Stephen Gutowski (00:03.365)
All right, welcome, ladies and gentlemen, to another episode of the Weekly Reload Podcast. I'm your host, Stephen Gutowski. I'm also a CNN contributor and the founder of TheReload.com where you can head over and sign up for our free newsletter today. If you want to keep up to date with what's going on with guns in America. This week's episode is once again brought to you by The Dispatch, a publication that I really enjoy and subscribe to myself, which I will tell you a bit more about at the end of the show. But before we get to that.

The meat of our episode today is going to once again turn to the Supreme Court's decision in Rahimi, the first case where they have applied their new Second Amendment test, which means, you know, it's one worth taking a lot of time to examine and try to get some of the implications from. And, you know, on this show, we'd like to try and bring you guys a variety of perspectives on this. We had David Kopel on a couple of weeks ago, two weeks back to give his point of view. He's a prominent pro-Second Amendment, pro-gun scholar.

who's supportive of the Bruen decision that Second Amendment tests I just mentioned. and we got his view of how Rahimi came down this week. We are going to get somebody who has been a critic of the Bruen test and who's also, it seems to some of his writing has been influential in this decision as well, just like Coppola was, on the majority opinion. And, that is, associate professor of Pepperdine university's law school.

Jake Charles and he's joining us today. Welcome back to the show, Jake. Thanks for coming on.

Jake Charles (01:29.6)
Thanks, I'm Steven, happy to be here.

Stephen Gutowski (01:31.461)
Yeah, and you just tell people a little bit more about your background before we get going.

Jake Charles (01:36.384)
Sure, so I got into firearms law by being the inaugural executive director of the Duke Center for Firearms Law. That was about five years ago when I started there and it was at a good time because it was when the new justices started coming on the court and we first started getting more Supreme Court interest in these cases. So I've written a bunch of things about the Second Amendment and how the court's deciding these cases. And then I'm also working on a Second Amendment case book with some of the folks there.

Stephen Gutowski (02:04.517)
Right. And we've, we've had you on the show before a number of times, or I think more than once, at least hopefully I have to go back. We've done, I think like 165 episodes now. So it's hard to keep track of every single one, but I know you've been on before and you're somebody that I think is, is a prominent voice in this conversation. and who has also been somebody who's tracked a lot of the, the actual practical fallout from the Bruin decision. You've been the one that's been keeping track of the numbers across all these different.

Jake Charles (02:11.392)
At least once.

Jake Charles (02:15.2)
Yes.

Stephen Gutowski (02:32.709)
lower court cases that have been impacted by this new second amendment test. And so your work has been widely cited. And one thing that you've focused in on oftentimes in critiquing the Bruin test, the Bruin ruling, is this concept of that has come up in Rahimi as well. And so I want to start with that and deals with how the court views

founding era law and or really the lack of founding era law on specific topics and how that should be interpreted in regards to modern gun regulations. Can you just explain your view on this a bit, you know, what the court held and why

you think it's problematic and then we'll get into what they said in Rahim.

Jake Charles (03:24.544)
Yeah, certainly. So I think on one reading of what the Bruin test was doing, the reading that Justice Thomas, who authored Bruin, it's obscene, is the right reading in Rahimi. On one reading of the Bruin test, what the court is requiring the government to do in cases where the Second Amendment is implicated is to produce a regulation from the founding era or very close to the founding era to support a modern regulation. And if it can't do that, then the modern law is unconstitutional.

And so what that means is that if you look in the past and you see conduct that went unregulated or just the absence of regulation, then the assumption is that that's some that tells us something about what the constitutional authority was at the founding era. And I think that assumption is unwarranted. Justice Barrett and her concurrent, Nerehemi, says this assumption is unwarranted because we can think of lots of reasons why

founding era legislators might not have enacted a law, even if they thought it was constitutional to do so. But unless you assume that the only reason they did not enact the law was because they thought it was unconstitutional, then the lack of a law there doesn't tell you anything, or at least doesn't tell you much about whether or not a similar law today would be constitutional. So that kind of absence in the past, and some lower courts applying Bruin's test had also...

adopted this reading of Bruin that it requires a regulation or a showing of statutory authority. And if there wasn't that, then the modern law was unconstitutional. I think this is one of the key fights over the justices in the Rahimi case.

Stephen Gutowski (05:04.293)
Right, so you're, and this has been something you've written extensively about since the Broom decision was handed down two years ago. And like you just mentioned there, it does seem like perhaps the justice have been at least reading some of your critiques or at least this concept generally. I don't think Barrett, Barrett didn't specifically reference your work, but I didn't, Justice Jackson, is that?

Jake Charles (05:20.096)
concept certain.

Jake Charles (05:25.12)
That's right. Justice Jackson cited an amicus brief I joined with a few other law professors that was focusing on the lower court fallout from the Bruin decision and the kind of inconsistent decisions that the courts were reaching over this and other questions like how to apply Bruin's test.

Stephen Gutowski (05:42.885)
So just to establish that your work has been read by these justices and seems to have had some impact here. Now, can you get a little bit more into what Barrett said, into her concurrence and what you think that might mean for the balance of the court on Second Amendment cases going forward?

Jake Charles (06:02.144)
Yeah, sure. So your listeners don't need any background on what the majority said, but just to recap it so I can put her comments in context. So the majority's decision, as I read it in Rahimi, is really narrow. Essentially, the court says there's this one historical principle, and that historical principle fits basically 922G8C1 and maybe some other laws, but not a ton of other laws.

It doesn't say that's the only historical principle it finds, but it says like, we found this historical principle. You can disarm people who have shown to be a credible threat to the physical safety of others after a judicial finding. Right. So it's really narrow historical principle. Exactly. And, and I think part of the very narrowness of the majority's decision is that there's eight justices that signed onto it. They don't all agree about the scope of what the, what

Stephen Gutowski (06:39.877)
Right, temporarily, right?

Jake Charles (06:56.576)
set of historical principles might justify other laws. So we've got a lot of concurrences. I counted seven different justices out of the nine justices who wrote separately, who wrote something in the Rahimi decision. And one of those concurrences was Justice Barrett's. I think the thrust of her concurrence was to say later tradition is not, can't change the original meaning of the constitutional text and only the original meaning controls.

So even if we found a later tradition that was widespread and it was widely seen to be constitutional, if it's a later tradition, it can't trump the original public meaning. But in the course of doing that, she also fleshes out these ways to understand what the original public meaning is. And she rejects this reading of Bruin that would say, if you don't find specific laws, that means it's unconstitutional.

Instead, she adopts kind of this principles -based approach to looking at what she calls original history or original contours. And she says we have to look at the evidence of what kind of principles they would have understood the Second Amendment to be consistent with, not try to find particular laws. Sometimes those laws can shed light on those principles and sometimes those regulations are what give rise to the principles.

But we look for the principles. We don't look for particular regulations.

Stephen Gutowski (08:27.173)
Yeah, that's, it is interesting in the context of some of your critiques of Bryn here, because I mean, it kind of, it feels like, especially with her concurrence and Kavanaugh.

opinion itself that that the conservatives outside of Thomas and we'll get to Thomas in a little bit because I feel like you might have a similar view of his similar view to his of how this might all come out or what it does to Bruin but but the other conservatives on the court seem to be more in this idea of

Jake Charles (08:46.336)
Mm -hmm.

Stephen Gutowski (09:06.277)
that you don't need a historical twin. It feels like she's kind of saying you don't need to have literal restraining orders at the founding for the restraining orders that affected Rahimi to be constitutional today. She's not necessarily saying you don't need any sort of evidence that this type of act would have been appropriate under the second amendment. You just don't need a literal exact copy of the law. And this is one of the...

Jake Charles (09:26.048)
Yes.

Jake Charles (09:30.496)
Yes, yeah.

Stephen Gutowski (09:33.541)
One of the main issues that they argue about in brewing over and over again, right? Throughout the concurrences, at least, is this concept of like, we haven't given a lot of answers because they set this standard of, you don't need a historical twin, but also this isn't a regulatory blank check. And so you're supposed to fall somewhere in the middle of that. And they just, it feels like they're going to just need a lot of time to go through and flesh out this test. And this is part of it.

Jake Charles (09:48.448)
Yes.

Jake Charles (09:55.84)
Yeah. Now she said, you don't even need a cousin. It doesn't have to be a cousin. So we don't need twins, we don't need

cousins. But yes, we're ready to write a blank check is on the bad side and we're kind of trying to figure out where we are.

Stephen Gutowski (10:08.741)
Yeah. And so, what, what was your main takeaway from the majority opinion in the case? I mean, it sounds like you think it was pretty narrow. What are you, what impacts do you think it's going to have on those lower courts?

Jake Charles (10:23.904)
Yeah, so I thought it was significant that it was an eight to one decision. I thought after argument, most of us who heard argument thought the government was going to win. And the question was, what was the margin of victory that the government was going to have in that case? Was it going to be nine Was it going to be a one? Was it going to be seven - two? The fact that Justice Alito and Justice Gorsuch signed on to the opinion I think was significant.

The fact that Justice Thomas did not though, and that he was the author of Bruin, I think really suggests some internal grappling of the justices who themselves signed on to the Bruin decision about just how that test was supposed to work, how that opinion was supposed to be understood. So I got from the majority's opinion that they really didn't want to give, or maybe they couldn't with a justice majority, give a lot of guidance for other kinds of cases going on.

that they wanted to correct a few of the errors that lower courts have been making after Bruin. One of those is to demand too much specificity in the historical record to try to find too close a match for historical regulations. They said the Fifth Circuit did that wrong. They seem to suggest that lower courts were misunderstanding that. And then relevant, I think, to this case and maybe a few others, they talked about the standard for facial challenges and how the Fifth Circuit

misunderstood or misapplied the standard for facial challenges, which requires the challenger to show that this law is unconstitutional in all of its applications as opposed to maybe permissibly constitutional in some applications, even if there are other applications that might be problematic. And so those are the things that fall to the Fifth Circuit for. Maybe some of those have broader echoes, but I think the kind of for me, I was maybe a little bit surprised at how narrow the decision.

was, especially because the court acknowledges lower courts misunderstanding Bruin. I thought we'd get a little bit more guideposts on how to address at least other questions related to permissible disarmament schemes and particularly the other challenges that the court has already pending for the felon and possession cases. And beyond the kind of principles based approach, namely telling

Jake Charles (12:47.008)
courts to look to historical principles and not require exact matches to historical regulations. Beyond that, I'm not sure how much guidance it gives to resolving felon and possession cases. And so I could see, for instance, if the court was to say, vacate and remand the pending petitions in those cases, the 922 G1 cases, I can see each of the courts that have split already on this question.

issuing basically the same opinions again and saying like, you know, we don't think Rahimi calls into question our reasoning. Their reasoning, of course, is the exact opposite, but I could see each of those courts reaching the exact same decisions even under

Stephen Gutowski (13:27.365)
Yeah, I think that makes a lot of sense. I mean, the court just didn't, beyond establishing that, like you said, very narrow principle of disarming temporarily people who have been shown to be a danger, physical danger to others. It doesn't really do much else other than just sort of critique the fifth circuit for being too strict in how it interpreted Bruin, but it doesn't.

get into a whole lot of degree into how they were too strict. It just says, you know, we found these were the laws to put together. They represent a, a tradition that, that this restraining order band falls into. so yeah, I mean, it does, I mean, like I said, I think there's the concurrences kind of got to that point. There, it does seem like if you read like Gorsuch or

Jake Charles (14:08.576)
Yes.

Jake Charles (14:15.904)
Mm -hmm.

Stephen Gutowski (14:20.005)
or Jackson's concurrence, they talk a lot about what the court didn't decide. Right. And so there's still so many, even on this specific federal law, there remain a lot of questions, even on, even for potentially Rahimi himself, because Gorsuch talks about the due process challenge. This wasn't resolving potential due process issues with the restraining order that he was disarmed under or what have you.

Jake Charles (14:24.128)
Yes.

Yes.

Jake Charles (14:39.84)
Yep, yes.

Jake Charles (14:48.736)
Yes, I think it's probably too late for him to raise a due process challenge, but yes, someone in his position for sure.

Stephen Gutowski (14:48.869)
I don't know if that's likely challenged to come, but yeah, it seemed like there were quite a lot of still viable challenges even to the very law that they were ruling on.

Jake Charles (15:02.208)
Exactly, yes. Not only did they not resolve a category of cases, which is one of many categories of cases in Second Amendment world, but they didn't even resolve all the challenges to this particular law.

Stephen Gutowski (15:15.333)
Yeah. But, at the same time, it does give us our first insight into how this test should be done. And our first insight into it is one where the court comes down, against a more conservative courts, strict interpretation of Bruin. And, and, you know, that that's what Thomas got into in his descent. And I'm interested in your view as somebody who's, has been critical of the Bruin test itself.

Jake Charles (15:31.264)
Yes.

Jake Charles (15:39.328)
Mm -hmm.

Stephen Gutowski (15:45.285)
Do you like Thomas has a pretty, pretty dark view of where this is going to lead for the Bruin test. he kind of is at least predicting or that it could potentially undermine the whole concept and the second amendment generally. now I imagine you don't, you know, you don't agree with his view on, on that part, but I, do you take his points about how

Jake Charles (16:03.232)
Mm -hmm.

Stephen Gutowski (16:15.229)
wide reaching the way the court came to this conclusion could be, you know, that, that sort of combining surety laws

and a fray laws to make a principle when I guess his critique was that neither one of them was really a good, yeah. Like what do you say? Do you, what do you think of the Thomas descent?

Jake Charles (16:28.352)
Mm -hmm.

Yeah, there's single one.

Jake Charles (16:37.888)
Yeah, I think it's really interesting how forceful his dissent is about the majority's, I think he says that he tried to rewrite the court's precedent. So he certainly thinks that it is not like a different reading of Bruin, but in fact, like, if not a repudiation of Bruin, at least like a rewriting of Bruin. So he thinks this isn't one kind of permissible style of

implementing the Bruin test. And I think I said something like this on Twitter earlier, I think his view of Bruin is a really narrow view of the test, but it also is basically the dominant view among lower courts, or it had been the dominant view among lower courts before the Supreme Court intervened in Rahimi.

There had been some courts that had done kind of the principled stuff or raised up the level of generality a little bit, but lots of courts were reading the Bruin decision, how Thomas read the Bruin decision, which is to say, we got to find a historical regulation. We're going to require the parties to put together a spreadsheet, right? Show us all the laws that existed between, you know, maybe 1750 and 1805, right? If you compile that spreadsheet, I will pick out an individual law and I will compare that law to the modern.

This is what courts were actually doing in Second Amendment cases based on this reading of Bruin that Thomas says like, yes, that's what I meant when I wrote the Bruin decision. And the other justices say, that's not the right way to read Bruin. So I think in terms of like Justice Thomas's dissent, he's right in the sense that that's the dominant way that other courts were understanding his test too. That's how I understood it when I was critiquing it. And the majority, I think,

is maybe not reading my critiques, but reading the critiques of that reading of Bruin and saying like, that can't be what we mean. It just doesn't make sense to say you have to have such a narrow comparison to a modern law, especially as the concurrences were fleshing out, because that's not what originalism requires when we're looking at the original scope of the right. In terms of Thomas's concern about the mixing and matching,

Jake Charles (18:55.936)
I don't share his view that like that's, you know, underlines like the second amendment if you can mix and match because I think that the principles based approach seems right if one is an originalist and thinks that history has to control contemporary adjudication, then it has to be the case that we're looking not for a single particular law for all the reasons that Justice Barrett said and for all the reasons I've written about and others have written about. But we're looking for

What was the original understanding of the scope of the second amendment at the time? That shouldn't turn on whether one particular law matches both the how and the why, right? Maybe you don't wanna say like we can draw two different, too many different kinds of laws together and pick principles and shove them together from too many different kinds of laws, but historical evidence that events as a principle is what we're looking for. And even the kind of, even the Bruin understanding of

relevant similarity and these metrics, they're all trying to get at like, what was the original understanding? And so I think it makes too much of focusing on like these two metrics that we gave, the how and the why, as themselves, like the end point, as opposed to as themselves, like a sign of what the original kind of scope of understanding was.

Stephen Gutowski (20:14.277)
So when he says essentially that because of the way they, especially the, the Afray laws, the going arm to the, to the terror of the public laws, that because people could be imprisoned for that, you know, that implies that they, their, their guns could be removed at least temporarily. That's sort of where the majority comes down on how they're relevantly

similar. But he, he argues that, well, that's too much too broad of a reading because

You could say anything that had a potential punishment of jail time or like if you don't repay a fine, you'd end up in jail too. So he sort of says this goes so broad that you could pick out any laws. I imagine you don't agree with his critique on that point.

Jake Charles (20:58.464)
Yeah.

Well, I just think, I think maybe that's one critique of the court's like discussion of the penalty, but the penalty was only one aspect of the majority's discussion of the comparability of the burden. They also talk about that it's time limited in nature. Like that's something that's would stand apart. Like the felon prohibitor is permanent. So that stands apart already. So it's not the case that just because you have going armed laws that

justified imprisonment that everything else is automatically justified because the penalty is only one aspect of the burden. So they talk about the time limited. They talk about the fact that it's an individualized determination. So it's not a categorical basis, like again, distinguishing the felon prohibitor. So I just think that the majority had other reasons why it's comparable that were beyond just the fact that imprisonment was provided for in those historical laws and the modern law. So I don't think kind of the Rufus Folly nature of Thomas's point.

on that particular provision is kind of persuasive.

Stephen Gutowski (21:59.621)
And that does seem like what the other conservatives thought in response to Thomas's dissent. But it does sound like you perhaps agree with him to some point that the initial test appeared to me much stricter than how they've applied it in this case. Is that fair to say?

Jake Charles (22:17.856)
Yeah, I think I would say that there were a couple of ways to read Bruin when it came down. And judging by who the author was and what his expressed views in the Second Amendment are, many of us read it to say, well, that seems to require a really strict approach, a really narrow approach. A broader approach is consistent with what the court said in Bruin.

but the narrowest approach was probably the best reading of what he meant, I think expressed in his own words in Rahimi. And so that's why a lot of people took the test to mean it's gotta be strictly applied and it's gotta be narrow historical analogies. And so even folks who argued within the Bruin framework weren't saying like,

Well, so like people would make arguments, right? Well, some will be or most of them will be in within the Bruin framework. So litigants were not asking the court to have a real Bruin. They were saying like there's this alternative reading of Bruin. I think that's what the majority was was was adopting an alternative reading of Bruin that, yeah, I think at the end of the day, we can debate how much that is a rewriting of Bruin and how much of it is just an alternative reading of Bruin. If we held their feet to the fire, what would, you know, the Chief Justice or Justice Alito?

who signed on to Bruin say about whether or not it's a rewriting or an alternative reading of Bruin. At the end of the day, it doesn't matter, right? But I think it's an interesting point to debate whether or not this is a repudiation or rewriting of Bruin or just an option of an alternative reading of Bruin. But I do think it's the case that Thomas is right about what the dominant interpretation of his opinion was before Reem.

Stephen Gutowski (24:07.013)
Interesting. Yeah, because I mean, the Bruin itself had that concurrence from Roberts and Kavanaugh that implied that basically, you know, it said that permitting regimes for concealed carry are constitutional as long as they're, you know, shall shall issue instead of may issue, as long as there isn't too much government official discretion involved, which they did without, you know, going through the test of showing

historical analogs for that kind of permitting. So I think there are probably signs that not everyone on the court was of the most narrow view of the Bruin test to begin with.

Jake Charles (24:35.648)
Exactly. Yes. Yeah.

Jake Charles (24:45.184)
Yes, yeah. And as you know, like, shall issue laws post -date may issue laws, right? So they're not even like older in form than may issue licensing laws.

Stephen Gutowski (24:52.613)
Yeah, I think in Bruin, Roberts had a quote of like, some permitting is okay, but permitting is, some permitting is different than other permitting is kind of what he was getting at. I believe there's like a First Amendment context to what his point was, but he obviously saw a pretty stark distinction between May issue and Chal issue gun carry permitting. And that made him that concurrence without this sort of historical, even the principles.

even this Verhimi justification didn't really make it in there. Right. Yeah, there's been a lot of stuff in Heller that is just kind of, we still think these things are constitutional. We're not gonna, without giving you the full, doing the full work of showing why under these tests it would be. So, it's not necessarily out of total left field to see a majority come down this way.

Jake Charles (25:23.712)
It's true. Yeah. Yeah. And they repeated Heller's safe harbor without, you know, purported to justify that. Yeah.

Jake Charles (25:46.496)
Yeah. I do think one more thing on Thomas's opinion that there was this question after Bruin of why didn't Bruin repeat this Heller safe harbor, the presumptively lawful, you know, felon prohibitor or mental illness prohibitions, because there's that concurrence in Bruin by two of the justices who are necessary to the majority where they repeat it, McDonald repeated it.

And in Bruin didn't. And I think we see in Rahimi where Justice Thomas is in dissent and he says like, this is dicta, right? Like we're not bound by this. So I think he didn't write, he didn't put it in in Bruin because he doesn't believe it, right? He doesn't think these things are presumed.

Stephen Gutowski (26:24.293)
Yeah. Well, they were addictive, right? I mean, it's, it's true, but the question being, even though they're addicted, how many members of the court are willing to, to, to vote, to vote, to toss out felon in possession laws or, and look, I still think that you probably have a majority that are willing to toss out some felon in possession crime. You know, we'll, we'll see on that point, right? Where you got, you got to that. Yeah. I mean, range seems like.

Jake Charles (26:47.712)
Maybe, yeah, probably.

Stephen Gutowski (26:53.157)
I mean, like, it just seems like this is very good litigating on the part of the solicitor general for one. I mean, having the first Bruin case heard be Rahimi, where the defendant is extremely unsympathetic. And, you know, this case where the first time they're commenting on the first time they're applying it beyond Bruin is a case where they're, they're upholding a conviction for gun possession is, is

Jake Charles (27:01.696)
Yes.

Yes.

Stephen Gutowski (27:22.085)
what the government wanted. I mean, they didn't get what they were asking for in their brief necessarily, this sort of responsible citizen sort of standard that they had initially asked for, but they did get a ruling like you mentioned that basically says the Fifth Circuit applied or brewing too strictly. And I think what gun rights advocates would want to see after this.

Jake Charles (27:33.088)
Mm -hmm.

Stephen Gutowski (27:49.285)
perhaps to alleviate some of those concerns that Thomas raised is a kind of anti -Rahimi case where they do the opposite. They take a case where the, well, even range wouldn't fit though, right? Because range, the lower court ruled in favor of range. So they wouldn't be repudiating them for being too broad. You'd have to take like a hardware ban case probably, the Illinois Soul Oppens Bans or something like that.

Jake Charles (27:55.776)
Hmm. Yeah, maybe range would be that case.

Jake Charles (28:08.928)
It would be repeating, yeah, maybe Jackson.

Yeah, maybe this opens up. Yeah.

Stephen Gutowski (28:18.501)
But I don't know, do you see them doing, where do you see it going from here? I mean, the DOJ has requested a bunch of these felon possession cases. They usually get some sort of preferential treatment when it comes to having cases granted. Where do you think they're gonna head?

Jake Charles (28:24.672)
Yeah.

Jake Charles (28:30.432)
Yeah, I think that was significant that the government renewed its request for the court to review the felon in possession ones. It even has a footnote that says like, look, we have other pending petitions in the C2 cases and we have pending petitions about unlawful drug users. We're not asking you to review those now, like send those back down. That's fine. But we are asking you to review the felon in possession cases because that's the most heavily enforced federal gun law. And so we need clarity on this because the

circuit splits gonna continue even after Rahimi. So I could see the, yes.

Stephen Gutowski (29:04.517)
And that does go to your point about it being narrow too, right? Even the DOJ seems to think this was not giving them a whole lot to go off.

Jake Charles (29:11.264)
I think that's right. Yes. So I think I could see the court taken, taken up those cases, especially as you said, with DOJ asking them to do so. I don't know. Maybe, maybe this saw weapons are next. Maybe the sensitive places are next. yeah, I think, I think sensitive places, a saw weapons and, and the felon cases are kind of the big ones where lower courts are.

sort of a drift at how to apply Bruin to those kind of frameworks. And so if the court took like a where case, like sensitive places, it could enunciate some principles for where you can restrict guns and where you can't. If it took the assault weapons case, it could talk about some of the principles that you use for weapons prohibitions. And then if it did range, one of the benefits of having a case like range versus one of the ones that strikes it down is that the court could uphold it, but it could give a little bit

more guidance about kind of how you do the framework because it has already taken a case from the Fifth Circuit to reverse. And so in this case, it could kind of step back and say, look, when you're applying it to unlawful drug users or mental illness, like here's what you do in people -based prohibition cases. That'd be one benefit of range.

Stephen Gutowski (30:28.773)
Serve a carrot and stick, carrot and stick approach, I guess.

Jake Charles (30:32.512)
Yeah, yeah. And I mean, range itself, it wouldn't be reversal if the court agreed with the range decision, but the standard that the Third Circuit gave in range was nonexistent. It basically said you can't prohibit guns from quote someone like range. And so even there, there weren't kind of principles that lower courts could apply. And so it would give the Supreme Court a chance to kind of flesh that out.

Stephen Gutowski (31:01.189)
Yeah, I mean, ultimately, do you think it just comes down to them having to take a lot more? I mean, that's kind of what Kavanaugh got at with his concurrence, where he's like, this is the second amendment. Second amendment law is comparatively in its infancy. When you look at first amendment law or fourth amendment law, fifth amendment, you know, all these other Bill of Rights aspects have hundreds of cases where the court has flushed out what they mean, with how to do the tests, all this stuff. And we have, you know,

Jake Charles (31:06.688)
Yeah, yeah.

Jake Charles (31:25.28)
Yes.

Stephen Gutowski (31:30.981)
five, six cases on the second amendment the court's done. So you think it's just part of that and sort of growing pains and they just need to do it more.

Jake Charles (31:37.088)
Yeah, I think it's part of that. I think part of one thing that makes it a little bit different is that, so yeah, we only had the couple of cases, but we had this four, or I guess 12 year stretch where we had basically nothing from the court, right? And so there was this time where lots of lower court precedent was developing that is now kind of back to square one. And I think that makes it a little bit more incumbent on the court to

provide greater guidance than resolving one case at a time. So we don't get more cases that have to be really relitigated after the court says, actually, you applied it wrongly again. Now go back to the drawing board. And because it's infancy, I think it is beneficial for the court to move slowly, not to have one case to say, this is how you resolve every one of these challenges.

But you could do it category by category and still give guidance about how to resolve cases in that category. That's narrow. It's still resolving some small set of claims. But it's not just like Rahimi, where the court is saying, OK, this one particular subdivision of this one particular law is constitutional. We're not going to say what else that means for other cases. I think it's got to do a little bit more than that so that we don't get more confusion and disagreement in the lower courts. And I think that's probably right. They are going to take more cases.

Stephen Gutowski (33:02.533)
Do you see, so this was a scenario where you had the liberals join most of the conservatives in the majority in upholding a federal gun law. Could you see them doing the same in a case where they're striking down one? I mean, is that even a realistic option? The liberals in the case still seem pretty unhappy about Bruin or even Heller to begin with. Like is that, how do you think?

Jake Charles (33:24.128)
Yeah. Yeah. I think, I could see some kind of compromise in, like, if you take the second circuits and Tonya case about sensitive places, the majority of their upheld almost all the sensitive places, or I think maybe all the sensitive places that were challenged. but it struck down the changing the default carry rule on, on private property or on

Stephen Gutowski (33:39.173)
Mm -hmm.

Jake Charles (33:52.831)
private property open to the public at least, where New York State had flipped the rule to say that you have to get permission to carry on private property. Even the appellate panel there said, you know, that's unconstitutional and consistent with history. Maybe there's a way in which the liberals would join on like a split decision like that, striking down some aspects of a law and upholding other aspects of a law. I'm not sure that, yeah, yeah, yeah, Catano. Yeah, where there were no noted dissents.

Stephen Gutowski (34:15.013)
Kind of like seitanu, the stun gun case.

Jake Charles (34:22.144)
Yeah, maybe there's a case like that that comes up. That's possible too.

Stephen Gutowski (34:29.061)
But it still seems like the, although I guess Sotomayor's concurrence did, there was some hay made, I think in pro -gun circles about her sort of accepting Heller and Bruin as the ruling standards. What was your takeaway from that? What do you think of it?

Jake Charles (34:46.624)
Yeah, that's precedent.

Jake Charles (34:51.584)
Yeah, I think...

I think, like, as a practical matter, they know it's not going to be overturned anytime soon. And so they're spinning whatever capital they have on the court to try to bring colleagues closer over to their view rather than trying to fight a battle that they know is not going to be won for, if they even believe it, for a very, very long time. I don't know. I mean, I imagine that, yeah, I imagine that Sotomar still thinks that Heller was wrong and decided, and it's because she had dissented in Heller.

Stephen Gutowski (35:15.781)
It didn't seem like Jackson was trying to do that.

Stephen Gutowski (35:21.061)
Yeah. Right.

Jake Charles (35:23.168)
But I think they're like, we're not gonna continue to relitigate Heller or even Bruin in every case. We're gonna try to get the justices that we can who disagree with us on those fundamental questions over to seeing a route where the government might have more authority.

Stephen Gutowski (35:39.077)
Jackson seemed willing to re -litigate it, but that might just be because she wasn't on the court at the time.

Jake Charles (35:42.912)
Yeah, maybe. Yeah. Yeah. She's like, I didn't get to say my piece yet. So maybe.

Stephen Gutowski (35:46.117)
All right. Well, so, you know, speaking of all this, what do you think the lower courts are going to do with this? Like, do you actually see the Fifth Circuit changing its approach to Bruin after this in any substantial way? Or do we think you're going to have continue to have these sort of circuit splits that we've seen where the more, you know, and I don't know, even in a, if you get that hypothetical anti -Rahimi case with the Ninth Circuit,

Jake Charles (36:07.328)
Mm -hmm.

Stephen Gutowski (36:15.877)
close attention to it. What is, what's the practical outcome going to be, you think?

Jake Charles (36:20.288)
Yeah, I highly, highly doubt that Rahimi will change how the Fifth Circuit or the Ninth Circuit adjudicates Second Amendment claims. There's enough in there for each of them, you know, to say like, this is the way we always understood it. I do think there's one Ninth Circuit case, Dorothy, about the felon in possession ban where the court strikes it down. I think the court there actually exhibits the same error as the Fifth Circuit because it's really uniquely focused on particular historical regulations.

So it might be one case that changes as a result of Rahimi, or at least how the analysis is conducted. Maybe the court ends up reaching the same decision, but how the analysis is conducted. But yeah, I highly suspect that the Fifth Circuit's gonna continue to say, there are no principles that support disarming domestic abusers, right? It's not gonna say that in this exact case again, but they're gonna say something like that. The Ninth Circuit's gonna say, you know.

Stephen Gutowski (37:12.037)
Yeah.

Jake Charles (37:17.056)
we've always looked at the historical principles, not particular laws. And so, you know, we're going to pull it under that basis. It's possible the court could, you know, refine it further in such a way that does tie the judge's hands in those circuits a little bit more. But at the end of the day, like it's impossible for the court to police all lower court activity. And so it has to take these cases like Rahimi that are kind of extreme outliers.

Stephen Gutowski (37:42.725)
And what do you expect in terms of the courts own workload on this front? I mean, they seem, at least some of them seem aware of this issue that they're gonna probably need to take a lot more cases to flesh all this stuff out. You got that from at least three of the concurrences, right? Kavanaugh, Gorsuch and Jackson, all these unresolved questions that remain and Kavanaugh going, I mean, Kavanaugh kind of wrote a whole book about originalism as his decend, his concurrence.

Jake Charles (37:49.216)
Mm -hmm.

Jake Charles (38:03.584)
Mm -hmm. Yep.

Jake Charles (38:10.464)
He did.

Stephen Gutowski (38:12.357)
But it ended with this whole idea of the infancy of second amendment litigation at the court. And so presumably he would want to take more. Like he's talking, he talks about going slow, sure, but not like 10 year gap between each case is kind of slow. It didn't seem like so. Yeah. Do you expect them to take more cases, especially in this era where they

aren't taking as many cases generally?

Jake Charles (38:27.808)
Yes. Yeah.

Jake Charles (38:39.008)
Mm -hmm. Yeah, I think the fact that they took Rahimi just two years after Bruin is a sign that they're not gonna do the Heller wait 10 years again.

Stephen Gutowski (38:51.301)
Well, they did take McDonald's two years after Heller, right? And then they waited forever.

Jake Charles (38:54.272)
They did, but not on an application of a standard. Yeah. And so, and, you know, there was a lot of reporting at the time that part of it was the squishiness of Justice Kennedy and, you know, neither side knew exactly where he'd be in a lot of issues. I think the fact that there are six solid conservatives now is a little bit clearer on many of these issues of how they're going to rule or at least general directions they might take.

Stephen Gutowski (38:57.477)
Mm. Right.

Jake Charles (39:21.6)
So I think that also means that we're likely to see more cases come up. I think the significance of the cases that are happening, if there are, the federal laws in particular, because they apply everywhere, and the felon and possession ban, in the government's filing after Rahimi, it said 12 % of all federal criminal actions in fiscal year 2022 were this single law, right? And so I think the court can't allow like,

things like that to stand unresolved for too long, like a year or two seems like already a really long time. Things like assault weapons bans, they have a huge kind of salience in the public and they matter in particular states, obviously, but if an accident, an assault weapons ban, it's just Illinois that's affected by that. And so that's kind of a different, I think a different calculus from the Supreme Court's perspective on whether or not it needs to take that case immediately.

The thing about a Sullivan's bans is they're kind of similar to the May issue, concealed carry, in that there's a lot of, or not a lot, there's a small number of states who have similar laws. And so resolving a Sullivan's ban for Illinois would also resolve it for all of the states that have it. So maybe that gives it a higher likelihood the court would hear a case like that. I think it's unlikely to hear ones that are only in particular, or only a small number of states like, you know, insurance mandates, for instance, or like a butterfly knives ban.

I think those are less likely to get the Supreme Court's attention. So I think we're more likely to get a case that's like an assault weapons ban where it has lots of, where lots of states are similar. And so you can resolve lots of things at once or a federal law like that 22 G one where the court is not going to want to let, especially a law that's frequently enforced, you know, operate differently in Pennsylvania than it works in California.

Stephen Gutowski (41:12.901)
Yeah, and we're recording this on Monday. It's a holiday week this week. And so we wanted to try and do this a little bit earlier. But we might get an answer to this, I guess, this week as the court may. Do you have any insight perhaps on why they've sort of, I don't know, they're kind of in purgatory, these Illinois cases, right? They haven't been relisted, but they haven't been denied. They're just kind of sitting around and nom.

Jake Charles (41:39.296)
Yeah, I think that's like generally seen as a hold pending, Rahimi. yes, the liminal space where these petitions exist. yes, my, my best guess on these, on those ones, excuse me, is that they'll probably be sent back down for reconsideration in light of Rahimi. you know, if the government is even

Stephen Gutowski (41:43.493)
Well, liminal space, right? That's the term. They're in liminal space somewhere. The phantom zone.

Stephen Gutowski (42:02.461)
And they aren't at final, I guess one of the issues is that they're not at the stage the court would normally take a case like that. That's my understanding of it.

Jake Charles (42:12.128)
so I think that, I think there was a cert petition before the seventh circuits ruling, but now the seventh circuit has ruled on it. And so I don't, I'm actually not sure. Maybe there, maybe it hasn't been a petition filed yet after the seventh.

Stephen Gutowski (42:25.477)
But I think, isn't it over the, they want a preliminary injunction and they've been denied that. So they haven't gotten through the full trial yet. Yeah, final judgment. So, but I guess we'll see, right?

Jake Charles (42:33.376)
Yeah, that might be right. Yeah. Yeah. So I think it's probably even more unlikely they're going to take it until there's a final.

Stephen Gutowski (42:43.141)
Yeah. So, but we could get that before this comes out of it. If so, it'll, we'll talk about it in our news update. so make sure you guys check that out, every week and are always constantly listening to everything that the reload produces and reading every word that I write. That's the most important takeaway, but, look, you know, I thank you for coming on and giving us your perspective on this. I like to, I really appreciate you doing that. Cause I like to try and give the audience,

Jake Charles (43:00.32)
Thank you.

Jake Charles (43:10.688)
Thank you.

Stephen Gutowski (43:11.397)
you know, a wide variety of viewpoints from people who I think are serious on the topic. And you are certainly one of those people, even though you might have principle disagreements with David Kopel, I think you can both, you're both good voices on this and it's important to hear from all sides. So people are going to have a good understanding, you know, they can take away what they, what they think is the strongest argument or what have you. And then also not everything you guys didn't disagree on everything either. So that's another important.

Jake Charles (43:13.568)
Thank you.

Jake Charles (43:25.216)
Yes.

Jake Charles (43:35.84)
Mm -hmm.

Jake Charles (43:39.872)
Yeah, yeah. Well, thanks for doing that, for having those, having lots of voices on.

Stephen Gutowski (43:40.837)
point to understand about this stuff. So yeah, and look, if you ever want to write in the reload as well for analysis piece, always welcome to do that too on these points. So we appreciate you taking the time to come and join us and give us

your point of view. And hopefully we can have you on again in the future to talk more about this stuff, especially if and when the court takes up another Second Amendment case.

which hopefully, and it does, it feels like everyone's agreeing that they're going to do that more often, but we'll only know when the court does what it does. That's, that's how it always goes. Right. So hopefully we'll, we'll see. but look, in the meantime, if people want to follow your writing or, you know, follow along with what you're working on, where can they do that?

Jake Charles (44:13.536)
Listen.

Jake Charles (44:22.016)
Yeah, that's right. But I'm sure it'll happen soon.

Jake Charles (44:35.936)
Mostly on Twitter these days at Jacob B. Charles.

Stephen Gutowski (44:42.117)
All right, wonderful. Well, I'm gonna send it over to myself now to tell you guys a little bit about The Dispatch and why I'm a subscriber there and their sponsor of this week's episode. So let's head to that.

That's right: this episode is brought to you by The Dispatch. We're doing one of these classic promo swaps with them, actually on Kevin Williamson's newsletter, which is one that I personally subscribed to and read pretty much every time it comes out. I've actually been a paying subscriber to The Dispatch since they launched. They have over 400,000 readers now. You know, Jonah Goldberg, and Steve Hayes, and Chris Stirewalt, and Allahpundit, and there's so many people who write over there that I've long followed and respected and enjoyed their perspective. And of course, in addition to a lot of the great commentary that they have from people that you probably know better than me, the people who are more well known than I, they also have a lot of really deep and original news reporting that they do. And so that's why I've been happy to have them as one of our sponsors as a promo swap. I definitely stand behind their work and recommend it to you guys in a way that I couldn't say for a lot of other publications out there. So, you know, if you're interested in checking out The Dispatch, if you haven't heard of it before, or you haven't taken the time to go over and examine what they're bringing into the world from a journalistic standpoint, I think you should do it. And in fact, part of our promo swap includes a 30-day free trial for their paid version. So you'll get access to everything they have for free for 30 days so you can read it and make up your own mind. Just follow the link in the description here or in our newsletter this week at The Reload. Honestly, I just do legitimately recommend them and so I'm glad to do this ort of promo swap because they're one of my favorite publications, and I think you guys will enjoy them if you enjoy what we do here at The Reload. So check out The Dispatch today at the link in our description.