The Constitutionality of Firearms Bans for Domestic Violence Abusers

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[00:00:00] Jeffrey Rosen: This week, the Supreme Court heard oral arguments in US v. Rahimi. This is a major Second Amendment case that asks whether laws prohibiting firearm possession by people subject to domestic violence restraining orders violates the right to keep and bear arms. 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 non-profit chartered by Congress to increase awareness and understanding of the Constitution among the American people.

[00:00:36] Jeffrey Rosen: In this episode of We the People, we will break down the arguments in Rahimi and talk about the future of the Second Amendment. Joining me to answer these crucially important questions are two of America's great Second Amendment scholars. It's an honor to convene them. Clark Neily is senior vice president for legal studies at the Cato Institute and an adjunct professor at George Mason's Antonin Scalia Law School. He served as co-counsel in District of Columbia v. Heller and he filed a brief in the Rahimi case in support of Mr. Rahimi. Clark, it's great to welcome you back to We the People.

[00:01:12] Clark Neily: Thanks so much, Jeff. It's great to be with you.

[00:01:14] Jeffrey Rosen: And Jacob Charles is an associate professor at Pepperdine Caruso School of Law. He's a constitutional law scholar who focuses on the Second Amendment. He has a series of marvelous writing on Bruen and is also the author of a forthcoming Foundation Press casebook on the Second Amendment. And he's co-editor of an Oxford University Press collection that's about to come out of historical essays on gun laws. He signed a brief in support of the petitioner, the United States, in the Rahimi case. Jacob, welcome back to We the People.

[00:01:48] Jacob Charles: Thanks for having me, Jeff.

[00:01:49] Jeffrey Rosen: Jacob, why don't I start by asking you what the core of General Prelogar's argument was when she said that historical tradition of regulating dangerousness meant that the Fifth Circuit was wrong to strike down the federal statute in this case?

[00:02:07] Jacob Charles: Sure. So the Solicitor General's argument revolved around what principles the government drew from the historical record that support disarming people today. And she focused on two principles. One, a law-abidingness principle, and another is a responsibility principle. And she said the responsibility principle is really the one that's at issue in this case. The other one deals with those who have criminal convictions. And here, Mr. Rahimi had no criminal convictions at the time of the underlying order. And she said, "The history shows that the government has the authority to disarm individuals who are more dangerous than an ordinary citizen with access to firearms."

[00:02:50] Jacob Charles: And she listed a couple of historical regulations from which the government drew that principle and said that now the determination about dangerousness is made not by the judgments of what the founding generation would've understood to be a dangerous person, but once we extract the principle of dangerousness, we bring in our modern conceptions and our modern evidence about who is in fact the dangerous person. And because Mr. Rahimi, or someone in his situation, who was found by a court could pose a credible threat to an intimate partner, that satisfies the dangerousness principle, and thus the Fifth Circuit was wrong to conclude otherwise.

[00:03:28] Jeffrey Rosen: Thank you so much for summing up the argument so very clearly, and you've helped us understand what General Prelogar meant by responsibility. And Justice Kavanaugh clarified that as well. He said, "When you say government can prohibit possession by those who are not responsible, by that you mean those who are dangerous. Is that correct?" And she said, "Yes." Clark Neily, tell us why the Fifth Circuit struck down the statute at issue in this case and why you think it was right to have done so.

[00:03:57] Clark Neily: Yeah. So the Fifth Circuit said that, under the Bruen test, the government has to identify a sufficiently analogous historical regulation. In other words, one that is sufficiently similar to the laws that is being challenged today. You have to go back to 1791 and find some sort of a regulation that is sufficiently analogous. And the Fifth Circuit required a fairly close level of similarity. Because the way they read Bruen is if there was a problem that they were aware of at the founding, and that problem persists today, and of course, that problem is domestic violence, then the analogy has to be pretty tight. And they were certainly aware of domestic violence at the founding. I'm sure we will discuss whether they were sort of sufficiently concerned about it, but they were aware of it. It was something that they addressed.

[00:04:47] Clark Neily: And so the Fifth Circuit said that the analogous regulation from 1791 is going to need to be quite similar. They looked at the history and did not find what they determined to be a sufficiently similar regulation. Now, they noted that the government pointed to a history of disarming people who had been shown to be dangerous, but what the Fifth Circuit says, well yes, but the way they did it back then is a person would have been criminally convicted. So there was a charge of some dangerous crime, the person was convicted. So we have a high degree of certainty that they actually did the thing, and they're a genuinely bad and dangerous person.

[00:05:23] Clark Neily: This law, the law that was at issue in Rahimi doesn't require a criminal conviction. It can, and is, triggered by a civil proceeding that lacks much of the due process of a criminal proceeding. And therefore the analogous law or the analogous historical tradition that the government is depending on is just not sufficiently similar to sustain the modern law that dispossesses people upon the issuance of a civil domestic violence restraining order. And that was the Fifth Circuit's rationale.

[00:05:56] Jeffrey Rosen: Thanks very much for helping us understand that dispute about what kind of analogous level of dangerousness was required. Jacob Charles, Justice Kagan asked General Prelogar, "There seems to be a fair bit of division and confusion about what Bruen means and what it requires in the lower courts." I plugged your wonderful articles in the intro because you've really written a series of pieces on the confusion that Bruen has provoked in the lower courts. Tell us what the most important elements of that confusion are and how that was relevant in the oral argument.

[00:06:36] Jacob Charles: Yeah. That question was music to my ears because I also share Justice Kagan's view that there has been a lot of chaos in the lower courts when they're trying to figure out just how to apply Bruen's test. And I think one of the surprising things about oral argument is there didn't seem to be much pushback on the notion that lower courts are struggling with applying Bruen's method, and that the court is going to have to provide more guidance in this particular case. So some of the things that I looked at in one of the articles that you mentioned is the ways in which the court in Bruen under… gave not enough guidance on a couple of key questions in the interpretive endeavor.

[00:07:20] Jacob Charles: So Bruen said that you have to find if the conduct is protected by the plain text of the Constitution, then the government bears the burden of producing historical analogs that show that the law is consistent with tradition. But it didn't give kind of any guidance at all about how to do the plain text inquiry to decipher whether or not people or arms or particular places are within the scope of the Second Amendment at that plain text prong. And it gave even less guidance about how to perform the traditional inquiry into history and tradition and to do the analogical reasoning.

[00:07:56] Jacob Charles: So Bruen didn't say things like how long a law had to last in order to count as a relevant analog. It didn't even say how many laws one would need to find in order to constitute tradition. And what we saw in the lower courts is a disagreement along all of these metrics. The Fifth Circuit in this case, in fact, dismissed a couple of laws because they said, “well, the legislature later changed those laws.” And in fact, one of the laws that it cited was changed 50 years after the Second Amendment was ratified. And yet that seemed to be a relevant factor for the Fifth Circuit to say, "Well, that just goes out of the calculus. Now that law doesn't count."

[00:08:33] Jacob Charles: Some other lower courts have said, "All right, three laws constitute a tradition, but there's fewer than three laws. That's not enough." Some have instead looked to the population that particular laws govern and said, if it only governed, say, 12% or 15% of the population, that's not enough to constitute tradition. It would need to be something closer to 20

or more percent. And I think that kind of struggle with what it means to define tradition has really been a key component of a lot of the cases.

[00:09:02] Jacob Charles: And that doesn't even get to the question of one, there is a tradition. There's this further question of is the law today analogous to that tradition? And here, I think we see courts, even when they agree on the underlying question of what are the historical laws that we're looking at, are disagreeing on just basic first principles of looking at a law or looking at a tradition and saying, is this... does this seem relevant enough to be analogous or not? And Bruen doesn't really give, other than two small metrics, guidance on how courts are supposed to do that analogical inquiry.

[00:09:36] Jeffrey Rosen: Clark, what was the defender of the Fifth Circuit's decision's response to those points about how long does the law have to last and how do you decide what law is analogous to a tradition?

[00:09:52] Clark Neily: There really wasn't a great deal of discussion about that during the argument, I think in large measure, because the... it became clear early on in the argument that a majority, and perhaps even all of the justices, were prepared to embrace the idea that if the government showed a general policy of disarming - and let's put quotes around it just because we're going to have to explain what this means later – "dangerous people" – then we didn't really need to get into questions of…sort of granular questions of, well, what exactly did the laws look like and how many states had those laws? And how long were you out there on those books?

[00:10:32] Clark Neily: The real question came down to, was there a historic tradition of disarming dangerous people? And there really wasn't any serious dispute about that. In other words, Rahimi's counsel didn't sort of push back and say, "No, it was no matter how dangerous you were, you still got to own a firearm at the time of the founding." And from that point on, really the discussion focused on the question of whether Mr. Rahimi himself could fairly be characterized as a dangerous person, and whether the process by which he was characterized as a dangerous person and therefore subject to a domestic violence restraining order was sufficient.

[00:11:11] Clark Neily: And it became, I think, equally clear during the argument that a majority, and perhaps even all of the justices, were satisfied that A, he is a genuinely dangerous person. And B, there was a sufficient amount of due process in making that determination. And that's really the only questions that I would say that the justices really had for his lawyer.

[00:11:32] Jeffrey Rosen: Yes. And at one point, Chief Justice Roberts asked Mr. Wright if he had any doubt that his client was dangerous.

[00:11:39] Roberts: You don't have any doubt that your client's a dangerous person, do you?

[00:11:42] Wright: Your Honor, I would want to know what dangerous person means at the moment.

[00:11:46] Roberts: Well, I mean, someone who's shooting at people, that's a good start.

[00:11:51] Wright: So, that's fair. I'll say-

[00:11:55] Jeffrey Rosen: Jacob Charles, if the court embraces the principle that Clark mentioned, if there's a general policy of disarming dangerous people and that counts as a history of tradition, would that solve many of the problems that you identified with Bruen that has confused lower courts or not?

[00:12:14] Jacob Charles: I think it would go some way towards resolving a few of the open issues. So, there are these kind of cases that are the class of persons cases. So when we think about firearms regulation, we generally think of them in different buckets. There are the who regulations that regulate who can have weapons. There are the what regulations that regulate what weapons you can have. And there are the where regulations that regulate where you can have weapons. The dangerousness principle would apply to the who regulations. And so, it could provide guidance in a lot of different future cases involving other classes of people that federal or state law prohibits from possessing firearms. But I don't think it would go all the way toward resolving a lot of what lower courts are stumbling over. And you mentioned Justice Kagan's question to the Solicitor General about how could the court provide greater guidance on Bruen's methodology.

[00:13:06] Jacob Charles: And I think Solicitor General Prelogar gave a couple of ways in which the court could do that, extend beyond just these class of persons cases and just beyond the dangerousness principle. So just briefly, she talked about the ways in which the court should clarify that we're not only looking to enacted law in the past, but we're looking to other sources of historical evidence that bear on original meaning. That court should be using a sufficiently high level of generality when they're looking to the history and not simply comparing each individual law one-by-one to the modern law.

[00:13:40] Jacob Charles: And then the court, she said, "should underscore the absence of historical evidence." So the lack of regulations at some time in the past does not, by itself, imply the lack of authority at the founding era to enact these regulations, and that there needed to be more evidence if you saw an absence of historical evidence to suggest that anyone at the time thought it would've been beyond the power of the legislature to act.

[00:14:06] Jeffrey Rosen: Thanks for identifying those three principles. Clark, if the court adopts those principles, namely look not only to enacted law but other sources of law, look at the tradition of the high level of generality and don't conclude that the absence of regulations suggests prohibition. Would you be okay with that or not?

[00:14:27] Clark Neily: Yeah, I think so. Unfortunately, I think what we're doing to some extent is what the justices did, which is acting like the proverbial man who loses his keys at night, and he looks for them under the streetlight because that's where the light is. There's a saying that hard cases make bad law, but I think sometimes easy cases can make bad law as well.

[00:14:44] Clark Neily: Part of the problem, I think, in Rahimi is that it's an easy case in the sense that he really genuinely seems to be a bad guy, and not the kind of person that I think anybody would think should be able to have firearms. The problem, I think, with the law at issue here is that it's not at all clear what the trigger is that would enable, or that would result in somebody losing their right to own a gun, losing their fundamental right of self-defense.

[00:15:14] Clark Neily: And as Rahimi cited in his brief, there was a case from 2011 in Texas, for example, where a family domestic violence restraining order was issued because the ex-husband threw himself across the hood of the car as the wife was trying to drive away. And there's also a provision in Texas law that says that you commit family violence if you use drugs in the presence of a child resulting in a mental, physical, or emotional injury to a child.

[00:15:48] Clark Neily: This is a rather open-ended standard. And so, while it is, I think, very easy to say that somebody who commits a serious act of physical violence towards a domestic partner can and should be disarmed, what is the limiting principle, if any. Is allowed argument a sufficient basis to disarm somebody you know, a histrionic performance like throwing yourself across the hood of the car?

[00:16:11] Clark Neily: I think those are where the harder questions lie. And they, by and large, didn't arise during the oral argument in Rahimi's case, because again, he just seems like a genuinely bad and dangerous person. And so the court, I think, really took the easy way out and said, "Well, whatever might be the result in these other difficult cases, this is an easy case." And so we really just didn't have a lot of discussion of these more nuanced questions of what are the limiting principles here. And when is it constitutionally legitimate and not legitimate to have this dispossession, this automatic dispossession, trigger in federal law.

[00:16:48] Jeffrey Rosen: Jacob Charles, what did some of the justices think about that question of a limiting principle? Justice Alito and Justice Thomas did focus on the question of due process and what kind of finding was necessary to determine dangerousness? How might they approach the question?

[00:17:06] Jacob Charles: Right. So there was some discussion during oral argument about kind of the stretching the boundaries of the principal here and what kind of underlying proceedings would be necessary. And I think Clark's brief in the case, and some of the justices' questions, get at this distinction between what would the Second Amendment require, what does the Second Amendment require, and are there separate obligations imposed by the due process clause? You might think that, even if some kind of disarmament will be permissible under the Second Amendment, that could still be a due process violation if maybe the person wasn't represented and the court decides that representation is necessary in these types of proceedings. For the most part, I think I was sort of surprised that most of the justices seemed content to say, like Clark just mentioned, "we'll address those questions when we get there."

[00:17:54] Jacob Charles: In this case, we don't have…there was no contest he agreed to this order that found that he had committed family violence and that he was a credible threat to an intimate partner. And I think some of the questions that gave a few of the justices pause, Justice

Alito, Justice Thomas. Justice Gorsuch asked about if there's potential duress defenses to issues. That the Solicitor General said, "That's not this case" and mentioned a couple of times that Rahimi himself didn't raise a due process argument in this case.

[00:18:29] Jacob Charles: She did seem, I think, to me, a little surprising, again, resistant to the notion that there could be as-applied challenges. This is a facial challenge. And some of the justices seem to suggest, well, if those issues arise, we'll address them in an as-applied basis. And she seemed to suggest that the statute was categorically constitutional as a whole and resisted the notion that these as-applied challenges would be viable. I think the court is leaning in the direction that if there are going to be concerns in particular cases, they'll address those on a case-by-case as-applied basis. And it wouldn't be surprising if some of the justices agree with Clark's view that there needs to be more procedural safeguards.

[00:19:11] Jeffrey Rosen: Clark, share with our audience what procedural safeguards you think there should be. You made a due process argument in your brief. What is it and why should the justices adopt it?

[00:19:23] Clark Neily: Yeah, thanks. So, just to illustrate, imagine that the law at issue in this case said that anyone who has been accused of domestic violence on a social media platform - in other words, the accusation has been made on social media - can no longer own a gun. That is quite obviously an insufficient amount of process because anybody can say anything on social media. So that's a really easy case. And of course, that isn't the law at issue here. But the question is, does the law at issue here ensure a sufficient amount of process? And the way this federal law works, it says that when a state court issues a domestic violence restraining order against you, you are automatically at that point forbidden from owning a gun under federal law, and it's a serious crime for you to do so. So we need to take a look at the process by which state courts issue these domestic violence restraining orders.

[00:20:13] Clark Neily: And there was a fair amount of discussion of this, particularly in the amicus brief in the Rahimi case. And what emerges from this discussion is that these procedures in state courts that, again, trigger this federal dispossession requirement, are all over the map in terms of how rigorous they are. And there appear to be some states where they take a really serious look. They make sure that the allegations are well supported, that the person in question really did engage in some violent act and, kind of belt and suspenders.

[00:20:43] Clark Neily: And then at the other end of the spectrum, there are allegations, and I personally think credible allegations, that are not only made in the amicus briefs, but by a tremendous number of actual family law practitioners that I've interacted with on Twitter and elsewhere who say, "Look, there are some states where they just hand out a domestic violence restraining order, like, you can get it from a vending machine. They don't ask any questions. They don't do any serious inquiry."

[00:21:06] Clark Neily: And as Justice Alito pointed out, or at least raised the question of, there are some judges that feel so much pressure to ensure that, sort of, neither spouse hurts the other spouse, and that there's no favoritism going on. That they just grant a domestic violence

restraining order to both partners regardless of what allegations have been made, regardless of what facts have been proven. And as Jim Ho, Judge Jim Ho of the Fifth Circuit, points out in his concurring opinion in the lower court decision, he says there's even cases where victims of domestic violence could be disarmed because the abuser has cynically manipulated the legal system, gone out and gotten a bogus domestic violence restraining order for the specific purpose of ensuring that the victim is then disarmed and easier to abuse.

[00:21:52] Clark Neily: Now, as I said, Justice Alito raised these questions with the Solicitor General, and her response was just an unequivocal, "No, I don't believe that any of that happens." And then she hedged a little bit and said, "Well, I don't think that accurately describes sort of what's happening day in and day out in the lower courts." And I think that this perhaps suggests why she was so cagey on this question of as-applied challenges being raised later, because I think she probably understands that this federal law has massive problems when it comes to procedural due process. And in some proceedings in the state courts, there's plenty of process. But it is equally clear that in some of these state court domestic violence proceedings, there's barely any process. And I think the Solicitor General would almost certainly prefer that that issue not come back up. And it is going to come back up for sure.

[00:22:42] Jeffrey Rosen: Well, I hear both of you saying that the courts seem to be converging both around a dangerousness standard and also will examine those due process questions in future cases. Jacob Charles, one of your great recent pieces was on sordid sources in Second Amendment litigation. That was 2023. And you talk about the dilemma that Bruen creates in the fact that Second Amendment history is littered with facially racist, misogynistic, homophobic, and xenophobic laws. And it's tough to know what to make of them. Tell us about that dilemma and how it came up in the oral arguments.

[00:23:23] Jacob Charles: Sure. So this also got a fair amount of airtime. And the dilemma that I discussed in the article is that we have in this country not only a history of general racism and misogyny, but also general racism with respect to gun laws in particular. And you often hear arguments that all gun laws are racist. I think that's a simplistic narrative. If you look at the historical record, there were lots of attempts to enact gun laws to actually protect racial minorities.

[00:23:55] Jacob Charles: But one of the things that the expressly racist laws can put advocates in a bind is because they are indisputably a part of our historical tradition. And Bruen simply says, look to historical tradition when you're trying to justify modern laws. And so an advocate who's trying to defend a law has this choice, when they're confronted with these sordid sources or these odious and hideous class-based laws, of, well, should we rely on them to support a modern regulation?

[00:24:26] Jacob Charles: And if we do rely on them, what do we take them to mean? Certainly it's not going to be the case that if we see a law in the 1830s disarming African Americans, that that means we would reenact something remotely like that today. But it does mean, or it might mean, that we can extract a principle about the scope of legislative power by the enactment of this law. And one principle you might get out of that legislative enactment is that the legislature

had authority to disarm individuals who they thought were dangerous. This is the principle that the Solicitor General drew out of the historical record, but in this case, the Solicitor General said, we are not relying on those types of laws for our dangerousness principle.

[00:25:10] Jacob Charles: We're relying on, instead, laws about loyalists or those who'd otherwise pose a risk of danger. Not these laws disarming Native Americans or African Americans or religious dissenters. Those are not the types of laws that we're relying on in this case. And I'm not quite sure whether the Solicitor General said those laws are entirely out of bounds for the government to rely on, or instead are maybe illustrative of a distinct principle.

[00:25:39] Jacob Charles: She said it a few times that they were…they kind of expressed the principle that the government could disarm people who are not part of the political community, which was maybe a separate principle that she was trying to draw out of the historical record. But I think that's the key question that advocates defending gun laws at least have to ask themselves is, should we rely on these laws at all? And if so, in what way? What historical principle might they announce?

[00:26:05] Jacob Charles: And I just want to say, I think there's really tragic effects of the government relying on these types of laws. They send a message to the groups that are targeted that maybe their government still doesn't see them as full members of the political community. So I think if the government is going to rely on those - one, it's forced to do so by Bruen's test. And it's not a thing that the government might do if it was defending gun laws in the first instance, free from this kind of test. But two, that they should be expressed in the disavowal of the racist or other kind of hideous intent behind these laws when they do extract some kind of principle from those historical records.

[00:26:48] Jeffrey Rosen: As you said, it did get a lot of airtime early on. Justice Thomas asked General Prelogar, "Why did you drop those classes of cases, slaves and Native Americans?" And as you say, she said, "We haven't invoked them here because we focused on the more directly relevant laws that apply to those who are indisputably among the people." Clark Neily, how should those who challenge gun regulations rely on those laws that single out black people and Native Americans and exclude them from protection?

[00:27:20] Clark Neily: Well, it's a very difficult question because, of course they were not wrong that armed slaves were dangerous. They were dangerous to an oppressive and tyrannical regime of enslavers. And perhaps the same thing could be said of Native Americans. Who were they dangerous to? They were dangerous to colonizers. And so they're not wrong in their factual characterization. But there is, of course, this incredibly unsavory overlay that it wasn't just the potential right to own a gun that these human beings were deprived of. It was every civil right. Free expression, the right to earn a living in the occupation of their choice, the right to move about freely.

[00:28:04] Clark Neily: And so there is no easy answer to this question. And I think I actually agree to some extent with Jake, that Bruen to some extent puts the government in the position of having to make a very difficult decision about whether to invoke these laws on the one hand,

because in fact, they sort of illustrate this principle of disarming populations that were perceived to be dangerous. But it's hard to sort of extrapolate from that or remove from that the overtly racist rationale that was the whole reason why those populations were dangerous.

[00:28:46] Clark Neily: And I would add one more thing. That we're not entirely done with this history either, because as a number of public defender organizations have pointed out, both in the Bruen case and most recently in the Rahimi case, we have a history in this country that remains to this day of disparate law enforcement, which is to say that certain laws are enforced more often against certain racial minorities. That is absolutely true with respect to drugs. Black people are more likely to be charged with drug offenses. And it is even more so with respect to gun offenses. The disparate enforcement of gun laws is even worse on a racial basis than the disparate enforcement of drug laws.

[00:29:22] Clark Neily: So that's not some kind of ancient history that we can just say, well, thank goodness we've gotten past that. We live with that policy. Or if it's not a policy, at least the application of these laws in a way that results in the wildly disparate enforcement of gun laws against racial minorities. And I think that has to be part of the dialogue as well.

[00:29:42] Jeffrey Rosen: Jacob Charles, the question of how to treat gun laws that treated some groups in a discriminatory way relates to the broader point that you make in your brief for the petitioner, along with other Second Amendment scholars. Namely that there's mismatch between the reasoning employed to determine what people, items, or conduct fall within the scope of the Second Amendment and the reasoning employed to determine whether the government regulation falls within the historical tradition. And you say that courts should reason at the same level of generality in identifying historical analogs for modern regulations as courts do in determining the scope of the right to bear arms.

[00:30:21] Jeffrey Rosen: It's a crucial point. Tell us how you think that that symmetry can be achieved, and is the difficulty in choosing levels of generality - both for the class of gun regulations and for the kind of historical analogs - does that show that originalism may not constrain discretion as much as some promised?

[00:30:42] Jacob Charles: Well, to answer your last question first, I think that is exactly right. That Bruen kind of announced its test as one that would be kind of more administrable than the test that it replaced. And I think we're seeing that, actually, it's granting judges enormous amounts of discretion when they look at the historical record, including when they select a level of generality. And so the problem that we were highlighting in the brief, which also came up in oral argument, is this question about the level of abstraction, the level of generality.

[00:31:12] Jacob Charles: And in response to Justice Kagan's query about clarifying Bruen, Solicitor General Prelogar said when the courts are doing this analogical reasoning and they're looking to history, they shouldn't be viewing isolated laws and comparing one by one that particular law to the challenged law and seeing if there are differences, and if those differences are enough to make them not analogous. Instead, they should be doing a more holistic inquiry into what principle emerges from that tradition. Now, I think she was correct when she

responded to Justice Gorsuch's follow-up to say, "Don't we then also look to a higher level of generality on the right side of the equation?" So if we're looking at the history of rights and regulation, shouldn't we do some kind of similar level of generality?

[00:32:04] Jacob Charles: I think that's exactly right, and that's what we argue for in our brief, that there's got to be this parity between the level of generality that courts are applying. And that hasn't been the case in a lot of decisions so far in the lower courts. That lower courts, when they strike down laws, are often looking at a very abstract level when they're defining the right. The right is a broad right to carry most weapons in public for self-defense, not a right to carry this particular weapon in this particular place. So they're defining the right side of the equation at a fairly broad level of abstraction.

[00:32:37] Jacob Charles: And yet when they turn to the right side of the equation, they're saying things like, oh, this law was only in effect for 10 or 15 years, or this law only applied to certain people when there was a direct complaint made to a peace officer, and not to categories of people altogether. So they're nitpicking on the regulation side, and they're looking at those laws at a very narrow level of abstraction. And yet at the right side of the equation, they're applying a really high level of abstraction.

[00:33:05] Jacob Charles: And I think the justices were, seemed to me, attuned to this problem. And kind of with the answer to Justice Gorsuch, maybe he's also on board to provide some guidance in the decision, that when they're doing the historical inquiry, the court should not be doing this mismatch in how they're viewing the history. But if they're going to view the right at a high level of abstraction, they should also look at the history at that same level.

[00:33:27] Jeffrey Rosen: Clark, this question of what a symmetrical level of abstraction is, is obviously difficult. The Fifth Circuit and its defenders argue that despite casting an incredibly broad net, the government has yet to find even a single American jurisdiction that adopted a similar ban while the founding generation walked the earth. The government cites no laws punishing members of the American political community for possessing firearms in their own homes based on dangerous irresponsibility, crime prevention, and so forth. Obviously, the question of whether there's a law banning dangerous possession in the home is a more specific statement of the principle than a ban on dangerousness. So how can courts, in a principled way, choose the right level of abstraction?

[00:34:14] Clark Neily: I'm not sure they can. Let's emphasize in a principled way. And I think Jake's exactly right, this is one of the real problems with Bruen. It... and among the things that it doesn't really tell us. And, this issue was emphasized, and I think quite properly so by Solicitor General. Do we suppose that simply because the founding generation did not regulate a particular act or punish a particular act at the time that that indicates a perspective on their part, that they had no constitutional authority? In other words, that it would represent a violation of somebody's right to regulate. Maybe it just didn't occur to them. Maybe they had other things on their mind. And let's be honest, the role of firearms is much different in people's lives at the time of the founding than they are now.

[00:34:59] Clark Neily: They're much more… they were much more akin to a smartphone back then. In other words, they were a very useful thing that you took with you if you were going more than 50 or 100 feet for your house for a whole bunch of reasons. That's really not, I would say that the role of firearms in modern life is much different. And, let's be honest, they were also willing to put up with a whole lot more back then than I think we would be today.

[00:35:21] Clark Neily: And there's only so much harm you can do if you've got a single shot musket inside dwelling that's made out of logs or rocks it doesn't really represent a threat to your neighbors. That would be just one difference, right? Now you're talking about somebody who owns a high-capacity pistol or a modern sporting rifle that shoots more powerful ammunition that can go through several walls. So I'm very skeptical of this idea that we can just go back in time and essentially see what they were doing then and just sort of import that outlook because we don't even really know what that outlook is. That's problem one. And then problem two, even if we did, there's a very powerful argument I think that could be made that circumstances are simply different now.

[00:36:02] Clark Neily: We have, to some extent, different values, and I'm not talking about different values in terms of the extent to which we respect constitutional rights, but all of the values that surround the exercise of constitutional rights. And the idea that we're sort of locked into a rigid rights framework that is defined by the snapshot that you can look and see in 1791 and then that just sets us in stone for all time is not a very appealing one. It's not a workable one, and I think, ultimately, it's not going to be a durable one.

[00:36:30] Clark Neily: So I think at least that part of Bruen is going to have to be substantially revised in order for this test to have any chance of working. And still, I'm not even sure it's going to be ultimately a workable test, even if that happens.

[00:36:43] Jeffrey Rosen: Jacob Charles, where did this text, history, and tradition argument come from? As we've discussed on a previous podcast, it had been used in cases like Glucksberg to identify which rights that weren't written down in the constitution might be protected by the due process clause, including perhaps a right to die. But in Bruen, the court seemed to use it for a whole new purpose, trying to identify the scope of a right that was explicitly protected under the Constitution. The Second Amendment. You've written a bunch of these great pieces on the text, history, and tradition test. Was it kind of taken out of context for Bruen for the first time and how might the court deal with it after oral argument?

[00:37:25] Jacob Charles: Right. So one of the interesting things when you go back and search for where this argument came from is you can…you trace it to a dissent by then-Judge Kavanaugh when he was on the DC Circuit, and it was a case called Heller II. And he dissented from the majority's application of intermediate scrutiny which many courts of appeals had adopted in the aftermath of Heller, as this is the method that we use for, say, First Amendment free speech cases. So we're going to use means-end scrutiny for Second Amendment cases too. And Justice Kavanaugh's reason for invoking this text, history, and tradition test was not that he thought this is what the Second Amendment demands based on its particular enactment history. Not that he thought this is the best constitutional interpretation methodology.

[00:38:19] Jacob Charles: His justification was solely that he read Heller to require this type of inquiry. And he read Heller to say any kind of means-end scrutiny, like intermediate or strict scrutiny, is completely off the table for the Second Amendment. And that methodology then, in the years after 2011, when Justice Kavanaugh first brought it up, began to crop up in other…in both litigation, on behalf of gun rights advocates, and then also in other dissents from decisions by conservative judges on the courts of appeals. It wasn't adopted by any court of appeals.

[00:38:59] Jacob Charles: All the courts of appeals that addressed the questions still said, "No, we think actually means-end scrutiny is consistent with Heller, and we think it treats the Second Amendment similarly to how we treat other rights." But in Bruen, the Supreme Court agreed with their now-colleague Justice Kavanaugh, that actually Heller did say you can't do a means-end scrutiny. Heller ruled that out by rejecting Justice Breyer in dissent there, his interest balancing test. And instead, it requires a search for history and tradition only.

[00:39:29] Jacob Charles: And I think you're right to point out that the way that Bruen requires this search for history and tradition is different than how the court often does it in its substantive due process cases where it's looking to history and tradition to define whether or not there is a protected right at issue. That's not the way that the Bruen Court said to use history and tradition. You're not looking back to see, was there a public understanding, say, that someone could carry a gun with no showing of need in 1791. That's not what it did in Bruen. That's not what it's demanding courts to do in future cases. Instead of looking for history and tradition to see the scope of what right might have been, you are looking for history and tradition to see what the scope of regulatory authority might have been.

[00:40:15] Jacob Charles: And so Bruen says, look and see if you see an analogous regulation, if you see something that's consistent with history, if the modern law today is consistent with that history and tradition, then it's okay. And if not, then it's not okay. And just one last point here on how that came up in oral argument in Rahimi is I think the Solicitor General did a fantastic job of telling the court what was wrong with Bruen by characterizing all of these criticisms as misreadings of Bruen. Instead of saying Bruen was underspecified and Bruen made this search for historical analog, she said, "No, that's a caricature of Bruen. Instead Bruen requires us to do…to search at this higher level of abstraction to look at all of the evidence, not just enacted law."

[00:41:03] Jacob Charles: I think it was a brilliant strategic move because the justices are not going to abandon Bruen one year after they issued it. But I do think it demonstrates that the way lower courts were interpreting Bruen, I think, is the way that Bruen was intended. But that the court can do a lot to change that without expressly saying we're disavowing Bruen.

[00:41:23] Jeffrey Rosen: That is so helpful. Thank you for helping me understand that Bruen did adopt this text, history, and tradition test, as you said, not to determine the scope of the right with the scope of the regulatory authority. Clark Neily, does that make any sense as a matter of originalist or textualist interpretation as came up in the oral argument? We don't do that in the First Amendment context. What would the justification be for looking to the history and tradition to determine, not the scope of the right, but the scope of regulatory authority?

[00:41:55] Clark Neily: Yeah, I do think it's problematic. I mean, I suppose you could try to argue that what we're looking here is essentially at a coin, and you've got two sides to the coin. And so if you identify the contours of the asserted right at the time, you then have also identified the contours of the extent of the regulatory power. Or you could flip that around and say, once you've identified the contours of the regulatory power by seeing how much of it was exercised, you now also know the shape of the right because the shape of the right exactly is the mirror image of the contours of the regulatory power.

[00:42:29] Clark Neily: I think the reasons that we've already discussed, and that Jake described very well earlier, that just doesn't work. It's not at all clear that that's sort of an accurate way of conceiving the relationship between regulatory power and a constitutional right. Nor is it reasonable to suppose that at any given time, the government is exercising the full measure of its regulatory power, right up to the limit of what a constitutional right permits. But that seems to be the underlying rationale here, and I think that is quite problematic.

[00:42:57] Clark Neily: Now I do think that the majority is… this is not…I don't think what's happening here is in bad faith, and I do think that the majority in the Bruen case felt that the lower courts had made a really kind of unforgivable, not even mistake, but display, of kind of bad faith in deliberately flaunting the court's guidance. Which admittedly was rather sparse in the wake of Heller. But in essentially applying a radically insufficient test for protecting gun rights in the wake of Heller and ignored a number of signals for the courts to ratchet that up.

[00:43:38] Clark Neily: And to some extent, the text, history, and tradition or the historical tradition test that is articulated in Bruen, and was sort of reaffirmed apparently during the Rahimi argument, appears to be a reaction to that and an effort to essentially say, "Look, if you guys can't apply our normal framework, which is sometimes referred to as tiered scrutiny, or a kind of a balancing test approach consistent with what we have told you repeatedly is the way to do it. Okay, we're going to try a different test and see if we can get you to be more faithful to our holding with this new framework."

[00:44:12] Clark Neily: I, again, I think it's deeply problematic for the reasons that we've discussed. And I think ultimately, I strongly agree with Jake that one way or another, you end up doing some kind of balancing test. Now you can tell a story to yourself that you're really not, and you're just being faithful to what you see in the history. But that's just belied by the fact that, even in the Bruen case, the court says the deciding court can pick what level of generality to engage in this analogical reasoning. And to me, that just opens the door to the kind of interest balancing that the majority disclaimed to some extent in Heller and fully disclaimed in Bruen. So I just don't know that we've made a lot of progress, to be honest.

[00:44:51] Jeffrey Rosen: Jacob Charles, if the court agrees that you should adopt a symmetrical level of abstraction for the regulation as for the scope of the right, would that solve the difficulty of the application that you note in your brief where, as you say, lower courts have disagreed about the status of assault weapons laws, and laws restricting possession of a firearm without a serial number, or convicted felon bans, or acquisition of new guns by people under indictment for crimes punishable by imprisonment and so forth. There's all that confusion that

you note in the lower courts. Would requiring a symmetrical level of abstraction solve that? Or does it just double the difficult discretionary choices that judges have to make in choosing the right level of generality?

[00:45:42] Jacob Charles: I think I have to agree with Clark that it's really hard to eradicate the inherent discretion in these types of cases. And in many ways, the Second Amendment is unique because there wasn't an enforceable federal right until 2008. It doesn't have this hundred-year history that the First Amendment has of building up through trial and error of what are the mechanisms that are going to work? What are the kind of outcomes that are going to be consistent with American norms and values? And so there's a host of questions that lower courts are now having to confront without having that kind of historical precedent to rely on. But I do think that if the court were to send clear signals about the level of generality, that would certainly help in many types of cases. And particularly cases like the domestic violence restraining order, where we're dealing with a societal problem that was just treated vastly differently in the 18th century than is treated today.

[00:46:45] Jacob Charles: And maybe in cases where there's weapons technology that is very different today than the weapons technology that existed in the 18th century. And I think one way you can illustrate that problem is to just think about the way... the levels of abstraction that you could look to history in whether you're going to uphold this particular federal law issue. So this federal law bars possession in the home of firearms for someone who's subject to a domestic violence restraining order. So you can say, "alright, we're going to look to history and see, did the government ever ban home possession of a gun by someone who is subject to this?" You'll never find that. So you can raise it up one level of generality. Okay, well, did the government disarm people who are subject to domestic violence restraining orders? Still not going to find that kind of history.

[00:47:31] Jacob Charles: Okay, go up another level of generality. Did the government disarm people who were considered dangerous after a judicial finding? There you're getting closer, right? But you might not have the same kind of restriction on home gun possession in the 18th century. So you could raise it up another level of generality. Did the government have authority to impose restrictions on gun ownership or use by those who after a judicial finding were found to be dangerous? And there you start to see some kind of historical analogies.

[00:48:02] Jacob Charles: And I think that's the kind of questions that courts are going to continue to confront. But if the Supreme Court were to send a clear message that there has to be this symmetrical look at both the rights and the regulation tradition, there is going to be less temptation, I think, and less opportunity for lower court judges to say, well we don't see home gun possession restricted based on a domestic violence finding. Therefore, this modern law is unconstitutional.

[00:48:26] Jeffrey Rosen: Clark, do you think that asking for symmetrical levels of abstraction would help solve some of this confusion or not?

[00:48:34] Clark Neily: Not really. I don't think this ultimately is a path forward. I think, ultimately, the challenge in these cases is that the government has not really treated the right to own a gun, or as we might describe it, the fundamental right of armed self-defense, is one that is entitled to any real regard or respect or protection. As Jake mentioned for, 200 years, essentially, the court said, "Look, this is pretty much a free-for-all, you do what you want to do here."

[00:49:05] Clark Neily: So we have this new situation where you've got a very challenging right in the sense that the more we protect this right the more we enable people, some of whom may be dangerous, to possess a deadly weapon. And that's no small thing, right? On the other hand, there are people who have used guns not only to save themselves from violence, but also to save others and prevent mass shootings. So the stakes are extraordinarily high in the setting.

[00:49:39] Clark Neily: And the idea that, instead of essentially trying to dial in the sort of competing risks and rights and interests that are very real and very weighty, that we would simply turn to history and say, well, whatever they were doing 200 years ago that was probably good enough for us now, I think is untenable. And so I hope that the path forward lies somewhere in between in the sense that I think the Supreme Court is correct to be frustrated with lower courts for giving short shrift to this right. Simply because we did so for the first 200 years, and the court has now made clear that's not supposed to happen anymore.

[00:50:19] Clark Neily: While at the same time recognizing that simply trying to go back through history, find an analogous case, get this…dial in this symmetry of rights versus regulation and just kind of hope that lands us in the right place is untenable because I. First of all, I don't know how to do it. It's clear the lower courts don't know how to do it, and I'm not even confident that if everybody did know how to do it, we'd end up in the right place, either from the standpoint of providing adequate protection for people's Second Amendment rights, or from the standpoint of ensuring that the protection and exercise of those rights don't become a menace to other people.

[00:51:02] Clark Neily: It's a very difficult and delicate question. And I think we're just using inapt tools still to try to answer it. And that's one of the reasons why I think the court has just got to update and refine the framework that it announced in Bruen. It's not working, it's not going to work, and it's going to need a major overhaul.

[00:51:21] Jeffrey Rosen: Jake, what would, in your view, a principled overhaul of Bruen look like? If the court were to abandon this text, history, and tradition detour as you've described it, and simply ask what the text means today, what approach do you think would make sense?

[00:51:39] Jacob Charles: Yeah, I just want to kind of follow up on what Clark said, and that's, I think there is a risk that Rahimi ends up solidifying Bruen as kind of the methodology. A lot of the briefs, most of the briefs, worked within the Bruen framework as opposed to calling for the court to overhaul or overrule Bruen. I think part of that, again, is kind of the nature of the current court, that there's probably not an appetite among five justices to completely abandon the Bruen framework. But I think it is a difficult framework to operate within.

[00:52:14] Jacob Charles: And by operating within it and the briefs and in the oral argument, there's a risk that it ends up becoming cemented as the way Second Amendment cases are decided. Justice Jackson was the only one at oral argument who seemed to say like "Is the problem with the Bruen test itself?" and the Solicitor General was like, "No, no, no. There's not a problem with the Bruen test. It's the mischaracterizations of the Bruen test. It's the inaccurate application of the Bruen test that lower courts are struggling with. And so this court should just clarify the Bruen test."

[00:52:46] Jacob Charles: I think if the court were to adopt the clarifications that I would call kind of revisions of the Bruen test that the Solicitor General advocated, that would go a long way toward helping resolve some of the some of the concerns in lower courts, especially not relying on the absence of enacted laws as the basis for striking down laws today. I think that's one of the most kinda indefensible parts of Bruen. At least the way I read Bruen, is to say that you have to find a historical law.

[00:53:16] Jacob Charles: So getting rid of that requirement would still keep the historical inquiry for those justices who think that's a more legitimate mode of constitutional inquiry. It would still require judges and advocates to look for what the record says about what kinds of things were understood to be within the scope of the government's regulatory authority in which how rights were understood and which kinds of things people could and couldn't do with their firearms. So that would be an improvement, I think, over Bruen, but I'm not quite sure the best all things considered constitutional test.

[00:53:52] Jacob Charles: I don't think the court is likely to go back to tiered scrutiny or intermediate or strict scrutiny in the near future. And then after that, you might have to just kind of develop your own method for Second Amendment claims, because there aren't a lot of constitutional rules that are trans-substantive in the same way that tiered scrutiny is trans-substantive in a number of different constitutional domains. So I'm not quite sure what the best way to replace it with, but I do think that the revisions the Solicitor General argued for would be an improvement over the current Bruen test.

[00:54:24] Jeffrey Rosen: Clark, you've talked about your due process test. Do you have a broader suggestion for a principled approach to the Second Amendment? Would you return to tiered scrutiny, or do you have another approach?

[00:54:35] Clark Neily: I would, and I think the due process concerns mostly arise in the specific context of the Rahimi case because of the unique way in which this federal law is triggered by something that another tribunal does. So you have a federal law that's triggered by a thing that happened in a state court. And as we discussed earlier there's just too much variation and an insufficient amount of protection there. And by the way, a question that I really wish had been asked, or in the oral argument yesterday would be, what if the significance of the issuance of a domestic violence restraining order was not just that you lose your guns, but you also lose your kids? So that a domestic violence restraining order prevents that parent from being around their kids anymore. Would the amount of process that's described in this federal law 922[g][8]

that was at issue in Rahimi, would that suffice to support termination or suspension of parental rights?

[00:55:29] Clark Neily: And I think anybody would look at this law and say, "Absolutely not." You get more process before the government prevents you from seeing your kids anymore. And essentially I think the subtext in Bruen was, well, okay, but guns are not as important as being able to see your kids. That's a value question. I'm not going to go further down that road, but I'm going to say that I think it points us back in the direction that answers your question, Jeff, which is that however we approach this question of how to assess the constitutionality of gun regulations, I think we should drop the idea that we can avoid courts essentially recognizing that there are trade-offs here.

[00:56:05] Clark Neily: That the more you protect somebody's right to own a gun, the more places and the more people who are going to be able to possess guns. That arguably increases risk to some extent. But it also has certain offsetting characteristics, like you've got more armed people in certain areas who might be able to stop a mass shooting, which is a thing that has happened not once, not twice, but many times. So I think we should just drop the fiction that courts are able, going to be able, to decide gun rights cases without making the kinds of value judgements that we've described that are not sufficiently illustrated or answered by consulting the history books.

[00:56:43] Clark Neily: And so whatever we go back to, and I think probably some form of tiered scrutiny is the right path because we're so familiar with it and because it seems to work pretty well in other areas with rights we care about, like the free exercise of religion or free speech. I just don't see any strong reason to depart from that sort of constitutional comfort zone that both courts and litigants and constitutional lawyers like us have.

[00:57:08] Clark Neily: And I think we'd be likely to get better and more faithful results, not just better in terms of a policy, but more faithful to the actual underlying values of the Second Amendment and the right to own to keep and bear arms. So that's my preferred path forward. I agree with Jake. I don't think we're going back, so I think we're just going to have to sort of cobble something together that's got most of the elements of Bruen while parsing out as many of the flaws as we can. And that's going to be a somewhat painstaking process, and it's not going to happen over a period of a couple of more years. It's going to be a couple of more decades at least, I think.

[00:57:41] Jeffrey Rosen: Thank you so much. Last question in this great discussion. And just briefly, Jacob Charles, if the court does uphold this law as widely expected by a broad margin, what important Second Amendment questions are likely to remain open after Rahimi comes down?

[00:58:01] Jacob Charles: A lot of them actually. So, I think there are two pinning petitions in other class of persons cases. There's a case called Range versus Attorney General, which deals with the felon prohibitor, which is much more often invoked and prosecuted than the provision that's at issue in this case. And the Third Circuit said that's invalid in at least one application. So

that case is coming down and Rahimi could say something that helps to resolve that case, and so they might just remand that case with the guidance from Rahimi where they might take that case separately.

[00:58:33] Jacob Charles: There's also a similar, another class of person case that's about the federal law that prohibits unlawful drug users from possessing firearms. That case could also be partially decided by whatever the Supreme Court says about the Rahimi case. But there are other cases that I think are not going to be so easily resolved just by the guidance the court gives in Rahimi. The Seventh Circuit just decided an assault weapons ban case and upheld Illinois assault weapons ban under the Second Amendment. I think that case is coming to the Supreme Court very soon.

[00:59:08] Jacob Charles: And I suspect that we're going to have other circuits disagree on the question of whether Bruen, the Bruen methodology, permits assault weapon bans. So when we see those splits, the court's going to have to step in. And there are lots of questions about what kinds of places the government can designate as sensitive places that can be essentially gun-free zones. Lots of states enacted new sensitive place restrictions in the aftermath of Bruen, and those have been challenged all over the country.

[00:59:35] Jacob Charles: Those I think are going to come to the court soon and test the ability of, and especially this level of abstraction question - do you have to find historical regulations on guns in zoos in order to uphold a no guns in zoos policy today? Or is there a broader principle that supports those kind of laws? So those kind of cases, the sensitive place cases, the assault weapon cases, and then more of these class of person cases, I think are the ones that are coming down that are coming to the court next.

[01:00:03] Jeffrey Rosen: Thank you so much for that. Clark Neily, last word in this great discussion is to you. In addition to the categories that Jake just mentioned, what big cases do you think will remain open after Rahimi?

[01:00:17] Clark Neily: Yeah, I think by and large, we're looking at two classes of cases. We're looking at line drawing questions involving things like what arms are protected by the Second Amendment, and that includes a variety of different kinds of guns, high-capacity magazines but it also includes things that are not guns. There are cases involving knives, pepper spray, other personal defense devices. We're also going to be litigating over-sensitive places, as Jake mentioned. What is the significance of that term? Where can a person who has a lawful permit to carry take that gun, where can they not take the gun?

[01:00:52] Clark Neily: I think again, probably the most interesting cases in the near term are going to be what Jake calls these classes of persons cases, right? This idea that anybody who has been convicted of a felony, even a rinky-dink felony like state welfare fraud, which is the issue in Range. This guy basically filled out some forms with some incorrect information in the mid 1990s, and he can never own a gun again. That I think is a very difficult sort of case to make under any framework that you might choose to apply.

[01:01:20] Clark Neily: And of course, this Daniels case out of the Fifth Circuit that says that someone who is an unlawful user of controlled substances, which by the way would include marijuana. And there are millions of... you have regular users of marijuana in this country, and the idea that every single one of them is so irresponsible and so dangerous - to use the terms that the Solicitor General prefers - to the point that they can't exercise their Second Amendment right, I think is an incredible stretch again, under any framework that you might choose to apply. By the way, they consumed a lot of [laughs] cannabis back in the founding era. And so I think those are the areas in which we are going to have some very, very interesting cases.

[01:01:58] Clark Neily: And I think, frankly, more interesting than the Rahimi case, because at the end of the day, basically everybody agreed, look, this guy's a thug and thugs don't get to own guns open and shut. But the cases that Jake and I have discussed and that we've covered in the last few minutes, these are not going to be open and shut cases. And if the Supreme Court does as conscientious a job of approaching these cases, as the lower courts have done, then I think we're in for some very interesting back and forth and much, much more challenging and more interesting than what anything that happened in Rahimi in my judgment.

[01:02:28] Jeffrey Rosen: Thank you so much, Jake Charles and Clark Neily for a substantive, illuminating, and really constructive discussion of Rahimi, perhaps the most important Second Amendment case of the year. Jake, Clark, thank you so much for joining.

[01:02:44] Jacob Charles: Thank you.

[01:02:45] Clark Neily: Pleasure.

[01:02:48] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Bill Pollock, and Samson Mostashari. It was engineered by Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith, and Yara Daraiseh. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional debate. Sign up for the newsletter at constitutioncenter.org/connect. And always remember, We the People friends, that the National Constitution Center is a private nonprofit. We rely on the generosity, the passion, the engagement of people from across the country who are inspired by our non-partisan mission of constitutional education and debate. Support the great mission by becoming a member at constitutioncenter.org/membership, or give a donation of any amount to support the work, including the podcast, at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.