Concealed Carry and the Right to Bear Arms

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Other Views:

• James Bishop, *Hidden or on the Hip: The Right(s) to Carry After* Heller, 97 Cornell L. Rev. 907 (2012), https://www.lawschool.cornell.edu/research/cornell-law-review/upload/Bishop-final.pdf.

• Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 Fordham Urb. L.J. 1695 (2012), https://ir.lawnet.fordham.edu/ulj/vol39/iss5/3/.

• Jonathan Meltzer, *Open Carry for All:* Heller *and Our Nineteenth-Century Second Amendment*, 123 Yale L.J. 1486 (2014), https://www.yalelawjournal.org/note/open-carry-for-all-heller-and-our-nineteenth-century-second-amendment.

• Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2016), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2016/06/09/10-56971.pdf.

The Second Amendment protects "the right of the people to keep and bear Arms."[1] In recent times, what it means to bear arms has become the subject of some debate.[2] That bearing arms involves the public carrying of arms to some extent is clear enough, but to whom the right extends, where it extends, and in what manner remains unsettled.

This article addresses what manner of carrying the Second Amendment protects—specifically, whether the concealed carrying of arms is protected. The Supreme Court, American history and tradition, and the most influential lower court decisions indicate that it is.

I. *Heller*

The Supreme Court expressly defined "bear arms" in *District of Columbia v. Heller*.[3] Adopting a definition Justice Ruth Bader Ginsburg had previously provided, the Court determined that the "natural meaning of 'bear arms'" is 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."[4] Carrying "in the clothing or in a pocket" is concealed carry, whereas wearing "upon the person" includes open carry. Thus, the Supreme Court explicitly included both concealed carry and open carry in its definition of "bear arms."

The Court did note, however, that "the Second Amendment is not unlimited" and recognized that historically "the right was not a right to carry . . . in any manner whatsoever."[5] Rather, states have been permitted to regulate the manner of carrying. As the Court pointed out, "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful."[6] The Court cited cases that upheld such bans when open carry remained available. Thus, the Supreme

1 U.S. Const. amend. II. In full, the Second Amendment provides: "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."

2 *See, e.g.*, James Bishop, *Hidden or on the Hip: The Right(s) to Carry After* Heller, 97 Cornell L. Rev. 907, 922 (2012) ("Under any application of originalist analysis . . . states may not prohibit open carry unless they instead offer the alternative outlet of concealed carry."); Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 Fordham Urb. L.J. 1695, 1696 (2012) ("Apart from service in militia, there is little evidence of a broad constitutional consensus on a right to carry arms in public."); Jonathan Meltzer, *Open Carry for All:* Heller *and Our Nineteenth-Century Second Amendment*, 123 Yale L.J. 1486, 1528 (2014) ("[T]he Second Amendment protects the right to carry openly outside the home.").

3 554 U.S. 570 (2008).

4 *Id.* at 584 (quoting Muscarello v. United States, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

5 *Id.* at 626.

6 *Id.*

Court explained that the right to bear arms includes concealed carry and open carry, but it suggested that a state can regulate the manner of carrying—for instance, by prohibiting concealed carry if open carry is available.

Given this, is it constitutional for a state to prohibit open carry while broadly allowing concealed carry—as some states do today? The "original meaning" sources relied on by the *Heller* Court, the right-to-carry cases extolled by the *Heller* Court, and post-*Heller* decisions from lower courts indicate that the right to bear arms is not infringed as long as law-abiding citizens are able to publicly bear arms either openly or concealed.

II. The Founding Era

The *Heller* Court focused on the founding-era understanding of the right to bear arms. To that end, it found Noah Webster's definitions of "keep," "bear," "arms," and "militia" persuasive.[7] While the Court had no need in *Heller* to provide the entire definition of "bear," it is worthy of closer examination here.

Webster's definitions of "bear" included: "To wear; to *bear* as a mark of authority or distinction; as, to *bear* a sword, a badge, a name; *to bear arms in a coat*."[8] This authoritative source expressly contemplated bearing arms as carrying a concealed firearm.

Moreover, Webster defined "pistol" as "A small fire-arm," and he explained in his definition that "Small pistols are carried in the pocket."[9] Notably, as Webster explained in defining "gun," pistols were never called guns in the founding era.[10] "Gun" referred to a long gun. With the understanding that pistols were regularly carried in a concealed manner, the framers could have codified the right to bear "guns" rather than "arms" had they intended to exclude concealed carry. Or they could have expressly excluded it as some state constitutions later did. But they did neither, nor did they ever demonstrate an intention of excluding concealed carry from the Second Amendment's protections in any other way. In fact, pistols, knives, swords, and armor were ubiquitous militia equipment throughout the colonial and founding eras[11] and included in Webster's definition of "arms,"[12] demonstrating that the Second Amendment was intended to protect much more than just long guns.

Concealable firearms in America date back to the first permanent English settlement. In 1622, "300 short pistolls with fire locks" were delivered to Jamestown Colony.[13] Indeed, it was common practice in the founding era to carry concealed firearms. Historian George C. Neumann explained that "[a]mong eighteenth-century civilians who traveled or lived in large cities, pistols were common weapons. Usually they were made to fit into pockets."[14] Similarly, in describing founding-era America to his friend in Scotland in 1775, a Virginian wrote, "No person goes abroad without his sword, or gun, or pistols."[15]

As indicated by Webster's definitions, pistols were commonly carried in one's pocket. Consequently, a popular pistol size was referred to as "pocket pistols." "Pocket pistols, also known as coat pistols, were small in size yet of large caliber that could easily be carried in one's trouser pocket or, more commonly, the coat pocket."[16] Larger versions were referred to as "overcoat pistols."[17] A smaller size was called "muff pistols," because women would commonly conceal them in their hand warmer muffs. Muff pistols "were quite popular . . . in the 18th century"[18] and included Queen Anne pistols. "The Queen Anne style of pistol first became popular in England during the reign of Queen Anne (1702-1714)."[19] Their popularity soon spread throughout the colonies, and the pistols were later used by soldiers in the French and Indian War and in the American Revolution.[20] Other firearms designed to be concealed were "boot pistols," which "could be easily concealed high in the top of riding boots."[21]

Many other pistols existed in the colonial and founding eras, and with one exception they were never prohibited from being carried either openly or concealed. The exception was a 1686 New Jersey law that prohibited concealed carry by anyone, as well as the open carrying of swords, pistols, and daggers by planters.[22] Planters were "those who settled new and uncultivated

7 *Id.* at 581, 582, 584, 595.

8 Bear, American Dictionary of the English Language (Noah Webster, 1828) (online edition), *available at* http://webstersdictionary1828.com/Dictionary/bear (emphasis added). The *Heller* Court relied on this edition of Webster's dictionary to define the words in the Second Amendment.

9 Pistol, American Dictionary of the English Language (Noah Webster, 1828) (online edition), *available at* http://webstersdictionary1828.com/Dictionary/pistol.

10 Gun, American Dictionary of the English Language (Noah Webster, 1828) (online edition), *available at* http://webstersdictionary1828.com/Dictionary/gun.

11 David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. Ill. U. L.J. (forthcoming 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3205664.

12 Arms, American Dictionary of the English Language (Noah Webster, 1828) (online edition), *available at* http://webstersdictionary1828.com/Dictionary/arms.

13 Harold B. Gill, The Gunsmith in Colonial Virginia 3 (1974).

14 George C. Neumann, The History of Weapons of the American Revolution 151 (1967).

15 3 American Archives, 4th series, 621 (Peter Force ed., 1840) (Sept. 1, 1775).

16 Jeff Kinard, Pistols: An Illustrated History of their Impact 57 (2003). Derringers, which entered the market in the 1820s, became the most popular and well-known pocket pistols. *Id.*

17 Hal W. Hendrick, et al., Human Factors Issues in Handgun Safety and Forensics 44 (2008).

18 *Id.*

19 Rupert Matthews, The Illustrated Encyclopedia of Small Arms 177 (2014).

20 Carl P. Russell, Guns on the Early Frontiers: A History of Firearms from Colonial Times through the Years of the Western Fur Trade 84–85 (1980).

21 *Id.* at 56. A popular variation of the boot pistol was the underhammer pistol, invented in the first half of the nineteenth century. "Such handy weapons were considered indispensable on the frontier and along highways and back alleys of the new nation." *Id.* at 57.

22 23 The Grants, Concessions, and Original Constitutions of the Province of New-Jersey 289–90 (1758).

territory."[23] "Thus, frontiersmen could openly carry long guns, but not handguns. People in towns could openly carry anything."[24] Significantly, "[n]o colony followed New Jersey's statute against concealed carry, or the restrictions on open handgun carry by planters. Nor did any state until about half a century after American independence."[25]

Laws that required colonists to carry arms were more common. Many colonies mandated that colonists bear arms to church,[26] court,[27] musters,[28] or to work on the roads or in the fields.[29] None mandated the manner in which arms were to be carried.

III. The Nineteenth Century

The first states to restrict the bearing of arms were Kentucky and Louisiana, which each banned concealed carry in 1813.[30] Throughout the nineteenth century, other states enacted similar restrictions. Far from coming to a consensus, courts reached a variety of conclusions when the laws were challenged. In his annotations to James Kent's famous *Commentaries on American Law*, future Supreme Court Justice Oliver Wendell Holmes, Jr. noted that "it has been a subject of grave discussion, in some of the state courts, whether a statute prohibiting persons, when not on a journey, or as travellers, from wearing or carrying concealed weapons, be constitutional. There has been a great difference of opinion on the question."[31] The Supreme Court of Georgia exclaimed, "'*tot homines, quot sententia.*'—so many men, so many opinions!"[32]

Of them all, it is most instructive to review the cases the Supreme Court relied on to define the individual right in *Heller*. In defining the Second Amendment right, the *Heller* Court approvingly cited five cases interpreting the right to bear arms protected by the Second Amendment or analogous arms-bearing rights in state constitutions.

The 1813 Kentucky ban was ruled unconstitutional in *Bliss v. Commonwealth*, where the Court of Appeals of Kentucky held that a prohibition on either concealed or open carry would violate the right to bear arms.[33] Conversely, the 1813 Louisiana ban was upheld by the Supreme Court of Louisiana in *State v. Chandler*, where the court stated that open carry was the guaranteed right.[34]

The Alabama Supreme Court upheld a concealed carry ban in *State v. Reid* in 1840, declaring that the legislature had "the right to enact laws in regard to the manner in which arms shall be borne . . . as may be dictated by the safety of the people and the advancement of public morals."[35] The manner selected would be valid as long as the arms could still be used for self-defense efficiently:

> We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional. But a law which is intended merely to promote personal security, and to put down lawless aggression and violence, and to that end inhibits the wearing of certain weapons, in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the constitution.[36]

In other words, a state may regulate the manner in which arms can be carried if it promotes public safety and still allows the carrier to defend herself.

A few years later, in *Nunn v. State*, the Georgia Supreme Court followed *Reid*'s reasoning in upholding a prohibition on concealed carry while striking a restriction on open carry.[37] This

23 Richard M. Lederer, Jr., Colonial American English 175 (1985).

24 Nicholas Johnson, et al., Firearms Law and the Second Amendment: Regulation, Rights and Policy 199 (2d ed. 2017).

25 *Id.*

26 *See*, *e.g.*, 1 William Waller Hening, The Statutes at Large: Being a Collection of all the Laws of Virginia, from the First Session of the Legislature 173 (1808) (1632 Virginia statute providing that "ALL men that are fittinge to beare armes, shall bringe their pieces to the church"); *id.* at 263 (1632 Virginia statute providing that "masters of every family shall bring with them to church on Sundays one fixed and serviceable gun with sufficient powder and shott"); *id.* (1643 Virginia statute requiring that "masters of every family shall bring with them to church on Sundays one fixed and serviceable gun with sufficient powder and shott"); 2 *id.* at 126 (similar 1676 Virginia law); 19 (part 1) The Colonial Records of the State of Georgia 137-40 (Allen D. Candler ed., 1904) (1770 Georgia statute imposing fines on militiamen who went to church unarmed).

27 *See* 2 Hening, *supra* note 26, at 126 (1676 Virginia statute requiring "that in goeing to churches and courts in those tymes of danger, all people be enjoyned and required to goe armed for their greate security").

28 *See* Kopel & Greenlee, *supra* note 11.

29 *See* 1 Hening, *supra* note 26, at 127 (1624 Virginia statute providing "That men go not to worke in the ground without their arms (and a centinell upon them)"); *id.* at 173 (similar 1632 Virginia law); Oliver H. Prince, Digest of the Laws of the State of Georgia 407, 409 (1822) (1806 Georgia statute requiring "All male white inhabitants . . . from the age of eighteen to forty-five years . . . to appear and work upon the several roads, creeks, causeways, water-passages, and bridges" and to "carry with him one good and sufficient gun or pair of pistols, and at least nine cartridges to fit the same, or twelve loads of powder and ball, or buck shot"). *See also* 1 Hening, *supra* note 26, at 127 (1623 Virginia statute requiring "That no man go or send abroad without a sufficient partie will armed."); *id.* at 173 (similar 1632 Virginia law).

30 2 A Digest of the Statute Laws of Kentucky, of a public and permanent nature, from the commencement of the government to the session of the Legislature, ending on the 24th February, 1834, at 1289–90 (A. G. Hodges, ed. 1834); State v. Chandler, 5 La. Ann. 489, 489 (1850).

31 2 James Kent, Commentaries on American Law *340 n.2 (O.W. Holmes, Jr. ed., 12th ed. 1873).

32 Nunn v. State, 1 Ga. 243, 248 (1846).

33 12 Ky. 90 (1822).

34 5 La. Ann. 489 (1850).

35 1 Ala. 612, 616 (1840).

36 *Id.* at 616–17.

37 1 Ga. 243. *Nunn* is the precedent that *Heller* quoted and lauded most.

holding may seem to indicate that open carry is constitutionally protected and concealed carry is not. But it is more plausible that the court required that one or the other be available, and that its holding was intended to reflect the legislature's preference for open carry—which it demonstrated by prohibiting concealed carry while merely regulating open carry. Regarding the concealed carry ban, the court said, "it is valid, inasmuch as it does not deprive the citizen of his natural right of self-defence."[38] Since open carry was available, citizens could still defend themselves. But had open carry been prohibited also, the concealed carry ban would have deprived citizens of the natural right of self-defense and therefore would have violated the Second Amendment.

Similarly, after creating some uncertainty earlier in that century, the Tennessee Supreme Court held in *Andrews v. State* that a general carry "prohibition is too broad," but "[i]f the Legislature think proper, they may by a proper law regulate the carrying of this weapon publicly, or abroad, in such a manner as may be deemed most conducive to the public peace, and the protection and safety of the community from lawless violence."[39]

Of these cases, only the *Chandler* case indicated that concealed carry was not protected by the right to bear arms, declaring that open carry "is the right guaranteed by the Constitution of the United States."[40] But even *Chandler* was later interpreted by the Louisiana Supreme Court as "prohibiting only *a particular mode* of bearing arms which is found dangerous to the peace of society."[41] Based on changes in societal preferences, a present-day law regulating open carry but allowing concealed carry could arguably serve the same purpose.[42]

IV. Post-*Heller*

Since *Heller*, many courts have decided whether the right to bear arms includes concealed carry. Like the pre-*Heller* cases, there is a difference of opinion among various courts; also like the pre-*Heller* cases, they generally agree that the right protects both open and concealed carry.

In challenges to concealed carry permitting schemes, the First,[43] Second,[44] Third,[45] and Fourth[46] Circuits all assumed (without deciding) that concealed carry is protected. The D.C. Circuit and Seventh Circuit have gone further, both determining that concealed carry is protected.

When the District of Columbia banned open carry and required applicants to show a "good reason" for needing a concealed carry permit, the D.C. Circuit struck it down in *Wrenn v. D.C.* because the burden on concealed carry was too great.[47] The court held that restrictions on the manner of bearing arms were permissible, but that "the law must leave responsible, law-abiding citizens some reasonable means of exercising" the right.[48] Thus, a "shall-issue" scheme was required, where permits are generally issued to all applicants who meet objective criteria.[49]

The Seventh Circuit struck down Illinois' complete prohibition on bearing arms in *Moore v. Madigan*. Illinois responded by enacting a shall-issue licensing scheme for concealed carry. This scheme was upheld in 2016, indicating that a prohibition on open carry and a shall-issue licensing scheme for concealed carry was consistent with the Seventh Circuit's understanding of the Second Amendment.[50]

In *Norman v. State*, the Florida Supreme Court followed the approach of the D.C. and Seventh Circuits—as well as the overall theme of the cases summarized in this article—in rejecting a challenge to Florida's open carry ban.[51] The court determined that the state's shall-issue licensing scheme satisfied the constitutional requirement because it "provides almost every individual the ability to carry a concealed weapon."[52] Since anyone not prohibited by law from owning a gun could carry one concealed, the state could regulate the open carrying of arms.

By contrast, only the Ninth and Tenth Circuits have upheld concealed carry bans. But both did so without considering the availability of open carry. In the Tenth Circuit case, *Peterson v. Martinez*, the plaintiff "repeatedly expressed . . . that he is not challenging the Denver ordinance" restricting open carry, so the court conducted its analysis "based on the effects of the state statute [restricting concealed carry] rather than the combined effects of the statute and the ordinance."[53]

The Ninth Circuit took a similar approach in *Peruta v. County of San Diego*, although in that case the court took it upon itself to consider only concealed carry rather than the combined effects of the laws prohibiting all carrying.[54] Subsequently, in last year's *Young v. Hawaii*, a three-judge panel of the Ninth Circuit decided that since concealed carry is unavailable, open carry must be permitted.[55] The court is currently considering whether to rehear that case en banc, along with another case that challenges open carry and concealed carry bans simultaneously. The latter

38 *Id.* at 251 (emphasis omitted).

39 Andrews v. State, 50 Tenn. 165, 187–88 (1871).

40 *Chandler*, 5 La. Ann. at 490.

41 State v. Jumel, 13 La. Ann. 399, 400 (1858) (emphasis in original).

42 *See infra* section V.

43 Gould v. Morgan, 907 F.3d 659 (1st Cir. 2018).

44 Kachalsky v. Cty. of Westchester, 701 F.3d 81 (2d Cir. 2012).

45 Drake v. Filko, 724 F.3d 426 (3d Cir. 2013).

46 Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013).

47 864 F.3d 650 (D.C. Cir. 2017).

48 *Id.* at 663.

49 *See generally* Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 63 Tenn. Law Rev. 679 (1995).

50 Berron v. Illinois Concealed Carry Licensing Review Bd., 825 F.3d 843 (7th Cir. 2016).

51 215 So.3d 18 (Fla. 2017).

52 *Id.* at 28.

53 707 F.3d 1197, 1208 (10th Cir. 2013).

54 824 F.3d 919 (9th Cir. 2016).

55 896 F.3d 1044 (9th Cir. 2018).

case, *Flanagan v. Becerra*, was filed in response to *Peruta*.[56] It challenges the combined effects of California's open and concealed carry restrictions to ensure that the court considers the full context of the burden on the right to bear arms—thus precluding the possibility of the court considering either restriction in a vacuum as it did in *Peruta*.

V. Public Policy

If the right to bear arms does not protect concealed carry at all, it would follow that it protects only open carry. To be sure, one can still exercise the core right of self-defense with an openly carried firearm. But most Americans prefer concealed carry. There are roughly 17.25 million concealed carry permitholders in America, and this does not account for concealed carriers in the fourteen states that do not require a permit.[57] Many millions of these Americans would not carry at all if they had to carry openly. As UCLA law professor Adam Winkler explained, "for those who want fewer guns on the streets, there are a million reasons to prefer open carry," including that "[v]ery few gun owners want to carry openly displayed guns."[58]

If concealed carry were held not to be part of the right to bear arms at all, it could become far less available. States compelled to allow open carry would be less inclined to allocate the funds and resources necessary to administer a concealed carry licensing scheme. For instance, they may instead license open carry. And anti-gun states that currently view concealed carry as the lesser evil may abolish their concealed carry schemes since open carry would be permissible either way.

Regardless of prospective policy considerations, American history and tradition show that the carrying of concealed arms is part of the right protected by the Second Amendment. It can be prohibited only if open carry is available, just as open carry can be prohibited only if concealed carry is available.

VI. Conclusion

The Supreme Court has elucidated that the scope of the Second Amendment is defined by the founding-era understanding of the right, as informed by American history and tradition. A historical analysis shows that both concealed and open carry are protected by the right, and that a government may only restrict one if the other remains available for law-abiding citizens to exercise.

56 *See* Joseph Greenlee, Peruta*,* Flanagan*, and the Right to Bear Arms in the Ninth Circuit*, Federalist Soc'y Blog, Aug. 29, 2016, https://fedsoc.org/commentary/blog-posts/peruta-flanagan-and-the-right-to-bear-arms-in-the-ninth-circuit.

57 John R. Lott, Jr., *Concealed Carry Permit Holders Across the United States: 2018*, at 3, Crime Prevention Research Center, Aug. 14, 2018, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3233904.

58 Adam Winkler, *Want fewer guns on California streets? Open carry may be the answer.*, L.A. Times, Feb. 23, 2014, http://articles.latimes.com/2014/feb/23/opinion/la-oe-winkler-gun-control-open-carry-20140223.