulted in relief for defendants challenging gun regulations).

15. *See* United States v. Quiroz, 629 F. Supp. 3d 511, 527 (W.D. Tex. 2022); *see also* United States v. Holden, 638 F. Supp. 3d 931, 940-41 (N.D. Ind. 2022) (dismissing an indictment for making false statements to a firearms dealer), *rev'd*, 740 F.4th 1015, 1018 (7th Cir. 2023).

16. *See* United States v. Daniels, 77 F.4th 337, 340 (5th Cir. 2023), *vacated*, 144 S. Ct. 2707 (2024). *But see* United States v. Biden, No. 23-61, 2024 WL 2112377, at *4 (D. Del. May 9, 2024) (denying Hunter Biden's motion to dismiss the same charge).

17. *See* United States v. Bullock, 679 F. Supp. 3d 501, 506 (S.D. Miss. 2023). *Cf.* Range v. Att'y Gen., 69 F.4th 96, 106 (3d Cir. 2023) (ruling in favor of an as-applied challenge to the federal felon-in-possession law), *vacated sub nom.* Garland v. Range, 144 S. Ct. 2706 (2024).

Bruen's usefulness—at least for criminal defendants—took a hit, however, when the Supreme Court scaled back the decision just two Terms later in *United States v. Rahimi*.[18] Zackey Rahimi, who was convicted of violating 18 U.S.C. § 922(g)(8), a federal law prohibiting people subject to domestic-violence protection orders from possessing firearms, had a history of engaging in seemingly senseless gun violence and outrageous domestic abuse.[19] Mr. Rahimi was the poster child for those people you would *not* want walking around with a loaded weapon.[20]

Rahimi therefore pitted the Roberts Court's love for guns against its disdain for criminal defendants.[21] The disdain for criminal defendants won out. Part I elaborates on how this happened. It describes how criminal-defense lawyers dutifully followed the Supreme Court's decision in *Bruen*, only for the Court to pull the rug out from under them. This Part further argues that if the Court had been intellectually honest and had faithfully followed *Bruen*, Mr. Rahimi's position as a criminal defendant would have carried the day.[22] Instead, the *Rahimi* Court gaslit us all by telling us that *Bruen* did not say what even its own author said it did. Now that criminal defendants were winning, this Lucy of a Court yanked the ball away.

But then, you can't talk about criminal law or the Second Amendment without talking about race. Part II explores how racial-justice narratives were

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18. 144 S. Ct. 1889 (2024).

19. *See* Daniel S. Harawa, *The Second Amendment's Racial Justice Complexities*, 101 MINN. L. REV. 3225, 3239-40 (2024) [hereinafter *Racial Justice Complexities*] ("Zackey Rahimi was the quintessential bad guy who very few people would want walking around armed—after Rahimi was put under an agreed-to domestic violence order and was prohibited from possessing a gun, he participated in *five* shootings over the course of just two months, including shooting his gun at a Whataburger simply because his friend's credit card was declined.").

20. *Id.*

21. *See, e.g.*, Editorial, *The Activist Roberts Court, 10 Years In*, N.Y. TIMES (July 4, 2015), https://www.nytimes.com/2015/07/05/opinion/sunday/the-activist-roberts-court-10-years-in.html [https://perma.cc/E3YR-D3XF] ("Whether the issue is racial or gender equality, voting rights, women's reproductive freedom, access to the courts or the rights of criminal defendants, the court has often ruled against those most in need of its protection."). *But see* Elizabeth Slattery, *The Roberts Court Is Not 'Increasingly Conservative*,*'* HERITAGE FOUND. (Oct. 9, 2014), https://www.heritage.org/courts/commentary/the-roberts-court-not-increasingly-conservative [https://perma.cc/FZ8D-TDJY] (arguing that the "Court frequently sides with criminal defendants").

22. *See, e.g.*, Nelson Lund, *The Fidelity of 'Originalist' Justices Is About to Be Tested*, N.Y. TIMES (Apr. 9, 2024), https://www.nytimes.com/2024/04/09/opinion/guns-supreme-court.html [https://perma.cc/86RK-SZGD] (asserting that "[u]nder *Bruen*'s originalist test, *Rahimi* should be an easy case").

instrumental to the Supreme Court's creation of a muscular Second Amendment.[23] In case after case, the Court wielded America's history of denying guns to formerly enslaved Black people as reason to refashion modern Second Amendment rights.[24] But with the Second Amendment at full mast by the time of *Rahimi*, the Court did not even bother to pretend that racial justice mattered.

To be sure, in *Rahimi*, there were plenty of racial-justice narratives to be excavated, all of which the Court ignored. For example, in reversing the Fifth Circuit and upholding Mr. Rahimi's conviction under 18 U.S.C. § 922(g)(8), a law designed to protect against domestic violence, the Court could have discussed, as Professor Michael Ulrich explains, the fact that Black women are far more likely to be victims of intimate-partner violence.[25] Or, if the Court wanted to affirm the Fifth Circuit's decision vacating Mr. Rahimi's conviction, the Court could have focused on the reality that Black men are far more likely to be prosecuted for violating § 922 than any other demographic, and violations of § 922 routinely make the list of top-charged federal crimes.[26] Yet, having served its purpose in *Bruen*, race did not feature in the Court's *Rahimi* opinion,[27] which is perhaps unsurprising given the Roberts Court's broader criminal-law and race jurisprudence.[28]

There's more. In contorting itself to rule against Mr. Rahimi, the Court (at the government's urging) implicitly invoked a version of gender justice to get

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23. *See* Daniel S. Harawa, NYSRPA v. Bruen*: Weaponizing Race*, 20 OHIO ST. J. CRIM. L. 163, 172 (2022) [hereinafter *Weaponizing Race*].

24. *See id.*

25. Michael R. Ulrich, *The Second Amendment's Second Sex*, 134 YALE L.J.F. 125, 140 (2024).

26. *See* United States v. Bullock, 679 F. Supp. 3d 501, 525 n.22 (S.D. Miss. 2023).

27. The majority opinion in *Rahimi* does contain one oblique reference to race: "In the aftermath of the Civil War, Congress's desire to enable the newly freed slaves to defend themselves against former Confederates helped inspire the passage of the Fourteenth Amendment, which secured the right to bear arms against interference by the States." United States v. Rahimi, 144 S. Ct. 1889, 1899 (2024). When looking at the history of the Second Amendment itself, Randall Kennedy glosses historian Carol Anderson's argument that the Second Amendment was included "in the Bill of Rights in order to assure themselves of a fighting force willing to suppress slave insurrections." Randall Kennedy, *Was the Constitutional Right to Bear Arms Designed to Protect Slavery?*, N.Y. TIMES (May 28, 2021), https://www.nytimes.com/2021/05/28/books/review/the-second-carol-anderson.html [https://perma.cc/H82X-LKLF]; *see* CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA 38 (2021).

28. *See, e.g.*, Khiara M. Bridges, *The Supreme Court 2021 Term—Foreword: Race and the Roberts Court*, 136 HARV. L. REV. 23, 25 (2022); Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court's Criminal Jurisprudence*, 110 CALIF. L. REV. 681, 683 (2022) [hereinafter *Lemonade*].

there.[29] Professor Ulrich paints a compelling picture of how women have been an afterthought in the Supreme Court's Second Amendment jurisprudence, with the Court ignoring the unique harms that women face when guns are possessed both in and outside the home.[30] He also persuasively details the intersections between guns and domestic violence, providing strong support for why we would want to prohibit people subject to domestic-violence protection orders from possessing firearms, whether via the criminal legal system or (preferably) through some civil remedy.[31]

But while Professor Ulrich's points make perfect sense — and are in fact reflected in Justice Sotomayor's *Rahimi* concurrence[32] — none of that matters under the *Bruen* framework. In no uncertain terms, *Bruen* disclaimed the relevance of modern-day realities to the constitutionality of gun regulations.[33] Even so, to limit *Bruen*'s fallout, the Court took up *Rahimi*, using the presence of real domestic-violence concerns to ensure that *Bruen* would not expand the rights of criminal defendants,[34] while studiously ignoring the racial-justice interests on both sides of the equation.

At bottom, this Essay, read alongside Professor Ulrich's essay, aims to show that the Supreme Court's modern Second Amendment jurisprudence tells us whom the Court believes the Second Amendment is designed to protect and whom it is supposed to protect against. It reveals that race matters until it doesn't, that gender matters until it doesn't, that *law* matters until it doesn't.[35]

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29. *See, e.g.*, Brief for the United States at 1, *Rahimi*, 144 S. Ct. 1889 (No. 22-915), 2023 WL 5322645, at *1 (opening the brief with "Firearms and domestic strife are a potentially deadly combination" (quotation marks omitted)).

30. *See* Ulrich, *supra* note 25, at 126-27.

31. *See* Ulrich, *supra* note 25, at 139-40.

32. *Rahimi*, 144 S. Ct. at 1905-06 (Sotomayor, J., concurring).

33. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 72 (2022) (Alito, J., concurring) (pondering why "the dissent think[s] it is relevant to recount the mass shootings that have occurred in recent years?").

34. *See* Melissa Murray & Kate Shaw, *The Conservative Supreme Court Vision that Means Inequality for Women*, N.Y. TIMES (Nov. 11, 2023), https://www.nytimes.com/2023/11/12/opinion/supreme-court-rahimi-women.html [https://perma.cc/628P-N73A].

35. This is not the only time that the Roberts Court has refashioned inconvenient precedent while stating that it was being faithful to its earlier decision. In *Alexander v. South Carolina State Conference of the NAACP*, the Court reversed a finding that South Carolina engaged in an unconstitutional racial gerrymander, claiming it was faithfully applying *Cooper v. Harris*, 581 U.S. 285 (2017). Alexander v. S.C. State Conf. of the NAACP, 144 S. Ct. 1221, 1234 (2024). Justice Kagan, who authored the majority opinion in *Cooper*, explained that this was not the case, and that, actually, the majority in *Alexander* was adopting the logic of the *Cooper* dissent. *Id.* at 1269 (Kagan, J., dissenting). Then, of course, there are the occasions where the Roberts Court has overruled or "abandoned" major decisions, allowing stare decisis to fall by the wayside. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534 (2022) ("abandon[ing]" the

The Court's Second Amendment precedents lay bare the reality that some legal arguments, and some constitutional rights, are more readily available to some than to others.

I. DAMNED IF YOU DO: ZACKEY RAHIMI'S FAILED ATTEMPT TO CAPITALIZE ON *BRUEN*

The Roberts Court's Second Amendment revolution was swift. Less than two decades ago, the Supreme Court in *Heller* held for the first time that the Second Amendment encompasses a private right to keep arms in the home for self-defense.[36] Dissenting from that sea-change decision, Justice Stevens not only bemoaned the fact that the Court's understanding of the Second Amendment was unprecedented; he also explained that by announcing a private right to keep arms, the Court opened itself up to the "formidable task of defining the scope of permissible regulations."[37]

A. The Bruen *Court Calls Modern Gun Regulation into Question*

In *Bruen*, the Court undertook that "formidable task." There, the Roberts Court not only recognized a private to right to carry arms for self-defense outside the home; the Court also sought to set a standard by which to judge the constitutionality of all firearm regulations going forward.[38] Said Justice Thomas, writing for the Court: "Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'"[39] Second Amendment enthusiasts and gun-rights groups praised the decision.[40] The Second

Lemon test); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (overruling *Roe* and *Casey*); Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling *Chevron*). As Professor Khiara Bridges remarked, "the Roberts Court does not appear to consider itself particularly bound by stare decisis." Bridges, *supra* note 28, at 53.

36. District of Columbia v. Heller, 554 U.S. 570, 628-29 (2008).

37. *Id.* at 679 (Stevens, J., dissenting).

38. *Bruen*, 597 U.S. at 17.

39. *Id.* at 17 (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961) (Black, J., dissenting)).

40. *See, e.g.*, *NRA Wins Supreme Court Case,* NYSRPA v. Bruen, NAT'L RIFLE ASS'N, https://home.nra.org/statements/nra-wins-supreme-court-case-nysrpa-v-bruen [https://perma.cc/ZQ9K-E2YG]; Walter Smoloski, *GOA Celebrates Massive 'Right to Bear Arms' SCOTUS Victory*, GUN OWNERS AM. (June 23, 2022), https://www.gunowners.org/goa-celebrates-massive-right-to-bear-arms-scotus-victory [https://perma.cc/GL8A-6X79].

Amendment was a "second-class right" no longer.[41] But praise for *Bruen* also came from what many saw as a surprising corner: public defenders.[42]

In *Bruen*, a group of New York public defenders filed an amicus brief in support of extending Second Amendment rights outside the home. Their argument was straightforward. They described how "each year, [they] represent hundreds of indigent people whom New York criminally charges for exercising their right to keep and bear arms."[43] The prosecutions are not equally borne across racial lines, they explained, as most of the people they saw prosecuted "for exercising their Second Amendment rights [were] Black or Hispanic."[44] The public defenders therefore had a simple request for the Court: "[C]reate a rule that will in fact protect the Second Amendment rights of 'all' the people."[45]

When the *Bruen* Court took up the public defenders' invitation and struck down the New York gun-permitting law, creating a "history and tradition" test by which to judge gun regulations in the process, criminal-defense lawyers across the country immediately went to work. In jurisdiction after jurisdiction, criminal defendants started raising Second Amendment challenges in their gun-related prosecutions.[46] Their arguments were based on a straightforward application of *Bruen*. For example, when a defendant challenged his conviction under

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41. *See, e.g.*, Silvester v. Becerra, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from denial of certiorari) (quoting McDonald v. City of Chicago, 561 U.S. 742, 780 (2010) (plurality opinion)); *see also* Darrell A.H. Miller, *The Second Amendment and Second-Class Rights*, HARV. L. REV. BLOG (Mar. 5, 2018), https://harvardlawreview.org/blog/2018/03/the-second-amendment-and-second-class-rights [https://perma.cc/D7HS-P886] (discussing the fact that gun-rights advocates often complained that "[j]udges treat the Second Amendment as a second-class right").

42. *See* Harawa, *Racial Justice Complexities*, *supra* note 19, at 3232 (noting the press coverage reacting to public defenders supporting *Bruen*). For a broader discussion of the public defenders' brief in *Bruen*, see Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. REV. F. 449, 449 (2022) (arguing that "the racial justice concerns the public defenders highlight should be addressed in democratic politics rather than in the federal courts").

43. Brief of the Black Attorneys of Legal Aid, The Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae in Support of Petitioners at 5, *Bruen*, 597 U.S. 1 (No. 20-843).

44. *Id.*

45. *Id.* at 33 (quoting McDonald, 561 U.S. at 773).

46. *See, e.g.*, George Joseph, *City Defense Attorneys Use Supreme Court Gun Decision to Challenge Possession Charges*, CITY (July 26, 2022), https://www.thecity.nyc/2022/07/26/city-defense-attorneys-use-supreme-court-gun-decision-to-challenge-possession-charges [https://perma.cc/7YYS-XAZQ] ("New York City defense attorneys are asking judges to drop gun possession cases following this June's Supreme Court decision [in *Bruen*] striking down the state's restrictive gun licensing regulations . . . ."). *See generally* Billy Clark, *Second Amendment Challenges Following the Supreme Court's* Bruen *Decision*, GIFFORDS L. CTR. (June 21, 2023), https://giffords.org/lawcenter/memo/second-amendment-challenges-following-the-supreme-courts-bruen-decision [https://perma.cc/E8TQ-RGLQ] (noting the increase in Second Amendment challenges after *Bruen*).

18 U.S.C. § 922(n), which prohibits people under indictment from possessing firearms, he argued that the government could not point to "historical English or American laws that specifically forbade criminal defendants from possessing or buying firearms while awaiting trial."[47] In a case challenging a conviction under the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1), the defendant noted the "absence of historical authority from the Founding Era supporting felon disarmament."[48] In perhaps the most famous Second Amendment challenge by a criminal defendant, Hunter Biden, President Biden's son, argued that the federal statute criminalizing firearm possession by someone who is an "unlawful user or addicted to any controlled substance"[49] is unconstitutional because there is no "historical precedent for disarming citizens based on their status of having used a controlled substance."[50]

To be certain, criminal defendants making these arguments did not always, or even usually, win. In a one-year postmortem after *Bruen*, one study found that Second Amendment challenges were successful in just five percent of criminal cases, whereas civil litigants were successful in sixty-seven percent of federal appellate cases.[51] The point here is not that *Bruen* charted a guaranteed path to success for criminal defendants. Rather, *Bruen* gave them the *ability* to make arguments previously unheard of in criminal cases. As a result, criminal defendants achieved some Second Amendment successes that were impossible before *Bruen* in both state and federal court.[52]

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47. Appellant's Initial Brief at 19, United States v. Bangash, No. 23-10228 (5th Cir. Mar. 12, 2024), 2023 WL 6010399, at *19 (internal quotation marks omitted).

48. Brief for Defendant-Appellant at 19, United States v. Thawney, No. 22-1399 (2d Cir. Dec. 21, 2022), 2022 WL 17960862, at *19.

49. 18 U.S.C. § 922(g)(3) (2018).

50. United States v. Biden, No. CR 23-61 (MN), 2024 WL 2112377, at *2 (D. Del. May 9, 2024) (internal quotation marks omitted).

51. *See* Ruben et al., *supra* note 13, at 33. The study found that organizational plaintiffs were far more successful than individual plaintiffs. *Id.* at 34. It also found that judicial ideology was relevant to success, as Republican-appointed judges more frequently ruled in favor of the party bringing a Second Amendment challenge than Democratic-appointed judges. *Id.* at 44-46.

52. *See, e.g.*, Natalia Martinez, *Judge Dismisses Gun Charge Against Convicted Felon; Ruled as Unconstitutional*, WAVE (Mar. 15, 2024), https://www.wave3.com/2024/03/15/judge-dismisses-gun-charge-against-convicted-felon-ruled-unconstitutional [https://perma.cc/KJ9T-JKD4]; *Second Amendment Courtwatch*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/litigation/second-amendment-courtwatch [https://perma.cc/D9L9-BY4G] (tracking Second Amendment litigation).

B. The Rahimi *Court Walks Back* Bruen

But all good things must come to an end. The Second Amendment success of one particular criminal defendant proved a bridge too far. Zackey Rahimi was convicted of possessing a firearm while subject to a domestic-violence protection order in violation of 18 U.S.C. § 922(g)(8).[53] The facts of *Rahimi* are somewhat outlandish. Mr. Rahimi was under an agreed-to restraining order after he dragged his ex-girlfriend into his car following an argument and shot at a bystander who witnessed the altercation.[54] In the following months, he allegedly threatened another woman with a gun and was suspected to be involved in five separate shootings, including shooting at a constable's car and "into the air outside a Whataburger after his friend's credit card was declined."[55]

Before the Fifth Circuit, Mr. Rahimi argued that none of these facts matter; the indictment should be dismissed because 18 U.S.C. § 922(g)(8) is facially unconstitutional.[56] In support of this argument, Mr. Rahimi relied on the fact that women were largely unprotected—especially from their husbands—at the time of the Second Amendment's ratification. He explained that the "historical support for the exclusion of domestic violence offenders from Second Amendment protection appears rather thin. Judges in this time period were more likely to confiscate a wife beater's liquor than his guns."[57] As Mr. Rahimi put it, "Indisputably, domestic violence is a persistent social problem. . . . Yet there is little or no historical evidence suggesting *disarmament* for those who committed domestic violence; and there is certainly no tradition of disarming people subject to a no-contact order related to domestic violence."[58] Mr. Rahimi argued that the "analysis that *Bruen* demands is cold, calculating, and historical."[59] And here, he continued, that analysis required the court to vacate his conviction and to hold

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53. United States v. Rahimi, 61 F.4th 443, 448-50 (5th Cir. 2023).

54. Alejandro Serrano, *U.S. Supreme Court Hears Texas Case About Whether Domestic Violence Suspects Can Be Banned from Having Guns*, TEX. TRIB. (Nov. 7, 2023), https://www.texastribune.org/2023/11/07/supreme-court-guns-domestic-violence-rahimi [https://perma.cc/YV7H-S7J7].

55. *Id.*

56. *See* Appellant's Initial Brief at 12, United States v. Rahimi, No. 21-11001 (5th Cir. May 2, 2022), 2022 WL 594104, at *12.

57. *Id.* at 17 (quoting Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L.J. 1257, 1301 (2017)) (cleaned up).

58. Appellant's Supplemental Brief at 15, United States v. Rahimi, No. 21-11001 (5th Cir. July 25, 2022), 2022 WL 3010970, at *15.

59. *Id.* at 23.

§ 922(g)(8) unconstitutional.[60] In other words, Mr. Rahimi, through his counsel, closely followed the *Bruen* playbook.

The United States urged the Fifth Circuit to resist this argument. Attempting to satisfy the history-and-tradition test, the government argued that although no history specifically shows that those subject to domestic-violence protection orders were disarmed, there was a long history more generally of disarming dangerous people, including "slaves and Native Americans."[61] The United States argued that these restrictions were sufficiently analogous to satisfy *Bruen*'s history-and-tradition test, attempting to exploit the potential confusion over what makes a law analogous enough to meet *Bruen*'s demands.[62]

The Fifth Circuit rejected the United States's argument and sided with Mr. Rahimi. The Fifth Circuit held that none of the examples cited by the government were "relevantly similar" to the domestic-violence prohibition at issue in the case.[63] The Fifth Circuit therefore concluded that while § 922(g)(8) "embodies salutary policy goals meant to protect vulnerable people in our society," the Supreme Court's decision in *Bruen* "forecloses any" consideration of "[w]eighing those policy goals' merit."[64] What matters is the "historical analogical inquiry."[65] "Through that lens," the Fifth Circuit held § 922(g)(8) to be facially unconstitutional.[66]

The Supreme Court reversed, and in so doing, attempted to clean up *Bruen*'s mess.[67] According to Chief Justice Roberts, writing for the Court, the Fifth Circuit (and many others) "misunderstood" *Bruen*'s "methodology."[68] As the *Rahimi* Court framed it, *Bruen* did not "suggest a law trapped in amber," as the Second Amendment "permits more than just those regulations identical to ones

60. *Id.*

61. United States v. Rahimi, 61 F.4th 443, 456 (5th Cir. 2023). There is something particularly galling about the government analogizing laws disarming people subject to domestic violence orders and racist laws disarming Native people and enslaved Black people. *See* Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE 30, 31 (2023).

62. *See Rahimi*, 61 F.4th at 460.

63. *Id.* at 458.

64. *Id.* at 461.

65. *Id.*

66. *Id.*

67. *See* Dahlia Lithwick & Mark Joseph Stern, *John Roberts Tried to Clean Up Clarence Thomas' Mess. He May Have Invited More Chaos*, SLATE (June 24, 2024, 4:16 PM), https://slate.com/news-and-politics/2024/06/supreme-court-john-roberts-clarence-thomas-guns-mess-second-amendment-chaos.html [https://perma.cc/Y8QV-G9EH].

68. United States v. Rahimi, 144 S. Ct. 1889, 1897 (2024).

that could be found in 1791."[69] Rather, a firearm regulation is constitutional under the Second Amendment if it is "consistent with the *principles* that underpin our regulatory tradition."[70] The Court emphasized: "The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'"[71]

With this recasting of *Bruen* "in mind," the *Rahimi* Court held that § 922(g)(8) was constitutional, at least as applied to Mr. Rahimi.[72] Looking to surety laws[73] and "going armed"[74] laws, the Court explained that "[f]rom the earliest days of the common law, firearm regulations have included provisions barring people from misusing weapons to harm or menace others."[75] Then, from those two examples, the Court derived the principle that "[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed."[76] Acknowledging that "[s]ection 922(g)(8) is by no means identical to these founding era regimes," the Court held that "[i]ts prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly within the tradition the surety and going armed laws represent."[77]

Alone in dissent, Justice Thomas—*Bruen*'s author—had a much different view of what *Bruen* said. He thought that under *Bruen*, this case "should have been . . . straightforward"[78] given that the "Court and Government [did] not point to a single historical law revoking a citizen's Second Amendment right based on interpersonal violence."[79] Justice Thomas did not believe that surety laws and going armed laws were "relevantly similar" to § 922(g)(8).[80] Starting

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69. *Id.*

70. *Id.* (emphasis added).

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

72. *Id.* at 1900.

73. Surety laws were a form of "preventive justice" practiced in the eighteenth and early nineteenth centuries, which allowed magistrates to require persons who were thought to present a future danger to post a bond. *Id.* at 1899-1900. If the person failed to post the bond, they would be jailed, and if they posted the bond but still broke the peace, they would forfeit the bond. *Id.* at 1900.

74. "Going armed" laws were part of the "common law prohibition on affrays," which "prohibited . . . riding or going armed, with dangerous or unusual weapons, to terrify the good people of the land." *Id.* at 1901 (quotation marks and brackets omitted).

75. *Id.* at 1899.

76. *Id.* at 1901.

77. *Id.*

78. *Id.* at 1941 (Thomas, J., dissenting) (quotation marks omitted).

79. *Id.* at 1947.

80. *Id.* at 1944.

with surety laws, Justice Thomas explained that they did not impose the same "burden" on Second Amendment rights as § 922(g)(8) because "in a nutshell," they were just "a fine on certain behavior," as opposed to a criminal statute that strips a person of their Second Amendment rights and imposes imprisonment as a penalty.[81] And going-armed laws were not relevantly similar: they had a "distinct justification from § 922(g)(8) because they regulated only certain public conduct that injured the entire community."[82] Thus, Justice Thomas concluded that these laws did not have "an analogous burden and justification" to § 922(g)(8), and therefore they could not be used to satisfy *Bruen*'s history-and-tradition test.[83]

As Justice Thomas explained, *Rahimi* should have been "an easy case" if the Supreme Court had hewed faithfully to what it said in *Bruen*.[84] Indeed, as Justice Sotomayor noted in her concurrence, "[T]he law at the founding was more likely to protect husbands who abused their spouses than offer some measure of accountability."[85] Thus, to rule against Mr. Rahimi, which the Court seemed inclined to do from the start, it had to walk back (or rewrite) *Bruen* stealthily.[86] It did so by announcing a principle-based approach to its history-and-tradition test to replace the regulation-based approached that *Bruen* seemingly articulated—all while claiming it was faithfully following *Bruen*, over the dissent of *Bruen*'s author.[87] In other words, when a criminal defendant tried to reap the

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81. *Id.* at 1933.

82. *Id.* at 1942.

83. *Id.* at 1933.

84. *See* Lund, *supra* note 22; *see also* Ian Millhiser, *The Supreme Court Refuses to Accept Blame for Its Worst Guns Decision*, VOX (June 21, 2024, 1:25 PM EDT), https://www.vox.com/scotus/356267/supreme-court-us-rahimi-domestic-abuse-guns-second-amendmen [https://perma.cc/D5NW-92TX] ("As Justice Clarence Thomas persuasively argues in dissent, *Bruen* compelled the Fifth Circuit to rule that domestic abusers do, indeed, have a Second Amendment right to own a gun.").

85. *Rahimi*, 144 S. Ct. at 1905 (Sotomayor, J., concurring) (citing Reva Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2154-70 (1996)).

86. *See* Elie Mystal, *The Supreme Court Just Got a Gun Ruling Right—for Completely Bonkers Reasons*, NATION (June 21, 2024), https://www.thenation.com/article/archive/rahimi-supreme-court-domestic-violence [https://perma.cc/2AD7-P7CE] (describing *Rahimi* as "retconning *Bruen* to justify denying Rahimi his 'right' to a gun"). This stealth rewriting is slightly different than the phenomena of stealth overruling. *See, e.g.*, Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 15 (2010).

87. *See* Jacob D. Charles, *On Guns, the Supreme Court Can't Shoot Straight*, WASH. MONTHLY (June 29, 2024), https://washingtonmonthly.com/2024/06/29/on-guns-the-supreme-court-cant-shoot-straight [https://perma.cc/7YSG-9R7J]. To be sure, *Bruen* did not say that courts had to look to the principles underlying historical firearm regulations when applying its history-and-tradition test.

benefit of the Court's maximalist vision of the Second Amendment, the Court blinked.

C. *The Second Amendment After* Rahimi

Looking forward, however, there is no guarantee that *Rahimi*'s rewriting of *Bruen* is etched in stone. In fact, that may well be the perverse genius of *Rahimi*. By claiming that *Rahimi* is a faithful application of *Bruen*, the Court may have created a choose-your-own-adventure Second Amendment paradigm.[88] In cases involving criminal defendants whom the Court does not believe should possess guns, the Court can look to malleable principles underlying historical gun regulations such as "dangerousness" to find that certain gun-related prosecutions are permissible. Meanwhile, when the Court sympathizes with the party raising a Second Amendment challenge, the Court can revert to the more regulation-based approach that *Bruen* articulated. Under that approach, no particular historical regulation is guaranteed to be analogous enough, as the questions of what is analogous and how many analogues it takes to build a historical tradition will often be in eye of the beholder.[89] As Justice Jackson noted, the Court's approach to Second Amendment questions is "creating chaos,"[90] making it hard to know what the law is and to discern the scope of one's constitutional rights. But perhaps this chaos is by design: by adopting this choose-your-own adventure paradigm, the Court aggrandized itself, claiming the power to decide which regulations pass muster and which must fall.

So where does *Rahimi* leave criminal defendants? Maybe close to the same place they started. For instance, in one post-*Rahimi* decision, a federal judge thought that nothing much had changed. In an order dismissing an indictment charging a violation of 18 U.S.C. § 922(g)(5), which criminalizes gun possession by someone who is illegally in the United States, Judge Reeves made clear that he read *Rahimi* as the Court "doubl[ing]-down on the legal standard they

88. As the Chief Judge of the Fourth Circuit lamented, "the Supreme Court's recent attempt to decipher the *Bruen* standard in [*Rahimi*] offered little instruction or clarity about how to answer [the] persistent (and often, dispositive questions)" that *Bruen* left open. Bianchi v. Brown, 111 F.4th 438, 474 (4th Cir. 2024) (en banc) (Diaz, C.J., concurring).

89. *See Rahimi*, 144 S. Ct. at 1928-29 (Jackson, J., concurring). The choose-your-own-adventure aspect of modern Second Amendment jurisprudence can be considered apiece with what Professor Darrell Miller has called originalism's "selection problem." Darrell A.H. Miller, *Originalism's Selection Problem*, 33 WM. & MARY BILL RTS. J. (forthcoming 2024), https://ssrn.com/abstract=4909251 [https://perma.cc/7AB2-ZJ47].

90. *Rahimi*, 144 S. Ct. at 1929 n.3.

articulated in *Bruen*."[91] Thus, following *Bruen*'s history-and-tradition methodology, Judge Reeves held that dismissal was warranted because the government did not meet its burden of proving "that immigrant disarmament is a principle consistent with American history and tradition at the founding."[92] Under this view of *Rahimi*, defendants may not have to alter their litigation approach much, aside from perhaps avoiding facial challenges given the higher bar they pose to success.[93] As proof, after *Rahimi*, criminal defendants have successfully challenged charges for violating federal laws prohibiting possessing a gun under indictment and possessing machine guns, all because those courts purported to follow *Bruen*.[94]

By contrast, if judges view *Rahimi* as "softening" or "modif[ying]" *Bruen*'s approach,[95] then defendants may have to adjust accordingly. In front of a judge with this view of *Rahimi*, defendants may instead choose to argue over levels of generality, asserting that the principles that the government claims can be derived from a historical tradition are far too abstract. After all, as Justice Barrett said in *Rahimi*, "[A] court must be careful not to read a principle at such a high level of generality that it waters down the right."[96]

Either way, criminal-defense attorneys reading *Rahimi* should not give up all hope. As Justice Jackson pointed out, *Rahimi* leaves open a number of questions and potential avenues for defenders to pursue.[97] First, the Court emphasized

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91. United States v. Benito, No. 3:24-CR-26-CWR-ASH, 2024 WL 3296944, at *3 (S.D. Miss. July 3, 2024).

92. *Id.* at *8.

93. *Rahimi*, 144 S. Ct. at 1898 (describing facial challenges as "the most difficult challenge to mount successfully, because it requires a defendant to establish that no set of circumstances exists under which the Act would be valid" (quotation marks omitted)).

94. *See* United States v. McDaniel, No. 22-CR-0176-BHL-1, 2024 WL 3964339, at *9 (E.D. Wis. Aug. 28, 2024) (granting a criminal defendant's as-applied challenge to 18 U.S.C. § 922(n), which prohibits people under indictment from carrying guns); United States v. Morgan, No. 23-10047-JWB, 2024 WL 3936767, at *4-5 (D. Kan. Aug. 26, 2024) (granting a criminal defendant's challenge to 18 U.S.C. § 922(o), which prohibits possession of machine guns). And another example: The Supreme Judicial Court of Massachusetts dismissed a defendant's conviction under a state law that prohibited carrying a switchblade applying the *Bruen* methodology. *See* Commonwealth v. Canjura, 240 N.E.3d 213, 216 (Mass. 2024).

95. As one district judge opined, "*Rahimi* can be seen as a softening of the approach to the Second Amendment taken in *Bruen*. How else does one explain that the author of *Bruen* is the sole dissenter in *Rahimi*?" United States v. Herriott, No. 2:23-CR-37-PPS-JEM, 2024 WL 3103275, at *2 n.1 (N.D. Ind. June 24, 2024); *see also* United States v. Rahimi, 117 F.4th 331, (5th Cir. 2024) (Ho, J., concurring) (asserting that *Rahimi* "modified" *Bruen*).

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

97. *Id.* (Jackson, J., concurring).

that Mr. Rahimi raised a facial challenge to § 922(g)(8).[98] Defendants therefore can still raise as-applied challenges to charges under that statute and can still assert both facial and as-applied challenges to other gun regulations.[99] Second, the Court made clear that its decision was limited, as *Rahimi* "conclude[d] 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."[100] Thus, by its terms, the decision is narrow and leaves the status of all other forms of gun regulation—those not predicated on a court finding of dangerousness or that are not temporally limited—up in the air. In other words, even after *Rahimi*, there is still ample room for criminal-defense attorneys to raise Second Amendment challenges to various gun-crime charges,[101] although as one Ninth Circuit judge complained, courts may (in his view, inappropriately) use *Rahimi* as cover to reject criminal defendants' Second Amendment challenges.[102] Zealous defense attorneys must continue to press these arguments, exploiting *Bruen*'s methodology and *Rahimi*'s noticeable gaps in service of their

98. *Id.* at 1902-03 (majority opinion). Technically, Mr. Rahimi was charged under § 922(g)(8)(i); the Court did not address § 922(g)(8)(ii). *Id.* at 1899. The Court did not address the possibility of a defendant raising a due-process challenge arguing that the proceeding in which the domestic violence order was entered did not provide adequate process to justify the stripping of Second Amendment rights. *See id.* at 1903 n.2. Presumably this is a challenge a defendant can still bring after *Rahimi*.

99. *Id.* at 1909 (Gorsuch, J., concurring) ("Our resolution of Mr. Rahimi's facial challenge to § 922(g)(8) necessarily leaves open the question whether the statute might be unconstitutional as applied in particular circumstances." (quotation marks omitted)); *see, e.g.*, Range v. Garland, 69 F.4th 96 (3d Cir. 2023) (en banc) (raising as-applied challenges to 18 U.S.C. § 922 (g)(1)); United States v. Duarte, 101 F.4th 657 (9th Cir. 2024) (same); United States v. Daniels, 77 F.4th 337 (5th Cir. 2023) (raising an as-applied challenge to 18 U.S.C. § 922(g)(3)). The government filed a petition for a writ of certiorari in *Range*. *See* Petition for a Writ of Certiorari, Garland v. Range, 144 S. Ct. 2706 (2024) (No. 23-374). The Supreme Court granted the petition, vacated the Third Circuit's judgment, and remanded for the court of appeals to reconsider the case in light of *Rahimi*. *See* Garland v. Range, 144 S. Ct. 2706, 2707 (2024).

100. *Rahimi*, 144 S. Ct. at 1903.

101. *See, e.g.*, Eric Ruben, *SCOTUS's 2nd Amendment Decision Leaves Open Questions for State Courts*, ST. CT. REP. (June 26, 2024), https://statecourtreport.org/our-work/analysis-opinion/scotuss-2nd-amendment-decision-leaves-open-questions-state-courts [https://perma.cc/GLU6-36Y6] ("*Rahimi* leaves open many questions about when a disarmament order is constitutional—questions that state courts will be largely left to grapple with.") Kami Chavis, *Narrow Gun Opinion Says Law Not in 'Amber,' but History Rules*, BLOOMBERG L. (June 25, 2024, 4:30 AM EDT), https://news.bloomberglaw.com/us-law-week/narrow-gun-opinion-says-law-not-in-amber-but-history-rules [https://perma.cc/BZ9W-HCMN] ("The narrowly tailored opinion focuses on a problematic historical analysis. It leaves open many questions about constitutionality of modern gun regulation, and allows courts assessing gun laws to set aside evidence of firearms' harms in today's society.").

102. United States v. Duarte, 108 F.4th 786, 788 (9th Cir. 2024) (VanDyke, J., dissenting).

clients.[103] While the decision may have been a lemon for Mr. Rahimi, criminal-defense attorneys can still try to make lemonade.[104]

II. WEAPONIZING JUSTICE

Another striking feature of the *Rahimi* decision is the absence of any discussion of race. As I've said before, in its previous Second Amendment cases, the Roberts Court "consistently appropriated a racial justice angle in its efforts to reshape the scope of Second Amendment rights," while at the same time ignoring the racial disparities in gun violence and prosecutions today.[105] Indeed, by the time of *Bruen*, the racial-justice "meta-narrative" of the Roberts Court's Second Amendment cases was so clear that much of the briefing in *Bruen* purposefully emphasized racial-justice narratives, including briefs from those who normally would espouse a colorblind, postracial worldview.[106]

A. The Unstated Racial-Justice Narrative in Rahimi

In *Rahimi*, however, racial-justice narratives largely fell away. The omission of race is conspicuous given that issues of race and racial justice are particularly

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103. *See, e.g.*, Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999, 2022-23 (2022) (explaining that "[c]lient centered advocacy is a bedrock principle of modern-day criminal defense. It is also a fundamentally individualistic ethic"); Monroe H. Freedman, *How Lawyers Act in the Interests of Justice*, 70 FORDHAM L. REV. 1717, 1727 (2002) (explaining that lawyers "act in the interests of justice by using all means that are lawful and reasonably available to help our clients to advance and to protect their interests as the clients, after proper counseling, perceive their interest to be").

104. *See generally* Harawa, *Lemonade*, *supra* note 28 (discussing how advocates, including criminal defense lawyers, can utilize seemingly unfavorable Supreme Court precedent to further their clients' ends).

105. Harawa, *Weaponizing Race*, *supra* note 23, at 163; *see also* Danny Y. Li, *Antisubordinating the Second Amendment*, 132 YALE L.J. 1821, 1827 (2023) (stating that pro-gun conservative legal academics often raise arguments about gun regulations having racist origins and impacts); Melissa Murray, *Stare Decisis and Remedy*, 73 DUKE L.J. 1501, 1530-31 (2024) (describing Justice Thomas as invoking postbellum racial violence in *Bruen* to justify expanding the Second Amendment).

106. Harawa, *Weaponizing Race*, *supra* note 23, at 163; Li, *supra* note 105, at 1824; Darrell A.H. Miller, *Conservatives Sound Like Anti-Racists—When the Cause Is Gun Rights*, WASH. POST (Oct. 27, 2021), https://www.washingtonpost.com/outlook/2021/10/27/gun-rights-anti-racism-bruen-conservative-hypocrisy [https://perma.cc/EZ3K-JAPU] (discussing the briefs filed by 23 Republican state attorneys general and 176 members of Congress and asserting that the "hypocrisy on display in these briefs is galling").

salient in criminal law.[107] Lest there was doubt, there were racial-justice issues at play in *Rahimi* on both sides of the "v." As such, if the Supreme Court wanted to continue its trend of discussing race in Second Amendment cases, it had the necessary ammunition. The Court held its fire.

1. *Racial-Justice Narratives Favoring the Government*

Start with the racial narratives that favored the government. The Court could have engaged in the sordid reasoning that has often featured in Second Amendment briefing and in the case law since *Bruen* was decided.[108] The argument goes like this: The nation's history of racial and racist disarmament illuminates that "founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety."[109] Historically, Black and Native people were prohibited from possessing guns because they were viewed as dangerous.[110] Analogizing from there, as the federal government argued before the Fifth Circuit in *Rahimi*, the Court could have held that domestic abusers are similarly considered within the same class of "dangerous" persons in the eyes of the law.[111] In other words, if the Court had wanted to, it could have consistently employed *Bruen*'s history-and-tradition test to hold that the Nation's history of racism required *reining in* the Second Amendment.[112] But given that the Roberts Court had used the history of racial disarmament to *expand* gun rights just two years ago in *Bruen*,[113] perhaps the Court recognized that it would be a little dizzying to use this same history now to contract them.

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107. *See generally, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (discussing racism and mass incarceration in the United States).

108. *See* Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE 30, 32–33 (2023).

109. Brief of 97Percent as Amicus Curiae in Support of Petitioner at 6, United States v. Rahimi, 144 S. Ct. 1889 (2024) (No. 22-915) (quoting Kanter v. Barr, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting) (internal quotation marks omitted)).

110. *Id.*

111. *Id.*

112. Or at a minimum, the Court could have expressed discomfort with analogizing people alleged to have committed domestic violence with Native people and formerly enslaved Black people. For his part, Justice Thomas criticized this particular form of analogizing, explaining that "[f]ar from an exemplar of Congress's authority, the discriminatory regimes the Government relied upon are cautionary tales. They warn that when majoritarian interests alone dictate who is 'dangerous,' and thus can be disarmed, disfavored groups become easy prey." *Rahimi*, 144 S. Ct. at 1946 (Thomas, J., dissenting).

113. *See* Harawa, *Weaponizing Race*, *supra* note 23, at 171.

Likewise, if the Court had wanted to rule for the government and claim consistency in its invocation of race, it could have discussed some of the important issues raised by Professor Ulrich and some amici concerning the racial disparities in intimate-partner violence.[114] For example, the Court could have noted that women of color are disproportionately likely to face intimate-partner violence and are also more likely to seek court intervention as a recourse.[115] The Court could have highlighted the fact that Black and Native women are at much greater risk of dying at the hands of an intimate partner.[116] Or the Court could have raised the startling fact that Black pregnant women are far more likely than nonpregnant Black women to be victims of intimate-partner homicide.[117] Yet the Court left the intersectional harms of gun violence unaddressed,[118] thereby obscuring the special harms that women of color face in a nation where guns proliferate.[119] But perhaps it should not be surprising that these stories were absent from the opinion, given *Bruen*'s exhortation that modern-day realities have no place in our current understanding of the scope of the Second Amendment.[120]

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114. *See* Ulrich, *supra* note 25, at 145.

115. Brief of Public-Health Researchers and Lawyers as Amici Curiae in Support of Petitioner at *21, United States v. Rahimi, No. 22-915 (U.S. Aug. 21, 2023), 2023 WL 5486316; Brief of the National League of Cities, The United States Conference of Mayors and the International Municipal Lawyers Association as Amici Curiae Supporting Petitioner at *25, United States v. Rahimi, No. 22-915 (U.S. Aug. 21, 2023), 2023 WL 5489066; *see also* Brief of Amici Curiae National Indigenous Women's Resource Center, et. al., in Support of Petitioner at *8, United States v. Rahimi, No. 22-915 (U.S. Aug. 21, 2023), 2023 WL 5489082 (noting that "in Indian Country . . . Native women face the highest rates of domestic violence and victimization in the United States.").

116. Brief of Public-Health Researchers and Lawyers as Amici Curiae in Support of Petitioner, *supra* note 115, at *21.

117. Brief of Center for Reproductive Rights, Amicus Curiae, in Support of Petitioner at *8, United States v. Rahimi, No. 22-915 (U.S. Aug. 21, 2023), 2023 WL 5489056. This observation would seem especially appropriate given the Court's abortion rulings. *See* Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 731 (2024) (explaining that the Supreme Court's decision in *Dobbs* "may simply be a way station en route to the pro-life movement's desired resolution: the complete abolition of legal abortion").

118. *See generally* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242-43 (1991) (seeking to "explor[e] the race and gender dimensions of violence against women of color" since "discourses have failed to consider intersectional identities such as women of color").

119. *See, e.g.*, United States v. Rahimi, 144 S. Ct. 1889, 1906 (2024) (Sotomayor, J., concurring) (providing data on domestic abuse involving firearms); Brief of Center for Reproductive Rights, Amicus Curiae, in Support of Petitioner, *supra* note 117, at *8; Brief of Public-Health Researchers and Lawyers as Amici Curiae in Support of Petitioner, *supra* note 115, at *21.

120. *See* Harawa, *Weaponizing Race*, *supra* note 23, at 172.

2. *Racial-Justice Narratives Favoring Mr. Rahimi*

There is an important racial-justice story to be told on the other side, too. If the Roberts Court had wanted to rule for Mr. Rahimi (just as it had ruled for every *civil* plaintiff who had raised a Second Amendment challenge) and continue its pattern of discussing race, it could have addressed the racial-justice implications of gun prosecutions. Recall the reality that compelled the public defenders to write in support of the challengers in *Bruen*: people of color, and Black people in particular, are far more likely to be prosecuted for possessing guns. If one looks specifically at 18 U.S.C. § 922(g), the federal firearm statute Mr. Rahimi was convicted of violating, the racial disparities are breathtaking.

The United States Sentencing Commission reported 64,142 sentencings in Fiscal Year 2022.[121] Of those cases, 8,688 were convictions under § 922(g) violations — over 13% of all cases.[122] Of people sentenced for violating § 922(g), 58.1% were Black, despite Black people comprising just under 14% of the country's population.[123] That same year, over *three-quarters* of all sentencings under this statute were of defendants of color.[124] While these numbers are shocking in the abstract, they become less surprising when one considers the fact that the federal government has purposefully established gun-focused prosecution programs in cities across the country with large minority populations.[125] That the federal government regularly partners with local law enforcement in cities with large minority populations to aggressively prosecute gun crimes renders the racial disparities in federal gun prosecutions unremarkable. There is a racial-justice story to be told about how gun possession by people of color is targeted in a way that white gun ownership is not.

With these facts at its back, if the Court had wanted to continue its trend of invoking racial justice when striking down gun regulations and expanding the scope of the Second Amendment, it could have plausibly done so with a straight face. Indeed, the Court could have gone even further than just focusing on how § 922(g) is prosecuted. It could have zoomed out to explain, consistent with what the public defenders said in *Bruen*, that *most* rulings striking down a criminal statute are consistent with racial justice given the persistent racialized

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121. *Quick Facts: 18 U.S.C. § 922(g) Firearm Offenses*, U.S. SENT'G COMM'N, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY22.pdf [https://perma.cc/P4YP-YPNH].

122. *Id.*

123. *Id.*; *see also Quick Facts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045221 [https://perma.cc/YE5C-9NB2] (stating that Black people comprise 13.7% of the U.S. population).

124. *See Quick Facts: 18 U.S.C. § 922(g) Firearm Offenses*, *supra* note 121.

125. *See, e.g.*, Harawa, *Racial Justice Complexities*, *supra* note 19, at 3233-34.

patterns of criminal-law enforcement in the United States.[126] But again, because the Roberts Court's Second Amendment case law has been so laser focused on the United States's *history* of racial discrimination, and consistent with the Roberts Court's general apathy towards the average criminal defendant,[127] the Court treated present-day racial disparities in gun-crime prosecutions as irrelevant.[128]

B. The Absence of Racial Justice and the Ascendance of Gender Justice in Rahimi

The absence of any discussion of the racial realities of gun prosecution feels especially pernicious given the broader context. In a trio of *civil* cases, the Roberts Court chipped away at the state's ability to regulate firearms.[129] A Second Amendment challenge in a criminal case has far different racial-justice implications, as Black people's gun possession is far more likely to be regulated through the use of the criminal legal process than white gun possession.[130] And as Justice Thomas noted in his *Rahimi* dissent, even when gun regulations fall, criminal prosecution and incarceration are still available mechanisms to regulate gun possession.[131] This reality increased the importance of the Court hewing to the standard announced in *Bruen* when it came time to apply the Second Amendment in a criminal case — that is, if the Court meant what it had said up until that point. But rather than staying faithful to the history-and-tradition test that it had just announced, the Roberts Court backed away in *Rahimi*. In so doing, the

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126. *Id.* at 3227-28.

127. As Professor Katherine Shaw notes, the Court does seem to show a special solicitude for defendants charged with public corruption offenses. *See* Katherine Shaw, *Partisanship Creep*, 118 NW. U. L. REV. 1563, 1618-20 (2024).

128. David Olson, *Illegal Firearm Possession: A Reflection on Policies and Practices that May Miss the Mark and Exacerbate Racial Disparity in the Justice System*, DUKE CTR. FOR FIREARMS L. (Jan. 19, 2022), https://firearmslaw.duke.edu/2022/01/illegal-firearm-possession-a-reflection-on-policies-and-practices-that-may-miss-the-mark-and-exacerbate-racial-disparity-in-the-justice-system [https://perma.cc/35WK-DSJ5]; *see* Harawa, *Weaponizing Race*, *supra* note 23, at 172; Melissa Murray, *Stare Decisis and Remedy*, 73 DUKE L.J. 1501, 1568 (2024).

129. *See* Harawa, *Racial Justice Complexities*, *supra* note 19, at 3238.

130. *See, e.g.*, Brandon del Pozo & Barry Friedman, *Policing in the Age of the Gun*, 98 N.Y.U. L. REV. 1831, 1879 (2023).

131. United States v. Rahimi, 144 S. Ct. 1889, 1947 (2024) (Thomas, J., dissenting) ("This case is not about whether States can disarm people who threaten others. States have a ready mechanism for disarming any who uses a firearm to threaten physical violence: criminal prosecution.").

Court essentially endorsed the use of the criminal legal system, with all its built-in biases,[132] as a tool to regulate firearms.

By distorting precedent to condone the use of criminal law to regulate guns, *Rahimi* sent a message about who the Court envisions as "rightful" gun owners. It is easy to cast *Rahimi* as the Court saying that "dangerous" people should not possess guns. But one must go one step further and ask: whom does society regularly perceive as dangerous? The widespread association of Blackness with criminality and dangerousness is well-documented.[133] And as just discussed, the over-policing of Black people is uncontroverted. Therefore, the use of criminal law to regulate firearm possession will necessarily mean that the right will be less accessible to Black people than to others. As a result, Black people who lawfully exercise their Second Amendment rights must worry that their actions may still be perceived as illegal in ways that most white people's actions will not.[134] As Professor Khiara Bridges helpfully explains, there is a "racial injury" that comes with "using the criminal legal system to control access to guns."[135] This "racial injury" was either illegible or unimportant to the Roberts Court in *Rahimi*.

While race fell away, a not-so-subtle variant of (raceless) gender justice took its place. It all started with how the government shifted its framing of the case from Mr. Rahimi being a drug dealer who deserves to be behind bars to § 922(g)(8) being an important tool to protect against domestic violence. In its petition for a writ of certiorari, the government opened with this: "Zackey Rahimi was a drug dealer who 'mostly sold marijuana and occasionally sold cocaine.'"[136] The problem of intimate-partner violence that § 922(g)(8) was supposedly designed to address would not feature until page six of the petition.[137] To state what might be obvious, Mr. Rahimi allegedly being a drug dealer had little relevance to this case, yet it was the government's opening salvo. In that way, at least the petition was transparent: Section 922(g)(8) was a vehicle for the government to get a perceived bad guy off the streets. That § 922(g)(8) might also be tool to protect against domestic violence came in a distant second in the government's framing.

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132. *See, e.g.*, Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 GEO. L.J. 923, 925 (2023) (pointing out the racial disparities at every major decision point in the criminal legal system).

133. *See* Bridges, *supra* note 28, at 85; Harawa, *Racial Justice Complexities*, *supra* note 19, at 3252; Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, *in* POLICING THE BLACK MAN 3, 5 (Angela J. Davis ed., 2017).

134. *See, e.g.*, Harawa, *Weaponizing Race*, *supra* note 23, at 173-75.

135. Bridges, *supra* note 28, at 74 (referring to the harms one experiences due to race, whether or not they are legally cognizable, as racial injury).

136. Petition for a Writ of Certiorari at 2, *Rahimi*, 144 S. Ct. 1889 (No. 22-915), 2023 WL 2600091, at *1 (internal quotation marks omitted).

137. *Id.* at 6.

The government's merits brief reads much differently. There, the government opened with this: "Firearms and domestic strife are a potentially deadly combination."[138] And the government immediately highlighted the fact that § 922(g)(8) was designed to "address that acute danger."[139] The government appropriately amplified the allegations of Mr. Rahimi's partner abuse.[140] By the time of merits briefing, that Mr. Rahimi was allegedly a drug dealer was suddenly, and rightfully, irrelevant. For its part, the Court deftly threaded the needle, connecting the story of Mr. Rahimi being a bad guy to the plight of domestic violence. As evidence, in a lengthy facts section, the Court made sure to describe vividly the domestic-violence allegations against Mr. Rahimi, including by detailing a number of incidents that occurred *after* the domestic-violence restraining order was issued—salacious details that had no real purpose other than to sully Mr. Rahimi's image.[141] Thus, by rehearsing all of these facts before conducting an analysis, the Court painted a picture of Mr. Rahimi that would leave most readers certain that he should not be allowed to have a gun.

Whatever the government's reasons for prosecuting Mr. Rahimi, its narrative of protecting women[142] who experience intimate-partner violence is the version of the case that took hold in the public imagination. The day before oral argument, an opinion piece in *The New York Times* asked: "Will the Supreme Court Toss Out a Gun Law Meant to Protect Women?"[143] Then, right after oral argument, the *Times* ran a headline declaring: "Supreme Court Seems Likely to Uphold Law Disarming Domestic Abusers."[144] Under this framing of the case,

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138. Brief for the United States, *supra* note 29, at *1 (quoting United States v. Hayes, 555 U.S. 415, 427 (2009)).

139. *Id.* at 1-2.

140. *Id.* at 2.

141. *Rahimi*, 144 S. Ct. at 1894-95.

142. I understand women are not the only ones who experience intimate partner violence, but the harms disproportionately fall on women. *See* Ruth W. Leemis, Norah Friar, Srijana Khatiwada, May S. Chen, Marcie-jo Kresnow, Sharon G. Smith, Sharon Caslin & Kathleen C. Basile, *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Intimate Partner Violence*, CTRS. FOR DISEASE CONTROL & PREVENTION 4 (2022), https://stacks.cdc.gov/view/cdc/124646/cdc_124646_DS1.pdf [https://perma.cc/7AB5-8MJ9] (noting that women experience intimate partner violence at higher rates than men).

143. Linda Greenhouse, *Will the Supreme Court Toss Out a Gun Law Meant to Protect Women?*, N.Y. TIMES (Nov. 6, 2023), https://www.nytimes.com/2023/11/06/opinion/guns-domestic-abuse-supreme-court.html [https://perma.cc/LY6W-PDQ8].

144. Adam Liptak, *Supreme Court Seems Likely to Uphold Law Disarming Domestic Abusers*, N.Y. TIMES (Nov. 7, 2023), https://www.nytimes.com/2023/11/07/us/politics/supreme-court-gun-rights-domestic-violence.html [https://perma.cc/92RZ-GMHJ]; *see also, e.g.*, Nina Totenberg, *High Court Seems Likely to Uphold Law Banning Guns for Accused Domestic Abusers*, NPR (Nov. 7, 2023, 4:43 PM ET), https://www.npr.org/2023/11/07/1211226091/supreme-court-guns-domestic-abuse [https://perma.cc/Q8UA-3YVD] (framing Section 922(g)(8) as

the Court comes out looking like a hero. The postdecision *Times* headline proves this point, blaring: "Supreme Court Upholds Law Disarming Domestic Abusers."[145] But the Court is no hero. The confused status of § 922(g)(8), and laws like it, was a confusion of the Court's own making, a point Justice Jackson made forcefully in her separate writing in *Rahimi*.[146]

But this seemingly strategic reframing of the case should not obscure Professor Ulrich's persuasive argument that the Court's modern Second Amendment jurisprudence champions men at the expense of women. As Professor Ulrich explains, the Court's history-and-tradition test tying modern gun regulation to a time when women were not part of the polity is "an affront to hard-fought progress toward gender equality."[147] But the gender issues run deeper than that, as the Court's vision of the Second Amendment is not only offensive, it is dangerous because it "enables firearm proliferation," in turn "plac[ing] women at increased risk of harm while doing virtually nothing to help women against known assailants."[148] As such, as Professor Ulrich highlights, the way the Roberts Court views the right to keep and bear arms and the notion of self-defense more generally prioritizes the vantage point of men, to the peril of women.

By taking up the dispute in *Rahimi* and using it to uphold the criminal prosecution of certain gun possessors, the Court implicitly swapped one justice narrative for another. At first, expanding access to guns was important to further a particularly cramped vision of racial justice. Now, criminalizing certain people who possess guns is important to further a particularly cramped version of gender justice. All the while, the Roberts Court's Second Amendment jurisprudence

aimed at domestic abusers); Josh Gerstein, *Supreme Court Looks Poised to Uphold Bans on Guns for Accused Domestic Abusers*, POLITICO (Nov. 7, 2023, 3:49 PM EST), https://www.politico.com/news/2023/11/07/supreme-court-guns-domestic-violence-argument-00125853 [https://perma.cc/3S98-UY3T] (same).

145. Adam Liptak, *Supreme Court Upholds Law Disarming Domestic Abusers*, N.Y. TIMES (June 21, 2024), https://www.nytimes.com/2024/06/21/us/politics/supreme-court-guns-domestic-violence.html [https://perma.cc/2QMG-TYF4].

146. *See Rahimi*, 144 S. Ct. at 1926 (Jackson, J., concurring) ("Make no mistake: Today's effort to clear up 'misunderst[andings]' is a tacit admission that lower courts are struggling. In my view, the blame may lie with us, not with them." (quoting *id.* at 1897-98) (alteration in original)). The Court also could have had its historically low approval rating at the back of its mind. *See* Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historic Lows*, GALLUP NEWS (Sept. 29, 2022), https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx [https://perma.cc/NQ3K-BBN6].

147. Ulrich, *supra* note 25, at 136; *see also Rahimi*, 144 S. Ct. at 1905 (Sotomayor J., concurring) ("History has a role to play in Second Amendment analysis, but a rigid adherence to history, (particularly history predating the inclusion of women and people of color as full members of the polity), impoverishes constitutional interpretation and hamstrings our democracy.").

148. *See* Ulrich, *supra* note 25, at 139.

as a whole has arguably made people of color and women less safe.[149] *Rahimi* is therefore another example of how the Roberts Court coopts justice narratives to advance a vision of the Second Amendment that is designed for some and not for others.

CONCLUSION

So what did we learn from *Rahimi*? We learned for the first time that the Supreme Court's maximalist view of the Second Amendment has at least one endpoint—certain criminal defendants. We learned that the Court was willing to contort its precedent to find this endpoint while telling us that it was applying its precedents faithfully. We learned (or confirmed) that the Court's previous invocations of racial justice in its Second Amendment cases were instrumental: now that the Court's project of refashioning the Second Amendment is largely complete, race and racial justice have fallen from the picture. We learned that the present-day harms of gun violence, which disproportionately fall on people of color and women, still do not matter to this Court. And we learned that courts will be in the business of resolving Second Amendment disputes, likely law by law, for years to come.[150] Perhaps the "formidable task of defining the scope of permissible regulations" under the Roberts Court's newfound view of the Second Amendment is far more formidable than the Court had anticipated.[151] Or maybe the Court played its hand exactly right, making itself the final arbiter of all gun regulation. Either way, as Justice Jackson reminded us, in this uncertain Second Amendment regime, we, the public, suffer.[152]

Professor of Clinical Law, NYU School of Law. Many thanks to Michael Ulrich for his engagement, Michele Chu for the research assistance, and the Yale Law Journal *editors for making the piece much better. Mistakes are my own.*

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149. *See, e.g.*, Li, *supra* note 105, at 1829; Joseph Blocher, *Domestic Violence and the Home-Centric Second Amendment*, 27 DUKE J. GENDER L. & POL'Y 45, 46-47 (2020).

150. As proof that Second Amendment litigation is far from over, the Court recently granted certiorari, vacated the judgment below, and remanded eight cases to be reconsidered in light of *Rahimi*. *See* Garland v. Range, No. 23-374, 2024 WL 3259661 (U.S. July 2, 2024); United States v. Daniels, No. 23-376, 2024 WL 3259662 (U.S. July 2, 2024); United States v. Perez-Gallan, No. 23-455, 2024 WL 3259665 (U.S. July 2, 2024); Vincent v. Garland, No. 23-683, 2024 WL 3259668 (U.S. July 2, 2024); Antonyuk v. James, No. 23-910, 2024 WL 3259671 (U.S. July 2, 2024); Jackson v. United States, No. 23-6170, 2024 WL 3259675 (U.S. July 2, 2024); Cunningham v. United States, No. 23-6602, 2024 WL 3259687 (U.S. July 2, 2024); Doss v. United States, No. 23-6842, 2024 WL 3259684 (U.S. July 2, 2024).

151. District of Columbia v. Heller, 554 U.S. 570, 680 (Stevens, J., dissenting).

152. *See Rahimi*, 144 S. Ct. at 1930 (Jackson, J., concurring).