AMERICAN CONSTITUTIONALISM
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Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Guns

Peruta v. California, __ U.S. __ (2017)

Edward Peruta sued the County of San Diego and California after state officials denied his request for a permit to carry a concealed weapon. California law forbids in almost all instances persons from carrying open weapons in public and requires "good cause" for a permit to carry a concealed weapon. General fear does not meet this "good cause" standard. Persons most show they are somehow differently situated from members of the general public to get a permit for a concealed weapon. Peruta claimed this rule violated his right to bear arms under the Second and Fourteenth Amendments. A federal district court denied his claim. That denial was reversed by a panel for the Court of Appeals for the Ninth Circuit, but that decision, in turn, was reversed by the entire Ninth Circuit, en banc. *Peruta appealed to the Supreme Court of the United States.*

The Supreme Court by a 7–2 vote denied certiorari. Justice Clarence Thomas's dissent from the denial of certiorari claimed that conditions were ripe for a Supreme Court decision. He noted extensive lower court analysis of the Second Amendment right to carry weapons in public and a split among the circuit. Thomas claimed that the refusal of the court to consider this right demonstrated the Court thought that Second Amendment rights were less important than other constitutionally enumerated rights? Is he correct? Under what conditions should the court determine the right to carry a gun in public? Do those conditions exist at present? What best explains the court's relative disinterest in the subject?

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, dissenting from the denial of certiorari.

. . .

. . . This Court has already suggested that the Second Amendment protects the right to carry firearms in public in some fashion. As we explained in *Heller,* to "bear arms" means to "'wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person.'" The most natural reading of this definition encompasses public carry. I find it extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen.

The relevant history appears to support this understanding. The panel opinion below pointed to a wealth of cases and secondary sources from England, the founding era, the antebellum period, and Reconstruction, which together strongly suggest that the right to bear arms includes the right to bear arms in public in some manner. For example, in *Nunn v. State* (Ga., 1846)—a decision the *Heller* Court discussed extensively as illustrative of the proper understanding of the right, the Georgia Supreme Court struck down a ban on open carry although it upheld a ban on concealed carry.

Finally, the Second Amendment's core purpose further supports the conclusion that the right to bear arms extends to public carry. The Court in *Heller* emphasized that "self-defense" is "the *central component* of the [Second Amendment] right itself." This purpose is not limited only to the home, even

though the need for self-defense may be "most acute" there. "Self-defense has to take place wherever the person happens to be," and in some circumstances a person may be more vulnerable in a public place than in his own house.

Even if other Members of the Court do not agree that the Second Amendment likely protects a right to public carry, the time has come for the Court to answer this important question definitively. Twenty-six States have asked us to resolve the question presented, and the lower courts have fully vetted the issue. At least four other Courts of Appeals and three state courts of last resort have decided cases regarding the ability of States to regulate the public carry of firearms. Those decisions (plus the one below) have produced thorough opinions on both sides of the issue. Hence, I do not see much value in waiting for additional courts to weigh in, especially when constitutional rights are at stake.

The Court's decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right. The Constitution does not rank certain rights above others, and I do not think this Court should impose such a hierarchy by selectively enforcing its preferred rights. The Court has not heard argument in a Second Amendment case in over seven years—since March 2, 2010, in *McDonald v. Chicago* (2010). Since that time, we have heard argument in, for example, roughly 35 cases where the question presented turned on the meaning of the First Amendment and 25 cases that turned on the meaning of the Fourth Amendment. This discrepancy is inexcusable, especially given how much less developed our jurisprudence is with respect to the Second Amendment as compared to the First and Fourth Amendments.

For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it. . . .