GOOD CAUSE REQUIREMENTS FOR CARRYING GUNS IN PUBLIC

Joseph Blocher[*]

Can the government require a person to give reasons before lawfully carrying a gun in public? If so, what reasons must it accept?

The answers to these questions remain somewhat unclear, but their importance is difficult to overstate. Licensing requirements for public carrying — especially concealed carrying — are central to the regulation of guns in public spaces, which is perhaps the most important issue in contemporary gun law and policy. As a constitutional matter, that issue is the crux of recent cases that have found or assumed a right to carry guns in public for self-defense. As a statutory matter, some states have expanded the right to possess and use guns in public by liberalizing concealed carry laws, loosening restrictions on gun possession in bars and restaurants, and adopting of Stand Your Ground laws.[1]

But some jurisdictions — including populous states like California, New York, and New Jersey — require applicants for certain kinds of public carrying licenses to show cause (such as Maryland's "good and substantial reason"[2] or New York's "special need for self-protection"[3]) for public carrying, especially concealed public carrying. And the government interest underlying these laws is easy enough to identify, since the costs and benefits of gun use are very different in public areas than in one's home. One can support an individual right to keep and bear

---

[*] Associate Professor, Duke Law School. Many thanks to Darrell Miller and Chris Schroeder for thoughtful comments.

[1] These and other political and legal successes make it hard to credit the analogy made by some commentators between the position of contemporary gun owners and that of black schoolchildren in the 1950s. *See* Alan Gura, *The Second Amendment as a Normal Right*, 127 HARV. L. REV. F. 223 (2014) (comparing post-*Heller* developments in gun rights to the struggle for racial equality after *Brown v. Board of Education*); David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?*, 127 HARV. L. REV. F. 230 (2014) (same). For similar reasons, it seems inappropriate to invoke the white segregationist policy of "massive resistance" when describing lower courts' response to *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Compare* Petition for Writ of Certiorari at 3, Drake v. Jerejian, No. 13-827 (U.S. Jan. 9, 2014) (describing "lower courts' massive resistance to *Heller*"), *with* WIKIPEDIA, *Massive Resistance*, http://en.wikipedia.org/wiki/Massive_resistance, *archived at* http://perma.cc/MDQ7-586A (last visited Mar. 30, 2014) (describing the "Massive Resistance" policy undertaken by white segregationists to oppose school integration).

[2] MD. CODE ANN., PUB. SAFETY § 5-306(a)(6)(ii) (West 2014) (listing "necessary as a reasonable precaution against apprehended danger" among these reasons).

[3] Bando v. Sullivan, 735 N.Y.S.2d 660, 662 (N.Y. App. Div. 2002) (interpreting the "proper cause" requirement of N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2013)).

arms, and even support the extension of that right into public spaces, while still believing that the Second Amendment permits public carrying to constitutionally be regulated more stringently than gun possession in one's home.

Gun rights advocates have recently challenged these good cause requirements on Second Amendment grounds. If successful, their challenges could effectively compel states to issue public carrying licenses to anyone who is not a felon, mentally ill, or otherwise excluded from the scope of Second Amendment coverage. In gun law lingo, this would mean constitutionally mandating a "shall issue" regime for public carrying licenses. It is important, therefore, to understand the arguments both for and against the constitutionality of restrictions on public carrying.

The extreme position holds that any kind of good cause requirement is unconstitutional. As one district court judge put it, "[a] citizen may not be required to offer a 'good and substantial reason' why he should be permitted to exercise his rights. The right's existence is all the reason he needs."[4] When framed this way, the point is rhetorically powerful, but substantively weak. Surely not every "cause" is "good" enough to trigger Second Amendment coverage. If a person turned in a concealed-carry application with the explanation, "I need to carry a gun in public so that I can hijack a plane with it," few would think that denying the license would violate his Second Amendment rights. It is not clear why the result would be any different if the insufficient cause were conveyed through evidence other than an outright declaration.

It follows that *some* good cause requirements — or at least some "not bad" cause requirements — are constitutional. Or, to put it another way, the right to keep and bear arms does not encompass a right to carry guns in public for any reason whatsoever. It is equally clear, however, that some "causes" for gun ownership are constitutionally protected, and therefore cannot be excluded by a good cause requirement. If a person (we can call him Brad) wants a gun because he is in immediate danger of being killed by violent criminals — and is not himself a felon, mentally ill, or otherwise subject to the categorical restrictions approved in *District of Columbia v. Heller*[5] — then his claim

---

[4] Woollard v. Sheridan, 863 F. Supp. 2d 462, 475 (D. Md. 2012), *rev'd by* Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013).

[5] 554 U.S. 570, 626–27 (2008) ("[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.").

to carry a weapon in public would fall squarely within the "core" interest of self-defense.[6]

Separating these extreme cases, a host of harder questions remain. What if Brad is not actually in any danger, but simply paranoid about imagined threats? What if he wants the gun so that he can hunt squirrels, a generally lawful activity whose constitutional coverage is nevertheless unclear? What if his "bad" reason for gun ownership is not likely ever to manifest itself in illegal activity?

One partial answer to these questions is to say that self-defense is always a good cause, and that licensing regimes therefore cannot deny guns to people seeking to carry them publicly for that purpose. There is much to like in this approach. *Heller*, after all, identified self-defense as the "core" of the right to keep and bear arms.[7] And although the Court found the need for that right to be "most acute" in the home,[8] it did not explicitly limit it as such. In fact, long before *Heller*, courts recognized self-defense and necessity exceptions to gun laws,[9] even for prohibited groups like felons.[10]

But this does not necessarily mean that the Second Amendment requires that a person be able to carry a gun in public — let alone a concealed gun — any time he invokes self-defense. After all, the right of self-defense *itself* typically requires a person to show something like good cause — a reasonable fear of imminent harm as a result of unlawful force, for example. In other words, the core of the right to keep and bear arms is the right to keep and bear arms for self-defense; the core of the right to keep and bear arms for self-defense is self-defense. And if *that* core right is compatible with a good cause requirement, shouldn't the right to keep and bear arms for self-defense also be?

The difficulty of this question arises from the fact that the right to self-defense and the right to keep and bear arms for that purpose are closely related but not coextensive. When a person purchases a gun for self-defense, he generally does not know whether he will ever have to use it for that purpose — fortunately, the vast majority of gun owners never do. But in light of *Heller*, the rule cannot be that *only* those people who actually fire a gun in self-defense are validly exercising their Second Amendment rights.

How should the law treat the inevitable space between actions of justified self-defense and the preparations for those actions? Does the

---

[6] *Id.* at 630.

[7] *Id.*

[8] *Id.* at 628.

[9] State v. Hamdan, 665 N.W.2d 785, 811–12 (Wis. 2003) (creating exception in concealed carry ban for store owner whose store in a high crime neighborhood had been robbed multiple times).

[10] United States v. Gomez, 81 F.3d 846, 854 (9th Cir. 1996) (finding that felon convicted for possessing a firearm should have been permitted to present a justification defense).

Second Amendment require the government to recognize as "good cause" a generalized claim to self-defense in the absence of a specific threat? One way to frame the issue is to ask what level of risk is necessary to "trigger" the right to carry a gun in public for purposes of self-defense. A person who is 100% certain to face a justified need for armed self-defense would surely have "good cause"; a person who is 100% certain *not* to have such a need would not have good cause. (The latter person could probably still have a gun at home, and might have some kind of cognizable interest in public carrying, but it is hard to see how it would be grounded in self-defense.) When does the risk become constitutionally salient? Ten percent? One percent?

Of course, people often have no way of knowing with precision the chances of their facing a "real" threat. Self-defense law and good cause requirements approach this uncertainty from two different angles. Self-defense law is about ex post risk assessment, in the sense that the event has already happened, and the law seeks to determine whether the self-defender's actions were reasonable and proportional to the threat. Good cause requirements do the same thing from an ex ante perspective, transposing the threat assessment before the action takes place.

To be sure, one might argue that reasonableness, proportionality, imminence and other "good cause" elements of self-defense should only apply to *actions* of self-defense, not to preparations for those actions. There is some strength to this argument as well. It is difficult to assess a risk ahead of time, which is one reason why well-tailored good cause requirements are typically more forgiving than self-defense doctrine. Thus a person seeking a license in Maryland need only show that the "permit is necessary as a reasonable precaution against apprehended danger,"[11] rather than demonstrate the "imminent or immediate danger of death or serious bodily harm"[12] necessary to justify an action of self-defense. It is also true that mere preparations for self-defense might never involve physical harm to anyone, so the state's interest in public safety is presumably lower than when it comes to actual confrontations. Nonetheless, when such preparations include the public carrying of guns, the risk of misuse is undeniable. It is that risk which good cause limitations seek to minimize.

None of this means that good cause requirements are always constitutional, only that challenges to them should focus on the details of their implementation. If a public-carry licensing regime operates like a ban, it should be evaluated as such. For the most part, though, the matter is one for legislatures to decide. These days, most of them seem

---

[11] MD. CODE ANN., PUB. SAFETY § 5-306(a)(6)(ii) (West 2014).

[12] State v. Faulkner, 483 A.2d 759, 761 (Md. 1984).

to be moving in the direction of loosened restrictions. The Constitution has nothing to say about that trend. But it also has very little to say to those legislatures who have chosen to maintain a "may issue" approach to public carrying, including its attendant good cause restrictions. The Second Amendment is busy enough these days without being deployed in fights where it does not belong.