Gun rights may shift in Scalia's absence

Erwin Chemerinsky is dean and distinguished professor of law, Raymond Pryke Professor of First Amendment Law at UC Irvine School of Law.

In two opinions for the 9th U.S. Circuit Court of Appeals, Judge Diarmuid O'Scanlon went further than any U.S. Supreme Court decision in history in striking down laws as violating the Second Amendment. One of these rulings, *Peruta v. County of San Diego*, was overturned by an en banc decision on June 9, 2016 DJDAR 5523. The other, *Teixeira v. County of Alameda*, 2016 DJDAR 4594, decided May 16, likewise should be overruled. In fact, with the change in the composition of the U.S. Supreme Court because of Justice Antonin Scalia's death, the constitutional protection of gun rights seems unlikely to continue.

*Peruta* involved the constitutionality of a California law that limits possession of concealed weapons. California law prohibits a person from carrying a concealed weapon in public, but allows a person to obtain a permit to do so in the county where he or she lives or works. A permit can be issued by a county if the applicant demonstrates "good moral character," completes a firearm training course, and has "good cause" for carrying such a concealed weapon.

In *Peruta*, the 9th Circuit in a panel decision declared this unconstitutional, with O'Scanlon writing for the court. O'Scanlon said that the Second Amendment protects a right of people to possess guns outside the home and concluded that limiting the carrying of concealed weapons to those who have "good cause" for doing so was unconstitutional in light of the ban on carrying weapons openly.

But the 9th Circuit in an en banc decision reversed and concluded that "the Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public." Judge William Fletcher wrote for the en banc court. He explained that regardless of whether there is a right to have guns outside the home - an issue left open by the Supreme Court's decisions - there is no right to have concealed weapons.

Fletcher's opinion engaged in a detailed historical analysis, beginning with the law in 13th century England and spending many pages tracing the English law on the topic. He concluded that "English law had for centuries consistently prohibited carrying concealed (and occasionally even the broader category of concealable) arms in public." He then reviewed the law in the colonies and the law in the states after ratification of the Second Amendment and concluded that these were no different.
Based on this thorough examination of history, the 9th Circuit concluded that the historical materials are "remarkably consistent" and that the "Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed weapons in public." Because there is no right to do so, state regulations - including the California law requiring a concealed weapons permit based on good cause - are constitutional.

This is the type of historical analysis that the Supreme Court used in District of Columbia v. Heller, 554 U.S. 570 (2008), in finding that a District of Columbia ordinance prohibiting private ownership and possession of handguns violated the Second Amendment. But I am very skeptical that the meaning of the Second Amendment today - or of any constitutional provision - should be determined by English law before the Constitution or the law in the colonies. Fletcher's opinion for the en banc court is very much an originalist approach to the Second Amendment.

This originalist approach was unnecessary and needlessly lends credence to that as a desirable method of constitutional interpretation. The 9th Circuit could have relied on a Supreme Court decision on point. In Robertson v. Baldwin, 165 U.S. 275 (1897), the Supreme Court expressly declared: "The right of the people to keep and bear arms ... is not infringed by laws prohibiting the carrying of concealed weapons." This decision has not been overruled or questioned by the Supreme Court and is binding on the 9th Circuit.

Moreover, in Heller, the Supreme Court clearly indicated that laws prohibiting concealed weapons are constitutional. Scalia, writing for the majority, used laws prohibiting the carrying of concealed weapons as an example of the type of regulations that are permissible under the Second Amendment. The court wrote: "For example, the majority of the 19th century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment and state analogues." The court was explicit that "[n]othing in our opinion should be taken to cast doubt on long-standing prohibitions."

Also, as Judge Susan Graber indicated in a concurring opinion, even if there is a Second Amendment right to have concealed weapons, the California law is still constitutional because of the dangers posed by concealed weapons. Indeed, as the concurrence points out, many courts have upheld similar permitting requirements.

Restrictions on concealed weapons make great sense; that is why they have existed throughout American history. As Justice John Marshall Harlan explained: "Concealed weapons create and immediate and severe danger to the public." Terry v. Ohio, 392 U.S. 1 (1968) (Harlan, J., concurring). Prohibiting concealed weapons limits the ability of criminals to take advantage of stealth and surprise. It protects police officers and limits danger to the public. It lessens the likelihood that a minor altercation will escalate into one where deadly force is used.
The 9th Circuit also should grant en banc review and reverse another Second Amendment opinion of O'Scannlain in Teixeira. A county ordinance prohibited a gun store from being located within 500 feet of any residential district, school, other gun store, or establishment that sold liquor. O'Scannlain, writing for the panel in a 2-1 decision, said that the Second Amendment protects a right to commerce in firearms. He concluded that "the County has failed to justify the burden it has placed on the right of law-abiding citizens to purchase guns." The panel reversed the district court's dismissal of the case and remanded it for further proceedings.

But no Supreme Court case ever has implied that the Second Amendment protects a right to commercial transactions of firearms. As Judge Barry Silverman pointed out in dissent, "there is no claim that due to the zoning ordinance in question, individuals cannot buy guns in Alameda County. It is undisputed that they can. The record shows that there are at least ten gun stores already operating lawfully in Alameda County." He noted, "When you clear away all the smoke, what we're dealing with here is a mundane zoning dispute dressed up as a Second Amendment challenge."

Once more, O'Scannlain went far beyond any Supreme Court decision in protecting gun rights. In fact, Supreme Court protection is far less likely in the future if Scalia is replaced by a democratic appointee. From 1791, when the Second Amendment was ratified, until 2008, not once was any law found to violate the Second Amendment. The relatively few Supreme Court decisions held that the Second Amendment just was a right to have guns for the purpose of militia service.

In Heller, the Supreme Court, in a 5-4 decision, held that the Second Amendment protects a right of individuals to have guns in their homes for the sake of security. But that was a sharply contested ruling, with Scalia writing the majority. A fifth democratic appointee likely will mean that this decision will not be extended and even may be overruled.

There is an intense debate over gun rights in the United States. But the Second Amendment should be interpreted to mean what it says: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." It is about a right to have guns for the purpose of militia service. But even if it is not, sensible regulations like prohibiting concealed weapons and zoning the location of gun stores should be deemed constitutional.

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