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Anthony Sanders 00:06
Hello, and welcome to Short Circuit your podcast on the Federal Courts of Appeals. I'm your host Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. If you enjoy this podcast, you should check out our newsletter and often an irreverent take on certain Court of Appeals opinions, which we publish every Friday, you can subscribe at shortcircuit.org or find it on the Volokh Conspiracy Blog. And please check out our sister podcast, the documentary series, Bound by Oath. We're recording this Thursday, May 20, 2021. And we are very pleased to be bringing you a special short circuit with a special guest, David Kopel is a familiar name to many of our listeners. He is a man who wears many impressive hats. A research director of the Independence Institute, associate policy analyst with the Cato Institute, adjunct professor of law at Denver University Strunk College of Law, longtime blogger with our friends at the Volokh Conspiracy, which is probably how many listeners know him, and perhaps most importantly, a fiercely proud Coloradoan. Over the years in which I've looked for cool headed, deeply informed, and rational discussion on gun issues in the Second Amendment. David has always been the first voice I've turned to. So, it made a lot of sense to have him on Short Circuit now that the issue of the Second Amendment in the form of the right to carry is now not only back before the Supreme Court in the case, New York State Rifle and Pistol Association v. Corlett, but also still bubbling along in the court of appeals with the case Young v. Hawaii that the Ninth Circuit recently decided. David is going to help us sort out what the Supreme Court is looking at with the New York case, what's the simmering relevance of the Ninth Circuit's case, the underlying issues the court is looking at and what we might expect from the court when it rules next term. So, David, thank you so much for joining us on Short Circuit.

David Kopel 02:00
I'm happy to be here. And I love your weekly newsletter, it is a fantastic resource.

Anthony Sanders 02:07
Thank thanks so much. It's a lot of fun to write. And it's even more fun, I know, for our readers to listen, sorry, to read. So, I'm going to assume our listeners know about the case, Heller v. District of Columbia from 2008, which said the Second Amendment protects a right to have a firearm in one's home. But the

question which the follow up case, in the follow up case, mostly left open, was how does that right extend beyond the home. And that's what these latest cases, of course, are addressing. So before we get to the constitutional issues, though, and all the relevant history, maybe let's get started with a couple terms we're going to hear a lot about over the next year, if you haven't already: concealed carry, and open carry. The cases we'll be discussing concern whether the Second Amendment protects the right to carry a firearm outside the home. But sometimes that's in the context of concealed carry, sometimes open carry. So, for someone like me who really doesn't know much about guns, why is there a distinction often in the law between conceal and open carry, apart from the obvious of exactly what they mean? So, if you're a responsible gun owner, why would you prefer one versus the other? And why is that they so often differently regulated?

David Kopel 3:30
The tradition of different regulation starts in approximately in 1813 or so in a couple of states, like Kentucky and Indiana, which had state constitutional right arms protections in their own state constitutions, as well as, at the very least caring about the spirit of the Second Amendment. And those state legislatures banned concealed carry only while allowing open carry. The Kentucky Supreme Court said you can't do that. The Indiana Supreme Court said you could in a one sentence opinion. And over the course of the 19th Century, the dominant approach of the state courts was to uphold concealed carry restrictions, as long as open carry was available. Their view was you've certainly got the right to bear arms from your state constitution, but the legislature can regulate the mode of how you do so. A different approach would be which would be more purely originalist would say well as of 1776, or, most importantly 1791, when the Second Amendment was ratified by the states and the people, no state, restricted, open versus concealed carry, they just left that choice up to the individual

Anthony Sanders 05:00
And if you're a gun owner in a state where? Yeah, this might be a basic question. But if you're a gun owner in a state that say has both, which is a lot of states these days, what why might you pick open carry versus concealed carried, if you're in crowded environment? Concealed carry is just a safer bet or it's less alarming? What's the reason why people pick one or the other?

David Kopel 05:22
there are good reasons for both. So, exactly, if you live in an area with a bunch of hoplophobes, that that's actually something that is an identified mental disorder. Just like any kind of phobia can be a mental disorder, you know, arachnophobia, you're afraid of spiders, all those things. And some people

just get freaked out and don't like seeing a gun no matter how peaceful the circumstances. So maybe out of protecting their sensibilities you deal with concealed carry, or for whatever other reason, you just don't want to have that be a visible thing. On the other hand, open carry for the individual is a more visible deterrent. So, if you're walking down the street, and you want to make sure the criminal who's watching people come by and you know, from, say, from an alleyway, who am I going to mug, and he sees you walk by with a gun in a holster on your belt? He says, I'll skip that guy.

Anthony Sanders 06:30
I see.

David Kopel 06:31
And it can be depending on the situation, it can be in an emergency, it can be faster to access the firearm, if it's open carry.

Anthony Sanders 06:40
Now, the case that the Supreme Court has taken is a case concerning concealed carry. And I believe that's because in New York State, you can apply for a concealed carry permit, although it's hard to get, but there just is no open carry.

David Kopel 06:57
That's right. So that's correct.

Anthony Sanders 07:00
So what's the genesis of that case? And one interesting thing I found about that case is the Second Circuit's opinion is two pages, which usually doesn't make for epic Supreme Court appeals. But in this case, there's some background there. So, tell us a bit about that. Sure. So, after District of Columbia vs. Heller was decided in 2008. And then, the follow up case, McDonald v. City of Chicago in 2010. Would said the 14th amendment makes the Second Amendment right to arms enforceable against state and local governments. Challenges began coming up in the now fairly small minority of states that don't respect the right to bear arms. In 42 states as a statewide matter, you can get a concealed carry permit. If you are a law-abiding adult who can pass a background check and a safety training class. And you've offered the background check is more intense than just to buy a gun, that the buying a gun in a store is a kind of a name, and Id check where you show your driver's license, a concealed carry permit would be more likely to require fingerprinting, and several weeks or more to process those fingerprints against

the various databases. But there's a minority of states and New York is one of them, where the right to bear arms is not respected. In some counties in New York. They do respect the right and will issue a permit to somebody after a proper background checking and maybe a little investigation. In others, such as New York City, you only get one if you're a celebrity, or maybe a security guard or a, you know, let's say a diamond merchant, or a doctor who's carrying narcotics while making house calls. So New York State like Massachusetts, Rhode Island, in California, and actually Delaware to some extent to is pretty variable. Whether you can get a permit or not depends a lot on the county you live in other jurisdictions, namely Hawaii, and New Jersey and Maryland, somewhat, are much more restrictive. And just as a statewide matter, you can in essence, almost never get a permit. In New Jersey, even if you were a diamond merchant, who had been robbed six times in the past 15 years, they still wouldn't give you a permit because you wouldn't be able to say well, there's some specific guy I know who's going to try to rob me.

Anthony Sanders 09:44
Even then?

David Kopel 09:46
Yeah.

Anthony Sanders 09:47
But in but in New York, which is what the case, the Supreme Court concerns, I know from so there's an earlier case that really did get into the Second Amendment issues. Kachalsky. Yes. Which our friend Alan Gura litigated that that case of my read of that case says that the New York courts have opined on what the New York statute means. And that it basically means you need some broader need than just, you know, I live in a dangerous neighborhood. There has been something specifically happened to you. But are you saying that perhaps some rural counties interpret it more loosely than that, and there's not even agreement on what the law might be?

David Kopel 10:33
I think the interpretation of the New York law is that there's a lot of discretion. It seems to be and t that's been somewhat long standing. And what Kachalsky in the Second Circuit case, said is, it's basically fine to have a highly arbitrary system, where an official decides whether or not you need to carry a gun or not. The other point of view is, well, the reason we have some things in the Constitution written down

is you don't have to go through a process where somebody decides whether you need to do it or not, you know, the nobody says, you know, do we need to open another mosque in this city? You know, do you really need to have a public assembly? Why can't you just do it by email? None of those things are based on need, they can be based on reasonable regulation, you want to have a big parade, well get a permit to do it, maybe even have to post bond to clean up the litter, those kinds of processes. You know, and likewise, if you if you're a church, you may have to comply with the fire code, and then lots of other sensible laws, but the government doesn't have the ability to say no, you can't do it, because we don't think you need to.

Anthony Sanders 11:51
So that the court took the case. The case said, I read the cert petition. Well, we'll link to it on our show notes. And that the cert petition gave a question presented, which for those non lawyers out there, that is basically the main question that the Supreme Court is trying to address when it reads the briefs. And hears the oral argument. And the question presented in the in the cert petition was “whether the Second Amendment allows the government to prohibit law, ordinary law-abiding citizens from carrying handguns outside the home for self-defense” which sounds pretty straightforward. But then the court took the case. And they put the question presented as whether the state's denial petitioners’ applications for concealed carry licenses for self-defense violated the Second Amendment. What's going on there?

David Kopel 12:45
There's been speculation and no one that I know of has written any credible explanation of exactly what that means and what difference it makes you. There is some language in Heller, which definitely says it's okay for states to deny concealed carry, as long as open carry is allowed. And that's, they've got a solid number of 19th century state court precedents on that. But you, you would think the court wouldn't bother to take a case that says, “Oh, well, we already said concealed carry can be banned. So, we'll so, this guy in the Corlett case, no Second Amendment violation there, that would be kind of a waste of everybody's time.

Anthony Sanders 13:33
Right. It makes it sound like a straight of appeal of a denial the permit, which was

David Kopel 13:40

Yeah, I mean, it is it, in a way it's administered, it's the, in this sense, it's the same procedural posture as District of Columbia v. Heller, where Dick Heller went to the DC police headquarters and tried to register his handgun, which he owned from before his time he lived in DC and wanted to be able to have it at his home in DC. And the DC police said, “No way.” We don't register handguns because they've been banned. New registrations have been banned since 1976. And this is the end for standing purposes, that counted as final administrative agency action, which means he had standing. So, this is the same kind of thing they have applied. The administrative agency has said no way and that's the end of the situation until the Supreme Court fixes it.

Anthony Sanders 14:38
Well, we'll leave that that mystery there for now. But let's go to the meat that most people are waiting for. So, the right to carry, to bear arms is something that the circuit courts are split on. A couple have gone one way the rest have gone like the Second Circuit has. What is the history behind that? How are the court getting it right, how are they getting it wrong? And what is going to be important for the Supreme Court to look at?

David Kopel 15:06
So, there are some courts like the DC circuit, and the Seventh Circuit, which mainly analyze that issue based on what does the text of the Constitution say? And what was the original meaning? And not only in 1791, but tradition is part of it. It's not exactly originalism, but in Heller, and in general, tradition, especially early traditions, do count for a lot. So, the courts that that did text history tradition, fairly straightforwardly found, there's a right to bear arms, says it says that with the Second Amendment, and then also said, with sort of our modern sensibilities of the administrative state, it's perfectly fine to have some kind of licensing system where you have to go through a process. But it can't be some licensing system where, yes, anyone can apply and no one gets it, which is basically the Hawaii system unless you're a professional security guard on the job. Or we're the DC system, which was actually very much like New York's where it said, you can have a permit, if we decide you're special.

Anthony Sanders 16:34
Right.

David Kopel 16:37
Other courts have really been all over the place, there's no consistent rationale for the courts that say, “No, you don't have a meaningful right to bear arms.” Some of them such as the Second Circuit of the

Kachalsky case, and that was, and as you pointed out, in the current case, Corlett, the Second Circuit basically said, “Well, we already decided this in Kachalsky, so here's this two pages saying so.” The Second Circuit, and the Fourth Circuit have said, they can't even decide if there's a right to bear arms. They say, “well, we're not sure about that one way or the other. We didn't want information from the Supreme Court. But arguendo, we will hypothesize there's a right to bear arms. And then we will review it under a weak form of intermediate scrutiny, where unlike normal intermediate scrutiny, where the court is supposed to look at the evidence on both sides of the case, all we're going to do is basically say, does this government have any evidence, any hypothetical theory for why it's better to prohibit 98% or more of the public, 99% from being able to exercise this arguendo right to bear arms?” And so having set things up so weakly, they say, “No, there isn't.” The Ninth Circuit recently went in a different direction, and said, “No, there's actually no right to bear arms at all, in any meaningful way. To the extent, you can bear arms, you can do it in your house, you can carry it from your kitchen to your bedroom. And I suppose you can, if you have a farm, you can carry it when you're walking around on the farm, that anything outside your property, there is zero right,” according to the Ninth Circuit, and supposedly they base that on history and tradition, although that's accomplished with a lot of misleading and false citations. So there's a Firearms Policy Coalition amicus brief in the Corlett cert petition, really did a good job of showing how diverse the circuits are on that, so it's not like the negative circuits have just one theory of why there is or is not a meaningful, right.

Anthony Sanders 19:15
and that was filed actually before the young case was decided. Right. So that adds even another wrinkle.

David Kopel 19:16
Yes, sir. Yeah, but yeah.

Anthony Sanders 19:19
Now I know that that you and a colleague have put out in the Illinois Law Review a response to the analysis of Young, young Of course, it's not the case that's at the Supreme Court, but it's kind of looming large as the biggest his historical analysis in the circuit courts of this issue. What, would you summarize that article? What did what did Young get wrong or leave out that we ought to know about?

David Kopel 19:51

Well, the title of the article is called “Errors and Omissions: The Words Missing from the Ninth Circuit's Opinion in Young v. State of Hawaii.” The opinion by the Ninth Circuit majority says, claims that gun carrying, arms carrying was generally prohibited, both in England from the at least the 1300’s onward. Through the time of when American colonization began, that same policy existed in the colonies, and in most of the United States through the 19th century. And it's, it is just incorrect to say so. What we do is look at some of the sources that Young cites for its assertions, and say, “Well, here's what the court quoted from the case. And then here's the full text of that sentence, where it means really the opposite of what the court said.” So you can go back to a 1615 case called Chune v. Piott, from England, where the Young majority says, “oh, a sheriff can arrest somebody, even if that person did not breach the peace.” And that, as quoted supports the theory that merely carrying on an arm in England was an arrestable offense. But, actually, when you go back and read what the case says, it says that the sheriff may arrest a person who didn't breach the peace in the presence of the sheriff. So, the sheriff didn't see the breach of the peace. But some witness came up to the sheriff and said, “hey, there's this guy walking around town with a gun, he's yelling about how he's going to get revenge on some guy he does. Like he's waving the gun around, and everybody's really scared of what's going on.” And by the time the sheriff's shows up, maybe the fella has calmed down, the sheriff can still arrest him. That's what Chune v. Piott says. And the Ninth Circuit chops it to invert its meaning to say that a person would be arrested, even if they're behaving peaceably.

Anthony Sanders 22:19
Now, I believe that case and a number of other cases that the Ninth Circuit looks at, talk about this, what is about to become, I believe, the most famous medieval statute outside of Magna Carta. And that's the statute of Northampton. And it seems to me in reading the Young case, reading your piece and others on this that this is this is going to be a big deal, in a funny way is this statute of Northampton when we're talking about the history. What was the genesis of that statute? What do people get wrong about it? And how should we understand it?

David Kopel 22:55
Well, let me give you just some quick background for why some people have tried to make such a big deal about it.

Anthony Sanders 23:03
Right.

David Kopel 23:04

If you look at the record of American statutes, both the colonial era and early republic, antebellum later 19th century, and also the case law, you find in that whole sweep of things, very few statutes that attempt to prohibit arms carrying in general. You get some statutes, especially later in the 19th century, that says, you know, the restricts certain locations, maybe bringing it to a school or to a polling, bringing a gun to a polling place or to a legislative assembly. You have, by the end of the 19th century, a significant number of statutes that say you can't carry concealed, of course, leaving open carry available. And then you have few statutes such as an eccentric one that Georgia enacted in 1836, which says you can't carry any handgun open or concealed, except for what's called a horse pistol, which is a very large handgun, you might wear in the saddlebags when you're riding a horse, but would be tough to carry, you know, when you don't have the horse to do the work for you. And the Georgia Supreme Court strikes that down and says you can't carry that, to the extent that it bans concealed carry, that's fine, to the extent that it bans open carry, that violates the Second Amendment. And the Supreme Court in the District of Columbia v. Heller looks to none as the perfect expositor of the right. The best state court opinion explaining what the Second Amendment actually means. So that's the state of the law, we've got very few restrictions on concealed carry, on any form of carry early on. And certainly no general bands at all. And that's a tradition that carries through anything that we wrote, well carries through from the 1600s, up till the turn of the 20th century in the in almost all of the United States. So, if you're an anti-gun person, and you're stuck with this situation, “Oh, God, Heller says originalism and history and tradition are very important. And yeah, the Heller case struck down a ban on somebody having a handgun in his own home and having that gun be functional. So, it's usable for self-defense, rather than locked up all the time,” you know, and as to what the law of England was in 1335, maybe that's plausible, or that's at least arguable. But it's clearly not how that law was interpreted in the 1600s, in England, or by the time English law was being transmitted to the United States. But they take this and pretend, maybe convinced themselves, that it was a complete ban on carrying and was imported into the United States via the English common law. And so, in fact, it was illegal to carry anywhere in the United States, almost everywhere, in the United States, from the colonial period, all the way through. They don't have any statutes to support that. They don't have any case law that supports it. And in fact, the American cases that do discuss this common law principle related to the statute of Northampton, say just the opposite.

Anthony Sanders 26:48

And one interesting thing I found in your article is that the Young case says that it was incorporated early, that statute, without even changing the word, it still referred to the king, was incorporated into the

North Carolina statutes shortly after the founding. But your article shows that was a mistake. It's kind of like a myth of history that was later corrected.

David Kopel 27:14
Yes, so in North Carolina, there was some guy who was a lawyer, and lawyers write books to make money. And there's nothing wrong with that. I've done it myself many times. This lawyer named Martin writes, what he calls this compilation of statutes now in effect in North Carolina, for which he apparently has some sources of the colonial statutes and wrote some of those down. And he writes also some of the English common law statutes, which he apparently thinks apply in North Carolina, including the statute Northampton, which of course mentions the king. Well, he writes this book in 1792. That's just his theory, his treatise, whatever, and a later reviser of North Carolina's official published real statutes, says "this thing that Martin wrote in 1792, was just a mess. You know, he's a good lawyer, but he just screwed up and omitted a lot of statutes that were in effect and brought in a lot that were not." The Young court takes the full citation of this. And if you read the full citation, it's clearly, it's a treatise by an individual expressing that individual's opinion. They truncate the citation to make it look like an official North Carolina publication, and then say that the North Carolina legislature in 1792 loved this 1398 state statute in Northampton so much that they reenacted it verbatim, including the words, "the king," you know, we just fought a big war to not have a king, but the North Carolina legislature decided they loved, they wanted to put the king of the statute anyway. Again, this is so typical of what the Young v. Hawaii opinion is, it's a very impressive opinion, when you read it within its four corners. And then when you read the sources, the cited sources, they're often directly contrary to what the opinion purports to make say that they mean.

Anthony Sanders 29:37
Well, maybe that can be a hint or advice to any clerks listening, any judicial clerks listening to make sure you double check those sources when we're talking about earlier American history. Reminds me a little bit of Suetonius writing about the Emperor's. You take it with a grain of salt when you're reading about what he has to say.

David Kopel 29:58
Well, and there are, I'll say frankly, there are two scholars Patrick Charles and Saul Cornell, who have kind of made a career of presenting what I would call a highly inaccurate view of English history to the courts. But of course, we're now talking into an area of academic debate and courts, which, you know, the Supreme Court level, they're still dealing with 80 major cases a year, and at the lower courts a

much larger firehose of stuff they've got to deal with, they often don't have or don't take the time to go within and drill down and check those original sources. So, here's just one example not what this is not something that appears in the Young opinion, but we've seen it in the scholarship from these folks before. There's a 1686 case we'll talk about Sir John Knight's case, which clearly says the statue Northampton is only against carrying guns with malo animo, with bad intent, again, like all the American indictments for the common law analog of this, there about some guy who was walking around shooting a gun through somebody's window, or, you know, getting drunk and yelling threats and causing a breach of the peace, never a single case involving somebody who was just being peaceable. And this article by Patrick Charles says, well, even so they had a gun licensing system for carrying. And here's a newspaper article from the Postboy, saying that got all the handgun carrying licenses have just been revoked, and you're going to have to reapply. Well, what he doesn't tell you is the Post Boy is an Irish newspaper. So yes, that was true in Ireland. The right to arms that the English parliament, enacted in 1689, for England, did not apply in Ireland, which at the time, even though was under the King of England, had its own parliament. And as the law developed in England, people had a right to carry. No permission needed, you could just do it, as long as you don't cause trouble while you're doing it. Or you don't go hunting. If you're a commoner. And in Ireland, where the right arms did not legally apply. They had a very restrictive handgun and gun in general licensing system because it was part of the English colonial rule of Ireland as you keep the Irish Catholics from having guns. And so, this guy, Patrick Charles reports, the Post Boy oppressions of which is a good source on Ireland, as if it was really about England. And this is, this example can be multiplied over and over and over of misleading claims about English law. But getting down into the weeds at a level of detail where the average clerk or judge may not go far enough to find out how much they've been misled.

Anthony Sanders 33:27
So, here's a level of detail that we at Short Circuit think clerks and judges should be getting into a bit more. And we talked about a few weeks on the show, and I'd be curious to get your thoughts on it. So, we had on a few weeks ago, Professor Chris Green, and also Evan Bernick, who are both originalist scholars, to discuss the idea of when you when you have incorporation of the bill of rights against the states that you should at least pay attention to the meaning that those provisions had when they were incorporated with the 14th Amendment in 16, I'm sorry, in 1868, right, not so much in 1791 if you're talking about the federal government. So, listeners can go back and listen to that, that episode, if they if they missed it. But one thing we talked about there and has been talked about a lot is that the Second Amendment did arguably have a stronger protection in 1868, especially as regards the Freeman and the need to arm themselves in against the KKK and others in the south. One thing I've noticed in the,

and this is probably predictable, because the Supreme Court itself hasn't done a good job on this is I haven't seen the circuit court cases on this issue, talking so much about 1868 versus you know, 1328, or whatever it is, so what should the Supreme Court be paying attention to on how the right to keep and bear arms, which is what we're talking about now was understood at the time of the 14th Amendment? So how is the 14th Amendment especially relevant to this this case?

David Kopel 35:20
Well, I guess I'd say the 14th Amendment is relevant to all of the Bill of Rights. Because what we now know through a lot of research is certainly the specific intent of Congress was to make all of amendments one through eight, the specific protections, the Bill of Rights, then nine and 10 are more like, interpretive principles to make everything in one through eight, enforceable against the states, right?

Anthony Sanders 35:46
At a minimum, we would say at IJ.

David Kopel 35:48
Yes, exactly. And there's a whole other economic freedom and follow a lawful trade or calling. One of your, or the core IJ specialty. There's that issue, but clearly to make amendments, once right, enforceable against the states. So of course, what the Congress and the public thought of those amendments at the time, would be relevant. I think we've also got to say, as a practical matter, the Supreme Court is not going to return to what it tried to do in the 1940s and 50s for a while, which is say we're actually going to have a double Fourth Amendment, we're going to have one Fourth Amendment that applies full strength to the federal government, and then we'll have a weaker Fourth Amendment, we're only part of it only partially applies against state and local governments, it's, among other things, it's just too tough to have, "well, you know, I'm a county in Illinois, I've got to obey the 1868 interpretation of the Second Amendment. But I'm, we're the federal government, well, the, you know, or, you know, Guam, where you're just based on your federal territories, you've got the regular federal restrictions, we were going to be the 1791 interpretation of the Second Amendment, it's got to be one thing," but as Heller said, and showed, there is a consistent interpretation of the Second Amendment from its colonial roots, through adoption and setting in 1791. Thereafter is interpreted in in American law and treatises in state and federal courts. And then that tradition continues with an essentially similar interpretation as of 1868, with some of the difference being that by 1868, you may have more sub issues elucidated. So, by 1868, not the majority of states at all. But, uh, you know, approximately a

quarter of states have some kind of ban on restriction on concealed carry. So does that make it easier to say that as of 1868, compared to 1791, when there wasn't any such law, that maybe by 1868, it's kind of clearly established, that a legislature can have the choice. They can say, “We want you to conceal, carry concealed, we want you to carry openly, but we're going to we're going to decide for you the mode of how it's done.” Yeah, that's more supportable on the, by the post-Civil War era, than it would be on purely originalism. Or a 1791 originalism.

Anthony Sanders 38:50
And finally, do you think that the court is interested, so this is getting into the procedure again, but do you think the court is interested in taking the Young case? Even though it's a little bit on a different schedule than the New York case and in amalgamating them, consolidating them? Or is that a worry you think they don't have to deal with?

David Kopel 39:15
I wouldn't speculate, and one of the challenges that this whole business, that we're all in, you know, the Institute Justice with all its great lawyers, and things you're always trying to speculate about the minds of judges, and nothing is more opaque than the inside of the Supreme Court. People who have been a supreme court clerk might have some insights, but you know, who knows.

Anthony Sanders 39:39
They’re often wrong too.

David Kopel 39:41
Exactly. You know, it sort of reminds me of these like, before the Iowa caucuses every four years, we get like four months of massive coverage of you know, Ted Cruz's ad to the you know, on fireworks freedom is going to like help him like, bring up, you know, get that, you know, microtargeting and help him do better in the Iowa caucuses. And there's this poll, and there's that poll and Howard Dean's leading and all this. And then then you have the Iowa caucus. And it turns out often completely different from what this half year of speculation and the straw polls and all that turned into. So going forward, I'm going to try to think about the Iowa caucus less, until the caucus actually happens. And then, and then with the way they do the results, we get we find out who won a month later.

Anthony Sanders 40:33

Well, will that help healthy perspective, I'm not going to ask you how you think the court is actually going to rule in the New York case, but I'll look forward to your analysis. When that day comes, unless you'd like to offer something short of a prediction.

David Kopel 40:50
I'd say if they're not going to protect the right to arms. Why take the case in the first place, you know, if they're happy to let it, let the right having been more or less obliterated judicially in a few places. They've got that status quo already.

Anthony Sanders 41:09
Well, great. That's an inspiring note to end on for those for those who are interested in the right to keep and bear arms. For everyone else, I hope that this conversation has been interesting. And once again, I would like to thank David Kopel for coming on the program. We're very, very happy to have him and until next time, I'd say to everyone else to get engaged.