Carrying Guns in Public: Legal and Public Health Implications

Jon S. Vernick

Introduction
The Second Amendment to the U.S. Constitution states: "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." Until recently, no federal appellate court had ever struck down any gun law as a violation of the Second Amendment. In fact, even laws outlawing most handgun possession, or restricting other types of firearms, had been upheld, in part, because the laws did not interfere with the functioning of state militias.

Then, in 2008, the U.S. Supreme Court — for the first time in nearly 70 years — decided a case squarely addressing the meaning of the Second Amendment. In District of Columbia v. Heller, the Supreme Court concluded that the Second Amendment protected an individual right to own handguns in the home, invalidating a Washington, D.C. law.

But Heller left many issues undecided, including the precise scope of the Second Amendment. In particular, it was (and remains) unclear whether the Second Amendment applies to gun carrying outside of the home environment. Since Heller, lower federal courts have wrestled with this issue, with sometimes inconsistent results.

This article will consider the legal and public health implications raised by gun carrying in public. Given the public safety importance of this issue, and the significance attached to gun carrying by some interest groups, this may well be the next Second Amendment topic considered by the Supreme Court.

Supreme Court’s Recent Second Amendment Cases
A Washington, D.C. law, enacted in 1976, required that handguns had to be owned and registered prior to September of that year. This had the effect of essentially banning private ownership of handguns in Washington. Dick Anthony Heller, a D.C. resident, and others challenged that law. In District of Columbia v. Heller, in a 5-4 decision, the Court sided with Mr. Heller. Writing for the majority, Justice Scalia analyzed the language of the Second Amendment, its history, and prior cases. Based on all of these factors, the Court concluded that a law banning handguns in the home violated the private right protected by the Second Amendment.

Despite the seeming breadth of its ruling, the Court also took pains to assert that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” Scalia explained that historically both commentators and courts had understood that the Second Amendment was “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”

Regarding laws other than handgun bans, the Court also stressed: “[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” Scalia went even further, reassuring the reader that this list of presumptively lawful gun laws are just examples, as “our list does not purport to be exhaustive.”

Jon S. Vernick, J.D., M.P.H., is an Associate Professor Johns Hopkins Bloomberg School of Public Health and the Co-Director of the Johns Hopkins Center for Gun Policy and Research.
McDonald v. City of Chicago (2010)
Following Heller, in 2010, the Supreme Court decided McDonald v. City of Chicago.\(^7\) Because Heller had involved a law in the federal enclave of the District of Columbia, the issue of whether the Second Amendment applied as a limit on the powers of state and local governments never squarely arose. Two 19th-century Supreme Court cases, United States v. Cruikshank and Presser v. Illinois, suggested that the Second Amendment applied only to the federal government.\(^8\) In McDonald, again in a 5-4 decision, the Court concluded that the Second Amendment did indeed apply to state and local laws as well. Writing for the Court, Justice Alito therefore invalidated Chicago’s 1982 handgun ban. But he specifically repeated Scalia’s assertion from Heller that certain types of gun laws are nevertheless presumptively valid.\(^9\)

Even following McDonald, however, there were at least two major issues unaddressed by the Supreme Court’s modern Second Amendment jurisprudence. In Heller, the Court emphasized the home environment as deserving of special Second Amendment protection. For example, Scalia wrote of the Second Amendment that “whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”\(^9\) About the Washington, D.C. law more specifically, Scalia emphasized that “...the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.”\(^9\)

Having chosen to underscore home protection, the Heller and McDonald decisions beg the constitutional questions: Does the Second Amendment apply to gun possession or carrying outside of the home? And if the Second Amendment does apply to gun carrying in public, what legal standard should be used to judge the constitutionality of these laws?

The Supreme Court has provided no clear answer to these questions. In fact, in Heller, Scalia specifically declined to provide a standard of review, preferring that these issues be developed over time by the courts.

Laws Governing Gun Carrying in Public
Federal law establishes certain categories of persons who may not purchase or possess firearms. These categories include convicted felons, domestic violence misdemeanants, and several other prohibitions.\(^10\) States are permitted to exceed these minimum standards. But federal law leaves the matter of qualifying to carry a firearm in public largely up to the states.

States have generally established four legal regimes for carrying firearms in public. Following a powerful advocacy effort by the National Rifle Association and other groups, most states now have what are called “shall issue” carrying permit laws. Under a “shall issue” regime, also called a right-to-carry law, persons who are lawfully permitted to own guns must be allowed to obtain a permit to carry those firearms in public, provided that they fulfill certain administrative requirements, in some states, like completing a safety course. By comparison, under a “may issue” regime, on the books in approximately 10 states, persons seeking a carry permit must generally demonstrate that they have a special need to carry weapons in public, such as receiving specific threats or routinely carrying large sums of money. Officials in those states, therefore, retain some discretion to issue or deny a permit.

In the third major regime, applicable in just a few states including Vermont and Alaska, persons who lawfully own firearms may carry them in public without the need for a permit. And finally, just one state, Illinois, currently does not have a system to allow ordinary citizens to lawfully carry concealed firearms in public. Complicating matters further, many states have different permitting rules applicable to concealed versus open carrying of firearms.

Lower Court Challenges to Carrying Restrictions
Following Heller and McDonald, dozens of constitutional challenges to a wide variety of federal, state,
and local laws have been brought. Regarding gun carrying laws, these challenges have primarily concerned restrictions on obtaining a carry permit in “may issue” states. The majority of courts considering this issue have upheld these laws. Two recent federal district court cases, however, help to illustrate the sometimes disparate judicial treatment of gun carrying under the Second Amendment.

Piszczatoski v. Filko (2012)
In Piszczatoski v. Filko, five New Jersey residents who were denied handgun carry permits were joined by two advocacy organizations in challenging the constitutionality of New Jersey’s carry permit law. That law requires an applicant to demonstrate, among other factors, that he or she “has a justifiable need to carry a handgun.”

Like many other courts following Heller, the court in Piszczatoski adopted a two-part approach to analyzing the New Jersey law. First, it considered whether the conduct at issue — gun carrying in public — was within the scope of the Second Amendment. If so, the court next would consider (and apply) the appropriate constitutional standard of review.

Weighing the language from Heller emphasizing home protection, and mindful of its role as a lower federal court, the court in Piszczatoski declined to extend the scope of the Second Amendment beyond the home. Although this conclusion, by itself, would have been enough to decide the case, the court went on to the second part of the analysis — the standard of review.

As with many other courts considering the issue, the court in Piszczatoski determined that, if the Second Amendment were to cover gun carrying outside the home, the appropriate standard of review would be intermediate scrutiny. To withstand intermediate scrutiny, the challenged law must concern a substantial government objective, the fit between the law and that objective must be at least reasonable, and the law must not “burden more protected conduct than is reasonably necessary.” The Piszczatoski court concluded that the New Jersey law met each of these three parts of intermediate scrutiny. The state’s objective to promote public safety is clearly substantial, and the court was deferential to the legislature’s determination that limiting carrying of handguns in public would further that objective. Finally, the court concluded that the law does not burden more of the right than needed because carry permits may still be obtained by those who can demonstrate a “justifiable need” for self defense.

Woollard v. Sheridan (2012)
The issues in Woollard v. Sheridan are quite similar to those in Piszczatoski. Mr. Woollard challenged the failure to renew his handgun carry permit under a Maryland law requiring an applicant to have a “good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger.”

The court in Woollard identified the same two questions as in Piszczatoski — whether to extend the Second Amendment right beyond the home and the standard of review — but answered them differently. The court first concluded that the right does indeed extend beyond the home. The Second Amendment’s use of the word “bear” suggested to the court that “the right, though it may be subject to limitations, does not stop at one’s front door.” Furthermore, Scalia’s reference in Heller to laws restricting gun carrying in sensitive places as “presumptively valid” suggested to the Woollard court that some form of heightened scrutiny of such laws was appropriate.

As in Piszczatoski, the judge in Woollard determined that the appropriate form of that heightened review was intermediate scrutiny. But this time, the judge concluded that the law did not meet the standard. The Woollard decision likened Maryland’s concealed carry law, requiring a “good and substantial reason,” to a mere rationing system. Its overly broad approach to promoting public safety does not “ensur[e] that guns are kept out of the hands of those most likely to misuse them, such as criminals or the mentally ill.” Both the Piszczatoski and Woollard cases are currently on appeal.

Research Relevant to Court Challenges
In his dissent in McDonald, Justice Breyer warned that judges may be faced with “empirically based questions that will often determine the need for particular forms of gun regulation.” In fact, substantial research on the public health implications of gun carrying in public, and the effects of loosening restrictions on carrying permits, has been conducted.

Gun possession in public — especially the carrying of handguns — has profound public health implications. In 2010, there were 11,078 firearm-related homicides in the U.S. Of the firearm homicides for which the type of gun is known, 88% were committed with a handgun. There were also an estimated 53,738 non-fatal firearm assaultive injuries treated in emergency departments in 2010. The lifetime medical and lost productivity costs from these homicides and assaultive shootings totaled an estimated $19.2 billion in 2009. Although some of these homicides and assaults occurred in the home environment, many were on the street or in other public places.
Yet some have argued that loosening restrictions on carry permits — typically to a “shall issue” regime — actually promotes public safety. Notably, research by John Lott suggested that “shall issue” laws were associated with significant reductions in violent crime. In 2005, however, a National Research Council panel of experts examined this research and found it to be unpersuasive: “with the current evidence it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates.”

More recent research by Abhay Aneja and colleagues now suggests that these laws actually may be associated with modest increases in aggravated assaults and rapes.

Conclusion

If the 4th Circuit Court of Appeals, currently reviewing the Woollard case, upholds that decision, the resulting split among the Circuits makes it more likely that the Supreme Court will consider the issue. Researchers and public health practitioners must be prepared to assist courts in obtaining and interpreting research relevant to gun carrying in public. The public health stakes — measured in mortality and morbidity — are substantial.

References

1. U.S. Const., amend. II.
11. 18 U.S.C. § 922(g).
18. Id., at 10.
22. See Centers for Disease Control and Prevention, supra note 20.