

A Dissenting Voice on Gun Rights

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

Last month, while many Americans were agonized and outraged over students killed and injured by an automatic-weapon-toting shooter at a Parkland, Florida high school, Supreme Court Justice Clarence Thomas did something only a life-tenured jurist who doesn't have to run for reelection could do – complain about *too much* gun control!

Thomas' February 20th statement dissented from the Court's refusal to review a Ninth-Circuit-Court decision upholding California's 10-day waiting period for firearms, as applied to residents already owning guns. Thomas objected to the lower courts' overly “deferential” review of California's law. The Justice accused his colleagues of “enabl[ing] this kind of defiance” by failing to accept review in the case at hand (*Silvester v. Becerra*) or previous cases. Thomas said the justices' “continued inaction in this area” made the Second Amendment right to bear arms “a disfavored right.”

Dissents from denials of review, although unusual, are by no means unheard of. They are one important way for justices to communicate with their colleagues, the broader legal community, the media, and others with a stake in the Court's acts and omissions.

In fact, last month's dissent is not the first time Justice Thomas complained about “indefensible” failures of Ninth-Circuit reasoning and the Court's “inexcusable” refusal to review a gun-rights case. Both quotes are from Thomas' dissent from the Court's refusal last June to hear *Peruta v. California*; that case challenged restrictive concealed-weapon-permit standards used by large California cities.

So, what are the three main lessons from Justice Thomas' latest dissent?

First, the area of Second Amendment rights is a perfect example of how one or two broad Supreme Court pronouncements are not sufficient to practically implement a major change in the law's course. True, in 2008 and 2010 decisions a bare majority of the Court rocked conventional assumptions and established that the constitutional right to bear arms includes an individual right of self-defense and applies to state and local gun regulations. Yet, the Court left unclear the critical question of what level of judicial scrutiny regulators would have to overcome to survive constitutional challenges. And even if the review standard had been clearer, it would take successive rounds of Court decisions to make the new constitutional regime stick in the lower courts, legislatures, and other venues.

Which leads to a second point: sometimes the Court finds it desirable to let key implementation issues “percolate” for a substantial period in the lower courts. This allows other judicial minds to develop different views and rationales and crystallize the issues. There may also be the incidental advantage of keeping the justices out of

controversy until intervention from the Court is truly necessary. In the 1990s, the Court pursued this wait-and-see strategy in the hot-button area of abortion. The justices waited eight years to revisit many questions about how to apply a newly minted “undue burden” standard.

Finally, Justice Thomas’ recent dissent is a reminder of the limitations on the power of any one justice. The Supreme Court is a collegial institution. It takes a majority of justices to affirm or reverse a lower court. And it takes four justices -- one less than a majority -- to grant Supreme Court review. Without the additional three votes from his colleagues to authorize review of the California waiting-period case, Justice Thomas was left with being a lonely – if loud – voice in the wilderness.

By the way, I discussed the issues the Court would have faced in the California concealed-weapons permit case in my very first (December 2016) podcast.

And, come to think of it, the phenomenon of dissents from review denials deserves, and will receive, its own podcast in the future.