

OPINION

# 5th Circuit gun ruling uses faulty reasoning

When legal history becomes a legal straitjacket.



The remarkable ruling by the 5th Circuit Court of Appeals shows the impact of the Supreme Court's current focus on the "original intent" of the Constitution's framers, writes David Coale. (GETTY IMAGES)



By David Coale

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Until this month, federal law banned possession of a firearm by a person under a domestic violence restraining order. But Feb. 2, in *United States vs. Rahimi*, the [U.S. Court of Appeals for the 5th Circuit](#) held that this law was unconstitutional because it violated the Second Amendment's protection of a right to bear arms.

This remarkable holding shows the impact of the Supreme Court's current focus on the "original intent" of the Constitution's framers. And it raises serious questions about how that focus will continue to reshape the country.

Just two years ago, the 5th Circuit held that this same statute did not violate the Second Amendment. It reached a different result in this case because of the Supreme Court's 2021 opinion in *New York State Rifle & Pistol Association vs. Bruen*, which struck down a New York law making it a crime to possess a firearm without a license.

*Bruen* held that if the plain terms of the Second Amendment apply to a law, then the only remaining question is whether "the regulation is consistent with this Nation's historical tradition of firearm regulation." The Supreme Court disavowed earlier cases that also considered the intended purpose of a gun law and the degree to which a law infringes on personal freedom. After *Bruen*, history alone sets the standard for whether a gun law is constitutional.

The *Rahimi* case presented a serious challenge for that history-focused test. The Second Amendment was ratified in 1791. At that time, there was no such thing as a domestic violence restraining order. How should a court evaluate "this Nation's historical tradition" about an issue in the 1700s, when that topic has no history then?

The 5th Circuit's answer, guided by *Bruen*, was to look for "historical analogs" to the modern domestic-violence law. And it examined three: a 1662 law that allowed "officers of the Crown" to seize weapons from people who were "dangerous to the Peace of the Kingdom"; a colonial law against "going armed to terrify the King's subjects"; and surety laws from the 1600s and 1700s that, if applied to a person, required him to post a money bond as a prerequisite to possessing a firearm.

The court found that these arcane laws did not establish a "tradition" that included the domestic-violence statute. It thus concluded that the statute "is an outlier that our ancestors would never have accepted," and held it unconstitutional.

It is not surprising that the historical record, from a time when women could not vote or own property, had little to offer about modern domestic-violence law. That era also has nothing to offer about how to change a light bulb or administer antibiotics. No matter how thorough and well-intentioned this sort of search may be, as a practical matter, it is over before it starts because the key concepts were unknown at that time.

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*Rahimi* and *Bruen* thus show that firearms laws face serious challenges under the Supreme Court's history-only approach to the Second Amendment. Paradoxically, the more a law is carefully tailored to a modern-day problem, the harder it will be to find "historical analogs" that support them.

And while *Bruen* only addresses the Second Amendment, its emphasis on history is central to the federal courts' approach to the Constitution today. When the court overruled *Roe vs. Wade* in that same term, it held that abortion rights were not part of the "ordered liberty" protected when the 14th Amendment became law.

Our Constitution has a rich history with much to teach us. But used unwisely, history can become a straitjacket. For example, our country will inevitably face another pandemic. When facing a constitutional challenge to a public-health law, should we really resolve it by looking to a time when physicians drained blood from their patients? Rahimi challenges us not only to search for apt historical analogies, but also to question when we should make such a search.

*David Coale is a Dallas lawyer. He wrote this column for The Dallas Morning News.*

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