

QUALIFIED IMMUNITY AS GUN CONTROL

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The Supreme Court's ruling in New York State Rifle & Pistol Ass'n v. Bruen threw the political project of gun regulation into question. Before Bruen, states could enact new kinds of gun restrictions if they passed a relatively stringent means-ends test. That is, if laws meaningfully reduced danger, while not too heavily burdening the right to self-defense, they were allowed. After Bruen, only gun controls actually in force in the Founding Era, and their close analogues, are permissible. Many fewer regulations will now pass the constitutional test.

Here, we suggest an unlikely source of continuing power, after Bruen, for states to disarm individuals they deem dangerous: qualified immunity. Qualified immunity shields state officers from monetary liability for many constitutional violations. In short, unless a previous case "clearly established," with high factual particularity, that the officer's conduct was unconstitutional, the officer does not pay. Thus, a state law enforcement officer may, after Bruen, confiscate an individual's firearm if the officer deems that person too dangerous to possess it. The officer's justifications may conflict with the federal courts' understanding of Bruen or the Second Amendment—perhaps flagrantly. But unless a previous, authoritative legal decision examining near-identical facts says so, the officer risks no liability. And because each individual act of disarmament will be unique, such prior decisions will be vanishingly rare. The result is a surprisingly free hand for states to determine who should and should not be armed, even in contravention of the Supreme Court's dictates.

Proponents of gun rights, who skew conservative, may see this as lawlessness. In the past, it has been liberals and civil libertarians who have seen qualified immunity that way. Here, as elsewhere in the law, what's good sauce for the goose is good for the gander. Gun rights advocates may therefore either accept qualified immunity's

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implications for their preferred rights or join with their usual adversaries in opposing it everywhere.

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INTRODUCTION

Gun regulation seems to have hit a legal brick wall. In *New York State Rifle & Pistol Ass'n v. Bruen*,¹ the Supreme Court threw out what had been the standard approach for applying the Second Amendment to gun laws. Under the old regime, such laws were subject, at most, to intermediate or strict scrutiny.² Neither test was trivially easy to satisfy. But under both, well-tailored laws that stood to significantly reduce loss of life and limb would be upheld. This meant that, as death rates from gun homicides and suicides rose, regulators could try new approaches to saving lives.

Bruen is a serious impediment to such regulatory innovation. According to the Court, means-ends scrutiny no longer has any place in Second Amendment analysis.³ Instead, constitutional review must ask only whether a gun regulation is “consistent with this Nation’s historical tradition of firearm regulation.”⁴ Thus a new gun law will be upheld only if it is a close “analogue” of a law in force during the Founding Era.⁵

What counts as a sufficiently close analogue is a difficult question. It is one that the Supreme Court declined to answer in *Bruen*. And it is one that the lower courts have struggled to answer for themselves. Absent an alternative yardstick by which to measure modern laws against their Founding-era forebears, the lower courts have taken a highly fact-specific approach. For example, the Fifth Circuit recently invalidated a modern law disarming individuals subject to a civil restraining order for domestic violence.⁶ According to the court, that law was not sufficiently analogous to Founding-era laws disarming dangerous individuals generally, but not domestic abusers, specifically.⁷

1 142 S. Ct. 2111 (2022).

2 *Id.* at 2126.

3 *Id.* at 2127.

4 *Id.* at 2126.

5 *See id.* at 2132.

6 *See United States v. Rahimi*, 61 F.4th 443, 448 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023) (mem.).

7 *See id.* at 459.

The net result, many worry, is that modern lawmakers will be shackled to the regulations of the distant past. They will be able to restrict gun ownership and use more or less to the same extent as they were restricted in the eighteenth century. And, since the eighteenth century was an era of single-shot muzzle loaders, fewer gun homicides, and lower state capacity, the list of permissible restrictions will be short, indeed. Thus, many have predicted that *Bruen* will hamstring lawmakers' ability to prevent even the most predictable modern tragedies.

Here, we argue that states can still do more than they think. Despite *Bruen's* aggressive narrowing of the range of permissible gun restrictions, states retain significant power to disarm individuals they deem dangerous. This includes individuals whose gun ownership would not have been restricted at the Founding. And it includes individuals whose gun ownership the courts will ultimately deem unregulable.

The reason is qualified immunity. Qualified immunity is a doctrine shielding state officers from monetary liability for violating constitutional rights.⁸ It operates as a kind of "clear warning" rule. Under qualified immunity, a plaintiff may not recover damages from a state official unless a prior, authoritative judicial holding "clearly established" that the officer's conduct was unconstitutional.⁹ Such "clear establishment" requires a high degree of factual similarity between the prior case and the new violation. For example, a difference between a Taser set to "dart mode" and one set to "drive-stun mode," may render a prior case inapplicable.¹⁰

What does this mean for gun control? Potentially, a great deal. As mentioned above, following *Bruen*, the Fifth Circuit invalidated a blanket ban on gun possession for domestic abusers subject to a restraining order. But what if there were no such blanket rule? State officials have other means of disarming people who seem likely to harm their domestic partners. The Fifth Circuit case arose in Texas. Under article 14.03 of the Texas Code of Criminal Procedure and section 411.207 of the Texas Government Code, for example, a police officer may disarm any individual when the officer "reasonably believes it is necessary for the protection of the [individual], officer, or another individual."¹¹

Suppose that police officers in Texas were directed to review the factual submissions supporting restraining orders in cases of domestic

8 And other federal rights. See Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 480 (2011).

9 See *White v. Pauly*, 137 S. Ct. 548, 551 (2017); see also Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1802 (2018).

10 *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 948–49 (9th Cir. 2017).

11 TEX. CODE CRIM. PROC. ANN. art. 14.03(h)(1) (West 2015); TEX. GOV'T CODE ANN. § 411.207(a) (West 2019).

abuse. Suppose that they made individual factual determinations about whether disarmament was necessary in each case. And suppose that they usually decided—reasonably, by their lights—that it was. The net effect would be quite similar to the effect of the law that the Fifth Circuit found unconstitutional.

Would the officers carrying out this policy be subject to monetary penalties for their apparent disregard for Fifth Circuit precedent? Almost certainly not. They would be making individualized factual decisions in each case as to whether a particular individual needed to be disarmed. Those individualized decisions would not violate any “clearly established” fact-specific ruling from the Fifth Circuit’s prior ruling on the domestic violence law. Nor, very likely, would any other fact-specific ruling apply. Qualified immunity would be an effective shield from damages.

The disarmed individuals could still sue, but they would only get injunctive relief. This would get them their guns back. But perhaps not for long. If additional facts came to light about the individual’s level of potential threat, an officer might seize his gun again. And even if not, an individual victory by an individual disarmed person would do little to blunt the police’s ability to disarm other domestic abusers. Only if a subsequent disarmament were undertaken on highly similar facts would qualified immunity cease to apply, and liability loom.

This is just one example. Fact-specific exercises of discretion are part and parcel of policing. Traffic stops, *Terry* stops, warrant searches, and more all ask police to determine who poses a threat, allow a search of persons and premises, and raise the possibility of confiscating a weapon, should one be found. All of these police activities potentially enable disarmament, and qualified immunity provides them broad protection.

Gun rights advocates, who lean conservative, would doubtless decry this state of affairs as lawless. Liberals and civil libertarians have long said the same about qualified immunity, albeit as applied to violations of other rights. Their objections have largely been to police’s repeated evasion of liability for using, in their view, unconstitutionally excessive force.¹² Historic defenders of qualified immunity have seen things differently. They warn that, without the doctrine, a flood of meritless excessive force claims could cripple police departments’ ability to do their important work.¹³

12 See Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 335–36 (2020). Recently, prominent legal formalists have likewise critiqued the doctrine on legal, rather than policy, grounds. See William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 46 (2018); Hoggard v. Rhodes, 141 S. Ct. 2421 (2021) (statement of Thomas, J., respecting denial of certiorari).

13 See, e.g., Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1881 (2018).

But what looks like a clear constitutional violation and what looks like a meritless claim depends, to some extent, on which rights one favors. If police begin to aggressively disarm citizens under the aegis of qualified immunity, its conservative-leaning defenders may worry less about meritless claims. Perhaps they will ally with liberals and civil libertarians in arguing for qualified immunity's abolition. Or perhaps not. Either way, the *Bruen* decision will have scrambled qualified immunity's political valence. Going forward, the doctrine will either provide cover for left-leaning states to disarm potentially dangerous citizens, even in tension with Second Amendment principles. Or it will be weakened, reinvigorating civil liability as a mechanism for policing the police.

I. THE EVOLUTION OF THE RIGID SECOND AMENDMENT

The Second Amendment is ascendant. Once treated, according to its supporters, as a “second-class” right,¹⁴ the Supreme Court has recently elevated gun ownership to first-class status, and maybe higher. This elevation underpins all of the dynamics analyzed herein. It means that many gun laws that would have been upheld in the past will now be struck down on Second Amendment grounds. This implies that more disarmaments of citizens by the state will constitute constitutional violations, according to the courts.

Here is how the Second Amendment gained “first-class” status. After *Heller*¹⁵ and *McDonald*,¹⁶ the courts reviewed gun control laws under the trans-substantive constitutional standards of strict and intermediate scrutiny. Those are demanding tests, but many firearm regulations passed muster. Courts recognized that the government had a legitimate interest in protecting people from gun injury and death. And they determined that many well-tailored gun laws served that interest without disproportionately burdening the right to possess firearms.

But in *New York State Rifle & Pistol Ass'n v. Bruen*,¹⁷ the Supreme Court ratcheted up the Second Amendment's protections. It rejected any constitutional test consisting of “means-end scrutiny,” favoring what it claimed was a textual, historical approach.¹⁸ That approach focuses on whether “‘historical precedent’ from before, during, and even after the founding evinces a comparable tradition of

14 *E.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion).

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

16 *McDonald*, 561 U.S. 742.

17 142 S. Ct. 2111 (2022).

18 *Id.* at 2129, 2131 (“The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding.” *Id.* at 2131).

regulation.”¹⁹ Essentially, if the historical record lacks evidence of a gun regulation closely analogous to a modern, challenged law, the modern law is unconstitutional. We have elsewhere questioned the coherence of this approach, as have others.²⁰

The lower courts have struggled to apply *Bruen*'s text-and-history test.²¹ But as they've applied it so far, the result has been the invalidation of common restrictions on firearms. The post-*Bruen* courts have struck down, among other things, age requirements on under-twenty-one-year-olds for firearm ownership²²; restrictions on possessions of firearms in sensitive places, like places of worship²³; and restrictions on possessions of firearms in automobiles.²⁴

One recent, and noteworthy, case invalidating a firearm restriction was *United States v. Rahimi*.²⁵ That case involved 18 U.S.C. § 922(g)(8),²⁶ which prohibits anyone under a domestic violence

19 *Id.* at 2131–32 (quoting *Heller*, 554 U.S. at 631).

20 See Peter Salib & Guha Krishnamurthi, *Gun Rights (Still) Aren't Trumps*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (July 21, 2022), <https://firearmslaw.duke.edu/2022/07/gun-rights-still-arent-trumps/> [<https://perma.cc/6NR4-RE9D>]; Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 95–122 (2023).

21 Charles, *supra* note 20, at 128–45.

22 *Firearms Pol'y Coal., Inc. v. McCraw*, 623 F. Supp. 3d 740, 758 (N.D. Tex. 2022).

23 *Antonyuk v. Hochul*, 639 F. Supp. 3d 232, 319–22 (N.D.N.Y. 2022).

24 *Koons v. Reynolds*, No. 22-7464, 2023 WL 128882, at *19 (D.N.J. Jan. 9, 2023). At the same time, there are several post-*Bruen* decisions upholding similar restrictions. Jake Charles, *By the Numbers: How Disruptive Has Bruen Been?*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Mar. 27, 2023), <https://firearmslaw.duke.edu/2023/03/by-the-numbers-how-disruptive-has-bruen-been/> [<https://perma.cc/NV66-BNV4>] (setting forth data on post-*Bruen* cases considering firearm regulations).

25 61 F.4th 443, 448 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023) (mem.).

26 Section 922(g)(8) reads in relevant part:

It shall be unlawful for any person . . .

. . . .

. . . who is subject to a court order that[:]

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . .

. . . .

to . . . possess in or affecting commerce, any firearm or ammunition

restraining order from possessing a firearm.²⁷ Zackey Rahimi was subject to such an order relating to an alleged assault of his ex-girlfriend.²⁸ Rahimi was then identified as a suspect in an unrelated shooting, his home was searched, and a gun was recovered.²⁹ Prosecutors charged him under § 922(g)(8). He raised a Second Amendment challenge to the section.³⁰

The U.S. Court of Appeals for the Fifth Circuit sustained the challenge and reversed his conviction.³¹ The court applied *Bruen's* historical test. The government argued that Founding-era laws “providing for disarmament of ‘dangerous’ people,” prohibiting “going armed,” and requiring firearms “suret[ies]” were historical analogues to § 922(g)(8).³² But the court rejected all of these, in part because none of them specifically operated to disarm someone based on a civil finding that they posed a credible threat to an intimate partner.³³

Thus, *Bruen* appears in practice to raise a serious obstacle to modern attempts at regulating guns. Its “absence of evidence is evidence of absence” reasoning, combined with a factually constrained understanding of what historical evidence counts as analogous, is restrictive, indeed. After *Bruen*, it seems like regulators will be able to restrict firearm possession only for an extremely narrow slice of the population: not those gun users who, modern experience has shown us, will predictably do much more harm with their weapons than good. Rather, just those individuals whose firearm possession would have actually been restricted by the law, as it stood 250 years ago.

II. THE AEGIS OF QUALIFIED IMMUNITY

But maybe not. Perhaps states—or, more accurately, some agents of the state—will continue to have a relatively free hand in deciding who should and should not have guns. Perhaps they will even be able to disarm people who, as the courts will ultimately see it, should not be constitutionally disarmed. And perhaps they will face few legal consequences for doing so.

Qualified immunity is a doctrine that protects government officials from liability for allegedly violating an individual’s constitutional rights, when the officials’ actions do not clearly violate the law.³⁴ It principally arises in cases brought under 42 U.S.C. § 1983 (“Section

27 *Rahimi*, 61 F.4th at 448.

28 *Id.* at 449.

29 *Id.* at 448.

30 *Id.* at 449.

31 *Id.* at 450.

32 *Id.* at 456.

33 *Id.* at 455, 460.

34 *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

1983”) and *Bivens*³⁵—which authorize civil suits for money damages by individuals alleging that their constitutional rights were violated by government officials.³⁶

The theory is that state officials should not be monetarily liable unless a “reasonable person would have known” that their conduct was unconstitutional.³⁷ This means that, to win, a plaintiff must show that the state official’s conduct was “clearly established” as unconstitutional in a prior authoritative judicial ruling.³⁸ If it were otherwise, the argument goes, state officials would be beset with “harassment [and] distraction” from voluminous civil rights suits.³⁹ Qualified immunity protects officials only from money damages. It does not apply to injunctive relief.⁴⁰ That said, in cases seeking only monetary damages, qualified immunity is supposed to protect the government official from facing suit at all.⁴¹ Thus, the Court “repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation.”⁴² The goal is that purportedly “‘insubstantial claims’ against government officials [will] be resolved prior to discovery.”⁴³

In *Saucier v. Katz*,⁴⁴ the Court set forth a two-part test to assess whether there was qualified immunity.⁴⁵ First, the court would determine whether there was a constitutional violation; second, it would determine whether that violation was clearly established in the caselaw at the time of the alleged violation.⁴⁶ The *Saucier* Court reasoned that this procedure would allow the determination of immunity at an early stage while still allowing courts to develop the law of constitutional rights.⁴⁷

In *Pearson v. Callahan*, the Court reversed course.⁴⁸ There, the Court determined that, while the two-step *Saucier* procedure was often valuable, it was not mandatory.⁴⁹ Rather, courts could resolve the question of immunity first, jumping straight to the question of whether the

35 *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

36 *See* 42 U.S.C. § 1983 (2018); *Bivens*, 403 U.S. at 395–97.

37 *Pearson*, 555 U.S. at 231.

38 *Id.*

39 *Id.*

40 *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 432 (2007); *Hydrick v. Hunter*, 669 F.3d 937, 940 (9th Cir. 2012); *Reinert, supra* note 8, at 482.

41 *See Pearson*, 555 U.S. at 231.

42 *Id.* at 232 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)).

43 *Id.* at 231 (alteration in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987)).

44 533 U.S. 194 (2001).

45 *See id.* at 201.

46 *Id.*

47 *See id.* at 201–03.

48 555 U.S. at 236.

49 *Id.*

alleged constitutional violation was clearly established.⁵⁰ The Court's rationale was that this would avoid the difficulty of rendering new substantive constitutional rules, thereby preserving judicial resources.⁵¹

The downside, however, is legal stagnation. When courts determine whether that alleged conduct was not a *clear* violation of law, without deciding whether it was a violation *at all*, then constitutional doctrine goes undeveloped. And the effect compounds. A subsequent case may allege the same conduct. But absent a constitutional ruling in the initial case, it too may be dismissed for lack of a "clearly established" violation without a decision on substantive constitutionality. And so on.

Even when courts do decide that a state official violated the Constitution, such decisions do not go very far toward overcoming qualified immunity in a subsequent case. The question of whether a government official's conduct violated clearly established rights is not generalized, but rather is fact specific. In Professor Joanna Schwartz's words, "[t]he Court has repeatedly made clear that a plaintiff seeking to show that an officer's conduct was objectively unreasonable must find binding precedent or a consensus of cases so factually similar that every officer would know that their conduct was unlawful."⁵² In the Supreme Court's words, "the clearly established law must be 'particularized' to the facts of the case. Otherwise, '[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.'"⁵³ This has led to courts insisting that there be governing caselaw even when the constitutional violations seem patent and obvious.⁵⁴ And it has resulted in courts finding qualified immunity even when there is factually similar precedent, based on fine factual distinctions.

Consider, for example, *Isayeva v. Sacramento Sheriff's Department*.⁵⁵ In that case, a police officer tased and fatally shot Paul Tereschenko during the course of a domestic abuse arrest.⁵⁶ Tereschenko was mentally ill and had been on methamphetamines, but was unarmed.⁵⁷ Officers tried to grab Tereschenko, and a brawl ensued.⁵⁸ Officers tased him, but the brawl continued. Unable to gain control of Tereschenko,

50 See *id.* at 236–37.

51 *Id.*

52 Schwartz, *supra* note 9, at 1802.

53 *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (alteration in original) (citation omitted) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639–40 (1987)).

54 Alexander J. Lindvall, *Qualified Immunity and Obvious Constitutional Violations*, 28 GEO. MASON L. REV. 1047, 1050 & nn.18–22 (2021) (collecting cases).

55 872 F.3d 938 (9th Cir. 2017).

56 *Id.* at 941–42.

57 *Id.* at 942.

58 *Id.* at 943.

officers fatally shot Tereschenko.⁵⁹ Tereschenko's widow, Diana Isayeva, sued, alleging excessive force in violation of the Fourth Amendment.⁶⁰ The Ninth Circuit held that qualified immunity shielded the officers from damages.⁶¹ The court considered whether a prior case, *Bryan v. MacPherson*, clearly established that Tereschenko's rights were violated.⁶² There, the Ninth Circuit determined that an officer tasing an unarmed, mentally ill individual as he was exiting his car constituted unconstitutional force.⁶³ The two cases' factual similarities were many: "Both Tereschenko and the plaintiff in *Bryan* were unarmed and were tased without warning. Both were possibly mentally ill, were agitated, and failed to comply with at least one law enforcement command. And neither had committed a serious crime."⁶⁴ But the Ninth Circuit held that *Bryan* did not clearly establish a violation in Tereschenko's case.⁶⁵ It relied on the fact that the officer in *Bryan* used the Taser on "dart mode," whereas the officer in *Isayeva* used the Taser in the less harmful "drive-stun mode."⁶⁶ In addition, the plaintiff in *Bryan* was further away from the officers than in *Isayeva*, where the officers and Tereschenko were involved in a physical fight.⁶⁷

We are not arguing that the decision in *Isayeva* was incorrect. Rather, *Isayeva* shows that the level of factual similarity required for a prior case to overcome qualified immunity in a later one is quite high.⁶⁸ This appears to be especially the case when government officials must make determinations of dangerousness that have life-and-death implications.⁶⁹ Furthermore, in the Fourth Amendment context, the Court has clarified that qualified immunity's reasonableness inquiry is

59 *Id.* at 943–44.

60 *Id.* at 942, 944.

61 *Id.* at 953.

62 *Id.* at 948–49 (citing *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010)).

63 *Bryan*, 630 F.3d at 824–26, 832.

64 *Isayeva*, 872 F.3d at 948.

65 *Id.* at 949.

66 *Id.* at 948.

67 *Id.* at 948–49.

68 And *Isayeva* is no outlier in this respect with respect to excessive force cases. See *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) ("Use of excessive force is an area of the law 'in which the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." (quoting *Mullinix v. Luna*, 577 U.S. 7, 13 (2015))). But this proposition of factual specificity for qualified immunity goes beyond that. Consider, for another example, *Sampson v. County of Los Angeles*, 974 F.3d 1012, 1015 (9th Cir. 2020), where a person alleged that they had been sexually harassed by a social worker. The Ninth Circuit recognized that there had been an equal protection violation by the social worker, but because in prior cases the right against being sexually harassed had only been recognized in workplace and school contexts, and not in social services contexts, the social worker was entitled to qualified immunity. *Id.* at 1024.

69 *Isayeva*, 872 F.3d at 953.

objective, not subjective.⁷⁰ Thus, even if one could show a particular government official acted with bad faith, it would not be relevant.⁷¹

That is not to say that all constitutional claims are automatically felled by qualified immunity. For example, when law enforcement imposes “[o]n-the-spot punishment,” using force after an arrestee is already fully within the officer’s control, qualified immunity does not apply.⁷² Moreover, once courts have determined that the subject was fully restrained, and the officer’s force therefore unnecessary to obtain or keep control, factual differences about the kind of force used—kicks, punches, Tasing, pepper spraying, or body slams—do not matter.⁷³ What *do* still matter, however, are fine-grained facts about whether force was needed to obtain and maintain control.⁷⁴ And courts afford law enforcement great deference on that question.⁷⁵ Thus, even where the qualified immunity threshold is lowest for a plaintiff challenging a violation of their constitutional rights it remains a significant hurdle.

Qualified immunity has come under heavy criticism, especially in recent years. Liberals and civil libertarians argue that it strikes the wrong balance between protecting police departments’ ability to function and protecting individual citizens’ rights. Judge Stephen Reinhardt has excoriated the doctrine for preventing “people whose rights are violated, even in egregious ways, . . . [from] enforcing those rights.”⁷⁶ Karen Blum, Erwin Chemerinsky, and Martin Schwartz contend that qualified immunity’s strictures mean that there is “[n]ot [m]uch [h]ope [l]eft [f]or [p]laintiffs” suffering such wrongs.⁷⁷ Joanna Schwartz has been among the doctrine’s most persistent and effective critics. Her empirical work has suggested that, in addition to preventing recovery for valid claims, the doctrine fails to fulfill one of its core purposes. Surprisingly few § 1983 cases are resolved on

70 See *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982); Schwartz, *supra* note 9, at 1802.

71 See *Graham v. Connor*, 490 U.S. 386, 399 (1989).

72 *Johnson v. Rogers*, 944 F.3d 966, 970 (7th Cir. 2019) (“On-the-spot punishment, not reasonably adapted to obtain or keep control, violates the Fourth Amendment (and perhaps other rules as well).”).

73 *Id.* (collecting cases).

74 See, e.g., *id.* (finding qualified immunity when officer kicked a handcuffed, inebriated subject who repeatedly attempted to stand because the officer’s action could be understood as attempt to control subject).

75 See *id.*

76 Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015).

77 Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 633 (2013) (emphasis omitted).

qualified immunity grounds early enough in the proceedings to spare officers the burden of litigation.⁷⁸

Formalists have also questioned the doctrine's validity on pure legal grounds. Qualified immunity is not mentioned in the text of any statute or constitutional provision. Rather it is a judicial creation of uncertain provenance. William Baude has convincingly argued that the rule is unlawful.⁷⁹ And Justice Thomas seems to agree.⁸⁰

The formalist turn against qualified immunity has complicated the doctrine's partisan valence. Traditional critics have skewed liberal, and formalists skew conservative. Nonetheless, seen from thirty thousand feet, a division remains. In cases finding that qualified immunity applies, the opinions in favor of the doctrine still tend to be written by conservative-leaning Justices,⁸¹ while dissents tend to be written by left-leaning ones.⁸²

III. QUALIFIED IMMUNITY AS A GUN CONTROL LAW

What does qualified immunity mean for gun policy after *Bruen*? We think that it means states, or at least certain agents of them, retain significant authority to disarm individuals they deem dangerous.

Let us return to the *Rahimi* case. After *Rahimi*, the government may not, as a blanket policy, disarm every individual civilly determined to pose a threat of domestic abuse. It may thus seem like the government has little or no ability to protect victims of domestic abuse from the extreme violence readily inflicted by firearms. But perhaps not.

Suppose that certain jurisdictions in the State of Texas, where *Rahimi* arose, wished to protect such victims from such violence. Rather than via a blanket policy, they could disarm domestic abusers on a case-by-case basis. Various laws would give them that authority. To begin, article 14.03 of the Texas Code of Criminal Procedure and section 411.207 of the Texas Government Code both give "peace officer[s]" the power to disarm a person "at any time the officer reasonably believes it is necessary for the protection of . . . another individual."⁸³

In such a jurisdiction, police officers might be given access to the factual records underlying restraining orders for domestic abuse. They

78 See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9–10 (2017).

79 See Baude, *supra* note 12.

80 See *Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021) (statement of Thomas, J., respecting denial of certiorari).

81 See, e.g., *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1277 (2017) (Alito, J., concurring in denial of certiorari).

82 See, e.g., *Kisela v. Hughes*, 138 S. Ct. 1148, 1155 (2018) (Sotomayor, J., dissenting); *Salazar-Limon*, 137 S. Ct. at 1278 (2017) (Sotomayor, J., dissenting from denial of certiorari).

83 TEX. CODE CRIM. PROC. ANN. art. 14.03(h)(1) (West 2015); TEX. GOV'T CODE ANN. § 411.207(a) (West 2019).

would review the facts of each case individually and determine whether the subject of the order ought to be disarmed “for the protection of” their domestic partner. Given the nature of such orders, they might reasonably conclude disarmament is warranted in most instances. The police could, pursuant to their statutory authority, demand that the individuals they determined to be dangerous surrender their weapons. Some individuals might refuse or claim that they owned no guns. But if the officers had probable cause to believe otherwise, they could search the relevant premises and seize any discovered. Thus, while officers acting after *Rahimi* cannot charge gun-possessing domestic abusers with a criminal violation under § 922(g)(8), they can still deprive them of their firearms, for a significant period of time.⁸⁴

What recourse would the disarmed individual have? Principally, that person’s remedy would be to sue the officers under 42 U.S.C. § 1983, for violation of his constitutional rights.⁸⁵ He might invoke, for example, the Second and Fourth Amendments.

Would he win? It is hard to say. But qualified immunity makes it quite unlikely that he would win *money*. Recall that the officers will only be monetarily liable if they “violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known.”⁸⁶ And to be clearly established, there must be “binding precedent or a consensus of cases so factually similar that every officer would know that their conduct was unlawful.”⁸⁷ But here, any violation would not likely be clearly established in this way.

Rahimi, in particular, would not serve as “clear establishment” of a violation in the individually disarmed individual’s case. The *Rahimi* court held that it was unconstitutional to categorically strip an entire class of people—those subject to restraining orders for domestic violence—of their Second Amendment right.⁸⁸ But this is not *Rahimi*. Here, the disarmed individual was not disarmed simply because he was subject to a restraining order. On the contrary, he was disarmed because police officers determined that disarmament was necessary,

84 After *Bruen*, at least one circuit court has held that individuals have a Second Amendment right to return of their firearms, after the conclusion of the proceeding if there is no wrongdoing on their part. *Frein v. Pa. State Police*, 47 F.4th 247, 253 (3d Cir. 2022). But that process could be rather prolonged.

85 If the officers are federal officials, then the claim would proceed under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Disarmed persons may be able to obtain their firearms back through administrative procedures, but often these are prolonged proceedings and may even be up to the discretion of government officials.

86 *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

87 Schwartz, *supra* note 9, at 1802.

88 See *United States v. Rahimi*, 61 F.4th 443, 448 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023) (mem.).

given specific facts, to protect another individual. True, that determination will correlate, perhaps strongly, with restraining orders. But not perfectly. This was, in fact, one of the reasons Judge James Ho raised in his concurrence in the Fifth Circuit's decision rejecting the blanket statutory ban. Judge Ho observed that protective orders are too often granted against individuals who, an honest factual assessment would show, pose little threat to their partners.⁸⁹ Thus, even if this disarmament was unconstitutional, that fact was not clearly established, for purposes of qualified immunity, by *Rahimi*.

What result, then, for the disarmed plaintiff? At worst, a court would determine that there was no Second Amendment violation at all, and he would get nothing. And at best, after a long and expensive litigation, he would win an injunction requiring only the return of his weapon, assuming he sought such relief.⁹⁰ In the meantime, the domestic partner who obtained the restraining order would have been protected against gun violence.

What about the next person whom local police disarm in this way? Will the first lawsuit overcome qualified immunity in the second? Probably not. First, the court in the initial suit may have skipped the substantive constitutional question entirely, ruling just on the question of clear establishment.⁹¹ Consequently, any given case might produce zero new development in the law of constitutionally appropriate officer conduct.⁹²

89 *Id.* at 465 (Ho, J., concurring).

90 There is the possibility that the disarmed plaintiff could sometimes obtain their firearm back on a temporary restraining order or preliminary injunction, but we think this is unlikely in many cases. It will be difficult for the plaintiff to show an overriding irreparable injury—there are perils in returning their firearms as well. And the potential factual nuances of each disarmament will make it difficult to show a likelihood of success on the merits. Put another way, cases that are sufficiently different from precedents to warrant qualified immunity will often also be cases where there is some genuine ambiguity in the merits.

91 *See, e.g., Sandberg v. Englewood*, 727 F. App'x 950, 961 (10th Cir. 2018) (determining that a Second Amendment claim for wrongful search and detention due to open carrying of a firearm failed due to the putative right not being clearly established, without deciding the constitutional merits); *Schaefer v. Whitted*, 121 F. Supp. 3d 701, 711 (W.D. Tex. 2015) (same with respect to confiscation of an individual's firearms during a domestic disturbance).

92 Moreover, even if the adjudicating court were to decide first that there was a constitutional violation, and then determine that it was not clearly established, there would be an argument that the determination on constitutionality was obiter dicta—because such reasoning is not necessary to the judgment. That is, the determination of the right not being clearly established fully determines the result of the case, whether there is or is not a constitutional violation. *See Pierre N. Leval, Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275–77 (2006); *see also Pearson v. Callahan*, 555 U.S. 223, 234–35 (2009); Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1284 n.49 (2016).

Even if the first case *did* produce a new example of a clearly established constitutional violation, it would probably still have little effect on the subsequent suit. There would still be the substantial problem of factual specificity.⁹³ As discussed above, to overcome qualified immunity, the facts of the case purporting to establish a clear violation and the facts of the claim it supports must be nearly identical. But in our hypothetical Texas jurisdiction, each disarmament determination by a police officer would be highly factually detailed. Thus, as with other police actions like searches and seizures, no case is likely to establish the kind of precedent sufficient to overcome qualified immunity in a later case with slightly different facts.

To concretize this point, suppose that in the first disarmament case, the court found—and stated as a holding—that some set of facts did not show sufficient danger to support disarmament. For example, suppose the officer relied on the communications between the subject of the domestic violence restraining order and the putative victim. But the Court found that those communications did not indicate a significant likelihood of further violence. Even then, officers in most subsequent cases could argue that their case was factually distinguishable. And it is true; every case is unique. Even facially similar sets of communications might portend different levels of danger, just as different Taser settings do.⁹⁴

Adjudicating courts might disagree that differences in the communications ultimately made a substantive constitutional difference. They might again find that the police violated the Second Amendment. But this is not enough to overcome qualified immunity and obtain more than an injunction. Given the state of qualified immunity doctrine, it would be difficult for a court to hold that prior cases *clearly established* that substantively different communications did not supply constitutionally sufficient reason to disarm.

Thus, police officers might continue indefinitely in this manner, disarming domestic abusers on a case-by-case basis. Even if large

93 This is important because even if plaintiffs were to limit their complaints to seeking injunctive relief—and thus obviate the qualified immunity defense—it would still be difficult for such plaintiffs to obtain meaningful relief. That’s because even if a plaintiff were able to obtain a judgment that a particular instance of government action wherein their firearms were confiscated violated their constitutional rights, such a judgment would be indexed to a particular set of facts. Any future instance, perhaps even involving that same plaintiff, might be factually distinct—or at least so characterized by law enforcement and their attorneys—such that the prior judgment does not control. Moreover, a limitation to injunctive relief may be otherwise unhelpful to plaintiffs, because all it imposes is a prospective obligation on law enforcement to not commit the act again. But even with such obligation, they still might, because all they will face is another reproach to not behave badly again. It is the bite of monetary damages that has the real potential to change government behavior.

94 See *supra* notes 55–67 and accompanying text.

numbers of the disarmaments violated the courts' view of the Second Amendment's strictures, officers would pay little or no damages. All that would happen would be that the individuals with sufficient fortitude to maintain civil lawsuits would eventually have their firearms returned. And even that might not be permanent. If new facts showing the need to protect a potential victim arose, the officers could seize the gun again, confident in the factual distinctness of the new disarmament from the prior one.

IV. CONSTITUTIONAL RIGHTS FOR ME, THEE, OR WE?

Gun rights advocates may find the gun control methods described above outrageous. They might even seem like a lawless conspiracy to maximally abrogate a disfavored constitutional right. We pause here to stress that this pessimistic characterization need not be correct. Certainly, a jurisdiction that did wish to maximally abrogate Second Amendment rights could try such an approach. But we think such motives are not the most likely explanation for the disarmaments we describe above.

Consider the story that police officers tell in all qualified immunity cases, irrespective of which rights are at issue: policing is difficult. It is dangerous. And it regularly requires making life-and-death decisions—for both officers and citizens—based on limited information.⁹⁵ Officers are bound to make mistakes, including serious ones. And it is only human for their gut instincts to favor their own safety, and the safety of others, over abstract legal principles. We think that a police force in a jurisdiction like the one above could be acting in good faith to make sound, fact-specific decisions in service of preventing violent crime. And we think that, even in a scenario like that, many guns could be confiscated in violation of the Second Amendment.

If you doubt this, consider longstanding liberal complaints about qualified immunity.⁹⁶ Just as there would be many gun confiscations in the scenario just described, there are many police searches and uses of force today. Many, if evaluated on the merits by a court of competent jurisdiction, would likely be found to violate the Fourth Amendment or the Fourteenth Amendment's Due Process Clause. Certainly,

95 See, e.g., *Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014) (explaining that qualified immunity analysis is informed by the “fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving” (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989))).

96 See, e.g., Schwartz, *supra* note 78, at 12; Mark Joseph Stern, *The Supreme Court Deals a Harsh, Unanimous Blow to Police Reform*, SLATE (Oct. 18, 2021, 5:16 PM), <https://slate.com/news-and-politics/2021/10/supreme-court-qualified-immunity-reform.html> [<https://perma.cc/4D9B-G49B>]; Ian Millhiser, *Qualified Immunity, Explained*, VOX (June 3, 2020, 8:00 AM), <https://www.vox.com/2020/6/3/21277104/end-qualified-immunity-police-definition-george-floyd> [<https://perma.cc/3KB4-L4DS>].

bad actors—police who disfavor those rights or who disfavor certain groups of people—explain some of the violations. But some other large number are surely errors made by law enforcement officers making what seem to them like reasonable decisions in ambiguous circumstances.

Crucially, in neither context—disarmament nor the use of police force—are the officers incentivized by the threat of liability to avoid making constitutional mistakes. In both cases, qualified immunity ensures that monetary penalties, whether borne by officers, their departments, or their insurers,⁹⁷ will be rare. And absent such penalties, it is perfectly rational to focus on one's own safety, and other salient goals, rather than compliance with the letter of the law.

It therefore seems straightforwardly true, as qualified immunity's defenders argue, that eliminating the doctrine would make policing—that is, the detection and prevention of crime—more costly and difficult. It would make the expected cost of a constitutional violation higher. This would, in turn, incentivize the avoidance of at least some violations. Avoiding those violations would take time, energy, and resources. All of which could be spent elsewhere, including on, for example, detecting and preventing crimes. The question is simply whether, given the constitutional rights in question, the trade-off is worth it.

Historically, there has been no public consensus about the trade-off. As discussed above, liberals have historically opposed qualified immunity, joined by libertarians and, more recently, legal formalists. But the doctrine persists, perhaps because law-and-order voters oppose legal changes that would burden the police.

That said, support for the police *and* support for gun rights both skew strongly conservative.⁹⁸ The possibility of qualified immunity as a gun control law thus poses a dilemma for the conservative voting public: Support qualified immunity and police, at the expense of gun rights, or vice-versa?

One solution to the dilemma might be to reject it. Perhaps there is a way to weaken qualified immunity *just* as to gun confiscation, but nothing else. This is not as easy as it sounds. Return again to our hypothetical scenario in Texas. There, the police's disarmaments were executed under the auspices of Texas's statutory law. We argued above that most disarmaments would escape liability and generate little

97 See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 957 (2014).

98 See Anna Brown, *Republicans More Likely than Democrats to Have Confidence in Police*, PEW RSCH. CTR. (Jan. 13, 2017), <https://www.pewresearch.org/short-reads/2017/01/13/republicans-more-likely-than-democrats-to-have-confidence-in-police/> [https://perma.cc/HE7L-L65X]; Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (Sept. 13, 2023), <https://www.pewresearch.org/short-reads/2021/09/13/key-facts-about-americans-and-guns/> [https://perma.cc/JCN2-XA6B].

precedent for future liability because of the inherent fact-intensiveness of qualified immunity decisions. But suppose a disarmed individual did not contest the constitutional sufficiency of the police's factual basis for disarming him, in particular. Suppose he instead argued that the Texas statutes authorizing disarmament were unconstitutional on their face, in every application.

We do not know whether statutes authorizing police to disarm someone when they reasonably believe it necessary to protect someone else are constitutional under *Bruen*. It seems implausible that, in the Founding Era, law enforcement officers lacked any power to protect citizens against credible threats of deadly force by seizing the implements of deadly force. But we are not historians. And given *Bruen*'s malleability, a judge favoring Second Amendment rights could find a way to strike down such a statute.

What then? Absent the authority granted by the two statutes cited above, would Texas police be unable to make fact-specific disarmaments, shielded by qualified immunity? We doubt it. Likely, other state statutes exist that could be read to authorize such actions. Disarmaments pursuant to different statutes, not yet ruled unconstitutional, would not be "clearly established" constitutional violations. Of course, these other statutes could be challenged, too.

But at bottom, police everywhere have *some* power to engage in acts of search and seizure. The power is specifically contemplated by the Fourth Amendment.⁹⁹ Suppose an officer in Texas had reasonable suspicion that a specific individual would imminently engage in a violent battery. Knowledge of a restraining order for domestic violence might inform such suspicion. Then, the officer might perform a *Terry* stop on that individual, seizing any gun they happened to find.¹⁰⁰ Likewise for a gun in a house, if the officer obtained a probable cause warrant from a local judge based on the same facts.

Could the disarmed individual here obtain a ruling that would exempt all such seizures from qualified immunity? It is hard to see how. Every *Terry* stop and warrant is, again, factually distinct. To put ordinary searches and gun seizures wholly outside qualified immunity's scope, one needs a Second Amendment ruling that covers all such seizures. Here is one such rule: "No law enforcement officer may ever seize a firearm, even pursuant to a search within the lawful bounds of the Fourth Amendment."

Such a rule would likely go too far, even for conservatives who support both gun rights and the police. Remember, the point of trying

99 See U.S. CONST. amend. IV.

100 See generally *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Hensley*, 469 U.S. 221, 226 (1985); Sam Kamin & Zachary Shiffler, *Obvious but Not Clear: The Right to Refuse to Cooperate with the Police During a Terry Stop*, 69 AM. U. L. REV. 915, 921 (2020) (explaining *Terry* stops).

to carve *just* gun seizures out from qualified immunity is to protect the Second Amendment without making police officers' lives difficult. And it almost certainly makes police officers' lives difficult to say that they can never disarm a violent criminal. After all, it is the police who have to investigate, intercept, and arrest such criminals. And when they do so, police risk being shot with guns they might otherwise have seized.

This puts conservative voters, broadly construed, right back to the horns of the dilemma: surrender the Second Amendment to the vagaries of police enforcement, shielded by qualified immunity, or oppose the doctrine in its entirety? Qualified immunity's traditional critics would likely regard either outcome as a victory, at least in part. If the doctrine becomes widely reviled across the political spectrum, and is abolished, the police will face damages for Fourth Amendment and due process violations. And if the doctrine persists, qualified immunity will, as described above, give state actors who desire gun control some power to enact it, even after *Bruen*.

CONCLUSION

The Supreme Court's decision in *Bruen* appears at first to be a significant hurdle to the political project of gun control. This is true, but it need not be the project's end. Even if *Bruen* is eventually read to reject most or all new laws specifically aimed at regulating guns, states may retain significant power to decide who is and is not armed. That power will be effectuated via state law enforcement officers, pursuant to state law or traditional police powers, and enacted via case-by-case disarmaments. Under current qualified immunity doctrine, such disarmaments would enjoy broad protection against monetary liability. Gun rights supporters may view qualified immunity's operation in this manner as outrageous. If so, they will find unexpected allies in liberals and other perennial critics of the doctrine. Thus, in the end, the possibility of qualified immunity as a gun control law may finally bring about the doctrine's demise. This would, of course, further limit the project of gun control. But, from the perspective of many policymakers who favor gun control, it would have other salutary effects. Chiefly, rolling back qualified immunity would help to deter currently under-deterred instances of police brutality, along with other constitutional violations.

