



Domestic Violence Laws and Gun Rights

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[00:00:00] Jeffrey Rosen: Earlier this month in a case called *United States versus Rahimi*, the U.S. Court of Appeals for the 5th Circuit struck down as unconstitutional a 30-year-old barring people subject to domestic violence restraining orders from possessing firearms. The ruling comes on the heels of the U.S. Supreme Court's decision in *New York State Rifle and Pistol Association versus Bruen*. That was a decision last term, which held that the Second Amendment protects the right to carry guns outside the home. *Bruen* also created a new history and tradition test for determining whether gun control regulations are constitutional, which has led some lower courts to rule differently on challenges to gun laws.

[00:00:42] Jeffrey Rosen: Hello friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to *We The People*, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by congress to increase awareness and understanding of the constitution among the American people. In this episode we break down the *Rahimi* decision, and explore the new landscape of the Second Amendment after *Bruen*. We're joined by two leading scholars of the Second Amendment.

[00:01:09] Jeffrey Rosen: Amy Swearer is senior fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. She was a primary author of the recently published Heritage book, *The Essential Second Amendment*. Amy, it is wonderful to welcome you to *We The People*.

[00:01:24] Amy Swearer: Jeff, thank you so much for having me. I'm really grateful to be here.

[00:01:28] Jeffrey Rosen: And Adam Winkler is the Connell Professor of Law at the UCLA School of Law. He's the author of *Gunfight: The Battle Over the Right to Bear Arms in America*, as well as *We The Corporations: How American Business Won Their Civil Rights*. Adam, it's wonderful to welcome you back to the show.

[00:01:44] Adam Winkler: Thanks so much for having me, Jeff. It's always a pleasure.

[00:01:47] Jeffrey Rosen: Amy, the lower courts have been disagreeing in the wake of *Bruen*. In recent months, there have been more than a hundred federal court decisions involving the Second Amendment. Tell us about the kinds of issues that lower courts are disagreeing about and, and how they're deciding these cases.

[00:02:03] Amy Swearer: Sure. So there are a lot of cases working their way right now through the lower courts. I think you can sort of broadly categorize them into two types. So the first are, are cases dealing with, uh, states like New York and New Jersey, whose public carry frameworks were i- invoked in *Bruen*, with some of the changes they made post-*Bruen*, sort of expanding the lists of prohibited places. Really sort of pushing the lines, past what we've seen with even the more restricted shall issue states.

[00:02:39] Amy Swearer: So we've seen challenges in the lower courts working their way through these, you know, as these states are, are trying to figure out how they are now going to do public carry frameworks after *Bruen*. And then there are another slate of cases dealing with, uh, challenges that, you know, we, we've seen for decades to a whole variety of really non-public, some of them public carry, but, but things that weren't necessarily on the table in *Bruen* that have been challenged repeatedly in, and in most cases, um, challenged unsuccessfully in the lower courts in, in pre-*Bruen* years.

[00:03:18] Amy Swearer: Most of those, you know, a- again, they're all still very early in those stages, even as they're getting to circuit courts, and we've seen a couple panel decisions, nothing really on **[inaudible 00:03:31]**. So preliminary stages. Most of those have still been unsuccessful, but where we have seen at least some success, uh, it's, it's been on a variety of different types of issues. So, you know, you've seen one come up dealing with federal prohibitions on gun possession for individuals who are abusers of addictive substances, in this case someone who, uh, used marijuana.

[00:03:59] Amy Swearer: You've seen prohibitions on possessing firearms with obliterated serial numbers, a- and in the case of *Rahimi*, you've had now the, the 5th Circuit, at least in a, a panel decision, strike down, uh, as unconstitutional 922G8, which is a federal prohibition on gun possession for individuals who are subjected to certain domestic violence restraining orders. Um, so really, all types of, of these prohibitions, but again, uh, very early on, and most of them, uh, have been unsuccessful, and even the ones where we have seen some success, uh, you know, th- this is ... we are in no way, shape or form at a point where these are now the law of the land.

[00:04:42] Amy Swearer: So definitely a landscape that is in a bit of turmoil, but far from settled in a lot of these decisions.

[00:04:52] Jeffrey Rosen: Thank you for describing landscape in turmoil as you put it, and you mentioned the Oklahoma District Court decision, striking down a law prohibiting people who use marijuana from owning firearms, the New York battle over guns in sensitive places, and there are many others as well. Adam, how would you describe the post-*Bruen* landscape, and what are some of the leading decisions?

[00:05:12] Adam Winkler: Well I think the post-*Bruen* landscape is really quite shocking, to be honest with you. I, I think many people in the gun world thought that after *Bruen*, we would see some gun laws struck down, and the kinds of gun laws that people thought were likely to be struck down were the kinds of sort of controversial or outlier gun laws like bans on assault weapons or bans on high capacity magazines, things that, although they're at the top of the gun

safety reform movement's agenda, are only in place in a few states, and, are definitely the kinds of laws that, uh, spark the ire of gun owners.

[00:05:52] Adam Winkler: What's happened instead is that the Supreme Court's *Bruen* decision basically dropped a gun on American gun policy and has really exploded with shards going everywhere. We've seen, um, not only the, uh, ban on possession of firearm by domestic abusers declared on constitutional, we've seen, um, a wide variety of laws that are generally thought to be mainstream, widely accepted, uh, in place in most states struck down. Bans on guns in churches, hospitals and bars. Bans on guns in summer camps. Bans on guns in the hands of people charged with felonies. Restrictions on 18 to 20-year olds carrying weapons. Prohibitions on having loaded guns in vehicles. Bans on guns with obliterated serial numbers, just to name, uh, a small, a small number of these cases.

[00:06:45] Adam Winkler: I think it's quite startling. I think that, while I completely agree with Amy, these aren't the last word, these are often district court rulings, um, with some exceptions, uh, and who knows how the, what the future's gonna turn out, but I think one thing has already become crystal clear, that the text, history and tradition test that the Supreme Court articulated in *Bruen* is, if sincerely applied, going to wreak total havoc on American gun policy, uh, and lead to, uh, the reversal of a lot of widely shared, widely agreed upon gun laws that are in place at the federal level and at the state level.

[00:07:29] Jeffrey Rosen: The text, history and tradition test is going to lead to great disruption, uh, Adam says, and that's the question we're gonna talk about now. Amy, in the *Rahimi* case, uh, the court struck down, as you said, the relevant portion of the Brady Handgun Prevention Act, which says it shall be unlawful for any person to sell or otherwise dispose of a firearm to any person having reasonable cause to believe that such person is subject to a court order that restrains such person from harassing, stalking or threatening an intimate partner, such person, or child. Tell us about this, uh, 1993 Brady Law and on what grounds invoking the history and tradition test the Appellate Court struck it down?

[00:08:14] Amy Swearer: Right, so I think you've explained for the most part how this law operates. This is a law that has been challenged before *Bruen* and including by Mr. Rahimi, the, the defendant in this case, um, and challenged unsuccessfully, including, again, by the defendant in, in this case. And I actually wanna start by laying out some of the underlying facts. Um, because I think it's very clear that most, you know, sane, sober, moral and prudent people are, are going to look at, at a defendant like Mr. Rahimi and say he's, he's not in- incredibly sympathetic. He's actually someone I think most of us would say should not own a gun, and we would all agree on that.

[00:08:52] Amy Swearer: So this case starts because Mr. Rahimi, uh, assaults his girlfriend in a parking lot, uh, threatens her with a firearm and then shoots at a bystander who may have witnessed the assault. He is of course charged with various criminal offenses. The woman in that case seeks a domestic violence civil restraining order, which is granted. I believe Mr. Rahimi waives his hearing, his, his right to counsel and, and all of that, uh, and as part of the, the

conditions of that restraining order, he is prohibited from possessing a firearm, um, which then also becomes a prohibition under federal law under this 922G8.

[00:09:34] Amy Swearer: Mr. Rahimi soon seems to forget that he is under this prohibition, obtains another firearm, uh, threatens another woman, commits pretty serious domestic violence offense again, and then goes on to commit a, a series of several other shootings. He shoots at a constable, he shoots into the ceiling of a fast food restaurant. Um, he shoots at the driver of a car crash he causes, leaves the scene, comes back, shoots at 'em again.

[00:10:05] Amy Swearer: After all of this, he's finally arrested again. He's charged with a plethora of criminal offenses again, and they also look at this and say, "Oh, you had a restraining order barring you from possessing firearms," and so they tag on a federal charge, uh, for violating 922G8. So again, not, not a very sympathetic defendant here. what the court says when he challenges this again, post-*Bruen*, is that instead of pre-*Bruen*, right, where this had been struck down under, uh, essentially means and intermediate scrutiny, they find that this 30-year-old prohibition on possession of firearms by people under these sorts of restraining orders is not consistent with the nation's historical tradition of firearms regulation.

[00:11:01] Amy Swearer: It's not similar to the, the ways and the means through which traditionally the government went about disarming dangerous people, they go through, uh, three distinct types of historical disarmament laws, uh, and find that they're not remotely similar and find that they're, they're not remotely similar. The first type of disarmament law that the court looks at from a historical standpoint would disarm individual who, uh, would be considered, uh, a threat to, uh, the nation itself, sort of a, a national security threat. hey find, well, he's not accused of being a national security threat.

[00:11:35] Amy Swearer: the second type of law looked at did he go about sort of like, your statute of North Hampton. That he went about armed to the terror of, of the public. And they say, well this, this is more of like an anti-rioting statute. It, it deals with general threats to the public at large and not to a specific person," and it doesn't go through sort of this civil proceeding, and it's also unclear whether that would have involved the forfeiture of anyone's weapon in that case.

[00:12:00] Amy Swearer: The third sort of genre of gun control laws, historically that they look at, are what's known as surety laws. And the court says, well, to some extent these seem similar this. Was civil court process through which one person accused another person of, of, uh, potentially being a threat to them, and that on its face might seem substantially similar.

[00:12:22] Amy Swearer: The problem was with those laws, with these surety laws, the person who was accused of being dangerous could post surety, and if they successfully post surety, then there was no prohibition. Th- there was no seizure of those firearms, um, unless and until they violated that surety, in which case it, it seems that they could have been prohibited from, uh, bearing arms in public, but there was no, a- as there was for Mr. Rahimi, broad wide sweeping prohibition on possession period. Absent some sort of, you know, again, posting of surety.

[00:13:01] Amy Swearer: Now they also say that does not leave the government, uh, without any means of disarming him per se. It doesn't invalidate any of the other laws, for example, that

would have, had he been convicted of any of those offenses, prior to, uh, you know, this, this disarmament being put in place. Of course, he as a convicted felon, could have been prohibited. Judge Ho, in his concurrence, uh, goes through, again, a, a variety of the methods the government could have used, but in so far as the government wants to convict Mr. Rahimi for violating the conditions of his domestic violence restraining order, they say that is not historically speaking how the government historically has gone about disarming people, and so therefore it is inconsistent with that national tradition of firearms regulation.

[00:13:51] Jeffrey Rosen: Inconsistent with that national tradition of firearms regulation. Adam, how would you describe the shift from what Amy called the means/ends test to the history and tradition test and are you persuaded or not by the way the 5th Circuit applied it in *Rahimi*?

[00:14:09] Adam Winkler: Well, after the *Heller* case, we did have the circuit courts did coalesce around, um, a form of intermediate scrutiny. A two-part test that did lead to many gun laws being upheld, some laws being struck down. But by and large, it was a test that led, uh, to too many laws being upheld in the views of, uh, several of the justices who started calling the Second Amendment, a, a second class right in the lower courts. And insisted on the need to raise the bar and make it harder for gun laws to survive.

[00:14:48] Adam Winkler: And the text, history and tradition approach was the tool that the majority of the court in *Bruen*, deemed appropriate to apply to Second Amendment challenges. I completely agree with Amy's assessment of the reasoning, uh, in the, uh, the, the 5th Circuit case, on domestic abusers. However, I think that we have to recognize that, uh, that number one, uh, the court may have been misapplying the text, history and tradition test. The court in *Bruen* did say that you don't have to look to history and tradition and find an exact match or a law that was, uh, precisely similar to the kinds of laws that we have today. The court said you should reason by analogy.

[00:15:39] Adam Winkler: And when you reason by analogy in all aspects of the law, you're framing something at a level of generality that is different from the precise approach that I think the 5th Circuit took here. You're supposed to frame things at a higher level of generality, and instead what the court does is say, "We wanna see laws that are really precise, compared to this one." We wanna see laws, for instance, that, uh, if there was never, um, a civil forfeiture of firearms before a conviction, then there can be no civil forfeiture of firearms today.

[00:16:16] Adam Winkler: So I think there is questions about whether the court here accurately applied the *Bruen* test, but I do think that, the *Bruen* test raises these questions and makes it difficult to justify many firearms prohibitions. And one thing that Amy pointed out at, uh, that, in this, uh, uh, uh, 5th Circuit opinion, uh, the court goes out of its way to say, "Well of course there are other means available to the government. They could, for instance, convict him, uh, and then ban him from possessing firearms." But if you take the felon in possession ban, uh, that the court was mentioning, and run it through the same analysis that the court used in this case on the ban on domestic abusers subject to a restraining order, well that law is likely to be struck down too.

[00:17:05] Adam Winkler: The court said that there isn't an analogous history of banning guns from dangerous people. That, that was, uh, that old traditional had been reframed by the time of the Second Amendment. So that's not a basis for banning felons from possessing firearms. The English and American laws prohibiting going armed are not analogous either to a ban on felon possessing firearms under the court's...under this court's own understanding of what those laws are.

[00:17:36] Adam Winkler: And so I think that at least if you apply the text, history and tradition test with the kind of specificity, uh, of analogies that the court does in this 5th Circuit case, we are likely to see, bans on felons possessing firearms struck down. Those bans did not exist in the 1700 and 1800s when the court says you have to find an analogous law.

[00:18:03] Adam Winkler: Laws banning people who are adjudicated to be mentally ill from having firearms did not exist in the 1700 and 1800s in the time period that *Bruen* says you're restricted to look at. Not allowed to look at laws of the 1900s, that's not, telling the court says or probative to the original public understanding. So I do think that many the reasoning here of this case, uh, does, I think, stray from *Bruen* in important ways, or if it doesn't, it really spells trouble for even the backstop of felon in possession bans that the court in the 5th Circuit says still remains available to the federal government.

[00:18:46] Jeffrey Rosen: Amy, Adam says that the reasoning in *Rahimi* calls into question, uh, bans on the possession of firearms by felons, as well as other bans that Justice Scalia in the *Heller* case said were presumptively constitutional including possession of firearms by the mentally ill, and now I'm reading from the Scalia passage, or laws forbidding the carrying of firearms in sensitive places, such as school and government buildings.

[00:19:09] Jeffrey Rosen: What, is your response, and what was the *Rahimi* court's, response, in particular perhaps the concurrence of Judge Ho?

[00:19:19] Amy Swearer: Sure. So I actually would generally disagree with Professor Winkler's a- assessment of how seriously threatened felon in possession laws are. So when, you look at, first of all, *Heller*, *McDonald*, *Bruen* itself, uh, it seems to presume that felon in possession prohibitions are, uh, perfectly compatible with the test it lays down. They are presumptively constitutional. Certainly the *Rahimi* ... the 5th Circuit in *Rahimi* does not seem to call those into question, uh, and to my knowledge, no post-*Bruen* court that has looked at, at these have, have seriously called into question felon in possession laws.

[00:20:03] Amy Swearer: You could argue that a district court opinion in *United States v.*, uh, Quiroz, um, m- may have sort of cast some doubt on that, um, but ultimately that was not the, the, the question in that case, uh, and, and plenty of other cases I would point to. *United States v. Harrison*, which was the, the district court case we had talked about dealing with, uh, possession prohibitions for people who, uh, unlawfully use or abuse controlled substances.

[00:20:32] Amy Swearer: In that case, marijuana. They certainly went through in, in, in that case, uh, I think the sort of outlining the historical tradition of, as they put it, dispossessing people who demonstrate that they are a present danger to the public if armed, uh, and sort of

analogize from that felon in possession laws dealing at least at, at the very least with people who like Mr. Rahimi are convicted of violent felony offenses, um, and arguably that would, by virtue of reason, you know, come down to people who are convicted of violent misdemeanors.

[00:21:08] Amy Swearer: At least to some extent, right? They, they have demonstrated a propensity for violence. I- in terms of what the *Rahimi* court, looks at, you asked about Judge Ho's concurrent in particular. And, you know, again, not only does the court in *Rahimi* not cast out on felon in possession laws, it looks at what it perceives as a history of the government's historical ability to disarm people who are violent, who are present dangers including, you know, those who are felons, as an integral part of that historical tradition.

[00:21:45] Amy Swearer: In fact, it understands *Bruen*, and I think rightfully so, as suggesting when, when there is this, this alternate history of the government dealing with, uh, of society dealing with a, a problem that has existed for a long time, and they've dealt with it in other ways in the past, that that is presumptively, you know, evidence against sort of modern different ways of trying to deal with that. And so Judge Ho looks at this and, and, and he says, look, historically, there are plenty of ways the government has undertaken to disarm dangerous people and that the constitution sort of, uh, presumes within its framework the government can use to disarm people so it looks like pretrial detention," right?

[00:22:27] Amy Swearer: So, when you charge people with crimes, and they are considered dangerous to the public, you can hold them while they are awaiting trial. You can also, as a condition of pretrial release accomplish, essentially the same thing, so again, you, you have a, an individual in Mr. Rahimi who is alleged to have committed very violent domestic, uh, violence offenses, and in so far as you think, okay, maybe we can't hold him in pre-trial detention, you can impose that, that same restriction as a condition of him being released, and certainly if he violates that condition, you can punish him criminally as well or, uh, remand him back into, pre-trial detention.

[00:23:08] Amy Swearer: One of the best ways that the government has through the criminal justice system of protecting the public is by disarming people by imprisoning them, by going through that adversarial system, convicting them in front of a jury of their peers with all of those due process requirements that come with that, a- and then holding them in prison where, again, I don't think anybody seriously suggests that the right to keep and bear arms extends to people who are currently incarcerated.

[00:23:34] Amy Swearer: And after that, neither this court nor any other post-*Bruen* court has doubted, or seriously suggested that as a convicted felon, the government cannot continue prohibiting him from possessing arms, and that again, because these are historically the ways that the government, that, that we as a society have acted to disarm dangerous people, that would seem to suggest against, modern re-interpretations or modern, routes of disarmament that go through other means, that would presumptively, work against them.

[00:24:10] Jeffrey Rosen: Adam, the *New York Times* recently reported that in the gun law fights of 2023 a need for experts on the weapons of 1791 and basically said that gun historians across the country are in demand as courts are looking to 18th century precedence. What, do you

make about the application of these historical tests? Why is that are courts are focused on 18th century, while Justice Thomas in *Bruen* was focused on the 19th century history of the 14th Amendment, and do you think that this history and tradition test can be applied in a principled way or not?

[00:24:42] Adam Winkler: So, we are seeing an increased need for historians. The history of gun law has not been that adequately written before, so, there are still real efforts to try to excavate that history and to figure out how we have done it in the past, and obviously that's because the Supreme Court is forcing lawyers to look to history. You know, generations, basically since the 1960s of law schools, have been taught that the way we think about constitutional rights is that no rights are absolute, that you have a constitutional right, but that right can be limited if government has a compelling governmental interest and limits that right in a narrowly tailored way.

[00:25:26] Adam Winkler: But the new text, history and traditional test, uh, says that those concerns are irrelevant. It doesn't matter whether it's a narrow ban. It doesn't matter whether the government has good reasons for the ban. All that matters is whether the gun law is analogous to the gun laws of the 1700 and 1800s. And, uh, the 1700s, because the 1700s will say something about the original public understanding of the Second Amendment, and the 1800s are relevant because, uh, they go potentially to the original public understanding of the 14th Amendment, and the 14th Amendment, the court notes, uh, was designed at least in part to extend the Bill of Rights to the states, and that includes the Second Amendment.

[00:26:08] Adam Winkler: So in understanding what constitutional protections are for the right to bear arms, we look to the 1700 and 1800s. The court does in *Bruen* draw a line and says basically the laws of the 1900s, the 20th century, which basically saw the advent of most of the foundational kinds of gun laws that today we take for granted, bans on felons possessing firearms, licensing of gun dealers, bans on people who are mentally from possessing firearms, bans on automatic weapons, are all products of the 20th century. So those laws, even if they're in place for 100 years, are irrelevant in the current, uh, understanding of history and tradition, unless you can find these analogous laws back in the day.

[00:26:54] Adam Winkler: And so it has led to a real interest in, uh, history here. There's a lot of, um, experts in this area, that are being asked to testify, I did read that story with a little bit of disappointment because my phone has not been ringing, and, uh, no one's offering me big bucks-

[00:27:12] Jeffrey Rosen: [Laughs]

[00:27:12] Adam Winkler: ... to testify in these cases. And so, I got to get a better agent or something, Jeff, I don't know. Just one final point in response to Ms. Swearer's point, uh, about felon possession bans being, uh, acceptable. I agree with her that at the end of the day it seems highly unlikely that courts are gonna strike down bans on felon in possession. My point was, and I think it remains unrefuted, that the exact same test and analysis that the court engages in, uh, in the 5th Circuit case, absolutely spells the end of felon in possession bans. We did not bar felons from possessing, uh, in the 1700 and 1800s. We had no similar laws.

[00:27:54] Adam Winkler: People who were released from their, uh, prison sentence at the end of the 1800s, uh, there was no law in any state that prohibited them from having firearms. Um, and the earlier laws that banned guns to dangerous people, well the 5th Circuit says that those laws really are not analogous. First of all, they're not criminal prohibitions that barred loyalists or African Americans or Native Americans from having firearms. There were no criminal convictions that led to those things. Um, just the court said that those people were not part of the quote/unquote, "people protected by the Second Amendment."

[00:28:29] Adam Winkler: Unless we're really willing to say that felons, if you have a felony conviction, you're not part of the American people anymore. Well, then I guess you're not protected from Fourth Amendment rights either, uh, against unreasonable searches and seizures, which also applies to the people. Apparently then they don't have full First Amendment rights either because that provides the right of the people to petition government for redress of grievances.

[00:28:53] Adam Winkler: So, I think that probably Ms. Swearer's right, that the felon in possession ban's likely to survive at the end of the day, but it will only be by bastardizing the history and tradition test, and not by applying it sincerely. And I think that really highlights the problem with the history and tradition test.

[00:29:12] Jeffrey Rosen: Amy, what's your response to Adam's point that a principle application of the history and tradition test might strike down the felony possession bans?

[00:29:22] Amy Swearer: Well I think to, to some extent, and, and I've actually written, as have a number of other people, on the issue of, uh, even pre-*Bruen*, bans on the, the possession of firearms for non-violent felons, and I think even pre-*Bruen*, under, *Heller's*, because again, *Heller* did not, create this sort of two-step analysis framework that, that the lower courts used. It, it just said essentially text, history and tradition are important. And I think things like bans on the, the possession of firearms for non-violent felons have, have always been called into question by a number of people, even before *Bruen*.

[00:30:02] Amy Swearer: With respect to possession by violent offenders, people who have been convicted of violent felonies, I, again, would generally disagree with the history, at least in so far as, you know, what has the state done historically to disarm violent, uh, people. I don't wanna get into the weeds with, uh, what is the exact history of, of felon disarmament, um, but again, in so far as, as violent felons have a history of recent violence, um, evidencing that they still might even after their prison sentence, uh, continue to present that imminent threat to, to public danger, um, there would still seem to be an indication that the government can continue in that case to protect the public from them.

[00:30:58] Amy Swearer: Now we can go back and forth, you know, with, with practical arguments or theoretical arguments of, well, then should they still be in prison until such a time as, you know, they, they are no longer constituting that threat, or can the government, uh, release them and still continue to impose, um, you know, post-sentence collateral consequences. But I would just say to the general extent that someone continues to, um, be that imminent threat, I, I

think the history there is, is actually fairly clear, even if it, we are not talking specifically about, uh, felon prohibitions per se.

[00:31:34] Jeffrey Rosen: Adam, let's talk about what, uh, lower courts are doing in this area, which both of you flagged at the beginning. So, there's a Texas District Court decision striking down a federal law banning those under felony indictments from banning guns. There's that Oklahoma decision striking down a federal law prohibiting people who use marijuana from owning firearms, a n- non-violent offense, and there is, um, uh, a 3rd Circuit argument about whether the federal government can prohibit a non-violent felon from possessing firearms. Uh, h- ho- how are, are courts invoking the history and tradition test to, to strike down these bans and, and how, how do you think they might fare before the Supreme Court?

[00:32:13] Adam Winkler: Well yes, we are seeing courts apply the text, history and tradition, to a wide variety of laws. In a lower court case dealing with the same issue of domestic abusers subject to a restraining order, uh, you know, a judge in Texas said that it was glaringly absent from the historical record. All the way up until 1994 of consistent examples of the government removing firearms from someone accused or even convicted of domestic violence.

[00:32:43] Adam Winkler: Now this is not a surprise to anyone who's studied domestic violence in American history. Um, uh, most of what we think of as domestic violence today was not even a crime, uh, in the 1700 and 1800s. It was allowed by law and we see a court that struck down the ban on firearms with obliterated serial numbers, or refused to allow an indictment on that basis because of the unconstitutionality of the requirement of having a serial number. The judge said, "Hey, look, there's no serial number requirement before 1968, so there's no longstanding historical tradition of such laws."

[00:33:21] Adam Winkler: A court that struck down the ban on guns in airports and buses, uh, said, "Well look, we didn't ban guns on public transportation, uh, in the 1800s," and we've seen similar rulings on bars and medical facilities. Again, those laws didn't exist back in the day, so we can't have them, uh, today. In reality, I think highlights sort of the absurdity of what's going on with the text history and tradition.

[00:33:48] Adam Winkler: Ms. Swearer says that, well, you know, someone who's currently still a significant threat of violence with firearms can be disarmed. Well, tell that to the victim of Rahimi. Rahimi is clearly a guy who is a present danger to people. He has had one incident after another, uh, with firearms, and yet the court says, "Hey, but you know, this ban is unconstitutional." So we are seeing courts apply the text, history and tradition test. We've seen some courts that have said, "Look, I'm applying it. I'm striking down this law, but I hope I misunderstand the Supreme Court's opinion. This is what it seems to me, and a sincere application of it will lead to that."

[00:34:33] Adam Winkler: I do believe that in the future, we're likely to see this test watered down significantly. I think when the Supreme Court starts getting a bunch of these cases, it's going to be extremely hard for, uh, a majority of justices to come together to say bans on domestic abusers facing a restraining order should have access to weapons. Um, uh, that the

courts are going to have to water down this test in significant ways, or frankly, just apply it in an insincere way, uh, and, uh, sort of fudge the analogies.

[00:35:09] Adam Winkler: Maybe the 5th Circuit case should be celebrated in the sense that, you know, it's, it's tearing off the lid of what's really the likely result from applying this text, history and tradition test.

[00:35:25] Jeffrey Rosen: Amy, do you think that the lower courts that have been invoking the history and tradition test to strike down these restrictions on felons, on marijuana users are correct, or do you think that the test should be watered down, as Adam puts it, um, in the way that he suggests?

[00:35:44] Amy Swearer: Well I don't wanna put all of these cases together as though they all sort of relied on the, the same, uh, breadth of, of analogy or, you know, the, that they, they all sort of acted, uh, perfectly similar. I do think there are probably some, some pretty serious questions about, um, for example, the, the courts that struck down as unconstitutional the ban on possession of obliterated serial numbers.

[00:36:16] Amy Swearer: That court did address, you know, like, in *Heller*, and again in *Bruen*, not casting doubt on these, uh, you know, lines from *Heller* about we're not questioning things like the regulations on the, the commercial sale of firearms, which would seem to indicate an approval for things like, yeah, you need to put serial numbers on firearms and you can't obliterate those. I think that's consistent with *Bruen* as well, which again does not cast out on this.

[00:36:47] Amy Swearer: I think there are some questions about how the court went about analogizing in that case. I mean, *Heller* itself, and again, *Bruen* not casting doubt on this, along with Kavanaugh's concurrence joined by the Chief Justice explicitly calling out this language from *Heller* that says, and I'll quote it here, "That nothing in our opinion should be taken to cast out on longstanding prohibitions on the possession of firearms by felons, the mentally ill, laws forbidding the carrying of firearms in certain sensitive places, or laws imposing conditions and qualifications on the commercial sale of arms."

[00:37:23] Amy Swearer: Now, again, this, this lower court did question is this a prohibition on the commercial sale of arms or regulation on the commercial sale of arms, saying you can't possess a firearm if it has an obliterated serial number. I think it's questionable whether or not they, they got that wrong, by saying, look, this is, this is not a commercial regulation. It's, um, ban on possession. You know, how much we wanna split hairs there, I don't know.

[00:37:48] Amy Swearer: That court certainly did try to, to split hairs to say, look, th- this prohibition on possession itself only goes back to 1990, um, but I, I think there is at least room within *Heller* and *Bruen* to look at, uh, some of these more modern regulations dealing with commercial regulations in particular, uh, to say maybe this fits under how the *Heller* and again, the *Bruen* concurrence looked at this, and, and said, "We, we don't need to have a one to one perfect analogy," there's more room for nuance when it comes to some of these, these more, uh, modern social issues, things that we're not necessarily, um, you know, at the forefront of the, the conversation on, on, you know, society and guns in 1792, uh, or in, you know, 1866, 1868.

[00:38:37] Amy Swearer: So, I think there's certainly room there with some of these more commercial regulations, um, to, to, to talk about that, and again, the court left room for nuance, uh, in some of these, these commercial regulations.

[00:38:49] Jeffrey Rosen: Adam, both you and Amy have suggested that the U.S. Supreme Court might, uh, clarify its history and tradition test to make clear that the exception that Justice Scalia recognized in the *Heller* case for prohibitions on, uh, possession by felons and the mentally ill and, and so forth are okay. What would the refinement look like? H- how could the court change the test in a principled way? And more broadly, are you surprised by the breadth of the history and tradition test as its been applied by lower courts, and, and do you think that Justices, uh, Kavanaugh and Chief Justice Roberts may be surprised as well?

[00:39:25] Adam Winkler: I think many of the justices will be surprised, and I think it will lead to significant pressure, uh, among the justices to change the text, history, uh, uh, and tradition test. Exactly how that goes, I don't know. One possibility is the way that Ms. Swearer kind of suggested, which is we'll, we'll do text, history and tradition for everything except the things listed in that one paragraph of the *Heller* opinion, a paragraph that was not supported by any history and tradition, that said longstanding prohibitions on felons possessing firearms or the mentally ill possessing firearms or commercial sale restrictions are allowed, right?

[00:40:01] Adam Winkler: All that's, that was a paragraph that we know now was inserted into that opinion to keep Justice Kennedy's vote. Um, and those exceptions were not based on a sincere and thoughtful, uh, analysis of the text, history and tradition of gun laws. So, we might see the court say, yeah, text, history and tradition, but there's the *Heller* exception. So, it's like do originalism except when we have this one paragraph in *Heller*, and that that might provide some exceptions and the nuance, uh, that was suggested earlier.

[00:40:31] Adam Winkler: Alternatively, we could see the court say, well, uh, uh, the, the lower courts have been applying this with too much precision. We need more of that nuance. We need to frame the, uh, historical analysis at a very, uh, a much higher level of generality." So the fact that we banned dangerous people in the past, even if we did so without criminal convictions, um, uh, would be such to justify things like bans on felons possessing firearms, uh, mentally ill, uh, people who have been adjudicated such to, from possessing firearms or domestic abusers subject to a restraining order.

[00:41:06] Adam Winkler: The issue here though is that the reason why the court said we have to move away from balancing the intermediate scrutiny towards this text, history and tradition test is because balancing gave judges too much discretion over how to frame these issues and how to determine whether laws are constitutional or not. Well if the court says that instead apply text, history and tradition but do so in a very high level of generality, then the court will be reintroducing into the analysis the exact judicial discretion that the court said we need to avoid, because how you frame it, what level of generality you frame, uh, an analysis or an analogy is going to be subject to, uh, judicial discretion.

[00:41:50] Adam Winkler: There won't be any clear guidelines in how you do that. And so, I do think we are going to see a lot of pressure o- on the text, history and tradition test. I wouldn't be

surprised to see it significantly revised and, and, and in, uh, and before too long, I mean I think, uh, the kinds of decisions were seeing coming out of the lower courts is certain to lead to a split among the circuits. The 5th Circuit decision on domestic abusers will find another circuit or opinion that goes the exact opposite way, I think within the next year. Uh, and so we're going to have splits in the circuits, and the Supreme Court's gonna have to step in eventually.

[00:42:32] Adam Winkler: It's unclear whether Kavanaugh and Roberts, uh, they file their concurring opinion, but did join the majority opinion in *Bruen* in full to support the text, history and tradition test. So we'll, we'll see about that. One thing I might note is that Kavanaugh's concurrence says, well, all of the current kind of restrictions we have, uh, on shall, you know, uh, the shall-issue permitting and the kinds of permitting, uh, requirements that shall-issue states today have are permissible, but it's worth noting that none of those requirements have any, um, history and tradition to support them in the 1700 and 1800s.

[00:43:09] Adam Winkler: There was no shall-issue permitting in the 1700 and 1800s. None of those requirements for carrying a firearm existed in the 1700 or 1800s, and the kind of laws that we did have, like the surety laws, uh, just aren't analogous in any really relevant way unless we're going to really abuse the text, history and tradition test. So, uh, I think the text, history and tradition test, uh, is going to be revised, needs to be revised, and if it's not revised, uh, we really are going to have a revolution in American gun policy over the next few years.

[00:43:38] Jeffrey Rosen: Well it's time for, uh, closing thoughts in this important and illuminating discussion,; Amy, the first one is, uh, to you. Um, in his concurring opinion, Judge Ho said that the history and tradition test should not be revised because it's our duty to interpret the constitution as judges based on the text and original understanding of the relevant provision, not on public policy considerations, or worse, fear of public opprobrium or criticism from the political branches.

[00:44:07] Jeffrey Rosen: Amy, do you think that the text, history and tradition test should be revised or not?

[00:44:14] Amy Swearer: I don't think it should be revised. I think it needs to be solidified. I think, you know, again, as, as Professor Winkler sort of e- expounded upon, there is a lot of uncertainty right now as this framework is being built out, as these cases are, are, uh, you know, coming through the lower courts about how broadly or narrowly we analogized. You know, how does this work itself out? How does text, history and tradition a- and this requirement that it, these laws that are challenged be consistent with the nation's historic tradition of firearms regulation, how does that work itself out with these presumptively lawful restrictions?

[00:44:54] Amy Swearer: How do we actually in practice make this all work together, and what is this supposed to look like? And I, I think it's certainly unsettling for a lot of people because this is not something that, that happens very often, where y- you have, uh, a constitutional right that doesn't have, you know, a, a coherent framework that we all agree, well, this, this is sort of how it operates, um, but this is what we have, right?

[00:45:22] Amy Swearer: We had *Heller* and *McDonald* that gave this bare bones text, history and tradition framework, the lower courts tried to figure that out through this, this two-step analysis test, and then all of a sudden, the court says, we're, we're not adopting that. We're back to square one, this is what you have to do. We're, we're starting all over with this new analysis. So it's certainly unsettling, um, because it, it, it does sort of put us back at square one and we're having to go through all of these cases again.

[00:45:49] Amy Swearer: But I don't think it needs to be, stripped or added to. It just needs to be clarified, um, and that happens through practice. It happens through the, the, the Supreme Court actually taking up more of these cases, um, to, to, through examples, to show lower courts what this is supposed to look like in practice. Um, and I think once that happens, once we have that clarification, uh, a lot of that unsettled feeling, um, you know, that, oh, you know, y- that, that laws are just gonna be struck down left, right and center, um, and we're gonna be left without, you know, any reasonable way of, of regulating firearms, I, I think that will go away once the court starts taking up these cases and in practice, showing us, showing lower courts what that means.

[00:46:41] Jeffrey Rosen: Adam, the last word in this great discussion is to you. You've argued that the text, history and tradition test should be revised. Tell *We The People* listeners, uh, why and how.

[00:46:54] Adam Winkler: Well certainly, I do think it needs to be revised. Uh, I saw a, a post on a blog by Randy Barnett and Nelson **[inaudible 00:47:04]**, two originalists, noted originalists who've written extensively on the Second Amendment, um, and they called for revision of this history and tradition test and basically say what courts should do is apply an undue burden standard.

[00:47:19] Adam Winkler: So here we are back ta- talking about, well the right standard is intermediate scrutiny. Maybe a little different from the intermediate scrutiny that the courts were doing after *Heller* and before *Bruen*, but it looks like we're right back here, and I do think that for gun rights advocates, the worst thing that can happen is these kind of decisions like the 5th Circuit, because when you strike down widely popular gun laws, it's going to create more opposition to gun rights and, uh, the Second Amendment.

[00:47:50] Adam Winkler: I thought *Heller*, pretty much struck the right balance, uh, in, in that it said there was a right to bear arms, but, uh, led, uh, provided the means for courts to uphold a wide variety of modern-day gun laws, treating the Second Amendment not as a second-class right, as Justice Thomas said, but like every other right. In, uh, defeating the second-class right, uh, a- argument, uh, Justice Thomas has turned the Second Amendment into a singular, unique right that rather than a second-class citizen, is more like the king of constitutional rights.

[00:48:27] Adam Winkler: No other constitutional right...there's no other constitutional right where the government's power to regulate at the margins is defined solely by the, the laws in place at the 1700 and 1800s. This is unique to the Second Amendment. It might catch on and go to other rights in the near future, maybe we're seeing that transition in constitutional law, um, but

Second Amendment, has become monarch of rights, rather than a second-class right, uh, one that has its own special rules, and, uh, as a result, we're seeing a lot of courts strike down gun laws.

[00:49:08] Adam Winkler: So I think it's going to create, that pressure that we've talked about on the Supreme Court to revise its opinion.

[00:49:14] Jeffrey Rosen: Thank you so much, Amy Swearer and Adam Winkler, for a thoughtful, illuminating and civil discussion of the text, history, tradition and future of the Second Amendment. Amy, Adam, thank you so much for joining.

[00:49:29] Adam Winkler: Thanks so much for having me.

[00:49:30] Amy Swearer: Yeah, thank you for having me as well.

[00:49:33] Jeffrey Rosen: Today's episode was produced Lana Ulrich , Bill Pollack and Sam Desai. It was engineered by Greg Scheckler and John Pop. Research was provided by Sofia Gardell, Emily Campbell, Liam Kerr, Sam Desai, and Lana Ulrich. Please recommend the show to friends, colleagues or anyone who is eager for a weekly dose of constitutional illumination, civil dialogue and debate, and always remember the National Constitution Center is a private nonprofit. We rely on the generosity, the passion, the devotion to civil dialogue of people from across the country who are inspired by our nonpartisan mission of constitutional education and debate.

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