Range v. Att'y Gen.: When Overbreadth Becomes Dangerous

Joshua N. Becker

I. INTRODUCTION

Sometimes courts write narrow opinions; sometimes courts write broad opinions. And sometimes courts write broad opinions and try to backstep by characterizing their decisions as "narrow one[s]".[1] In *Range v. Attorney General*,[2] the Third Circuit does just that: taking a soft case to illustrate a hard-to-swallow point, examining principles of Second Amendment jurisprudence in broad terms, and then limiting their opinion only on the last page. And yet, as far as the court's opinion addresses the plaintiff, and not some others similarly situated, the court reaches the right conclusion; the plaintiff, Range, is not a dangerous person, nor is he the type most people would feel comfortable disarming. But the Third Circuit dangerously used his case to invalidate an integral part of federal gun regulation, the prohibition of felons from possessing firearms.

However, their lack of discretion or brevity will be costly; some people who should not have firearms may now be able to, particularly if the reasoning is appealing to other circuits. As will be shown, the court unfairly rejected the government's arguments, incorrectly applied broad principles to reach a narrow conclusion, and could have held more narrowly by deciding on due process grounds, by finding historical analogues under the *Bruen* framework, or by applying a "dangerousness" standard.

II. BACKGROUND

A. Case Description

The court, sitting *en banc*, paints a sympathetic picture of the plaintiff. As they tell it, in 1995, plaintiff Bryan Range pleaded guilty to making a

1. *See, e.g.*, Range v. Att'y Gen., 69 F.4th 96, 106 (3d Cir. 2023).
2. *See generally id.*

false statement to obtain food stamps.[3] He was struggling to make ends meet, providing for his wife and three children on $300 per week.[4] Range's wife prepared documents to acquire food stamps; on those documents, Mr. Range's income was understated.[5] Range does not remember seeing the documents, but he took full responsibility for the fraud and was sentenced to three years' probation.[6] He dutifully completed his probation with no violations and paid around $3,000 in restitution.[7] Mr. Range was an upstanding citizen otherwise, who never hurt anyone (except some fish he once caught without a license).[8] Unbeknownst to Range, his conviction qualified as a felony for purposes of the federal felon-in-possession statute.[9]

Years later, Range attempted to purchase a firearm but was denied after a background check, so his wife bought him the gun.[10] A couple years later he again tried but was denied sale.[11] He eventually discovered his prohibition under federal law and sued, alleging the statute was unconstitutional as it applied to him.[12] The trial court granted summary judgment for the federal government, under the Third Circuit's then-existing precedent.[13] The Third Circuit's former precedent was two-pronged.[14] The trial court first looked to a multi-factor test to determine Range was "an 'unvirtuous citizen' of the kind historically barred from possessing a firearm[.]"[15] Here, the district court stopped their analysis, finding that Range was an "unvirtuous citizen," outside the protection of the Second Amendment.[16] Without such a finding, the district court would have proceeded to prong two, means-end scrutiny.[17]

---

3. *Id.* at 98.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 98.
8. *Id.*
9. *See* 18 U.S.C. § 922(g)(1).
10. *Range*, 69 F.4th at 98–99.
11. *Id.* at 99.
12. *Id.*
13. *Id.*
14. *Id.* at 99.
15. *Id.* Factors to be considered were: (1) whether the person was a misdemeanant or felon; (2) whether the offense was violent; (3) what sentence was imposed; (4) whether there was a consensus among jurisdictions of the seriousness of the offense; and (5) the potential for physical harm to others. *Id.*
16. *Id.* The government conceded that four of the factors, articulated in footnote 14, favored Range. But, the District Court held, regardless, that that the one factor favoring the government, that the crime was a felony, sufficed for disarmament because there was a consensus among jurisdictions that Range could be disarmed for his non-violent felony offense. *Id.*
17. *Id.* at 100. Means-end scrutiny is a balancing test used in Constitutional Law. The test weighs the government's justification in prohibiting conduct against the intrusion on an individual's Constitutional right. Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449, 449–50 (1988).

Range appealed.[18] While the appeal was pending, the Supreme Court decided the appropriate Second Amendment test was whether a certain regulation was within the Nation's historical tradition of regulating firearms.[19] Under the new framework, the Third Circuit panel held the government met its burden to show Section 922(g)(1) was within the historical tradition of firearm regulations.[20] The Third Circuit subsequently granted Range's petition for rehearing *en banc*.[21] The issue raised was whether Section 922(g)(1) was unconstitutional as applied to Range under the new history and tradition framework adopted by the Supreme Court.[22]

B. Legal Background

For most of American history, Second Amendment jurisprudence revolved around whether the Second Amendment conferred a "collective right" or an "individual right."[23] A collective right envisions individual ownership of firearms as embodying either (1) the right of the states to have militias, or (2) the rights of individuals to own firearms, but only in connection with state militia activity.[24] An individual right would have the right to ownership of firearms solely for the sake of the individual.[25] There is historical evidence that both considerations were built into the text of the Second Amendment, so we have two clauses; the prefatory clause, which emphasizes a state's right to militia, and the body of the amendment, which emphasizes an individual right.[26]

Until 2008, when the Supreme Court decided *District of Columbia v. Heller*,[27] lower courts favored varieties of the collective rights approach. However, in *Heller*, the Supreme Court ultimately held that individuals have a right to keep and bear arms, without relation to the militia.[28] The Court went to great pains to assure the reader that certain firearm prohibitions are still "presumptively lawful", including restrictions on felons owning firearms.[29] Two years later, the Supreme Court held the Second

18. *Range*, 69 F.4th at 99.
19. *Id.* at 100; N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2127 (2022).
20. *Range*, 69 F.4th at 99.
21. *Id.*
22. *Id.* at 99–100.
23. David T. Hardy, *The Rise and Demise of the "Collective Right" Interpretation of the Second Amendment*, 59 CLEV. ST. L. REV. 315, 316 (2011). The Framers differed on these two perspectives. One side, adhering to a Classical Republican philosophy saw the right as belonging to the state, valuing individual ownership of firearms for its value in securing the state through a citizen militia. *Id* at 322. The Jeffersonians valued individual rights to firearms for its value to individuals. *Id*.
24. *Id.* at 317.
25. *See id.* at 316.
26. *Id.* at 322.
27. *Id.* at 316.
28. District of Columbia v. Heller, 554 U.S. 570, 595 (2008).
29. *Id.* at 626–27, 627 n.26.

Amendment was incorporated to the states.[30] They again addressed the legality of certain presumptively lawful firearm restrictions, echoing the language from *Heller*.[31]

Following *Heller*, the federal circuits mostly followed a two-step test in assessing the validity of a firearm regulation, where the first step asked whether a person's conviction excluded them from the people protected by the Second Amendment and the second step implemented means-end scrutiny.[32] Then, in 2022, the Supreme Court held that means-end scrutiny was not appropriate to Second Amendment inquiry.[33] The appropriate inquiry, it said, was whether the regulation was rooted in the American history or tradition of firearm regulation, essentially taking the second prong out of the two-step analysis conducted by most circuits.[34]

III. COURT'S DECISION

Under the above legal framework, the *en banc* Third Circuit held for Range, declaring the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1), unconstitutional as it applied to him.[35] The court conducted a new two-step test. First, they asked if Range was one of "the people" protected by the Second Amendment.[36] They held he was, because "people" as used through the Constitution implies the whole body of political participants.[37] Second, they asked whether the government prohibition of Range owning firearms was sufficiently rooted in history or tradition, and therefore the government has the right to prohibit his possession of firearms.[38] They held it was not, because there was no sufficient historical analogue to prohibit non-violent felons from possessing firearms (meaning there was a lack of a showing that the Founders would have believed the law was acceptable).[39]

30. McDonald v. Chicago, 561 U.S. 742, 791 (2010).
31. *Id.* at 786.
32. Range v. Att'y Gen., 69 F.4th 96, 100 (3d Cir. 2023). For example, the Third Circuit, before the Supreme Court's ruling in N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022), conducted a two-part inquiry, looking first to whether the conduct was protected under the Second Amendment and second to both intermediate and strict scrutiny. *See generally* United States v. Marzzarella, 614 F.3d 85 (2010).
33. *Bruen*, 142 S. Ct. at 2127.
34. *Id.* Justice Kavanaugh concurred to make the point, as in previous cases, that the holding did not prohibit longstanding firearm regulations such as felon-in-possession statutes. *Id.* at 2161–62 (Kavanaugh, J. concurring).
35. *Range*, 69 F.4th at 106.
36. *Id.* at 101.
37. *Id.*
38. *Id.* at 103.
39. *Id.* at 106.

IV. COMMENTARY

A. The Court Created a Broad Rule From Too Easy a Case.

The court's recitation of facts makes Bryan Range out to be some sort of modern Jean Valjean, only defrauding the government for need of food.[40] Seemingly out of desperation, Range lies on a food stamp application, or at the very least covers for whoever did.[41] He is otherwise a good man with a clean record, except for one small incident where he was fishing without a license.[42] The court gives us no reason to doubt their characterization of Range as a good man who once fell on hard times, like the story of Jean Valjean acting out of desperation. The way the court tells the story, it certainly seems like Bryan Range is the type of person who should be able to buy a firearm if he chooses. But the court takes for granted that every non-violent felon is like Bryan Range.

The Third Circuit uses these facts to articulate broad rules. For example, it quotes *Heller*'s statement that the "people" referred to in the Second Amendment "unambiguously refers to all members of the political community, not an unspecified subset,"[43] despite the Supreme Court's insistence in *Heller* that the Second Amendment right extends to "law-abiding citizens for lawful purposes."[44] Further, in applying the history and tradition test, they state a law cannot be historical or traditional if it has existed only since 1961, the date the current Section 922(g)(1) came into effect.[45] Even so, the court seems to approve of the original Section 922(g)(1), enacted in 1938, because it only prohibits violent felons from possessing firearms.[46] By these statements, do they mean to deem all gun regulations since at least 1961 unconstitutional? The question the court never addresses is when exactly something becomes *historical tradition*. Such is the problem with overbreadth; these two statements show how the Third Circuit applies broad principles to reach their narrow conclusion. It, however, fails to consider alternative arguments that would have reached the conclusion more narrowly, which they have the duty to do as a discretionary court.

1. The Court Could Have Found 18 U.S.C. § 922(G)(1) Did Not Apply

40. *See generally* VICTOR HUGO, LES MISERABLES (1862). *Les Miserables* tells the story of Jean Valjean who steals a loaf of bread to feed his sister's starving children and is sentenced to nearly twenty years hard labor in the galleys.
41. *Range*, 69 F.4th at 98.
42. *Id.*
43. *Id.* at 101 (quoting District of Columbia v. Heller, 554 U.S. 570, 625 (2008)).
44. *See Heller*, 554 U.S. at 625.
45. *Range*, 69 F.4th at 104.
46. *Id.*

Because Range Was a Misdemeanant.

Range was never convicted of a felony, only a Pennsylvania misdemeanor.[47] The clear legislative intent of 18 U.S.C. § 922(g)(1) was to prohibit only felons from possessing firearms.[48] The statute uses the common law definition of felony, a crime punishable by more than one year in prison, to define a class of people who may not possess firearms.[49] This is presumably because some states may not call some of their serious crimes felonies. So, the statute intends to cover felons without using the word merely to encompass all crimes fitting within a category like a felony. It should not be read to fit misdemeanants in the category when the state divides offenses between the traditional common law "felony" and "misdemeanor". Range was prohibited from possessing a firearm under this act only because his conviction was a felony-equivalent having a potential sentence of more than one year in prison.[50] It offends due process to treat Range as a felon under federal law for a state misdemeanor conviction. The court could have reached this much narrower holding by deciding the felony equivalent framework of Section 922(g)(1) is unconstitutional because it arbitrarily converts misdemeanor convictions under state law into felonies for purposes of federal firearm regulations. This would have allowed Range to possess a firearm but prevented the harsher realities of the court's holding, namely that some felons, though convicted of non-violent crimes, have a potential for violence given the nature of their crime, as in the case of a felon convicted of drug distribution.

2. The Court Disregarded Legally Sufficient Historical Analogues.

The court notes the historical tradition of a challenged law may be established by "historical *analogue*"; a "historical *twin*" is not necessary.[51] Yet, the court rejected the government's proposed analogues.[52] The court's dismissal of the Government's analogues was unwarranted. It does not follow its own rule that historical analogues are sufficient in the absence of a historical twin. The Government's first analogue was evidence of Founding Era governments disarming people simply because they were parts of groups the government did not like: "Loyalists, Native Americans,

47. *Id.* at 98.

48. *Id.* at 105 ("Section 922(g)(1) is a straightforward 'prohibition[] on the possession of firearms by felons.'" (quoting *Heller*, 554 U.S. at 626–27)). The staute is justifiably interpreted to include only felonies because Congress used the common law definition of "felony" rather than simply stating "felony."

49. 18 U.S.C. § 922(g)(1). *See Felony*, BLACK'S LAW DICTIONARY (11th ed. 2019).

50. *Range*, 69 F.4th at 98, 102.

51. *Id.* at 103.

52. *Id.* at 104–05.

Quakers, Catholics, and Blacks".[53] This was insufficient and (ironically) "far too broad," said the court.[54] The court makes two points why they consider the analogue insufficient: first, they say these actions would be unconstitutional today; and second, this analogy does nothing to show Range belongs to a group which the Founders would have disarmed.[55] Both of these points cut against the court's reasoning. If the test is truly history and tradition, the court shouldn't care whether these disarmaments would be unconstitutional today, only if they are historical or traditional. Since they are historical, the analogy works. If the Founding Era governments were willing to disarm people of certain groups merely because they were deemed untrustworthy, how much more would they be willing to disarm someone when they have a legal justification?

The government's second proposed analogue is that in the founding era, some non-violent felonies were still punishable in many instances by severe punishment up to and including death.[56] The court insisted that did not prove much, because capital punishment is not sufficiently analogous to disarmament.[57] This is the court requiring a "historical *twin*," despite insisting a "historical *analogue*" would suffice.[58] Applying a history and tradition test like this means nothing can ever be historical or traditional. It does not tax the mind to believe a society that would execute a non-violent felon for a crime would disarm a non-violent felon for a crime.

3. Range Argued for an Appropriate Test, Which Should Have Been Applied.

Since the Government provided insufficient historical analogues, the court should have considered Range's proposed test: a non-violent felon may be disarmed according to their degree of "dangerousness."[59] This is another manner by which the court could have held more narrowly and decided not to do so. Even without analyzing the other historical analogues, the court could have taken Range's historical analogue from his brief: "[t]he historical evidence . . . [shows] that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety."[60] Yet, the court did not consider this test. Accounting for dangerousness makes sense: a person

53. *Id.* at 105.
54. *Id.* (quoting N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2134 (2022)).
55. *Id.* at 104–05.
56. *Id.* at 105.
57. *Id.*
58. *Id.* at 103.
59. *Id.* at 104 n.9. This argument was considered by the court because it was unnecessary given they held the government had not met its burden.
60. *Id.* (quoting Kanter v. Barr, 919 F.3d 437, 454 (2019) (Barrett, J., dissent)).

does not need to be violent to be dangerous, and a person's lack of past violence does not prove they will not be violent in the future. The court, if they applied this test, would have reached a just conclusion. Range, modern Jean Valjean that he is, would have been able to purchase firearms. Dangerous non-violent felons would not have.

V. CONCLUSION

It sure sounds like Bryan Range is a good guy; too bad not all felons are like him. Even non-violent felons can still be dangerous. *Range* stands for the proposition that even dangerous felons may be protected by the Second Amendment, whether that was the court's intent or not.[61] By not tailoring their opinion more narrowly, the Third Circuit leaves the door open for more challenges to legitimate firearms regulations.[62] Even reasonable firearms regulations could be stuck down under *Range*'s reasoning. This leaves us all less safe.

61. *See id.* at 106. The majority holds that people "like Range" have not historically been barred from firearm's possession, begging the question who is "like Range"? Is it all people who have not been convicted of violent felonies? If so, the presumption is that dangerous felons who were not convicted of violent felonies, for example drug traffickers, cannot be prohibited from possessing firearms.

62. *See e.g.*, Lucien Bruggeman, *Hunter Biden's Lawyer Says Gun Statute Unconstitutional, Case Will Be Dismissed*, ABC NEWS (Sept. 15, 2023, 6:45 AM), https://abcnews.go.com/US/hunter-bidens-lawyer-gun-statute-unconstitutional-case-dismissed/story?id=103214828. Hunter Biden's firearms charges are being prosecuted in federal court in Delaware, within the Third Circuit. *Id. Range* will surely play a part as the only post-*Bruen* Second Amendment case decided in the Third Circuit. *Id.*