Can New Yorkers carry guns? A 700 year-old law may inform Supreme Court's Second Amendment decision

John Fritze

November 2nd, 2021

When the Supreme Court hears oral arguments Wednesday in a closely watched guns case the discussion won't start with the last landmark ruling on firearms from 2010 or even with the ratification of the Second Amendment in 1791.

Instead, attorneys on both sides will likely reach back to a 700-year-old English law – and a debate over the influence it had on the framing of the Constitution.

At issue for the high court is whether New York may require residents to have a good reason to obtain a license to carry a handgun – a question with ramifications for gun laws nationwide. To find an answer, the justices are expected to look closely at the "history and tradition" of the right to bear arms, including before the nation's founding.

That has drawn both sides of the case, New York State Rifle & Pistol Association v. Bruen, into an intense battle over a statute from 1328 that some historians say informed the Framers' views of when people may carry their guns in public. The Statute of Northampton regulated the carrying of "arms" in public places.

"The reason why we're digging around in the reign of King Edward III is because the court has said you know the scope of the right by reference to the history that surrounds it," said Darrell Miller, co-director of the Center for Firearms Law at Duke University. "That is turning every constitutional scholar into an antiquarian."

The other reason, experts say, is that the court's conservatives often look first to the meaning of the words in the Constitution as the Framers might have understood them – an approach called originalism. Gun control advocates believe that focusing on the history of the right to bear arms may help bring at least two conservative justices to their side.

The Supreme Court court hasn't weighed in on the Second Amendment in more than a decade. In a pair of cases, one in 2008 and the other in 2010, it affirmed the right of Americans to

possess guns at home for self-defense. But the court left unanswered questions about carrying those weapons into public places.

The 2008 decision in District of Columbia v. Heller struck down a handgun ban in Washington, D.C. In 2010 the court applied the same ruling to states.

Associate Justice Antonin Scalia leaned heavily on the "text and history" of the Second Amendment in the 2008 ruling. He also stressed that the decision did not address "longstanding prohibitions" on guns – those ingrained in history – such as barring the mentally ill from obtaining weapons or carrying guns in public spaces.

With backing from the National Rifle Association, the plaintiffs in the New York case say that when the Second Amendment grants a right to "keep and bear" arms, the second part of that clause means a right to carry arms – not just keep them at home. And they say that right is firmly established in laws that date back centuries.

Robert Nash and Brandon Koch, both of whom live outside Albany, N.Y., applied for conceal-carry handgun licenses. While they were granted licenses, their privileges were limited to carrying guns for back country activities, such as hunting. Koch was also allowed to carry a gun to and from work, according to court documents.

They sued the superintendent of the New York State police and the licensing authority in Rensselaer County, asserting the requirement that they show "proper cause" for carrying a gun in public violates the Second Amendment. A federal court in New York dismissed their lawsuit in 2018 and the U.S. Court of Appeals for the 2nd Circuit upheld that decision. Nash and Koch appealed to the Supreme Court in December.

"The founding generation understood the Second Amendment and its English predecessor to guarantee a right to carry common arms for self-defense," the gun rights plaintiffs told the court in July. "The American tradition of protecting that right remained virtually unbroken in the century and a half following ratification" of the Second Amendment.

New York state counters that the Supreme Court has long recognized limits on that right – such as prohibiting people from carrying guns into schools and airplanes. It points to history to argue one of those limits has been on carrying loaded guns in public.

"Over the last seven hundred years, Anglo-American governments have regularly restricted where and when concealable weapons may be carried in public," New York told the court in September. "From the Middle Ages onward, laws on both sides of the Atlantic broadly restricted the public carrying of firearms and other deadly weapons."

The first question for the Supreme Court is whether the state requirement that people show "proper cause" to carry a gun falls within the sort of long-established regulations contemplated by the court's 2008 ruling in Heller. That's where history comes in.

Gun rights groups say many of the nation's early leaders – including George Washington and Thomas Jefferson – carried firearms. They point to state court rulings striking down 19th-century laws that restricted the carrying of guns. Critics counter that the NRA is cherry picking cases and that even Scalia, revered by conservatives, noted in the court's 2008 opinion that "the majority of the 19th-century courts...held that prohibitions on carrying concealed weapons were lawful."

New York points to the 1328 Statute of Northampton in its most recent brief. The medieval prohibition said that "no man great nor small" could "go nor ride armed by night nor by day, in fairs, markets," or "elsewhere." Several American colonies embraced similar regulations, allowing officers at the time to arrest people for carrying weapons in the public square – sometimes with strikingly similar language.

An 18th-century Virginia law, for instance, said residents couldn't "go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the country."

But gun rights groups say that the 1328 law – as well as the colonial statutes that copied from it – were understood as limiting weapons in situations where a gun owner was causing "terror" to others. That's partly based on a case dealing with the statute from 1686 in which Sir John Knight was accused of going into a church service with a gun. Historians agree that Knight was acquitted but they disagree on why.

Seeking a standard

The case before the Supreme Court could determine whether requirements like New York's are allowed under the Second Amendment. The Biden administration, which is supporting New York, told the court in a brief that Massachusetts, New Jersey, Hawaii, California, Maryland and Rhode Island have similar laws.

But the court's decision could have even wider implications if it sets a standard for how other gun regulations should be weighed by lower courts.

Since Heller, federal courts have generally applied a two-part test to review gun regulations. First, they look to history to determine if a restriction was historically understood as permitted under the Second Amendment. If the regulation doesn't have those historic roots, courts apply varying degrees of scrutiny depending on how much it impinges on the Second Amendment.

Critics say the current approach too often works against gun owners.

"I don't know what standard they're going to end up writing but certainly the right to carry is part of the right to keep and bear arms," said Ilya Shapiro, vice president of the libertarian Cato Institute. New York's law, he said, is "an impossible standard for the average law abiding citizen to meet."

The focus on history is partly a response to Heller but it's also an effort to appeal to the court's conservatives. While many of the court's six conservatives have often come down in favor of expanding Second Amendment rights, gun control advocates say the history of state public-carry

laws should make the choice more difficult for conservatives given their adherence to originalism.

After all, they note, the New York law itself isn't new. It's been on the books since 1913.

"History makes very clear that the states' ability to regulate outside the home is both well recognized and broad in scope," said Eric Tirschwell, executive director of Everytown Law, which filed a brief supporting New York's proper cause requirement. "If the justices who believe in originalism apply that methodology here we think it's an easy case."

"New York's law," he said, "is supported by centuries of history."