



Jeffrey Rosen: [00:00:00] 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. The Supreme Court recently agreed to here, New York State Rifle & Pistol Association versus Corlett, it's a challenge to a New York regulation on carrying guns outside the home. Here to explain the case, which could be a major second amendment ruling, I'm joined by two of America's leading scholars on The Second Amendment. Clark Neily is senior vice president at the Cato Institute, where he works on issues involving constitutional and criminal law, as well as gun rights. He served as co-counsel in district of Columbia vs Heller in which the Supreme Court held that the Second Amendment protects an individual's right to own a gun. Clark, thank you so much for joining and it's wonderful to have you back on the show.

Clark Neily: [00:01:03] Oh, it's my pleasure. Thanks for having me back.

Jeffrey Rosen: [00:01:05] And Adam Winkler holds the Commonwealth professorship in law at UCLA Law, where he specializes in American Constitutional Law, the Supreme Court and gun policy. He's also the author of Gunfight: The Battle Over the Right to Bear Arms in America among other important works. Adam, it's wonderful to have you back on the show.

Adam Winkler: [00:01:24] Thanks so much for having me, Jeff, it's always a pleasure.

Jeffrey Rosen: [00:01:27] Clark, tell we the people, listeners, why New York State Rifle & Pistol Association is important and what the case involves?

Clark Neily: [00:01:38] Yeah. So this is an interesting situation. The court has not granted cert in a Second Amendment case for more than 10 years and has left open a lot of really interesting questions and questions that have generated disagreements among the lower courts. So I think a lot of commentators think that perhaps we're overdue. And you may recall last term, the court accepted cert in another case out of New York involving a much narrower and kind of almost it was, it was sort of an oddity. It was a law that only affected people in New York city and, and affected who could essentially move a licensed handgun around under what circumstances within the state of New York. That case ended up getting mooted when the, when the law was changed by the legislature and ultimately by the state assembly. And so we didn't get an answer in that case about whether that law was constitutional.

So now what the court has done is granted cert in a case involving a really big issue. And the question is whether the Second Amendment does or does not protect the right of people to carry guns outside the home. That's a question that has been open the whole time, it's generated significant disagreement among the lower courts. I think the real interesting question in this Corlett case is are they going to answer it? And just because they granted cert in a case involving the question does not necessarily mean that they will answer it. And I'm sure we can talk about that later on.

Jeffrey Rosen: [00:02:55] Adam, your thoughts about the New York case, and help our listeners explain the precise question presented. Paul Clement frame the issue for the



petitioners, whether the Second Amendment allows the government to prohibit ordinary law abiding citizens from carrying handguns outside the home for self-defense, but the court narrowed the question. Tell us what the question the court's going to hear is and why that's significant?

Adam Winkler: [00:03:21] Well Clark is absolutely right that the Supreme Court has left open so many questions about the scope of the Second Amendment and this case I think most lawyers, advocates, and advocacy groups out there really hope the court will provide some clarity in this case about some of those questions and most prominent among them is the question of whether you have a right to carry outside the home, and importantly, whether New York's Permitting Policy, which only allows people who have quote unquote proper cause to carry a gun can get a concealed carry permit. In most states, they have something called shall issue concealed carry permitting, where if you meet certain objective criteria, you get a permit to carry a gun.

But New York is one of a handful of states like California and Massachusetts, and some others that require a special need. You have to show that you have a very personalized need for self protection beyond sort of the ordinary need for self-defense against criminals. And in the Corlett case to men and the New York Rifle and Pistol Association basically the NRA's advocacy group in New York, challenged the law the special permitting law after New York rejected the concealed carry applications of the two men. The 2nd Circuit court of appeals upheld the law and the challengers appealed to the Supreme Court. And so that key issue is whether the right extends outside the home and importantly, whether New York's proper cause permitting requirement is constitutionally permissible.

Jeffrey Rosen: [00:04:52] Clark, Adam says that a handful of states have similar laws some groups have identified California, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, and Rhode Island as having these proper cause laws. Tell us about how unusual these laws are, and then give us a sense of how lower courts have dealt with the question of whether or not restrictions on carrying guns outside the home are consistent with the Second Amendment?

Clark Neily: [00:05:19] You bet. So from a purely kind of population standpoint when you, when you've got New York and California in one group, you're going to have a lot of people. So on the one hand, not very many states have these you know discretionary issue, permitting systems, but the states that do two of them are the most populous states you know in the country. So a lot of people live in states that have that system. It's, you know, the... I would say the one point to make us about the history of these permitting systems. I'm not saying that all states are like this, but they do have a somewhat ugly history in the sense that the discretionary permitting has been an opportunity for local officials to decide who does or doesn't get permission to carry a gun outside the home.

You know, one thing to comment on is New York claims that, that the standard in New York is to show a special need. But if you actually go online, you can get a list of the people who have concealed carry permits in New York, Donald Trump, and his son, Estee Lauder, Howard Stern, Sean Hannity. You'll notice something rather similar about all these people in



that they are famous and certainly have enough money to pay, you know, for their own security, but nevertheless they have, they have a permit. So the point I'm making here is simply that lower courts have divided on this and most courts have actually upheld the so-called discretionary permitting approach, but really they've only done so by applying what I think has a standard review that has troubled the court, something not really much different if at all different from, from rational basis review, which is of course the lowest standard of constitutional scrutiny and effectively I think, amounts to a rubber stamp.

So the, the, there's definitely an imbalance in this split, but I do think that the courts that have struck down discretionary permitting have had the better of the argument, or at least have more faithfully applied the Supreme Court's guidance in the Heller case. And I suspect that's what the court has done in granting this case. I think they want to provide more guidance, whether they answer the question in the end, I'm not sure. I kind of suspect they might send it back down with instructions, but there I think what will emerge from this case is more guidance from the Supreme Court about the correct standard of review to apply.

Jeffrey Rosen: [00:07:16] Adam, you've written a definitive book about the history of gun regulations, tell us more about the history of this good cause licensing law in New York, which dates back to 1913, and it has been in substantially the same form since then. In upholding a similar law in March the US Court of Appeal for the ninth circuit upheld Hawaii's law and judge J Bybee said, "Our review of more than 700 years of English and American legal history reveals a strong theme. Government has the power to regulate arms in the public square." So tell us about the history of these laws and the reasoning that lower courts have used to uphold them?

Adam Winkler: [00:07:55] Well, it's important to distinguish between restrictions on concealed carry and the discretionary permitting laws. Restrictions on concealed carry for at least some portion of the population have been in existence for as long as we've had the United States. The founding generation had some restrictions on who could carry firearms in public, such as free blacks and slaves were not allowed to do so. Virginia had a law for instance restricting that and in the 1880s states began to really begin more broadly caring restricting concealed carry. Although there were restrictions on concealed carry like I said, going back to the earliest days and not just restricting African-Americans from carrying firearms, concealed carry restrictions were adopted in Southern states in the early to mid 1800s to where African-Americans were not allowed to possess guns at all.

And so those concealed carry laws were designed to stop, you know, ordinary white people who were full citizens from carrying guns in public. New York adopted its discretionary permitting law, like you say, in the 19 teens. And in the 1920s and 30s, almost every state adopted a discretionary proper cause or good cause discretionary permitting law for concealed carry. These laws were backed by the NRA at the time, written by the NRA as part of the uniform firearms act and promoted in state after state. And this, this was the law of the land for most of the 20th century until the 1980s and 90s, when the NRA led a big push to get state legislatures to lift these traditional restrictions on concealed carry and to move towards the shall issue permitting regimes that are most commonplace today.



Jeffrey Rosen: [00:09:28] Clark you have argued in favor of an originalist approach that would require the Supreme Court as you put it, "To confront 136 year-old mistake that pits history and text of the constitution against the false modesty of government favoring judicial restraint." Given the long history that you both have described of laws similar to New York's being on the books, why do you believe that an originalist approach to the Second Amendment would strike down the New York law?

Clark Neily: [00:09:59] Well, I think unfortunately the history we've heard so far is only a partial history. So for example, the New York law that we're talking about was a validly enacted to prevent immigrants, and particularly Italian immigrants from carrying weapons. There was a tremendous amount of legislative history that indicates this was an overtly racist law and it left people white people with the ability to carry guns. And of course, a discretionary permitting system is a perfect way of doing that. You have to go to the local police official and say, "Well, I'd like to have a permit to carry a gun." And if they don't like who you are, they don't have to give an answer. They just deny the permit or grant it if you have a kind of a favored status. And so that's point one, is that this law, these discretionary permitting laws have in many cases, a very ugly history, and they've been implemented in a way that's grotesque as I suggested in my response earlier, when you, you look at the list of people who have concealed carry permits in New York.

And we also see patterns of racial discrimination in many states in terms of who is issued a permit. So I think that there are significant, you know, sort of historical problems with the, with the origin of some of these laws and the way that they've been implemented. But you know, more, I would say more specifically to originalism question, it's this what other constitutional right can one think of where the ability to exercise it depends entirely on the unreviewable discretion of some local official who doesn't even have to give any reason for why they grant or deny the law? Now, I understand that the, that they've tried to sort of gussy up some of these discretionary permitting laws by, by trying to pretend as if there is some objective basis for deciding whether or not you have sufficient cause, but there's not, it's just not, it, this is entirely at the whim of local officials.

And I think if there's anything that our constitution stands for, it's that the ability of an ordinary citizen to exercise a particular right, or to be treated equally with other citizens should never depend completely on the individual whim of a government official, particularly when there's a history of those officials making those decisions in ways that offend core constitutional values like equal protection under the laws. So I think there are a lot of strong reasons why an originalist take you know, dictates you know, the invalidity of these discretionary permanent laws both because of the way they're written and certainly because of the way they've been applied historically.

Jeffrey Rosen: [00:12:11] Adam, in your book, *Gunfight: The Battle Over the Right to Bear Arms in America*, you argue that an originalist approach to the Second Amendment is consistent with many regulations that have been upheld over the course of American history, dating back to public inspection of muskets the revolution, tell us why you believe an originalist approach would uphold the New York law?



Adam Winkler: [00:12:33] Well, I think this case is actually gonna pose a real challenge for the originalists on the Supreme Court. I 100% agree with Clark that when, if you have a constitutional right there shouldn't be broad government discretion without guidance and without right to appeal for any denial of that right. The question is whether you have a right to carry guns in public at all. The Supreme Court suggested probably so. The Supreme Court in the Heller case suggested that the text of the Second Amendment referring to a right to keep and bear arms meant an ability to just carry a firearm in case of confrontation.

However, you know, the evidence about the original understanding or original use of the words, bear arms has really developed a lot in the 10 years or more since Heller was decided. And now we can look at the use of terms like bear arms with the help of things like Corpus linguistics. These are large databases of English language texts from the founding era. So for instance, Brigham Young University has the Corpus of founding era American English, which includes over 130 million words from a range of sources from 1760 to 1799. Well studies of these of the use of bear arms in these databases show that it was used nearly exclusively in the military context, 93% of mentions were military context, only 4% of mentions were non-military.

If you couple that with the reference to the militia in the text of the Second Amendment, and couple it with the fact that every known mention of bare arms and state ratification debates was about malicious service and not about the ability to carry a gun in case of confrontation against a criminal for ordinary personal self-defense, I think it's pretty clear that the ordinary and understanding of the words bear arms at the time of the founding was not that ordinary people would have a right to carry a gun in public. We... There's just no evidence to support that argument and there's a tremendous amount of evidence to support the idea that the right to bear arms was linked and was understood exclusively in a military context.

So I think it's really questionable whether there is a right to carry arms outside of the home. And as a result, the fact that there's broad government discretion on whether people can get a permit is much less problematic, obviously arbitrary or racially discriminatory permitting is inappropriate under equal protection principles, regardless of the meaning of the Second Amendment. But I also would push back a little bit on Clark's reference to Donald Trump and Estee Lauder and Sean Hannity. Yeah, that may be the case, but those are all really high profile people who've probably been victims of stalking or had serious threats made on their lives because of their controversial nature and high-profile nature. And that's one of the reasons why in a discretionary permitting law, you would get a permit to carry a firearm because you are someone who has been subject to specific and identifiable threats.

Jeffrey Rosen: [00:15:24] Clark, Adam just made a powerful originalist argument. He said that in the 10 years since Heller was decided studies of databases suggest that almost all 93% of the uses of the phrase bear arms in the founding era was linked to the right to bear arms in a military context. What's your response and have lower courts responded to this new evidence, and do you imagine that any of the conservative justices on the court will engage it?



Clark Neily: [00:15:52] Oh, I don't think this is going to give them any pause whatsoever for a number of reasons. The, the the fact that people mention a particular term in a particular context may have as much to do with whether the, the questions have been expressed about that term in that context. And maybe that because there's no question about whether that term applies in some other contexts, they just don't talk about it. You wouldn't expect it to show up. Let me give you an example. Although they are not the same today, I would say that the role of guns in society at the founding era was somewhat like smartphones are to us. If you're going more than 50 or 100 feet from your house, you do not leave the house without that thing in your hand. For us it's smartphones for them it was guns. This was back at a time when we had no professional police force.

If you lived, if you lived anywhere remotely in a rural area, you were gonna take your gun both in order to you know, put food on your table, to protect yourself wild animals, to protect yourself from potentially you know, native Americans that were still angry about us being there. So everybody carried guns everywhere back in those days, practically speaking. And the idea that any government could simply disarm you arbitrarily and just say, "Well, nobody's, nobody can carry guns outside the home anymore." In the late 18th century, I think would have been as astounding to them as the idea, for example, that the government could say, you can't own a plow, which is the single most important agricultural invention in human history and the only means of survival by many people you know, who lived in rural areas during that time. It's simply would not have occurred to anybody that the government even had this authority.

And I don't think we would expect to see very much discussion of the ability to carry weapons outside the house in the sort of citizen context, and therefore it doesn't surprise me at all that people weren't talking about bearing arms and asking questions about whether it applied to individuals carrying weapons outside their home, because there was never any question about whether it did.

Jeffrey Rosen: [00:17:33] Adam, what is your response to Clark's argument and more broadly your response to the thought that the conservative justices on the court in arguing for some kind of heightened scrutiny for Second Amendment rights are relying less on the original understanding of the founding era and more on the sense that the text of the second amendment does not create a second class right.

Adam Winkler: [00:18:00] Well, thanks, Jeff. I mean, certainly there are those justices on the Supreme Court who have been calling for more engagement with the Second Amendment precisely because they feel that the Second Amendment is being treated like a second class right. I think that, you know, that to the extent you think that the Second Amendment protects broad access to guns and seriously restricts the power of government to regulate guns then I can understand why they think that the right to bear arms is being treated as a sec, as a second class right. However, I think again, you know, originalists usually look to original understanding as I mentioned, there's absolutely no evidence that the founding era thought that you should be able to... That we were protecting in the constitution a right to have a gun for personal protection against confrontation.



Clark says everyone was carrying a gun, I just don't think there's evidence to support that claim inventories of of gun ownership at the time of the founding based on probate records show that actually it's only a fraction of the population that even possessed a hand gun. A hand gun in particular was not the kind of firearm that a lot of people own. They weren't very effective at the time. If you wanted to use a gun for hunting you wouldn't use a handgun. Remember hand guns at the time could only... You could only load one round at a time and they were highly inaccurate because it was before the era of the rifling of barrels.

So if you wanted to defend yourself when you were out on the roads back in the day you carried... Might, might've carried an arm, but it wasn't a firearm, it wasn't a gun, it was more likely to be a knife or some kind of club. But in any case, regardless of that, I think that the courts at least some of the justices have been frustrated because the government's government regulation of gun rights has been approved by the lower courts time and time again. And what I think that... I think that's pretty consistent with the history of the Second Amendment and the history of the right to bear arms under state constitutional law. Over the course of American history we've always had gun regulation, and we've seen very, very few gun laws struck down by the courts, either under state constitutional provisions or federal constitutional provisions, because there is this recognition that governments always had that ability to regulate firearms and firearms owners and where those guns could be brought.

And the interesting thing is if the court really does apply a heightened scrutiny under the Second Amendment after this case, it'll be the first time in American history that the Supreme Court has ever applied heightened review to The Second Amendment. And I should say before the last 10 years, it would, it would have been the first time that any state constitution has ever performed any kind of serious heightened scrutiny with regards to gun regulation. So I think what we're seeing is that heightened scrutiny would be seriously contrary to not only the original understanding of the Second Amendment, but contrary to the history and tradition of gun rights and gun regulation in America.

Jeffrey Rosen: [00:20:49] Many thanks for that. Clark, a strong claim from Adam, which I think needs our response, that heightened scrutiny for the Second Amendment would be contrary to the original understanding of the amendment and to nearly more than 200 years of history in the, in the, in the state and federal courts.

Clark Neily: [00:21:04] Yeah. I mean, you know, I really appreciate Adam and I, I think that, that, you know, he makes a very strong case for this position. But the challenge I think for me is that as you know, I take the position that, that really what we have in this country, what the Supreme Court has created is really functionally two standards of review. One, is the rational basis test, which is nothing more than a rubber stamp. It's just to me, it's just a fraud and a charade and a non-standard masquerading as a standard. And then there's all other forms of heightened scrutiny. And so I think if the court ends up in a position where it has to choose between the rubber stamp version of rational basis review, which is, I believe what most lower courts have been applying, although they haven't acknowledged that that's what they're applying, or some form of fairly minimal, but still discernibly, real heightened scrutiny.



I think it's going to be difficult for the, the, the sort of the conservative leaning justices to embrace the idea that Second Amendment rights should get the same completely meaningless standard of constitutional review as for example, economic liberties and most property rights. I could be wrong about that, but I just don't think that there'll be able to swallow that. Now, do I think that they'll go anywhere near strict scrutiny on the other side of the spectrum? I do not, but I do think we'll end up with something between rational basis with bite and intermediate scrutiny when the dust settles.

Jeffrey Rosen: [00:22:18] Adam let's talk about justice Amy Coney Barrett. Before joining the Supreme Court, she wrote a 37 page dissent in the case called Cantor and Burr in which she argued that only those shown dangerous can be stripped of Second Amendment rights and being convicted of a felony isn't enough. It sounds kind of radical to say felons can have firearms. She said in commenting on the decision, but she's found no blanket authority just to take guns without showing the person was dangerous. She quoted in her dissent, a colorful line from our law review that you wrote, "It's hard to imagine how banning Martha Stewart and Ron's Andrew Fastow from possessing a gun furthers public safety." was just as Barrett quoting you in context and what do you think her dissent says about the way she might approach the New York case on the Supreme Court?

Adam Winkler: [00:23:08] Well, Jeff, this puts me in a, kind of an uncomfortable position because Amy Barrett's dissent in that case saying that the lifetime ban on all felons possessing firearms was unconstitutional is a pretty radical position in the federal courts today, right? The felon in possession ban has been upheld by court after court, after court, and she's one of only a handful of judges that have said that the law is too broad. And in doing so she quotes and cites me in context 'cause I agree with her that the felon possession ban is overly excessively broad and should be curtailed. So ironically, the person who is here to, to defend gun control was the one who's supporting Amy Barrett on that particular issue.

But I do think that Amy Barrett, what's interesting... One thing that is interesting to note about Amy Barrett is that like Brett Kavanaugh, she has approached Second Amendment issues, not from the standards of review that Clark was talking about, whether rational basis, or intermediate scrutiny, or heightened scrutiny of some other sort but through a history and tradition approach. And I think one of the reasons why we might not get a majority opinion in this case is that I think there may be a real split among the conservative justices over how to approach gun regulations in the future, with Brett Kavanaugh and Amy Barrett, and maybe some others arguing that the right way to do it is to issue all standards of review and only look to history and tradition and to try to find historical analogies.

The interesting question here is you have a long history and tradition dating back at least to the 19 teens of discretionary permitting and restrictions on concealed carry that go all the way back to the founding era. It'll be interesting to see how those justices who look to this history and tradition make sense of that history and tradition that seems to suggest that there is at least some broad government power here.

Jeffrey Rosen: [00:24:50] Clark, Adam just said that there was a long history and tradition of discretionary permitting and restrictions on concealed carry back to the founding era. And



he, that justice Barrett's record suggest that she and justice Kavanaugh might be more focused on history and tradition than on standards of scrutiny. Do you agree or disagree and how do you think justice Barrett might approach the case?

Clark Neily: [00:25:08] I have to say I disagree with the thrust of the point. If you look at most of American history, what you will see is that ordinary white people got to carry guns pretty much wherever they wanted to. And what you will see is that when, when the government prevented people from carrying guns outside the home, it was usually done on the basis of some suspect classification, like the fact that they were newly freed African-Americans or they were immigrants from disfavored places, things like that. I don't think that that history adds up to a strong case for the proposition that arbitrary disarmament, or maybe a more precisely arbitrary refusal to allow people to carry guns outside the home has been a significant feature of our country's history.

Now different states have different rules about whether you had to carry openly or you had to carry concealed, but throughout most of our history up until the early 20th century, if you wanted to carry a gun outside of your home, and you weren't a member of some disfavored group, like a convicted felon, or racial minority, or an ethnicity that was currently not favored as in New York city at the time the Sullivan Act was enacted you had the ability to do it and it wasn't significantly interfered with. That I think is likely to be the relevant history that Amy Coney Barrett and Brett Kavanaugh focus on in the event that go with this history and tradition approach. The history and tradition here is quite strong and it is basically this, if you were sort of within a favored majority, no one bothered you if you wanted to carry your gun outside your home, your home and the people whose ability to do that primarily was interfered with... Were people of, of, you know, marginal groups and disenfranchised groups. That's I, that's how I see the history at least.

Jeffrey Rosen: [00:26:39] Thanks so much for that. You're both debating this so well that I only have to repeat the point. So rather than repeating it Adam, your response.

Adam Winkler: [00:26:47] Well, I mean, I don't, I want to go around in circles too much. I mean, I think Clark and I probably disagree on what the empirical facts of American history are. I mean, I see the uniform firearm, firearms act being adopted in virtually every state, including states where there was not significant Italian immigrants in the 19 teens states in which there was not an issue of African-Americans possessing firearms, because they were already prohibited from keeping firearms much less carrying firearms. And so I just don't believe that it was merely a matter of only discriminating against a suspect classifications.

But even if it were, I think one of the things we have to think about when we look at history and tradition is is whether there's a history and tradition of recognized government power. Now we know that government power has been abused with regards to property rights, marriage rights, almost anything in American law has been distorted over the course of history and tradition to promote racism racial privilege, and racial hierarchy in America. That doesn't mean government doesn't have the power to issue marriage permits just because marriage permits were once racially restricted. It doesn't matter that we don't have a basic...



We shouldn't throw out basic property law just because property law was often infested with racism in American life.

Government power to regulate guns has been infested with racism. I don't have... Clark and I are in agreement on that that that's always been the case because any area of law that dealt with violence was going to be used to maintain white supremacy. But I think that the basic recognition of government power seems to be very, very well established in this area. I think one of the interesting questions to move to another question is whether you have a right to carry a concealed weapon, or whether you have a right to carry in some way shape or form? Because there is some... There are some early or mid 1800s cases where the... Where state court said, "You can ban concealed carry entirely so long as you allow open carry."

And I'll be really curious to see what the court says about that question, is the idea that you can allow... You have to allow one carry, someone to carry in some way, shape or form. It might be interesting for a state like California to say, "Okay, we're going to continue to ban concealed carry, but we might allow open carry." And that's going to mean a lot fewer people carrying guns on the streets because people generally don't want to openly carry, and business of course could keep people who are openly carrying from coming into their stores or restaurants.

Jeffrey Rosen: [00:29:07] Clark, what do you make of Adam's suggestion, and do you think the court will hold that there is a right to carry in some form?

Clark Neily: [00:29:17] Yep. This is kind of a game that, that California and some other jurisdictions have been playing sort of like, "Well, we don't allow concealed carry, but maybe we would allow open carry." And so I think the way it's going to shake out as this I think this is just all kind of a gambit on the part of states that want to discourage people from being able to carry in any way, shape or form outside the house. The, the bottom line is this, in the old days, it was considered to be an act of cowardice to carry a concealed weapon. It was the kind of thing that, you know, lowlifes, gamblers, and others, and assassins did, and an honorable person would carry openly so that people would know that you are armed and that you have the ability to, you know, in effect shoot back.

of course has completely changed now. And I would say now it's open carry that makes people feel uncomfortable and concealed carry that has become the norm. The way I think it shakes out is this, there is I think no empirically valid or constitutionally sufficient justification for saying to somebody, "Hey, if you want to carry a gun outside the house, perfectly fine, but it has to be open or vice versa." In other words, there's not really any empirically valid distinction between forcing people to carry open only, or forcing them to carry concealed only, although I think frankly, the constitutional, if there is any constitutional basis here, it's probably points in favor of allowing concealed carry and, and, and protecting that constitutionally as opposed to open carry, which of course makes lots of people very nervous.

At the end of the day I actually don't think it really matters very much. Because what we do know is that jurisdictions that have, you know, authorized you know, this shall issue concealed carry permitting systems have not had markedly different results than



jurisdictions where you can only openly carry. So at the end of the day, the facts just aren't there to support this distinction. And I think a lot of states like California will lose interest in it. In the event, the court protects the ability to carry weapons outside the home in some way, shape or form, because up until this point, the whole concealed versus open carry has just been nothing but a MacGuffin. And once it doesn't work anymore, they'll lose interest in it.

Jeffrey Rosen: [00:31:08] Adam, if the court by majority vote decides to strike down the New York law by applying some form of intermediate scrutiny, what would the decision look like would just the New York law fall and what other laws would fall involving for cause permits and more broadly, what would embracing intermediate scrutiny for the Second Amendment outside the home mean for regulations in the states?

Adam Winkler: [00:31:33] Well, it's a great question. I think obviously this case only involves New York law. So the immediate official impact or formal impact of any decision would only be upon New York. However, of course, this a court ruling that New York's discretionary permitting law violates the right to keep it keep and bear arms under the Second Amendment would encourage lawsuits brought in other states. And there's already lawsuits pending in a bunch of those states, those lawsuits that have been going up on appeal. And of course those cases would all face briefing and summary judgment motions and whatnot and it would likely have a broad, much broader effect outside of New York, because it would affect all the other states that have discretionary permitting.

And what would it mean in terms of intermediate scrutiny? I guess it depends on what the intermediate scrutiny really looks like. So far, what the court has generally said with regards to intermediate scrutiny, I say, I should say the lower courts on the Second Amendment have said that if something's included some right, is included within the Second Amendment, then the government can all can restrict it. But if it's a substantial burden, it's going to trigger strict scrutiny. And if it's an insubstantial burden, then it's going to trigger intermediate scrutiny.

Well, there's no doubt if you have a right to keep arms and bear arms in public and carry a gun for confrontation, I think there's no doubt that the laws in place like in New York or in California are substantial burdens on that right. In Los Angeles county, we have 10 million people and less than 400 people other than retired police officers have concealed carry permits. So that's an effective ban. And so that would be a substantial burden, I think, and then would trigger under the two-part test that we see in the lower courts, a kind of strict scrutiny. So I actually might just disagree a little bit with Clark on this and that he said that I thought the court would stay away from strict scrutiny, but I'm not so certain about that. I do think that this would be deemed to be a substantial burden on a right to carry a firearm in public of the sort that might well trigger strict scrutiny.

Jeffrey Rosen: [00:33:26] Thank you for that. Clark, your response, might, might the court apply a strict scrutiny as Adam suggests, should it apply strict scrutiny, and what would the effect of an opinion applying either intermediate or strict scrutiny be on other restrictions?



Clark Neily: [00:33:41] I think it should apply strict scrutiny, and I think it won't apply strict scrutiny. I think it should, because if the Second Amendment really is a constitutional right of essentially, you know equal stature with others, then there's no obvious reason why it should receive substantially less protection than the right of free expression or free exercise. That's being said, I think that the Supreme Court is at the end of the day, a pragmatic institution. And I think the implications of applying strict scrutiny to gun laws as a matter of course, would so upset and concern enough justices that they, they, they wouldn't do it.

I really don't think the Supreme Court wants to be very much in the business of, of helping to set gun policy in this country. And I think they'll go to considerable lengths to avoid being in the position of you know playing a significant role in that area. How they get there, I don't know, but I think that they've got to stay away from strict scrutiny if they want to avoid getting drawn into a situation where they are as active on the Second Amendment, for example, as they have been on the First. And the one outcome I cannot fathom is the idea of the Supreme Court being as active on the Second Amendment as it has been on the First, I just don't think that's going to happen.

Jeffrey Rosen: [00:34:46] Adam, let's imagine for the sake of argument that Clark is correct, and the court applies a kind of intermediate scrutiny what other regulations would that call into account? It, it would still invite a whole lot of lawsuits as you said, and since Heller lower courts have been uniformly deferential to regulations, would intermediate scrutiny change that and what other regulations might be vulnerable to challenge?

Adam Winkler: [00:35:06] Well, it's a great question. And it kind of depends on how intermediate the scrutiny really is. As Clark says, the intermediate scrutiny we've seen in the lower courts has looked a lot like rational basis. The court has allowed... Has said, well, we really want important governmental interests like intermediate scrutiny traditionally requires, but that's easy for the government to meet restricting, you know, access to or reducing crime, public safety, all important governmental interests. The key is always with the tailoring prong of intermediate scrutiny and how much fit is required between the law and the governmental interest. And that's where the courts have done a kind of rational basis approach to intermediate scrutiny, and that they've allowed much leeway and not a very good fit between the ends and the means.

And so I think the court could tighten up that fit requirement. And it'd be interesting to see how they tighten it up because almost any way you tighten it up, will call into question a number of gun laws that are out there. And I think that as much as Clark suggests that the court will stay away from rewriting American gun laws if the court strikes down discretionary permitting, it's gonna have a huge effect on these cities, right, in Los Angeles. Like I said, 10 million people, less than 400 people with concealed carry permits. Well in states that allow shall issue permitting, we get about, you know, 10 to 14% of the population gaining a concealed carry permit. So if 10% of the population in Los Angeles county cut it in half, 5% of the population in Los Angeles county you're going to hundreds of thousands of people will have permits to carry firearms.



And so we'll have a big effect on these cities. And I know there's some debate about what the ultimate public policy impact of having all those guns on the streets are but it'll certainly be a very different environment. And I do think that the court is likely to call into question in the coming years restrictions on military style assault rifles. I think the court's likely to call into question bans that have been adopted in some places on high capacity magazines. When you think about it, if you, if you take down discretionary permitting, you take down bans on military style rifles, you take down bans on high-capacity magazines, you've basically taken down three of the four main elements of the modern gun control movements agenda. The only thing being left on the table is universal background checks, which I think the court would uphold if they were actually implemented.

So I think that's a pretty big impact that the court could have even with an intermediate scrutiny, as long as it was a little more tight than the version that we see in the lower courts.

Jeffrey Rosen: [00:37:31] Clark, your response to Adam's point first that striking down the New York law would have a very large effect in places like LA and New York, and also that it might lead the court to strike down bans on military style assault weapons, and high capacity magazines leaving only one prong of the gun control movements, agenda, mainly uniform background checks in place.

Clark Neily: [00:37:55] Well, my reaction is to say that it would have a very big effect on my retirement planning if I won the lottery but that's not going to happen. [laughs] And I would say the same thing here, I just don't see any scenario in which the Supreme Court strikes down that much you know, of, of sort of the current totality of gun regulation. I think a much more likely course is that, and, and I kind of want... One always hesitates to, to predict what the Supreme Court will do, but then of course, it goes ahead and does it anyway. My, my sense is this, I think that the Supreme Court would like for the intermediate courts, the lower and intermediate courts to sort of lead, not to charge, but sort of lead the March in the direction of a little bit more of substance in terms of reviewing gun regulation.

I don't think the Supreme Court is going to make any big moves in this Corlett case. And instead, I think what it may do is remand to the lower court with instructions to apply a bit more robust standard review, see how the, the, you know, sort of the chips fall and really not do much than that. In the next, let's say five or 10 years, it may be if they do this, that some of the justices will hope that places like California and Los Angeles county, for example, will see the handwriting on the wall and, you know, quote unquote voluntarily update their, their gun control policies so the courts don't have to force them to do it. And we may never get there. But I suspect that gun policy is not going to look much different in 10 years than it does now. And jurisdictions that wanna limit of the so-called military style assault weapons, which of course is a term that I resist, but a provisionally accepted for now, they'll still be able to do it.

You know, high capacity magazines I think is probably a little bit more uh, up in the air. But I, you know, again, I think if you're worried about the Supreme Court you know, having a huge impact on gun policy and changing a bunch of gun regulations by requiring, you know, government you know, government jurisdictions to make a heightened showing in court,



I'm, you know, I'm the Heller guy and I'm here to assure you that I personally don't see that coming. And I still don't think the courts are gonna be involved in any really significant way. And basically if you live in a state that wants to have pretty stringent regulations of guns they're going to be able to do it. And maybe there's a few that they won't be able to, you know keep on the books, but basically it's, it's all gonna look pretty much the same way it does now in my view.

Jeffrey Rosen: [00:40:01] Adam, on the substance of bans on assault weapons, you wrote with Nelson Lund, the explainer on the Second Amendment on the National Constitution Center's interactive constitution. And you have a wonderful 1000 words about what you both agree the Second Amendment means, but you disagree about the constitutionality of assault weapons. Professor Lund said that bans on assault weapons define this class of guns in terms of cosmetic features, leaving functionally identical semiautomatic rifles to circulate freely. This is unconstitutional for the same reasons it would violate the First Amendment to ban words that have a French etymology or to require the French fries be called freedom fries. Tell us why you think that professor Lund is wrong and that it would be wrong to strike down bans on assault weapons as a matter of text history and original understanding?

Adam Winkler: [00:40:53] Well, it's a great question. I do think that one of the challenges that the court faces in defining which arms are protected by the Second Amendment is that we don't have great original understanding of what they imagined would be protected by the Second Amendment. And the firearms today are so fundamentally different than the firearms they had in the founding era. And I certainly would never be one to say that you only have the right to the technology that existed in 1791, that, that would be an absurd way to think about constitutional principles.

However, I think there is a, what the court has said is that arms that are in common use and that are not dangerous and unusual weapons are protected by the constitution. And I think that, and most lower courts have agreed that a military style assault rifles are in common use. There's millions of them out there. They're the sort of favorite gun of shooters these days to bring to the gun range and whatnot. And they are in common use. And I think that if they're in common use, the court is likely to say that they are protected by the constitution.

What we've seen the lower courts say is, "Yeah, they're in common use, but we're going to say these bans are still constitutionally permissible because no one's really denied the right to defend themselves with a firearm because of a military assault rifle ban. You can still own a ton of different kinds of semi-automatic rifles you can still own a ton of handguns and you can still exercise that basic core fundamental right." It's not clear to me that the, the, the, the analogy that Nelson Lund makes to the English language is a particularly good one in that it's very, if you're prohibited from speaking in certain ways, it really fundamentally undermines your ability to express yourself in the kind of nuance and way that you wish.

If we think that the right to have a firearm is merely a right to have a tool that's a successful and functional tool for self defense in the home that's in the shape of a firearm, it's not clear why you would have there's any particular difference for why you might favor one particular weapon over another so long as they meet some minimum threshold of effectiveness. And



of course, military style rifles are not generally used for self-defense. That's not to say you can't use them for self-defense, any firearm can be used for self-defense but they're not general, that's not their general use. Generally handguns are the guns that you use for self-defense sometimes a shotgun.

Jeffrey Rosen: [00:43:05] Clark, tell our listeners whether or not you believe that bans on military style assault weapons are, or are not consistent with the Second Amendment and why?

Clark Neily: [00:43:15] Well, I think they are plainly inconsistent with the Second Amendment. I think the real question is what the courts will do about it. I don't think the Supreme Court in particular really wants to get into this debate if it doesn't have to. My take is a little bit different and it's this I think that as long as there is no serious effort to enforce these laws, so right now, there is no serious effort to enforce assault weapon bans in states that have them. New Jersey, for example, has one of the longest and most sweeping assault weapons bans, and the state estimates a compliance rate of about 3%. And that's pretty standard. So basically as long as there continues to be no serious effort to enforce these laws, and we don't have, you know, thousands of sort of otherwise law abiding, you know, mom and pop type people going to prison simply because they refused to give up their now illegal assault weapon, I don't think the courts will get involved.

I think they... There won't be any need for them to step in and decide whether there's a Second Amendment right to own a so-called assault weapon. I do think that if there's a change and local governments do start enforcing assault weapon bans in some serious way, which of course they have not up until this point, that may put the courts in the position where they have to step in, because I think it would be very difficult you know, for this current Supreme Court to kind of preside over a situation where you know, sort of, again, these, these pillars of the community, otherwise law abiding perfectly decent people who've never sort of committed another crime, at least that they know of in their life are suddenly looking at a five, 10, 15, 20 year felony simply for refusing to give up their assault weapon. That's going to put the courts in a very difficult position.

So my prediction is we'll continue to see assault weapons bans, and as long as there's no meaningful effort to enforce them as there has not up until this point, the courts will let it slide. But if there's a jurisdiction that actually does make a meaningful effort to enforce assault weapon, an assault weapons ban, then I think it's much more likely the courts would get involved. And then it would be a question of can the local government provide enough empirical evidence to meet some heightened standard of scrutiny. And that's gonna be challenging. I'll just end with one really quick quote. There's an amazing case out of the Seventh Circuit by judge Easterbrook from 2015, in which he upholds an assault weapon ban in Highland park, outside of Chicago. And all you can kind of come up with is that perhaps it makes people feel safer and there's no empirical evidence that it actually does. And he literally just says, "If a ban on semiautomatic guns and large capacity magazines reduces the perceived risk from a mass shooting and makes the public feel safer as a result, that's a substantial benefit." Well, good luck with that in the Supreme Court as currently composed, 'cause that's not gonna fly.



Jeffrey Rosen: [00:45:44] Thank you for that. Adam, last question and then closing arguments. If you were right, and that this New York case signals a new path for the Supreme Court and lower courts, where after 10 years of mostly upholding regulations, they now come to strike down what you called three of the four pillars of gun control movements how do you see that playing out, and might it provoke a political response that could include increased pressures for a constitutional amendment?

Adam Winkler: [00:46:11] Well I guess we'll really have to see how the court comes out on these issues. And I think both, you can get a sense from both Clark and I, that we... It's hard to really know exactly how the Supreme Court is going to go. I'm actually kind of surprised that Clark thinks that the court isn't going to seriously engage with the Second Amendment, and by that, I mean, start to strike down gun control laws. We've had justice after justice that have written dissents from these denials of cert where they say the Second Amendment is being treated like a second class right. And what they mean by that is that government efforts to regulate are being upheld. Well, why call it a second class right over and over again, if you don't think that the courts need to be more active, striking down gun control laws?

So I think that there is, and it's not just one or two justices saying this, right, we've had these statements have been made by, by Thomas, Alito, Gorsuch assume that Barrett's on board with that as well, given her lower court opinions. So I would be very surprised if we don't see the court more seriously engaged with this with this issue, raise the standard of review, expand Second Amendment rights over the coming years. And so I really think we're heading in a different direction than Clark believes. Maybe 10 years ago, I would have been exactly where Clark was and said, I don't think that the court is going to, to greatly expand gun rights because courts have generally over the course of American history not been very active in expanding gun rights.

But it seems that there's a real, a real concentration of justices right now who've made explicit claims that it's time to start striking kind of control laws down. So I think they're gonna... I think we should take them seriously, take them at their word and they're going... I think that this was the beginning this case. It may not turn out as Clark said earlier if I can phrase it in another way, tea leaves are hard to read and best left for making tea rather than predictions of the future. And so none of us really know exactly how the court's gonna go, but I would be really surprised if we don't see the court more seriously engaged in the Second Amendment in, in the coming years, given what the court itself has said needs to happen here.

And then I... So I think what we're going to see is a continuation of more and more challenges to gun control laws. And, and it'll really turn on how engaged the Supreme Court really wants to be if it takes a more Clarkian approach or a more Adam approach I think that's really gonna be the real difference.

Jeffrey Rosen: [00:48:24] Thank you so much for that. Well, it's time for closing arguments to this extremely illuminating debate. Clark tell me the people, listeners, what a Clarkian and approach to the New York law would be, why is this case important, and why... And on what



grounds do you think the justices should strike down the New York law as inconsistent with the Second Amendment?

Clark Neily: [00:48:44] You bet. So I think it's a no brainer. Again, there are that the court has taken the position that the Second Amendment protects an individual right to own a gun at home for self-defense and used language in *Heller* to suggest very strongly that, that the keep and bear has practical significance and bear certainly implies caring outside of the home. And I think a discretionary permitting system is the very worst posture for a law that affects the ability to carry outside the home to go to the Supreme Court, particularly one with such an ugly history as it has in New York. And I think it's going to be extremely difficult to defend the proposition that local officials should be able to decide on a whim who gets to exercise the right to carry a gun outside the home.

I think it would be much stronger case, frankly, if it was just binary, you either, you know, the largest says you cannot carry a gun outside the home. But that's not the New York law. The New York law is discretionary. I think it's going to be extraordinarily difficult to, to, for that to stand. But I will say one last thing. I really don't think the Supreme Court wants to be active in the Second Amendment. I really think they're gonna try and push the dirty work of building out some of the doctrine and actually applying it to specific cases to the lower courts.

And so what I think, I'll leave you with an image of seeing the movie *Ratatouille* which is wonderful Disney movie, where you have this gifted chef of a rat and the way he cooks is that he stands on top of a, of the head of this young man who actually does the cooking while the, you know, the rat stands up there and pulls his hair to indicate what he should be doing, that I think is what the, the ideal arrangement from the Supreme Court standpoint. They will sort of give availed signals to the lower courts about what they would prefer that the lower courts do, and then leave it to them to actually implement these instructions by ruling in concrete cases.

Again, it's a prediction, take it for what it's worth but that's what I think the Supreme Court will do to try to thread the needle. And I don't know that they will strike down this New York law, even though they should, I wouldn't be at all surprised to see them remanded to the 2nd Circuit with some instructions that very strongly suggest that's what the 2nd Circuit should do, but then leave it to the lower courts again, to do the actual, you know, get their hands dirty and actually engage with these laws. That's, that's my sense of how this case is likely to go down.

Jeffrey Rosen: [00:50:44] Thank you so much for that Clarkian approach, but a little help from *Ratatouille*. Adam, last word to you and the, and the Adam approach. Why do you believe that the New York law is consistent with the Second Amendment, and why on what grounds do you think the Supreme Court should uphold it?

Adam Winkler: [00:51:00] Well, first of all, we should note that with regards to the analogy to *Ratatouille*, the rat was still doing the cooking. Like you can have the lower courts using the whisk, but we know who's doing the cooking. So I'm not sure that that, that really changes things about who's really responsible for rewriting America's gun laws, whether it's



pushed onto the lower courts or not. I think in this case, I think it's gonna be a tough case. I think there is a really strong originalist argument against the idea that you have a right to carry a firearm in public for personal protection and outside of the military context. And I do think that we do have some originalists on the court who sincerely believe in originalism as a methodology. And I think that the evidence is going to push them in a direction. Recall that Heller said despite some language, it said that majority of 19th century courts to consider the question held the prohibitions on the carrying of concealed weapons were lawful. Prohibitions, not allowances with discretion, but outright prohibitions.

So I think that there's a very strong originalist argument against a right to carry in public. I honestly, I don't necessarily believe the Supreme Court is going to stick with that originalism. I would expect to come out of this case a ruling that the majority the court says the right under the Second Amendment includes a right to carry guns in public and likely says that discretionary permitting is unconstitutional, or as Clark says, throw it back to the lower courts or the chef doing the whisk uh, to tell them basically to strike it down themselves with certain guidelines. The effect is ultimately the same. I think states and cities like New York and California are gonna have to really try to figure out how to go forward without discretionary permitting and what the proper policy is going to be. Because I think the Supreme Court is going to start its radical reshaping of American gun laws coming this fall.

Jeffrey Rosen: [00:52:43] Thank you so much. Adam Winkler and Clark Neily for a substantive thoughtful and cooking approach to the Second Amendment and to helping our listeners understand the constitutional arguments on both sides of what could be an extremely important case. Adam, Clark, thank you so much for joining.

Clark Neily: [00:53:03] Thank you. Great to be back.

Adam Winkler: [00:53:05] Thank you.

Jeffrey Rosen: [00:53:09] Today's show is engineered by Greg [inaudible 00:57:08] and produced by Jackie McDermott. Research was provided by Mac Taylor, Anna Salvatore, and Lana Orrick. Please rate, review, and subscribe to We The People on Apple and recommend the show to friends, colleagues, or anyone anywhere who is hungry for a weekly dose of constitutional illumination light and debate. And always remember that The National Constitution Center is a private nonprofit. We rely on the generosity, passion, and engagement of people from across the country. We're inspired by our nonpartisan mission of constitutional education and debate. Support the mission by becoming a member of constitutioncenter.org/membership, or give us a donation of any amount to support our work, including this podcast at constitutioncenter.org/donate. On behalf of The National Constitution Center, I'm Jeffrey Rosen.