



What the Supreme Court's Opinion in *NYSRPA v. Bruen* Means for the Second Amendment

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[00:00:00] Jeffrey Rosen: Hello, We The People friends and happy Friday. Jeffrey Rosen here. We were in the middle of recording this week's podcast about the history of gay rights when the Supreme Court opinions in the Second Amendment and abortion cases came down. These are important cases and we want you to hear from thoughtful scholars on all sides of the issue. But it's also Pride Month and we have a fascinating conversation on the history of gay rights ready for you as well.

[00:00:26] So, we're bringing you two episodes today. They'll both be in the feed. Download them both, enjoy your weekend. And we're also working on an episode about the Dobbs case, which we'll publish soon. There are three episodes on Dobbs in the catalog already, so check those out while you wait and let's learn together. Thank you for listening and enjoy the show.

[00:00:52] 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.

[00:01:10] The Supreme Court has just released its opinion in *New York State Rifle and Pistol Association vs. Bruen*. It's a landmark decision about Second Amendment rights outside the home.

[00:01:22] Joining us for a deep dive into the decision are two of American's leading experts on the Second Amendment and two great friends of We the People. Clark Neily is Senior Vice President for Legal Studies at the Cato Institute. He served as co-counsel in *District of Columbia versus Heller*, that was an important Second Amendment case. And he's also the author of *Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government*. Clark, it is great to have you back on We The People.

[00:01:51] Clark Neily: It's wonderful to be with you, Jeff. Thank you.

[00:01:53] Jeffrey Rosen: And Adam Winkler is the Connell Professor of Law at UCLA Law School. He's the author of *Gunfight: The Battle Over the Right to Bear Arms in America*. And he's one of the Second Amendment scholars on the NCC's interactive constitution. Adam, it's great to have you back on the show.

[00:02:09] Adam Winkler: Thanks so much for having me, Jeff.

[00:02:11] Jeffrey Rosen: Clark, what did the Court hold in Bruen? And what's the significance of the decision?

[00:02:17] Clark Neily: I think there were two distinct holdings in Bruen and the first answered the question of whether the Second Amendment applies outside the home. In other words, is there a constitutional right to carry a gun outside of the home? The answer to that question, according to yesterday's decision, is yes. The second question is whether in licensing or, or requiring a permit to exercise that right, which the Sixth Justice Majority made clear, is permissible, may a state require someone to show a particular need to carry a gun. That's what the statute in New York that was under challenge, similar licensing regime in California and Massachusetts.

[00:02:54] And the Court said, no. The state may not require people to show a special need. They may have objective requirements, like you know, not having a felony conviction perhaps some demonstration of aptitude with using a firearm, but you can't require somebody who will show a special need. So, those are the two holdings in yesterday's decision.

[00:03:13] Jeffrey Rosen: Thank you so much for that. Adam, what would you say the Court held and the significance of the decision is?

[00:03:20] Adam Winkler: Well, I agree with Clark's assessment that those are two of the key important holdings of NYSRPA versus Bruen. But I think there's also an important third holding that we shouldn't overlook, which is that the Court established a new test going forward for Second Amendment cases. And the Court said rejecting the, the, the test that had been applied by the lower Courts. Uh, virtually, all the circuits had come to a consensus that a two-pronged intermediate scrutiny type test applied to Second Amendment challenges.

[00:03:52] But the Court rejected that test and established a new one. Based on history and tradition, the Court said that only those gun laws that are consistent with the history and tradition of gun regulation in America are constitutionally permissible. And I think that's a very important part of this holding, because that's what courts are going to look to in the future when deciding a wide range of challenges to gun safety laws under the Second Amendment.

[00:04:20] Jeffrey Rosen: Thank you so much for that. Well, let's really dig into that aspect of the Court's holding, so We The People listeners can understand the arguments on both sides. Clark, as Adam says the Court declined to adopt the two-part approach that Courts of Appeals have coalesced around, which combined history with, with what the Court called means and scrutiny or balancing interests on both sides. And instead adopted an approach rooted in the history. Uh, tell us what the history test is whether it represents a change from existing law and whether you think it's a good idea.

[00:04:57] Adam Winkler: Tall order, but I'll do my best. Um, so as best I you can make out the history tests essentially says that this is really a one-step inquiry and the question is is the particular activity that is being regulated, something that you would have been able to do either at the founding era or perhaps when the 14th Amendment was ratified in 1868. Um, the

Court does not sort of choose between those potential timeframes. But we look back to some point in history and ask whether the people were able to do the thing that is now being regulated.

[00:05:28] If the answer is yes, then according to Justice Thomas's majority opinion, presumptively, there is a constitutional right to do that thing today. Now, a big question is how much work is presumptive going to be doing in this context? In other words, the very use of that word suggests that the government may still be able to regulate in this area if it can overcome that presumption. But how it might go about doing that is not so clear.

[00:05:52] Um, so is this a change in the law? Uh, I think it is. I mean, I... uh, we didn't really have a clear framework for how to assess the constitutionality of gun regulations in the wake of Heller and McDonald. So, to some extent Courts were sort of making it up as they went. Um, this certainly represents a change from the way that most Courts were going about doing the Second Amendment analysis. So, yes, I think it's a change. Is it a good idea? I wouldn't presume to say. I think we have to wait and see how this shakes out. There'll be a lot of questions that have to be answered going forward.

[00:06:21] I personally think that the lower Courts were most of them acting in a quite disingenuous way by applying, in fact, the lowest standard of review, which is the rational basis test, while pretending to apply a heightened form of scrutiny, intermediate scrutiny but not being honest about the fact that they really were, in most cases, applying rational basis review. I think those days are over and I think that is good. Whether this new framework, this new approach will be superior I think we can only find out as the cases continue to come down. In other words, we, we can't say for now. I th- I don't think it's we can predict. We have to wait and see.

[00:06:56] **Jeffrey Rosen:** Adam, the dissent occurs, accuses the Majority of essentially cherry-picking history. And the Majority goes through five different historical periods from the medieval and early modern period in England to the American colonies in the Early Republic to Antebellum America to reconstruction to the late 19th, early 20th century. And the dissent says it's just choosing among different eras in order to reach its preferred result. Tell us about the dissent's criticism of the application of the history methodology and whether or not you agree with it?

[00:07:26] **Adam Winkler:** Well, I think that the Court does an extensive historical analysis. Um, but there are ways in which I think any historian would be very disappointed with the Court's historical analysis. And maybe that's not the standard to which we should hold justices but nonetheless, if you're going to say that, well, we're basing this on history and tradition, it's probably good to get the history and tradition right.

[00:07:49] What the Court says is, it looks at a whole bunch of different areas of law and it finds in almost all of these areas of law, some evidence that there is a government power to heavily restrict concealed carry. But it dismisses all of these examples one by one, um rather than looking at them in total as a tradition. So, the Court looks at old English common law and says, "Well, but those old English common law even if it supports government's ability to ban a concealed carry, um tho- that's too old. It doesn't really tell us much about the meaning of the Second Amendment.

[00:08:27] Uh, and then the Court looks at, it looks at actually some colonial examples in the colonial period of states that prohibited all concealed carry. Uh, and the Court says, "Well we, we have difficulty believing that that would apply in, in ordinary people carrying firearms. There's no evidence to support the majority's supposition there but nonetheless, they reject that history. Then they go to the mid-1800s, point out that there were some states that barred a concealed carry entirely. And the Courts says, "Well, but those are exceptions. Those are outliers."

[00:09:02] And then when we get to the late 1800s and we have a period of time where almost every state adopts a May Issue permitting system. By the 1940s, almost every state in the Union had that. Not everyone, but almost everyone had it. And the Court rejects all of those laws as being completely uninformative as to the nature of our history and tradition. In each of these instances, there's a little bit of gaslighting going on, in that the Court says, "Well, if we take, you know, looking at this one example in isolation that doesn't support the tradition." But then it goes down to the next period of history, and it says, "Well, we look at that one example and bear example that doesn't support a history and tradition."

[00:09:42] I think actually what the majority's opinion really suggests is that there is a history and tradition of very significant restrictions on concealed carry. Not every state used them. Not every state did it. But we have a long tradition of states doing it when they thought it was necessary and appropriate. Um, so I think that this case will be one that, that people study for years to come about in some ways, how not to do history and tradition in um a rigorous and a consistent way.

[00:10:13] **Jeffrey Rosen:** Clark, Justice Barrett, in her concurring opinion, notes that the Court doesn't conclusively determine the manner in which post ratification practice is relevant for the original meaning of the Constitution. And also talks about the ongoing scholarly debate about whether you rely primarily on what the framers thought when the 14th Amendment was ratified in 1868 or the Bill of Rights was ratified in 1791. And doesn't say how intervening history and subsequent history should matter.

[00:10:43] And as a matter of first principles, what's your understanding of what the, the Court is saying? Do we look at 1791, 1868 and, and what's the relevance if any of the, all that medieval history and also the history in between and after?

[00:11:00] **Clark Neily:** Yeah, so this is a fascinating question, and, and basically, if you're going to attempt to do originalism, which seems to be, you know, sort of the consensus, um analytical approach on the Court these days, you have to ask original from when, right? And, and so the, the, the sort of leading response to that is, well, look at the way that particular terminology was understood at the time that the relevant language was added to the Constitution. Um, that would be 1791 for the Second Amendment and 1868 for the 14th Amendment.

[00:11:34] Now, I tend to agree with Professor Akhil Amar, with whom I've actually had an opportunity to discuss this very case, that in this case because this is a state regulation. This is New York regulating the carrying of firearms, that the most relevant timeframe is, in fact, when the 14th Amendment was ratified, because up until that point the, the Bill of Rights did not apply against the states. And so, this 14th Amendment is the one that protects if your

right to carry a gun is protected, it's protected by the 14th Amendment, not the Second Amendment.

[00:12:06] So, I would look to the history at 1868, but in this case, I don't think it really matters. And I'm going to disagree slightly and push back against my friend, Adam Winkler, on this. I, I... you can certainly quibble with the way that Justice Thomas did his historical analysis. But I think when you boil it down to the really relevant question, and that is whether Americans both in 1791 and 1868, would have had a general right to go out and carry a gun wherever they want. And that, that's not a right.

[00:12:32] But let's say, was it common for Americans to be able to go out and take a gun with them, kind of, you know, almost wherever they went? The answer is, I think, emphatically, yes. Were there are some regulations, some restrictions? Yeah, a little bit. Some of them were quite unsavory, because they only applied, for example, against slaves or freedmen. Um, but in general, if you were just sort of an ordinary average American citizen, would you have been able to take a gun out of your house and take it with you pretty much wherever you wanted to go? I think it's quite clear during both of those time periods, 1791 and 1868, that the answer is yes.

[00:13:03] And I really don't think that is subject to real challenge or dispute. And if that's relevant, which I think it is and obviously, the majority justices think that it is then I think that history is sound as far as that goes. And also that, that you don't need to choose again between those two time periods in this case. Um, but I think eventually, they will need to choose and it could be quite a momentous decision, whether they look at the history for 1791 or they look at history from 1868.

[00:13:28] **Jeffrey Rosen:** Adam, Clark just said that if the question is, was it common for Americans to take a gun with them in 1791, 1868, generally, the answer is yes. Do you agree or disagree? And, and what's the originalist case against Clark's claim?

[00:13:41] **Adam Winkler:** Well, I should note that just in the next day after and I served or the Court handed down the decision in Dobbs where the Court makes clear that simply because women had an ability to end pregnancy prior to quickening, that does not mean it was an affirmative right. Simply the fact that you had the ability to do it does not make it a right. So, yeah, I think that's where I think Clark is absolutely right that most people did have the ability to carry a gun in public.

[00:14:11] Uh, but of course, we were in a rural society. There are very few big cities. The cities that were big were much smaller than today, not comparable in any way to the life on the streets that we have today. And so, people might have had the ability to do it, but that doesn't mean it was an affirmative right.

[00:14:28] And interestingly, if you're an originalist, and here's what I thought one of the most interesting things was the Court's unwillingness to deal with the originalist history of the meaning of bear arms, right? As Clark said, an originalist has to ask the key question. And I think I'm quoting him here. He says, "How was the relevant term understood at the time of the amendment's ratification?" Well we actually have now these huge databases of

English language text from the, the period right before the ratification and immediately after the ratification of the Second Amendment.

[00:15:03] And what those massive databases of text show is that the use of bear arms was like 90% of the time used exclusively in a military meaning. And in fact, if we look at all the ratification debates and all the debates over the Second Amendment at the time of the founding, there is not one single mention of people having a right to carry a gun to protect themselves against an ordinary criminal, not one. What we have is a lot of discussions about bearing arms as part of military service. And the Court just completely ignored all of that evidence.

[00:15:40] I think like um, a real honest originalism, I, I personally think that the Second Amendment is best understood to protect an individual right to bear arms. I, I don't think originalism has a lot to do with it. But certainly, when it comes to carrying guns in the streets, the Court really ignores the very best evidence that we have of what bear arms was thought to mean and understood by the public. Not by occasional treaties writer, but by the public when the Second Amendment was adopted.

[00:16:11] Jeffrey Rosen: Clark, you and Adam have debated this question before, and it's been extensively debated by scholars but what's your response to Adam's argument that the Court doesn't engage the... what he calls the extensive historical evidence that there was no ordinary right at the time of the founding or in 1868, for people to protect themselves against ordinary criminals. And he also mentioned the Dobbs abortion case where the dissenters accused the majority of choosing the historical period to reach their preferred results and actually cites this Bruen case, to say here the Court was looking at a broad snapshot of history, but if just focusing on 1798 or 1868 had favored their results, they, they would have changed the lens. So what, what's your response to that?

[00:17:02] Clark Neily: So, I think it's certainly accurate to say that the Court did not significantly engage with this question of whether bear arms is sort of a, a figure of speech that implies, um either a, a purely or largely military context. Um, that said, I think that the Court feels like this argument was already raised and, and dealt with in Heller. Perhaps, not to the satisfaction of, of some people, um like my friend, Adam. But you know, this argument has been had and perhaps the majority just feels like, "You know what? You had your chance. This has already been established as a matter of precedent."

[00:17:34] And it really hasn't. It was in Heller, I think we have to acknowledge that it was. But I think the most important thing is that maybe this points us to the fact that perhaps the majority should have picked the relevant time period. Now again, I'm with Professor Amar. I think that the relevant timeframe here is not 1791, because the relevant amendment here is not the Second Amendment. The relevant amendment here is the 14th Amendment and everybody agrees upon this, by the way.

[00:17:57] Um, the, if, if the right to own a gun or to carry a gun is protected from state infringement, it was only protected from state infringement by the 14th Amendment, so we need to know what the 14th Amendment says about this issue. And I think on that point, the historical record is ineluctably clear because Congress was deeply concerned about assaults on the freedmen, which is what the newly freed African Americans in the South were called.

They had specifically enacted the right to or, or underscored the right um, to keep and bear arms in the Freedmen's Bureau Act, which was passed by Congress or during Reconstruction.

[00:18:35] Um, and the idea that the freedmen would have been limited to owning guns and keeping them only at home, right? But then when you're walking to work and being stalked by, you know, gangs of Ku Klux Klan, you wouldn't be able to carry your gun with you when you're going to church or going to work or wherever you might be going. I think it's completely ahistorical. I don't think anybody in Congress would have supported that, that kind of bifurcation. And so, we look at what I consider to be the most relevant historical timeframe, which is 1868.

[00:19:02] And I think these questions about whether the right to carry or to keep and bear arms and carry them outside the home there's not even any question about it. We don't need to get hung up on bear, because that's not the relevant text anymore. The relevant text is that of the 14th Amendment. Um, and if we're doing originalism, we can look and see what Congress was deeply concerned about. They were deeply concerned about um, newly freed Blacks being terrorized in the South, and you need to be able to carry a gun outside the home to protect yourself from that kind of oppression. And I think that is exactly what they both meant and succeeded in writing into the text of the 14th Amendment.

[00:19:37] **Jeffrey Rosen:** Adam, what are lower Court judges supposed to make of this decision in terms of the historical analysis? There's a big debate about the Statute of Northumberland of 1368. If you're a lower Court judge, are you supposed to look at 1791, 1868 or go from the medieval period to the present? And what is the uncertainty about the answer to that question mean about what kind of regulations are constitutional moving forward?

[00:20:03] **Adam Winkler:** Well, I think that's a really big question Jeff, that we're just gonna have to sort of see how the lower Courts approach this. I think one thing is clear that, as Clark made apparent early in his comments that this two-step approach that the Courts have been taking in the past is no longer good law. And there's no longer supposed to be any means and scrutiny so the Court has directed the lower Courts to focus on historical traditions.

[00:20:32] I think that my, my best reading, o- of the opinion is, is that basically you have to show something as part of the historical tradition from about the, the mid-1600s to the mid-1800s and then nothing else is particularly relevant. Any laws that were adopted after the late 1800s the Court says are they're not relevant. Uh, in foot- in fact, the Court drops a footnote saying that there's no need to even think about any law that was adopted in the 20th Century.

[00:21:03] So that's sort of the period of time that Courts are going to have to look to, but I think it's going to be a real problem, Jeff, for, for Courts looking backwards, because so many of the gun laws that we have today are just not that well-grounded in early American history. We didn't ban felons from possessing firearms in early American history. There was a period where most felons were put to death, but that didn't last long in America. And by the early 1800s, that principle was discarded and you could be convicted of a crime and not be put to death.

[00:21:40] We had bans on mentally ill people possessing firearms are a modern 20th Century invention. We didn't have any such law. Um, the Senate gun bill just passed. The Senate is expected to pass, pass the House today, the day we're recording this has funding for red flag laws. We didn't have any red flag laws or anything similar to red flag laws in the 1700 and 1800s. Uh, so I think that Courts are really going to struggle with this history and tradition approach. In fact, Clark even mentioned one of the ways in which I think we've already seen the Court go both ways on this. The Court says history and tradition, but as Clark mentioned, the Court makes clear that you can have shall issue permitting for concealed carry.

[00:22:21] There was no shall issue permitting for concealed carry in the 1700 and 1800s. That's a modern 20th Century invention. Something that was really devised in the 1970s and '80s as a way of making it easier for people to carry guns on the streets at a time when almost every state had the May Issue permitting that the Court has now said is unconstitutional. So things like background checks and whatnot, none of those things are really historically grounded. Unless we phrase history at such a high level of generality that it's no longer doing the work of restricting judges and restraining judges from just reading whatever rights they want into the Constitution.

[00:22:59] **Jeffrey Rosen:** Clark, just so We The People listeners understand your view of the right answer, do you think that the relevant time period is 1868? And that it's wrong to start with the statute of Northumberland all the way up to the present? And do you agree with Adam or not, that this wide-angle lens is going to invite an awful lot of discretion and basically gives judges a blank check to do if they learned or not?

[00:23:25] **Clark Neily:** You know, it's an enormously complicated question. I think the simplest answer would be to say that it really depends on the nature of the right that you're trying to assess. Um, in this case, I do think that for a number of reasons the, the signs point clearly to 1868 because again, the text that we're engaging here is that of the 14th Amendment that prohibits states from depriving people of due process or equal protection of the laws or infringing the privileges or immunities of citizenship. And so, that's the language that we have to engage with.

[00:23:54] And I, I, I'm quite skeptical you know, whether a uh, you know, 800-year-old statute from, from England is, is likely to shed very much light on the best originalist understanding of a textual provision that was added to the United States Constitution in 1868. In a very particular factual context, which was, among other things, an attempt to prevent southern states from maintaining newly freed African Americans in a state of constructive servitude. Um, and in particular, depriving them of the ability to defend themselves against private violence and sometimes, public violence.

[00:24:20] So, I do think that in this case, it's pretty clear that the relevant timeframe or the most relevant timeframe is 1868. And I'm quite skeptical of efforts to turn and look at, at you know, the more... the further into the past that we're going in order to interpret the language of the 14th Amendment, the more skeptical I am that that she- sheds much useful light.

[00:24:48] **Jeffrey Rosen:** Thank you so much for that. And so, just to sum up where we are, because I'm trying to be completely neutral here, I hear you both expressing skepticism about

this wide angle lens approach to the Second Amendment. And suggesting that the 1868 period is more relevant, although you disagree about the nature of where the 1868 history points. Adam, to what degree is the Court's wide angle lens part of a general rejection of constitutional balancing?

[00:25:18] There's a really interesting footnote in the dissenting opinion of the abortion case, where Justice Breyer says the majority's failure to understand the obvious need to balance the interests of the fetus and the woman, stems from its rejection of the idea of balancing interest in this or maybe in any constitutional context. And then it cites to the Bruen decision. What's the significance of the Court's rejection of balancing in Bruen? And traditionally, even in the First Amendment context, there is balancing, so why is the Court reluctant to balance in the Second Amendment context?

[00:25:51] **Adam Winkler:** Well, Jeff, I do think that these two cases, Dobbs and NYSRPA may mark a turning point in how we think about and teach about constitutional law going forward. You know in NYSRPA, Justice Thomas says that we need to reject balancing and focus on history and tradition. And he has the sentence where he says "This second amendment standard accords with how we protect other constitutional rights." Now, you know maybe I'm stirring it up by calling this gaslighting. But I think any student who studied constitutional law reading any major constitutional law textbook in any constitutional law class in law school in the last 40 years, would be surprised by this assessment.

[00:26:33] Yeah, occasionally, history plays some role in constitutional analysis, to be sure, especially when you're determining whether a particular right is protected or not. But the idea that no rights are absolute and that rights can be overcome with when government has sufficient reason to do so and the law is sufficiently narrowly tailored to do so, is how constitutional law has been done for the last 70 years. We use tiers of scrutiny, which are not the only way to go about doing this kind of balancing, but are the most common form of balancing that we find. And that's pervasive in constitutional analysis.

[00:27:11] There's a couple of rights where it's not the main way in which a right is understood. But they tend not to be the biggest highest profile rights that are out there. Um I think that given that Courts do apply strict scrutiny and intermediate scrutiny and as Clark knows and has railed against for many, many years, rational basis review, um that is commonplace constitutional law. But maybe these two decisions mark a turning point where now we have to start thinking about teaching constitutional law in a fundamentally different way where the Courts are going to reject these standards of review.

[00:27:48] I do note that, I think that the idea behind rejecting the standards of review and interest balancing is the sense that that empowers judges to substitute their own views for the view, for what's really in the Constitution. I don't think that the history and tradition approach solves that problem. But it's actually going to complicate it and lead to, I think, unfortunately, significantly less judicial transparency and honesty about what's really going on.

[00:28:16] **Jeffrey Rosen:** And Clark, your thoughts on this is really important Question. Adam says that the idea that no rights are absolute and can be overcome when government's interests are sufficiently strong, it has been a commonplace in the First Amendment context as well as the Second and 14th amendment context. Is he wrong? In your criticism of how the

Courts applied intermediate scrutiny, I- I'm not sure I heard you arguing for the rejection of balancing entirely. Do you think it should be rejected? And, and what do you think of Adam's point that far from constraining judges, this new history approach will actually empower them to be less transparent?

[00:28:51] Clark Neily: I agree 100% with Adam, on this point. In fact, I would say that in virtually all constitutional decision-making, you are engaged in interest balancing. The only thing is whether you're being honest about it. Um, and, and I think it's inescapable in large measure, because factual settings are, are just different. Take one example. Um, a good friend of mine, just retired after a 25-year career as a lawyer for the CIA, absolutely fascinating job. I pester him almost weekly to write a memoir. But he will have to submit that memoir to pre publication review to that, to the CIA before it can be published.

[00:29:30] What, are you going to look back in history and find out how to you know decide whether or not that constitutes an abridgement of free speech or not? No, you're not. You're essentially going to have to say, "Well, how strong is the government's interest in ensuring that certain secrets are not divulged versus how strong is somebody's interest in being able to write a book about a very interesting part of their life." And you can either fool yourself into saying that you're not doing balancing in that case or you can be candid about it, and I'd prefer candor.

[00:29:56] I think we're just going to be exchanging kind of one type of gamesmanship that the Court has employed when it does this kind of tiered scrutiny. This, and when I say gamesmanship, I, I mean things like saying that there are two different kinds of rights, fundamental and non-fundamental, which I think is ridiculous. Or that non-fundamental rights will get a standard review that purports to be an actual constitutional test, the rational basis test, but it's in fact, a fraud and a charade, as I tried to point out every time I discuss it. So, I totally agree with Adam.

[00:30:25] Um, I don't know which set of problems will be more difficult for the Court, but I think that it's always good to be candid about your actual methodological approach and not fool yourself or worse, fool the people into thinking that you're doing something with more objectivity or precision than in fact, you are. Um, and this is, well, I, I think this is going to be quite problematic for the Court trying to use this standard going forward.

[00:30:48] Jeffrey Rosen: Well, what seems like this is a significant area of agreement between the two of you, and I want to ask you, Adam, where did this rejection of balancing come from? I, I didn't understand the Second Amendment Project to involve a rejection of balancing or even an exaltation of history and tradition, which I thought was relevant in determining unenumerated rights under the 14th Amendment. But instead, you both seem to be agreeing this, this is a new approach that may lead to less transparency. So, Adam, what should We The People listeners make of it?

[00:31:20] Adam Winkler: Well, I think the reason why we're seeing a backlash, among some justices to balancing is because they think it does empower judges to read their preferences into the Constitution. Um, and I think importantly, it emerged in the Second Amendment area most pointedly. In Heller case, for instance, rejected interest balancing and suggested that's not how constitutional rights were done. That was always a head scratcher

for my students. They'd say, "What do you mean? This is exactly how constitutional rights are done."

[00:31:53] You might think it's not the way we should do this one, but again, don't gaslight us by trying to pretend and say something otherwise but... and I think the reason why it emerged so strongly in the Second Amendment area is precisely because interest balancing might well lead to a lot of gun laws being upheld, that the Court was not really interested in upholding or was a little concerned about judges, lower Court judges upholding it. And so the Court rejects interest balancing there.

[00:32:22] As Clark notes under the two-pronged test that the lower Courts have been applying in the 14 years since Heller, the vast majority of gun laws have been upheld. Uh, and it's been... they've been upheld because of that second prong of the analysis, that means end scrutiny. It's very easy to show that a gun law is decently well-designed to prevent, to uh, protect public safety. Um, you know, that's what common laws are designed to do. Uh, they're not necessarily always that effective. We have a heavily armed society that really prevents the effectiveness of any new law from really working in some remarkably inspirational way.

[00:33:02] Um, but I do think that this is sort of the rise of originalism and in particular, a sense that judges have been given too much leeway under this, these balancing tests. But like I say I think Clark and I who often do these events and find ourselves in much agreement that this will just empower judges in different ways. And possibly ways that are going to be less transparent and less honest.

[00:33:27] Jeffrey Rosen: Clark, where did the rejection of interest balancing come from? Was it argued for in the briefs? Has it been a part of your advocacy or did the Court come up with it for the first time on its own in this case?

[00:33:40] Clark Neily: You know that's a really great question. I'm not sure I know the answer. The, the thing I do know the answer to is it's certainly never been part of my advocacy because, again Adam and I are in complete agreement that interest balancing is, is, is both necessary and perhaps inherent in much, if not most constitutional adjudication. So, I don't, I don't think it really benefits anybody to pretend otherwise.

[00:34:02] My sense is that what, what really happened here is that some of the justices expressed an an openness and perhaps an interest in receiving a certain kind of argument. In other words, arguments that would enable them to put together a majority opinion like the one that we see today, where they, they, they reject this interesting, interest balancing approach. Um, you know, this was very much the approach that Justice Breyer proposed in his Heller dissent. And I think that the response to that, by so-called conservative justices, has been, you know, strongly unfavorable.

[00:34:33] Um, I think part of the problem to be honest, though, is I think that many of the lower Courts really didn't do the cause any favors here because of the disingenuous way that I think they went about much of their decision-making. And, and again, what I saw was very clearly an application of rational basis review in many Second Amendment challenges but without being candid about it. So, they would purport to apply some form of have heightened

or intermediate scrutiny, but then actually, um clearly be applying some form of rational basis review. You know, where evidence doesn't really matter and the government can assert whatever justification it has in mind, even if it's not a plausible one, et cetera, et cetera.

[00:35:14] So, I think that, that the perception of the lower Courts were in effect, engaging in kind of massive resistance of Heller's clear instruction to apply some genuinely heightened form of scrutiny, probably helped set the table for this rejection. This categorical rejection of, of or purported categorical rejection of interest balancing and embrace of this kind of one step, you know, "Let's look at the history." If people were able to do this thing in the past, then we're going to say presumptively that they can do this thing in the present. Um, so I think there were multiple dynamics that contributed to this, but it certainly wasn't uh, a result of, of advocacy from any of the original Heller lawyers.

[00:35:51] **Jeffrey Rosen:** Adam, do you have a sense of where the rejection of interest balancing came from? Justice Thomas, including in his Dobbs concurrence rejects balancing as subjective and seems to argue that if a right is enumerated, it's more or less absolute. But hadn't, hadn't imported that into the second amount of context before. Um, and any, any sense of where this came from?

[00:36:14] **Adam Winkler:** Nothing really to add to what we've already said so far. I mean, the one thing I, I will note is that, you know, this is part and parcel of the general rise of originalism as a constitutional theory. This is a pretty straightforward way of thinking about originalism, that the original power of we're trying to figure out what the scope of the Second Amendment is. It's not just identifying a right, but identifying the boundaries on government regulatory authority.

[00:36:45] If you believe that history matters, where history is the lone determinant of constitutional meaning, well, then looking to history to see the scope and boundaries of government regulatory authority under amendment seems to be pretty pretty straightforward application of originalism. One thing that's interesting, though, is if we look at history and tradition, we actually find that the history and tradition of the right to bear arms is one in which Courts have generally given legislatures pretty wide leeway to regulate firearms in the name of public safety right?

[00:37:21] Most, most states, especially over the last 100 years have applied a reasonable regulation standard that says that the government has broad leeway to regulate guns and gun owners so long as the regulation doesn't go so far as to be deemed a complete nullification and destruction of the right to bear arms. The history and tradition of the right to bear arms in America is actually a tradition of relatively deferential review. There's a couple of examples of Courts going the other way. It's not like that's a uniform trend.

[00:37:56] But I think it's the clearly the overwhelming majority approach to the right to bear arms is to have deferential scrutiny that allows lawmakers wide leeway, so long as they don't completely destroy or nullify the right. And so the Court is invoking history and tradition, but at the same time, ignoring the history and tradition of how Courts have traditionally treated the right to bear arms. And that question of the scope of legislative authority under the right to bear arms.

[00:38:29] Jeffrey Rosen: Well, Clark, what's your response to Adam's characterization of the history. He just said that broadly, Courts have given legislature's broad discretion to uphold reasonable regulations as long as it's not a complete nullification of the right to bear arms. Did you agree with that characterization of the history and tradition or not?

[00:38:47] Clark Neily: I see it somewhat differently. I think it's perhaps a bit strong. My take would be to say that there were really no states that I'm aware of that that made it virtually impossible for people to either own or carry weapons outside their homes, the way that New York has. Um, so that, the, the regulation that's an issue in this case, you, you know, requiring people to show a special need in order to carry arms outside the home. That was certainly not the norm in any state that I'm aware of.

[00:39:19] Um, you know, there were there were a couple of Texas Supreme Court decisions that purported to you know, enforce something close to that. But it's, I think it's a real question. [laughs] And anybody who's ever seen a Western movie, right, would, would really question whether a, a law broadly preventing people from carrying guns, for example, on a cattle drive was being enforced in a place like Texas in the late 1800s. I'm a Texan. I think the answer is clearly no.

[00:39:43] But I think it's also important to consider that the Second Amendment, the, the you know, the sort of the Federal protection of arms was treated as essentially a null set up until 2018. So, this, to the extent there was litigation and adjudication in the State Courts during the late 1800s and the 1900s, keep in mind that it was going on against this sort of a, a backdrop of, of essentially a vacuum at the Federal level. Now, perhaps that shouldn't matter as a purely, you know, sort of analytical point. States are still free to interpret their own state constitution or State Supreme Courts still have a duty to interpret their own state constitutions.

[00:40:14] But I don't think we can totally write off the fact that this was going on against a backdrop in which the federal analog, the Second Amendment, had been held by most Federal Courts of Appeals to be essentially meaningless and the Supreme Court had done nothing. So, I would consider that as a, at least a relevant dynamic to keep in mind. And I think even apart from that I would say that, that perhaps Adam may overstate the case of it. Because I still think if we look back in history I believe that he and I agreed earlier that in most states at most times until relatively recently, let's say the you know, that the latter half of the 20th Century, if you wanted to carry a gun outside your home, you could.

[00:40:54] Jeffrey Rosen: This raises the interesting question of what the justices have called liquidation. And Adam is, as you note, during the oral argument, in this case, Chief Justice Roberts mentioned the principle of liquidation, which is to say that if something was ambiguous at the time of the founding or when the Amendment was ratified, over time, people can come to a conclusion about the scope of the right. And Adam, you've written that what has been liquidated is you don't have a right to carry a firearm, firearm absent special need. And in the '20s, virtually every state in the nation adopted laws re- requiring concealed carry.

[00:41:28] So, tell us about the Court's treatment of this principle of liquidation which Justice Barrett says it doesn't definitively resolve. And basically, whether post founding practice,

which seemed, would you argue is on the side of regulation here, can justify regulations moving forward for originalist?

[00:41:48] Adam Winkler: Well, this liquidation thing is you know, as someone who's not an originalist, I find it kind of I always find it a little amusing. I mean, liquidation is just another way of talking about living constitutionalism. Liquidation is the idea that ambiguities in the constitutional text can be settled by post enactment practices by decisions made by Courts years later and decisions made by legislators years later as to what that constitutional amendment should mean. That's just living constitutionalism got, you know, dressed up in historical garb.

[00:42:25] And I think that if we look at the right to carry a firearm on the streets we could see, you know, it depends on when you look at it. Uh, when, when was it liquidated? Well, if we look in the 1800s, you know, maybe as Clark says but you know, most people had the ability to carry a gun on, on the street without much of a problem so that might be liquidating the meaning of the Second Amendment.

[00:42:46] But why is liquidation that happens in a non-constitutional process without ratification, without a constitutional amendment, without even Supreme Court opinions interpreting the Constitution to say that that is the thing that's protected? Why is that have... what does that have any constitutional legitimacy? And especially, why would it have more constitutional legitimacy than say later arising movements, say that we saw in the 20th Century of virtually every state, almost every state restricted concealed carry and required May Issue permanent? Why isn't that the liquidation of the Second Amendment's meaning?

[00:43:23] Um, certainly, it would have more democratic legitimacy than the liquidation that happened in the 1800s when the vast majority of people were not allowed to vote in, in their elections. That we were existing in slavery and second class citizenship for vast numbers of people rather than a 20th Century time when those people were enfranchised. So, I think it's liquidation is a sort of a nonsensical approach to constitutional interpretation that tries to smuggle in living constitutionalism into the originalist historical practices.

[00:44:01] Jeffrey Rosen: Clark, you've already told us that you think that the relevant timeframe means 1868 and is it, is it right that you, like Adam, are skeptical of this idea of liquidation? And to what degree does Justice Thomas's majority opinion accept the possibility of liquidation or not?

[00:44:20] Clark Neily: Yeah, I, I think I, I find myself somewhat resistant to it. But I, I wouldn't necessarily push back across the board. Here's what I would say. If... I mean, so there are going to be some questions that you really are not going to be able to answer just by looking at history. Take for example an issue that's almost certainly going to percolate its way up to the US Supreme Court, which is bans on so-called high capacity magazine. So, there are a number of jurisdictions that restrict the number of rounds that a, a magazine can hold and there's a lot of debate over that. Um, that's going to be a real problem if you look back in history, right? Because in 1791, there were no detachable magazines. And so, you're just going to not be able to have any sort of information from that time period.

[00:45:02] Um, 1868, you'll be able to find some vaguely analogous weapons from that time, but nothing that's exactly uh like a high-capacity magazine and a modern pistol or a sporting rifle. So, that I think is going to be a challenge and you're going to have to figure out some way uh, of answering the question.

[00:45:20] I'm not sure I'm very enthusiastic about the so-called liquidation approach, but I would say that looking at, at, at a question like... so, if we have a presumption, for example, that, you know, the Second Amendment isn't a fundamental right. We have a presumption that restrictions on that right are unconstitutional and the government has to make some fairly strong showing in order to overcome that presumption, I think it's perfectly reasonable to look at how states regulate that particular issue.

[00:45:48] So, take for example this question of whether the government can require a permit to carry a gun. There's about, actually, almost half the states now, do not require any sort of a permit to carry a gun outside the home. Um, and you know, our, our friends who are strong proponents of gun regulation were emphatic about what an absolute disaster this is going to be. Just blood in the streets. Anybody carrying a gun wherever they want.

[00:46:10] I would say, first of all, clearly, that didn't happen. Um, that prediction has been falsified. And the question is, essentially, is that, you know, a relevant thing to take into consideration when assessing, for example, the, the, the constitutional validity of a permitting regime, the fact that nearly half the states don't have any permitting regime on the books and it doesn't seem to have been much of a problem.

[00:46:29] I would say that in an environment where a right you know, sort of, sort of you presumptively have a right to do something, carry a gun outside the home. The fact that states, some states don't even regulate that at all, and it doesn't seem to have been a particular problem, then I think that is relevant to the constitutional analysis, whether we call it liquidation or not.

[00:46:47] **Jeffrey Rosen:** Thanks so much for that. Adam, what are your thoughts about liquidation? And Clark's suggestion that assault weapons bans may now be unconstitutional?

[00:46:58] **Adam Winkler:** I, I just disagree with Clark. I mean, first of all what we actually... the studies that have been done, there are only initial studies have shown that in 10 states that have gone to permit-less carry, they had more victims of gun violence from concealed carriers than they would have had absent permit-less carry. Um, and it's also hard to say, "Well, they didn't have the disaster that people were predicting," when we already have disasters. We're in a heavily armed society already so we can't expect that law to have made a huge difference.

[00:47:31] And I think it's really questionable to take a political movement for permit-less carry that just emerged over the last 10, 15 years, and has been very successful, just as a matter of political mobilization and say that that has constitutional meaning. That's what liquidation asks us to do. And it's totally violative of the basic constitutional principles that support a ratification through a convention or through state votes a constitutional convention or ratifying conventions.

[00:48:02] Um, we have a way to amend the Constitution. Uh, maybe it's bad that the Supreme Court's interpretations amend the Constitution, and that's a kind of judicial activism. But to allow a political movement to just pass a bunch of laws in a bunch of states as a matter of political power and say, "Well, now that has constitutional status," I think highlights the problematic nature of liquidation.

[00:48:24] **Jeffrey Rosen:** Thanks for that, Adam. And quick thoughts on assault weapons bans?

[00:48:28] **Adam Winkler:** Well, I think that is, um the next great issue that's going to come before the Supreme Court. Are bans on military style rifles or bans on high capacity magazines constitutionally permissible? And I think the history and tradition approach that the Court has adopted is not going to be very helpful for that. Because as Clark says, there wasn't a history of high-capacity magazines at the time of the founding or at the time of the Civil War. So, we don't really have any constitutional basis for deciding that question.

[00:48:57] The traditional approach of an originalist would be then to say, "Okay, well, in the out- if the Constitution doesn't speak to the issue that's left to the political process." I, I don't think the Court is going to leave it to the political process and Courts likely to strike down both of those kinds of laws saying that these are firearm accessories or firearm types that are in common use and thus, are protected by the Second Amendment. And that's the end of the analysis.

[00:49:21] **Jeffrey Rosen:** Clark, what's your response to Adam's thoughts about liquidation and the, and, and the assault weapons ban?

[00:49:28] **Clark Neily:** Yeah, so let me be clear that I think Adam has a stronger point when he argues that we shouldn't use liquidation so called in, in making the first step which is, you know, essentially, is this particular activity covered or not covered by the Constitution. My point was simply that once the Court has decided that it is, and that there is a presumption that somebody has a right to engage in a particular conduct. And of course, these presumptions are not at all limited to the Second Amendment. They arise all the time with respect to various First Amendment rights.

[00:49:57] If we have decided that a particular act is presumptively covered by the Second Amendment, so you know, whether it's owning a high-capacity magazine, assault rifle or whatever my point was simply that if we, we, I think it's perfectly legitimate, then look at whether the you know, absence of regulation in certain jurisdictions has been a significant problem in deciding whether the government has overcome that presumption. So, that's point one.

[00:50:21] Um, point two, I think it's fascinating you know, how the Court is going to undertake this historical analysis as to weapons or attributes of weapons that really didn't exist during what seemed to be the most relevant time period. So, let's stick for example, with uh, high-capacity magazines or assault rifles. Those didn't really exist or at least not in the same you know, guys that they do today. But you could look at it from an angle and say, "You know what? You don't necessarily need to look at high capacity magazines as such, because yes, they didn't exist back then, but we could ask a slightly different question.

[00:50:52] Um, in 1868 and/or 1791, would you have had both the, the right and the ability to carry what was essentially the most lethal weapon that a person could carry at that time? And the answer in both time periods, as far as I'm concerned, is absolutely yes. Uh, and so if that's the relevant framework, if that's relevant analytical framework, which it may well be, then the historical approach might actually shed light. It might be useful, and it might even be the one that the Court adopts.

[00:51:18] But I don't know, and I think we can't really predict. And all of this will have to be determined or, or sort of built out in incremental litigation, just like all of the other constitutional rights that have been litigated over history.

[00:51:30] **Jeffrey Rosen:** Well, it's time for closing arguments in this really important discussion. We The People listeners, it is urgently important that this podcast is a platform for you to hear the best arguments on all sides of the cases that the Supreme Court is deciding and make up your own minds.

[00:51:44] So, Adam, the first closing thoughts are to you. Uh, please tell the We The People listeners, what you think the significance of the Bruen decision is and whether or not it's constitutionally convincing?

[00:51:57] **Adam Winkler:** Well, I think we should recognize that the Bruen decision is not the end of the debate over concealed carry, but in many ways, it's just the beginning. That we're going to see states like New York and California find new ways to follow the letter of what the Supreme Court has said, but yet still heavily restrict concealed carry. The Court said that you can ban guns from sensitive places. I think we're going to see states broadly define what counts as a sensitive place and make it very difficult for people to carry guns. We might even see states make the licensing requirements extremely hard and burdensome.

[00:52:32] California requires you to do over a thousand hours of training to be able to apply pesticides to a house and over 1600 hours of training to get a cosmetology license to put chemicals on someone's hair. And the whole point is that these things pose risks for society and so, if you're going to have the ability to do this dangerous thing, you need to do a lot of training. We can imagine a state like California adopting onerous requirements to get a concealed carry permit.

[00:53:01] Now, many of those laws may be struck down in the future. Um, but I think that's the real, the only prediction you can really make is that we're going to have a lot more litigation over this very issue in the years to come.

[00:53:12] **Jeffrey Rosen:** Clark, last words in this great discussion? Or to you, what is the significance of the Bruen decision, and do you find it constitutionally convincing?

[00:53:20] **Clark Neily:** I think I basically agree with Adam. This was, I think, in some sense, a really easy case because really, we don't allow the government to decide in effect on a whim who gets to exercise a particular right. They try to dress it up in this case and pretend like it wasn't a whim, but it was a whim. Um, and you, you just have to be careful about that kind of thing. And I think New York basically kind of overplayed its hand in trying to defend what was ultimately an indefensible law. I think part of the blame, as I suggested earlier, also

rests with lower Courts, who essentially played games with the standard that the Supreme Court instructed them to apply. By, by rather obviously applying a, a lower standard, the rational basis test and essentially rubber stamping uh, virtually everything that came before them.

[00:54:00] Uh, I think they would have been better served in being more judicious and applying the actual standard that the Supreme Court instructed them to apply and do so more faithfully. Uh, and I think they missed aroused the majority's ire or the six conservative justices. I think they've aroused their ire on this point, to some extent. I think there will be more litigation. And I think actually, the odds of cases going up to the Supreme Court are greater now. On, on the right to keep and bear arms question is greater now than it was before this case.

[00:54:27] And if the lower Courts, you know, kind of take their marching orders and apply them in good faith, then maybe the Supreme Court will not need to get involved very often. I don't think it wants to. Uh, but if the Court, lower Courts continue to engage in this kind of open defiance that we saw in the wake of Heller and McDonald, then I think the Supreme Court could be a lot more active in the gun rights area than, than even I had thought they would be.

[00:54:46] **Jeffrey Rosen:** Thank you so much, Clark Neily and Adam Winkler for deep and mind-opening discussion about the constitutional merits of the Bruen case. Uh, you've performed a great service and on behalf of all We The People listeners, I'm very grateful to you. Clark, Adam, thank you so much for joining.

[00:55:05] **Clark Neily:** Thank you again.

[00:55:06] **Adam Winkler:** Thanks, Jeff. Thanks Clark.

[00:55:12] **Jeffrey Rosen:** Today's show was produced by Melanie Rao and engineered by Dave Stotts. Research was provided by Colin Thibault, Vishan Chaudhary, Sam Desai and Lana Ulrich.

[00:55:21] Thank you for listening to our Bruen episode, dear We The People friends. Please also check out our episode on the history of gay rights and our Dobbs episode, which we'll publish as soon as it's ready.

[00:55:35] And please, rate, review and subscribe to We The People on Apple. Please recommend the show. And most of all, friends, please keep listening and learning together. It is so important in these hotly contested constitutional times that we continue to convene the most thoughtful voices on all sides of the constitutional issues of the Center of American life, so that you can make up your own minds.

[00:55:59] Thanks for listening. Thanks for supporting the NCC. On behalf of the National Constitution Center, I'm Jeffrey Rosen.