On the Intersection of the First and Second Amendments after *Bruen*

A Brief Note

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June 10, 2026

Abstract

This brief note works to understand how the Supreme Court has come to view similarly the liberties protected by the First and Second Amendments of the United States Constitution in recent years.

In recent Supreme Court jurisprudence, the analysis of statutes alleged to be in conflict with United States Constitution, amend. I and United States Constitution, amend. II have been remarkably similar. Indeed, even since *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), the First and Second Amendments of the Constitution have been inextricably linked; see *id.* at 579, 582, 595, 606, 618, 634–635 (opinion of Scalia, J.). We consider some of these similarities, drawing from *New York State Rifle & Pistol Association, Inc.* v. *Bruen*, 597 U.S. 1, slip op. (2022) and *Chiles* v. *Salazar*, 607 U.S. ___, slip op. (2026). Additionally, we consider *United States* v. *Rahimi*, 602 U.S. 680, slip op. (2024). We conduct our analysis by inspecting, and arguing against, the history and tradition test of *Bruen*. We then make connections to the First Amendment via *Chiles*. All things considered, we detail our view that *Bruen* and *Rahimi* are *logically* contradictory. As a final note, we speculate on important considerations of some cases at the intersection of both the First and Second Amendments.

History and tradition, a standard higher than strict scrutiny. Drawing its roots from *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977); *Washington* v. *Glucksberg*, 521 U.S. 702 (1997), the Supreme Court has, in some cases, elected to determine whether purported liberties are deeply rooted in the history and tradition of the United States as a prerequisite for constitutional protection. For example, a plurality in *Moore* stated "that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition," *Moore* v. *City of East Cleveland*, 431 U.S. at 503 (opinion of Powell, J.). Similarly, *Glucksberg* reasoned that because the "right to commit suicide which itself includes a right to assistance in doing so" was not present in the history and legal traditions of the United States,

the Constitution did not guarantee a right to assisted suicide, *Washington* v. *Glucksberg*, 521 U.S. at 723 (opinion of Rehnquist, J.).

In *Moore* and *Glucksberg*, the Court confined its history and tradition analysis to scenarios in which the Constitution did not explicitly enumerate a certain right. A similar substantive due process analysis was conducted in *Dobbs* v. *Jackson Women's Health Organization*, 597 U.S. 215, slip op. (2022), where the Court held that "a right to abortion is not deeply rooted in the Nation's history and traditions," and is hence not protected by the Constitution *id.* at 25 (opinion of Alito, J.). The Court also consulted history and tradition for the purposes of selective incorporation in *Timbs* v. *Indiana*, 586 U.S. 146, 2, slip op. (2019) (opinion of Ginsburg, J.), holding that the excessive fines clause of United States Constitution, amend. VIII applied to state and local governments.

But with *Bruen*, for the Second Amendment, the Court has drastically, and somewhat ironically, departed from its historical use of its history and tradition test. Specifically, the Court dispensed with standard means-end scrutiny analysis in favor of a stricter test that determines the constitutionality of gun control laws depending on whether the "regulation is consistent with this Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Association, Inc.* v. *Bruen*, 597 U.S. at 8 (opinion of Thomas, J.). The Court's line of reasoning in *Bruen* is "materially different" to other cases' use of history and tradition; previous cases have only used the standard to determine whether the Constitution protects a purported right via substantive due process or selective incorporation. In contrast, *Bruen* seeks to employ history and tradition analysis in place of means-end scrutiny to determine whether the *limitation* of an enumerated right is constitutional. Of course, history is an important consideration in any case, but *Heller* neither held, nor was understood to hold, that the existence of similar historical traditions was a necessary condition for limitations of constitutional rights. Before the Supreme Court heard the case, lower courts had used a form of intermediate scrutiny to determine that New York State's Sullivan Act, along with other statutes, were constitutional. We contend that *Bruen*'s application of the history and tradition standard is misguided and unwise.

In the Court's opinion in *Bruen*, Justice Thomas defends the novel use of the history and tradition standard by comparing the Second Amendment to the First Amendment. The Court contends that the "government must generally point to historical evidence about the reach of the First Amendment's protections" when proving the constitutionality of its actions when it has restricted speech *id.* at 15. Additionally, Justice Thomas, in line with *District of Columbia* v. *Heller*, 554 U.S. at 634, argues that the enumeration of an explicit right in the Constitution precludes any means-end scrutiny analysis; "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all," *id.* (opinion of Scalia, J.). Justice Thomas seems eager to apply this history and tradition standard to cases involving other amendments, for he alleges that those amendments' protections are empty promises otherwise.

When further scrutinizing the *Heller* rationale, we see that Justice Scalia

goes on to state that "The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets," *District of Columbia* v. *Heller*, 554 U.S. at 634 but these exceptions are nowhere in the text of the First Amendment. And furthermore, in recognizing these exceptions, the Court did not always resort to sole historical tradition analysis. In *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931), the Court clarified that the prohibition on prior restraint is not absolute, for "no one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops," (opinion of Hughes, J.). At first glance, it may seem that JUSTICE HUGHES is making some kind of tradition argument, but he instead cites *Schenck* v. *United States*, 249 U.S. 47, 52 (1919). At that time, "the question in every case [was] whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger," (opinion of Holmes, J.). The question was not solely one of history. Additionally, in *Miller* v. *California*, 413 U.S. 15 (1973), the Court *expressly disavowed* history and tradition when considering whether the First Amendment protected obscene speech. The first prong of the *Miller* test asks whether "the average person, applying *contemporary* community standards would find that the work, taken as a whole, appeals to the prurient interest," *id.* at 24 (opinion of Burger, C.J., emphasis added, internal quotation marks omitted). If not, the speech is not obscene and is protected. But if so, the speech has the potential be unprotected depending on the remaining two prongs. That is, it is possible for the prior restraint of speech to be permissible based on its *contemporary, and possibly ahistorical, understanding.* We do concede that *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964) consulted history to find that "actual malice" on the part of the speaker is necessary for public officials to win suits claiming libel (opinion of Warren, C.J.).

JUSTICE THOMAS quotes *McDonald* v. *Chicago*, 561 U.S. 742, 780 (2010) stating that the Second Amendment is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees," (plurality opinion); *New York State Rifle & Pistol Association, Inc.* v. *Bruen*, 597 U.S. at 62 (opinion of Thomas, J., internal quotation marks omitted). While other cases have deferred to historical analysis *in addition* to means-end scrutiny[1], *Bruen*'s *replacement* of means-end scrutiny with history and tradition analysis for the Second Amendment gives exactly an entirely different body of rules than the other Bill of Rights guarantees. JUSTICE THOMAS likely understands—or at least is aware of—this discrepancy, which could be another reason why he would like to broaden the use of the history and tradition framework. Doing so, as we will see, comes with its set of issues.

Means-end scrutiny is a well-established framework courts use to evaluate whether a government has unconstitutionally infringed on a constitutional right, *United States* v. *Carolene Products Company*, 304 U.S. 144, 152-153 (1938)

1. Indeed, doing so was the standard two-step test for statutes allegedly infringing on even the Second Amendment before *New York State Rifle & Pistol Association, Inc.* v. *Bruen*, 597 U.S. 1.

(opinion of Stone, J.). Different kinds of alleged infractions trigger different levels of scrutiny. For example, race-based discrimination triggers "strict scrutiny," where the government must state a compelling interest and show that their discrimination is narrowly tailored in furtherance of that interest. Another standard, "intermediate scrutiny" requires that the government action being challenged furthers an "important governmental objective" and is "substantially related" to the achievement thereof. See *Craig* v. *Boren*, 429 U.S. 190, 197 (1976) (opinion of Brennan, J.). The lowest standard is "rational basis" review, in which courts seek to determine whether a governmental action is "rationally related" to any "legitimate" state interest.

In almost all cases, *Bruen*'s history and tradition standard is a significantly higher threshold than strict scrutiny[2]. Take, for example, any state interest that courts have deemed to be "compelling," and consider a statute that is, in all respects, narrowly tailored to that interest by limiting some enumerated constitutional right. If this statute addresses the interest in such a way that is not analogous to statutes of history, it is unconstitutional. In addition, if courts today deem some state interest to be "compelling," but courts of history disagree with that classification, *Bruen*'s history and tradition test immediately fails, regardless of whether the statute is narrowly tailored. That is, even if a statute satisfies strict scrutiny, it may not satisfy *Bruen*'s history and tradition standard. It is easy to provide a concrete example, the statute in question in *United States* v. *Rahimi*, 602 U.S. 680 ostensibly satisfies strict scrutiny, but "not a single historical regulation justifies the statute," *id.* at 1 (opinion of Thomas, J., dissenting). The Court clearly erred in holding that the statute was in accordance with history and tradition, as it was a "materially different means" *id.* at 5 (opinion of Thomas, J., dissenting, internal quotation marks omitted) of addressing the state interest that founding generation-era surety laws worked to manage.

In rare instances though, a statute may violate strict scrutiny, yet, almost paradoxically, meet the requirements of the history and tradition test. For example, consider a compelling state interest such that it is impossible for any relevant statute to be narrowly tailored. Assume that analogous statutes have been passed by previous generations' legislatures. Then, suppose that even though these statutes would trigger strict scrutiny, over the course of history, courts have neglected to work through that analysis and have upheld the historical laws for other reasons. In this case, no relevant statute—current or historical—can satisfy strict scrutiny, but statutes analogous to those of history satisfy the history and tradition test. While this possibility is certainly interesting from a theoretical perspective, a concrete example is difficult to envision. We believe this possibility if of almost no practical importance, if any at all.

Furthermore, as Justice Breyer reminds us, judges are "are far less accustomed to resolving difficult historical questions" and "searching historical surveys," *New York State Rifle & Pistol Association, Inc.* v. *Bruen*, 597 U.S.

2. Justice Thomas writes that *Heller* observed "that the District's ban would fail under any heightened standar[d] of scrutiny," *New York State Rifle & Pistol Association, Inc.* v. *Bruen*, 597 U.S. at 15 (opinion of Thomas, J., internal quotation marks omitted)

at 26, 30 (opinion of Breyer, J., dissenting). Even the Court noted that it was not "undertak[ing] an exhaustive historical analysis. . . of the full scope of the Second Amendment," *District of Columbia* v. *Heller*, 554 U.S. at 627 (opinion of Scalia, J.). The outcome, then, of a constitutional challenge to a statute may depend on incomplete historical study, gerrymandered to arrive at a particular decision. This worry is not just hypothetical. As we will argue later, the outcome of *United States* v. *Rahimi*, 602 U.S. 680 intimately relies on incomplete historical study "cobbled together" to arrive at the common-sense decision that a statute barring those with a domestic violence restraining order to possess firearms is constitutional, *Chiles* v. *Salazar*, 607 U.S. at 19.

Connecting *Bruen* and *Chiles*. An 8-1 Court in *id.* struck down a Colorado law banning conversion therapy, as applied to talk therapy, holding that the statute constituted viewpoint discrimination. We do not consider the dissent's standard of care-based argument, but instead focus our analysis toward the First Amendment. Consequently, we also do not consider questions of standing.

JUSTICE GORSUCH begins his First Amendment analysis by invoking means-end scrutiny by *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015), stating that "As a general rule, such content-based restrictions trigger strict scrutiny, a demanding standard that requires the government to prove its restriction on speech is narrowly tailored to serve compelling state interests," *Chiles* v. *Salazar*, 607 U.S. at 8 (opinion of Gorsuch, J., internal quotation marks omitted). Additionally, JUSTICE GORSUCH notes that viewpoint discrimination is particularly suspect, and governments must almost always abstain from it, *id.* at 9. See also *Iancu* v. *Brunetti*, 588 U.S. 388, 393 (2019).

It is at this point that a similar-to-*Bruen* history and tradition test is considered. Gorsuch notes that "few historic and traditional categories of expression long familiar to the bar where content-based restrictions on speech will not automatically trigger strict scrutiny—categories that include fraud, defamation, and fighting words," *Chiles* v. *Salazar*, 607 U.S. at 9, *United States* v. *Alvarez*, 567 U.S. 709, 712 (2012) (plurality opinion of Kennedy, J.). *Alvarez*' use of the history and tradition standard is notable for three reasons: it is (1) similar to the pre-*Bruen* two-step test that sought to discern the constitutionality of laws allegedly violating the Second Amendment; moreover, *Alvarez*' standard (2) directs courts to use means-end scrutiny, with only a small set of exceptions in which case judges may turn to history and tradition; and perhaps most notably, *Alvarez*' history and tradition standard (3) was not able to earn a majority.

The most pertinent exceptions to *Chiles* are the two situations in which professional speech does not automatically trigger strict scrutiny. Analysis therefore turns to *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *National Institute of Family and Life Advocates* v. *Becerra*, 585 U.S. 755 (2018), which identified that strict scrutiny is not triggered when laws merely compel professional "speakers to disclose only factual, noncontroversial information," *Chiles* v. *Salazar*, 607 U.S. at 11 (opinion of Gorsuch, J.), or when laws only "incidentally sweep in speech," *id.* JUSTICE GORSUCH notes

that these exceptions are recognized by a "long historical tradition," *Chiles* v. *Salazar*, 607 U.S. at 11, and that the scenario of *Chiles* did not meet either criteria. The opinion then works through the strict scrutiny analysis.

The use of history and tradition in *Chiles* is similar, but distinct, to that of *Bruen*. Both cases use history and tradition to, at least in part, determine whether alleged encroachments on enumerated rights are constitutional. Importantly though, *Chiles* uses history and tradition to determine when the Court need not use strict scrutiny and a less restrictive level of scrutiny is warranted. *Bruen*, in contrast, requires courts to eliminate means-end scrutiny altogether in favor of the history and tradition standard.

As we have argued that *Bruen*'s standard is more stringent than strict scrutiny, it seems that with *Chiles*, the Court has made the Second Amendment "subject to an entirely different body of rules than the other Bill of Rights guarantees," exactly what JUSTICE THOMAS stated the Court needed to avoid, *New York State Rifle & Pistol Association, Inc.* v. *Bruen*, 597 U.S. at 62 (opinion of Thomas, J., internal quotation marks omitted). An ahistorical law placing a burden on the First Amendment may be found to be constitutional if it satisfies strict scrutiny, but an ahistorical law placing a burden on the Second Amendment will *always* be found to be unconstitutional by *Bruen*, regardless of whether it satisfies strict scrutiny.

Finally, JUSTICE GORSUCH argues that traditions of content-based speech burdens cannot be "cobbled together" to "sustain some new and broader category of lesser-protected speech," *Chiles* v. *Salazar*, 607 U.S. at 19. See also *United States* v. *Alvarez*, 567 U.S. at 718-722 (plurality opinion of Kennedy, J.) and *National Institute of Family and Life Advocates* v. *Becerra*, 585 U.S. 755. Since judges are not equipped to definitively and completely resolve ambiguous questions of history, courts may intentionally or unintentionally "cobble together" various historical traditions to constitutionally "sustain some new and broader category" of statutes *Chiles* v. *Salazar*, 607 U.S. at 19. Indeed, the Court did exactly that in *United States* v. *Rahimi*, 602 U.S. 680.

Over the course of just four years, the Court has been one of inconsistency. *Bruen* required that statutes burdening the Second Amendment satisfy rigorous historical scrutiny, and it endorsed such a standard for other enumerated rights. *Rahimi* pulled back and allowed "materially different" statutes to be ruled constitutional under the history and tradition standard, as long as these statutes addressed a historical interest. Then, *Chiles*, allowed for the use of means-end scrutiny for First Amendment claims, with few historical exceptions. But, *Chiles* rejected the idea of "cobbl[ing] together" various historical traditions, which the Court eagerly adopted in *Rahimi*. The history and tradition test is deeply flawed for the reasons we outlined in the previous section, but its inconsistent application has additional potential to arbitrarily govern Americans' constitutional rights. It already has.

On the logical contradiction between *Bruen* and *Rahimi*. While it provided a noble outcome, *id.* was "egregiously wrong" and "was on a collision

course with" *Bruen* "from the day it was decided." *Dobbs* v. *Jackson Women's Health Organization*, 597 U.S. at 44 (opinion of Alito, J.). Obviously, "it is emphatically the province and duty of the judicial department to say what the law is," *Marbury* v. *Madison*, 5 U.S. 137, 173 (1803) (opinion of Marshall, J.), but it is far beyond the province and duty of the Third Branch to ensure noble outcomes. The Court's decision in *Rahimi* also makes a mockery of *stare decisis*.

But the most invidious offense of *United States* v. *Rahimi*, 602 U.S. 680 is one of simple propositional logic. Just two years prior to *Rahimi*, the Court held in *Bruen* that statutes limiting the right of the people to keep and bear arms were constitutional only if those statutes had deep analogues to those of the United States' history and tradition. Contrary to *Rahimi*, *Bruen requires* the existence of "a law trapped in amber," *id.* at 7 (opinion of Roberts, J., *contra*); "the lack of a distinctly similar historical regulation addressing [a general societal problem] is relevant evidence that the challenged regulation is inconsistent with the Second Amendment," *New York State Rifle & Pistol Association, Inc.* v. *Bruen*, 597 U.S. at 17 (opinion of Thomas, J.). Ignoring *Bruen*'s requirement, the Court decided that even though the statute at issue in *Rahimi* was "materially different" to others attempting to resolve the same issue, it was constitutional, *United States* v. *Rahimi*, 602 U.S. at 5 (opinion of Thomas, J., dissenting). *Rahimi* therefore directly contradicts *Bruen* at the *logical* level; the antecedent of the implication "the statute is constitutional" is true, yet the consequent "the statute is rooted in the history and tradition of the United States" is false. We acknowledge here our reliance on JUSTICE THOMAS' dissenting opinion in *Rahimi*, but we note that as the author of the Court's opinion in *Bruen*, JUSTICE THOMAS is the best arbiter of its meaning.

To be abundantly clear, we argue that in *New York State Rifle & Pistol Association, Inc.* v. *Bruen*, 597 U.S. 1, the Court issued a ruling that would have resulted in an unacceptable consequence. So, just two years later in *United States* v. *Rahimi*, 602 U.S. 680, it issued another ruling which all but rendered the first case inoperable. Moreover, seeking to preserve itself from embarrassment, the Court opted not to expressly overrule *Bruen*. We believe JUSTICE THOMAS would agree with our characterization.

True threats and conduct. We keep this section quite short as it is largely speculative. The Court has long held true threats of violence to be unprotected by the First Amendment, *Watts* v. *United States*, 394 U.S. 705 (1969); *Virginia* v. *Black*, 538 U.S. 343 (2003); *Elonis* v. *United States*, 575 U.S. 723 (2015). In *Counterman* v. *Colorado*, 600 U.S. 66, 1, slip op. (2023), the Court clarified that for such speech to be unprotected, "The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another," (opinion of Kagan, J.). In this light, it may be the case that brandishing a firearm recklessly may be viewed as speech constituting an unprotected true treat, *even if* the defendant had no calculated intent to threaten others.

In this vein, another interesting question is whether, for the purposes of the First Amendment, the visible display of a firearm is conduct. Moreover, is brandishing a firearm *expressive* conduct? The answers to these questions may determine which degree of scrutiny various firearm regulations would trigger *United States* v. *O'Brien*, 391 U.S. 367 (1968); *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969); that is, if we treat these regulations as possible First Amendment encroachments. If we instead consider the regulations under the Second Amendment, the history and tradition standard of *Bruen* comes into effect.

Acknowledgements and Disclosure. The impetus for the author's writing of this document was due to a panel titled "The Intersection of the First and Second Amendments" at the 34th Annual Ira C. Rothgerber Jr. Conference on Constitutional Law hosted by the Byron R. White Center at University of Colorado Law School. Furthermore, the author is neither a lawyer nor a law student and therefore may be unaware of other related work. The author apologizes for any omissions in the citation of such work.

Marbury v. *Madison*, 5 U.S. 137 (1803).

Schenck v. *United States*, 249 U.S. 47 (1919).

Near v. *Minnesota*, 283 U.S. 697 (1931).

United States v. *Carolene Products Company*, 304 U.S. 144 (1938).

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964).

United States v. *O'Brien*, 391 U.S. 367 (1968).

Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Watts v. *United States*, 394 U.S. 705 (1969).

Miller v. *California*, 413 U.S. 15 (1973).

Craig v. *Boren*, 429 U.S. 190 (1976).

Moore v. *City of East Cleveland*, 431 U.S. 494 (1977).

Zauderer v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).

Washington v. *Glucksberg*, 521 U.S. 702 (1997).

Virginia v. *Black*, 538 U.S. 343 (2003).

District of Columbia v. *Heller*, 554 U.S. 570 (2008).

McDonald v. *Chicago*, 561 U.S. 742 (2010).

United States v. *Alvarez*, 567 U.S. 709 (2012).

Elonis v. *United States*, 575 U.S. 723 (2015).

Reed v. *Town of Gilbert*, 576 U.S. 155 (2015).

National Institute of Family and Life Advocates v. *Becerra*, 585 U.S. 755 (2018).

Iancu v. *Brunetti*, 588 U.S. 388 (2019).

Timbs v. *Indiana*, 586 U.S. 146, slip op. (2019).

Dobbs v. *Jackson Women's Health Organization*, 597 U.S. 215, slip op. (2022).

New York State Rifle & Pistol Association, Inc. v. *Bruen*, 597 U.S. 1, slip op. (2022).

Counterman v. *Colorado*, 600 U.S. 66, slip op. (2023).

United States v. *Rahimi*, 602 U.S. 680, slip op. (2024).

Chiles v. *Salazar*, 607 U.S. ___, slip op. (2026).

United States Constitution, amend. I.

United States Constitution, amend. II.

United States Constitution, amend. VIII.