

## San Diego & the Right to Bear Arms (Covertly)

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

In calling for tougher gun-control laws after tragic shootings at schools and other public venues, advocates despairing of “common-sense” *national* measures suggest that meaningful gun control will more likely emerge from *state and local* governments.

Well, right here in San Diego we are testing this speculation. Our County is at the center of a lawsuit about government power to restrict the rights of gun owners to carry concealed weapons.

In its February 2014 decision in *Peruta v. County of San Diego*, a divided three-judge panel of the U.S. 9<sup>th</sup> Circuit Court of Appeals held that San Diego County had to give a concealed-weapons permit to any otherwise qualified resident who claimed to be concerned about their personal safety. Only because this decision was reversed in June 2016 -- by a larger 9<sup>th</sup> Circuit panel -- do San Diego (and Los Angeles, San Francisco, and other metro areas) still have the right to require permit seekers to show through police reports or court filings that they face a specific, credible threat distinguishing them from the citizenry at large. (Gun-rights advocates have asked the U.S. Supreme Court to step in and resolve this controversy.)

How did constitutional law get to the point where substantial questions loom over what many San Diegans might assume to be an obvious public-safety measure? And what are the prospects for this and other gun-control laws to survive ultimate Supreme Court review? Let’s bring some context to these complicated and controversial gun-control issues.

Before 2010, the U.S. Constitution – and its Second Amendment “right...to keep and bear Arms” – had little to say about state and local gun-control laws. All that changed with a pair of Supreme Court cases.

In 2008 the Court confounded long-standing assumptions by holding that the “central component” of Second Amendment protection was an individual right to self-defense unrelated to service in the “well regulated Militia” that the Amendment also references. Two years later, the Court applied this newly announced individual gun right to state and local gun-control laws.

Now serious constitutional clouds hang over any non-federal gun law – such as San Diego’s concealed-weapons policy (or the California law upheld by an earlier 9<sup>th</sup> Circuit panel, which prevents persons convicted of misdemeanor domestic-violence offenses from ever possessing firearms.)

Most judges wandering into the uncertain terrain opened up by these recent Supreme Court rulings see them as requiring a two-step inquiry.

The first question is whether the specific aspects of gun possession restricted by a state or local law are within the “the right...to keep and bear Arms” as understood by the 1791 drafters of the Second Amendment and reflected in their broader society. This question can be tricky for any gun-use context not explicitly referenced by the Supreme Court.

The 2008 and 2010 Supreme Court decisions related to gun possession in the home. Concealed weapons are by definition carried *outside* the home, so previous decisions are not exactly on point. Nor are the concealed-weapon limits clearly within the categories of “reasonable” gun regulation the Court indicated wouldn’t raise constitutional problems.

Despite exhaustive rototilling of past case precedents and historical sources, the majority and dissenting 9<sup>th</sup> Circuit judges in the San Diego case couldn’t agree on where concealed weapons fit in the constitutional puzzle.

Nor did the judges agree on the second basic question arising once a contested law is deemed to infringe Second Amendment rights – how strong must government’s interests be, and how carefully must its law be constructed, before it can override the rights of gun owners?

The Supreme Court hasn’t clarified this “level of scrutiny” question either. Which leaves various lower courts to speculate and borrow doctrines from other constitutional-right areas (such as free speech).

Some day soon the Supreme Court will likely resolve these and other swirling uncertainties. And won’t it be interesting to San Diegans if their County’s concealed-weapon policy becomes the test case for doing just that!