WA has passed lots of new gun laws. Could they be in legal trouble?

April 15, 2024 at 6:00 am Updated April 15, 2024 at 6:00 am

Rifle magazines and accessories for sale at a gun store in Miami Beach, Fla. (Eva Marie Uzcategui / Bloomberg, 2023)Less

By David Gutman

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When a Cowlitz County judge ruled last week that Washington's ban on high- capacity magazines is unconstitutional, he added one line, on Page 43 of his 55-page opinion, that could just be a little-noticed throwaway, or could prove shockingly prescient.

There are, Judge Gary Bashor wrote, "few, if any, historical analogue laws by which a state can justify a modern firearms regulation."

The high-capacity magazine ban, Bashor wrote, pointing to U.S. Supreme Court precedent, fails because there are no "relevantly similar" laws from around 1791, when the Second Amendment was adopted.

Bashor's ruling was immediately placed on hold, and the state's ban on high-capacity magazines remains in effect, while the state Supreme Court considers the issue.

But it raises a question: Washington has passed a suite of new gun laws in the last decade. If each new law needs a "historical analogue" from 1791-era America, could many more gun laws be at risk?

There were no magazines in 1791, much less high-capacity magazines. So there were no bans on high-capacity magazines.

Washington, last year, banned AR-15-style semi-automatic rifles. Such weapons did not exist in 1791 and so, obviously, weren't banned.

Washington, this year, banned the carrying of guns in zoos, aquariums and public transit facilities. There were no zoos or buses in 1791 America, so there weren't bans on carrying guns in those places.

At least a half-dozen lawsuits are pending in Washington, challenging the constitutionality of the state's gun laws.

The debate, of course, is more than theoretical, not just an intriguing thought experiment. Nearly 50,000 Americans a year die from firearms, according to data from the Centers for Disease Control and Prevention. Studies have repeatedly found that states with stricter gun laws tend to have less gun violence.

High-capacity magazines were legal to buy and sell in Washington for about 90 minutes last Monday, after Bashor issued his opinion and before the state Supreme Court halted it from taking effect. In that time, Gator's Custom Guns, the Kelso gun shop at the heart of the litigation, sold hundreds of high-capacity magazines, said Wally Wentz, the store's owner.

Bashor's opinion follows the 2022 ruling by the U.S. Supreme Court, in a case known as Bruen, striking down New York's law requiring concealed-carry license applicants to demonstrate a special need for self-defense.

In Bruen, the Supreme Court tossed aside the traditional way of evaluating gun laws: weighing the public interest against the individual's right. Instead, courts now had to determine whether a gun law is "consistent with this Nation's historical tradition." The ruling has led to hundreds of court cases nationwide challenging the constitutionality of both new and longstanding gun laws.

Alan Gottlieb, founder and executive vice president of the Bellevue-based Second Amendment Foundation, thinks a lot of Washington's gun laws are in jeopardy.

"All because of the 1791-era analogue that anti-gun people can't find because it doesn't exist," Gottlieb said.

Gottlieb's organization has filed numerous lawsuits seeking to invalidate gun laws in Washington and elsewhere.

How could there be a 1791 analogue regulating something that wasn't created until years or decades later?

"In 1791 it wasn't just the Second Amendment, it was also the First Amendment era," Gottlieb said. "There were no satellite dishes, there was no internet, there were no high-speed printing presses, but that doesn't mean they weren't protected by the First Amendment. New technology is still protected by the Bill of Rights."

Attorney General Bob Ferguson, in court filings, called Bashor's ruling an "extreme outlier."

"There is nothing unreasonable about restricting the sale of deadly [high-capacity magazines] when the unrebutted evidence shows they make mass shootings and other horrific crimes more frequent and more deadly, and when the evidence shows they are not used for self-defense," Ferguson wrote.

Zach Pekelis, a lawyer with Pacifica Law Group who represents Alliance for Gun Responsibility and Oregon Alliance for Gun Safety, said the Cowlitz County judge interpreted Bruen incorrectly.

"Just because you didn't see the exact type of regulation in 1791 or 1868 doesn't mean that the modern law is unconstitutional," Pekelis said. "Different technologies and different societal concerns have evolved and perhaps even dramatically changed over time and the Constitution is supposed to be adaptive in that way."

Bruen, Pekelis noted, does not require "a historical twin," just a "historical analogue."

For instance, there may not have been historical bans on carrying guns in zoos and on buses, but there were historical bans on carrying guns in "sensitive places" like courthouses, schools and government buildings.

"The key question is whether modern and historical regulations impose a comparable burden," Pekelis said, "and whether that burden is comparably justified."

The Supreme Court didn't specify whether lower courts (and historians) should look to 1791, when the Second Amendment was adopted, or to 1868, when the 14th Amendment, which applies the Second Amendment to the states, was adopted.

"We need not address this issue today," Justice Clarence Thomas wrote for the 6-3 court.

But lower courts across the country have been puzzled about how to proceed.

Last summer, a federal judge in Mississippi dismissed a case against a man charged with having a gun as a convicted felon, because the law prohibiting possession by a

felon is from 1938, not 1791 or 1868, and the government didn't present a sufficient historical analogue.

But he expressed concern about the situation he found himself in.

"Judges are not historians," U.S. District Judge Carlton Reeves wrote. "Yet the standard articulated in Bruen expects us 'to play historian in the name of constitutional adjudication.'"

In the Cowlitz County case, the state, in defending its law, pointed to a litany of historical laws it said were analogous to the modern ban on high-capacity magazines.

But Bashor, a 2011 appointee of former Democratic Gov. Chris Gregoire, dismissed them all as either too old, too new or not relevant.

"Most of the laws provided are post-1868 and are not relevant to the analysis," Bashor wrote.

The state cites a 1771 New Jersey law that prohibited "trap guns," which could be fired by someone or something triggering a rope or wire.

Bashor knocks that analogy as it "predates the Declaration of Independence and the creation of the Second Amendment."

He writes that it was a "hunting regulation so its purpose was not firearms regulation." But Bashor links to the original law, which seems to regulate trap guns for reasons beyond hunting. The law begins: "Whereas a most dangerous Method of setting Guns has too much prevailed in this Province …"

Fifteen states followed New Jersey's lead in regulating trap guns, but Bashor finds all those laws wanting because they weren't "near the founding."

Historical laws regulating gunpowder, which was necessary for firing guns in 1791, "were for the purpose of fire control, not firearms regulation," Bashor writes, and are not relevant.

The state cites numerous laws regulating Bowie knives, but Bashor dismisses those as regulating weapons, but not firearms.

"Reviewing courts," a U.S. district judge wrote in 2022 about interpreting Bruen, "must find the goldilocks of historical analogues: not too old, not too new, but just right."

And just as the ideal porridge temperature is in the eye of the beholder (or mouth of the taster), judges have looked at near-identical laws and at identical history and come to different conclusions.

A federal judge in Oregon looked at that state's ban on high-capacity magazines and, after a weeklong trial, found reasonable historical analogues to justify the new law.

U.S. District Judge Karin Immergut cited the New Jersey trap gun law approvingly. She cited 19th century Bowie knife laws and finds them “tailored to address the particular features of the weapons that made them most dangerous to public safety.” She looks at gunpowder and finds that it “posed a threat to public safety at the time of the Second Amendment’s ratification” and writes that states responded with regulations.

In Bruen, the Supreme Court wrote that “dramatic technological changes” or “unprecedented societal concerns” can give courts more nuance in interpreting modern gun laws.

But Bashor writes that high-capacity magazines are not new technology and that mass shootings do not represent unprecedented societal concerns.

Immergut, an appointee of former President Donald Trump, finds the opposite, writing that from 1776 to 1949 there was no example of a mass shooting resulting in double-digit fatalities (excluding events like race riots and labor riots). She writes that a handgun with a large-capacity magazine can be reloaded in about three seconds, while the typical muzzleloading musket available in 1791 could be reloaded and fired three times per minute.

Both state bans on high-capacity magazines are now on appeal. In Washington, the state is appealing to the state Supreme Court. A hearing on the Cowlitz County case is scheduled for Wednesday.

In Oregon, gun rights groups are appealing to a federal appellate court, while the state pursues an appeal of a state court ruling saying the law could not be enforced.

California’s bans on high-capacity magazines and on AR-15-style rifles are both on appeal, after each was invalidated by the same federal judge.

“You’ve seen this storyline before and I think it’s important not to be too alarmed that a single judge takes a different view,” Pekelis said. “That’s why we have appellate courts, to correct errors.”

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