

## WHEN GUNS THREATEN THE PUBLIC SPHERE: A NEW ACCOUNT OF PUBLIC SAFETY REGULATION UNDER *HELLER*

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**ABSTRACT**—Government regulates guns, it is widely assumed, because of the death and injuries guns can inflict. This standard account is radically incomplete—and in ways that dramatically skew constitutional analysis of gun rights. As we show in an account of the armed protesters who invaded the Michigan legislature in 2020, guns can be used not only to injure but also to intimidate. The government must regulate guns to prevent physical injuries and weapons threats in order to protect public safety and the public sphere on which a constitutional democracy depends.

For centuries the Anglo-American common law has regulated weapons not only to keep members of the polity free from physical harm, but also to enable government to protect their liberties against weapons threats and to preserve public peace and order. We show that this regulatory tradition grounds the understanding of the Second Amendment set forth in *District of Columbia v. Heller*, where Justice Antonin Scalia specifically invokes it as a basis for reasoning about government’s authority to regulate the right *Heller* recognized.

Today, a growing number of judges and Justices are ready to expand gun rights beyond *Heller*’s paradigmatic scene: a law-abiding citizen in his home defending his family from a criminal invader. But expanding gun rights beyond the home and into the public sphere presents questions concerning valued liberties and activities of *other* law-abiding citizens. Americans are increasingly wielding guns in public spaces, roused by persons they politically oppose or public decisions with which they disagree. This changing paradigm of gun use has been enabled by changes in the law and practice of public carry. As courts consider whether and how to extend constitutional protection to these changed practices of public carry, it is crucial that they adhere to the portions of Justice Scalia’s *Heller* decision that recognize government’s “longstanding” interest in regulating weapons in public places.

We show how government’s interest in protecting public safety has evolved with changing forms of constitutional community and of weapons threats. And we show how this more robust understanding of public safety

bears on a variety of weapons regulations both inside and outside of courts—in constitutional litigation, in enacting legislation, and in ensuring the evenhanded enforcement of gun laws. Recognizing that government regulates guns to prevent social as well as physical harms is a critical first step in building a constitutional democracy where citizens have equal claims to security and to the exercise of liberties, whether or not they are armed and however they may differ by race, sex, or viewpoint.

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## INTRODUCTION

Today, debate about regulating guns is overwhelmingly focused on the terrible physical harms guns can inflict. Concern about preventing physical harm shapes the ways that gun laws are written, enforced, and adjudicated. In this Essay, we demonstrate, first, that government’s public safety interest

in regulating weapons includes preventing *social* as well as physical harms. Second, we demonstrate that *District of Columbia v. Heller*<sup>1</sup> recognizes that the government has a longstanding prerogative, rooted in the common law, to prevent weapons threats and threats to public order, which enables it to secure the equal freedom of all members of the public. Government can regulate weapons to protect the public sphere on which a constitutional democracy depends.

Government has a compelling interest in regulating weapons, not only to deter injury, but also to promote the sense of security that enables community<sup>2</sup> and the exercise of all citizens' liberties, whether or not they are armed. Gun laws protect people's freedom and confidence to participate in every domain of our shared life, from attending school to shopping, going to concerts, gathering for prayer, voting, assembling in peaceable debate, counting electoral votes, and participating in the inauguration of a President.

The Court's decision in *Heller* recognizes government's ancient common law authority to protect public safety against weapons threats. The common law has always regulated arms to secure the public peace, and to prevent terror as well as physical injury.<sup>3</sup> What counts as terror and whose terror counts have changed over time with evolving forms of sovereignty and community, but there is continuity in the common law and constitutional principle that government can regulate weapons to prevent some members of the community from intimidating and terrorizing others. As we show, *Heller* specifically recognizes this evolving body of common law when reasoning about the roots, character, and scope of government's authority to regulate weapons in public life.<sup>4</sup>

Today, a growing number of judges and Justices are ready to expand gun rights beyond *Heller*'s paradigmatic scene of a law-abiding citizen in his home defending his family from a criminal invader.<sup>5</sup> But expanding gun rights beyond the home and into the public sphere presents questions concerning valued liberties and activities of those law-abiding citizens *not*

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<sup>1</sup> 554 U.S. 570 (2008).

<sup>2</sup> Reva B. Siegel & Joseph Blocher, *Why Regulate Guns?*, 48 J.L. MED. & ETHICS 11, 11 (2020).

<sup>3</sup> See *infra* Part II.

<sup>4</sup> See *infra* Section II.B.

<sup>5</sup> We use the male pronoun purposefully here because the common law understood the household as governed by a male head responsible for representing and providing for its members. See Susan P. Liebell, *Sensitive Places?: How Gender Unmasks the Myth of Originalism in District of Columbia v. Heller*, 53 POLITY 207, 215 (2021) (“‘Self-defense in the home’ is unintelligible when detached from an essential historical context: the husband as head of household under common law coverture.”). Justice Scalia’s appeal to common law understandings to derive a right to defend home and family is an appeal to a tradition that recognized men as having authority over women and other household members.

wielding weapons.<sup>6</sup> Americans are increasingly wielding guns in public spaces, roused by persons they politically oppose or public decisions with which they disagree—as, for example, when gun owners carry weapons into a legislature or to the site of a racial-justice protest.<sup>7</sup> This changing paradigm of gun use has been enabled by changes in the law and practice of public carry: the spread of NRA-supported “right-to-carry” laws which have been adopted by twenty-five states since 1991<sup>8</sup> and the growth of an open-carry movement self-consciously seeking to shift norms about gun use.<sup>9</sup> As courts consider whether and how to extend constitutional protection to these changes in the law and practice of public carry, it is crucial that they adhere to the portions of Justice Scalia’s *Heller* decision that recognize government’s “longstanding” interest in regulating weapons to protect public safety—especially in public places.<sup>10</sup>

Yet, there are judges, legislators, and advocates—both inside and outside of courts—who argue that the government’s interest in regulating guns is limited to the prevention of physical harm. In post-*Heller* Second Amendment cases, a small but growing number of judges have voted to strike down gun laws on the ground that the government has failed to produce sufficient evidence that the challenged laws reduce gun injuries and deaths.<sup>11</sup> A similarly narrow understanding of the public safety interest

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<sup>6</sup> While this Essay was in its final round of edits, the Supreme Court granted certiorari in a case challenging New York’s law restricting concealed-carry licenses to those who can show “proper cause.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, No. 20-843 (U.S. Apr. 26, 2021), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-843.html> [<https://perma.cc/V2JA-ME2E>] (establishing the question presented as “[w]hether the State’s denial of petitioner’s applications for concealed-carry licenses for self-defense violated the Second Amendment”). A central question in the case is whether and to what degree the Second Amendment has been incorporated under the Fourteenth Amendment’s Due Process Clause to restrict states’ authority to regulate carrying guns outside the home.

<sup>7</sup> For an examination of this trend, see *infra* notes 92–100, 286–287 and accompanying text. For an examination of the armed invasion of the Michigan legislature in 2020, see *infra* Part I.

<sup>8</sup> These laws require the issuance of concealed-carry permits to anyone not specifically prohibited from possessing a gun. See “Concealed Carry | Right-to-Carry,” NRA-ILA, <https://www.nraila.org/get-the-facts/right-to-carry-and-concealed-carry/> [<https://perma.cc/6PJG-LXLB>] (celebrating this change and saying that such laws “are essential because self-defense is a fundamental right”). A growing number of states are doing away with permit requirements entirely—a policy change that supporters call “constitutional carry.” See Adam Weinstein, *Understanding ‘Constitutional Carry,’ the Gun-Rights Movement Sweeping the Country*, TRACE (Feb. 28, 2017), <https://www.thetrace.org/2017/02/constitutional-carry-gun-rights-movement-explained/> [<https://perma.cc/U4UK-98US>] (noting that ten states adopted such a policy between 2010 and 2017).

<sup>9</sup> See *infra* notes 282–286 and accompanying text (describing rise of open-carry movement).

<sup>10</sup> *District of Columbia v. Heller*, 554 U.S. 570, 626, 627 n.26 (2008) (calling various “longstanding prohibitions” “presumptively lawful”). For our discussion of these under examined passages of the *Heller* opinion, see *infra* Sections II.B–II.C.

<sup>11</sup> See *infra* Section III.A.

appears in legislatures.<sup>12</sup> Too often, lawmakers frame their task around violence prevention, not public safety; some argue that preventing violence is the *only* valid basis for laws restricting public carry and other forms of gun use.

In this Essay, we show that this “physical-harm-only” conception of public safety is deeply at odds with the common law tradition from which *Heller* draws its reasoning about the government’s prerogative to regulate weapons. Reading the common law and the Constitution together, we show how the government interest in regulating arms to promote public safety extends beyond injury prevention to protecting the constitutional order and building a community in which citizens have an equal claim to security and to the exercise of liberties, whether or not they are armed, and however they differ by sex, race, or political viewpoint. Acting in the interest of public safety, government may regulate weapons to protect the body politic.

Understanding that government’s public safety interest protects the exercise of liberties as well as physical survival can guide judgments about litigation, legislation, and the enforcement of gun laws. Recognizing that the way government secures public safety structures community, we are in a different position to understand the growing concern that selective enforcement of gun laws inscribes unequal membership and chills the exercise of rights.<sup>13</sup> We can ask a series of critical questions: Are gun laws underenforced in ways that privilege the security claims of armed members of the community over others? Are gun laws selectively enforced in ways that allow some members of the community to bear arms in ways that others are not? In our constitutional democracy, public safety includes an interest in evenhanded enforcement of gun laws so that some members of the community—whether identified by sex, race, or political viewpoint—are not allowed to use weapons to dominate or threaten others.<sup>14</sup> These questions disappear from view when we think about gun regulation solely in terms of physical harm.

We begin in Part I by reconstructing the story of the armed protest that shut down the Michigan legislature in the spring of 2020. We have chosen this episode to begin our account because it exemplifies an increasingly familiar form of gun use that was scarcely heard of at the time of the Court’s

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<sup>12</sup> See *infra* Section III.B.

<sup>13</sup> See *infra* Section III.C (describing concerns about the selective enforcement of gun laws in the protest context).

<sup>14</sup> Citizens and government officials can assert a public safety interest in evenhanded enforcement of gun laws under the Second Amendment in ways that may appeal to First and Fourteenth Amendment values of viewpoint neutrality and equal protection even in circumstances where a court would not find an independent judicially enforceable violation of those constitutional guarantees.

2008 decision in *Heller* and diverges in important particulars from the paradigmatic scene of criminal home invasion on which *Heller* focuses. It is now increasingly common for massed groups of heavily armed gun owners to engage in open carry, invading public spaces occupied by unarmed members of the community, as happened in Michigan.<sup>15</sup> Examining this episode, in which persons wielded guns in public spaces without inflicting physical injury on others, illustrates why government has a public safety interest in regulating guns to preserve the peace and to protect against weapons threats and intimidation, as well as to prevent physical injury.

In Part II, we show that this conception of public safety has ancient roots in the common law, and we demonstrate that *Heller* draws on this common law tradition in the portions of the decision that recognize government's interest in regulating weapons. We go on to show how this reading of *Heller* bears on disputes over the constitutionality of restrictions on public carry and matters in the two dominant modes of applying *Heller*—the so-called “two-step” framework and originalist methods drawing on text, history, and tradition. In Part III, we invoke this understanding of the Constitution to respond to gun-rights advocates who assert, in courts and in politics, the limiting principle that government may regulate guns *only* to prevent physical harm. In cases challenging gun laws' constitutionality under *Heller*, judges demand evidence that the laws prevent physical harm. And in legislative arenas, advocates assert that preventing physical harm is the only reason for limiting public carry. As importantly, we show that focusing on physical harm obscures important questions about the evenhanded enforcement of gun laws. The enforcement of gun laws helps define and shape a constitutional democracy, whether it reinforces hierarchies or attests to the equal liberties of community members.

As we were completing this Essay, the nation was transfixed by an assault on the body politic, one physical expression of which was the seditious invasion of the Capitol building by an armed mob.<sup>16</sup> While there

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<sup>15</sup> See *infra* notes 92–100, 281–283 and accompanying text (documenting when these practices emerged).

<sup>16</sup> Because of stricter gun regulations in the District of Columbia, the rioters mobbing the Capitol on January 6, 2021 did not openly carry guns to the same extent as protesters did in Lansing, but reports suggest that many of the invaders carried concealed guns. See Jane Lytvynenko & Molly Hensley-Clancy, *The Rioters Who Took Over the Capitol Have Been Planning Online in the Open for Weeks*, BUZZFEED NEWS (Jan. 6, 2021, 5:38 PM), <https://www.buzzfeednews.com/article/janeltyvynenko/trump-rioters-planned-online> [<https://perma.cc/A6CQ-FHRT>] (“Hundreds of extremists’ posts discussed bringing firearms in violation of Washington, DC, law. Nevertheless, people displayed weapons that they had brought with them. ‘All this bullshit about not bringing guns to D.C. needs to stop,’ read one post from Tuesday with more than 5,000 upvotes. ‘This is America. Fuck D.C. it’s in the Constitution. Bring your goddamn guns.’”). Members of Congress reported exchange of fire in the Capitol chambers. See Paul

has been violence in the Capitol before,<sup>17</sup> the mob of January 6, 2021 was unprecedented in size and purpose, shocking even as it followed a recognizable social-mobilization script of the kind we describe playing out in Michigan, including extensive online plotting for an attack on sites of lawmaking and political life.<sup>18</sup> Threats continued through the spring, leading the U.S. government to deploy 25,000 National Guard troops in advance of

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Bass, *As Battle Raged, DeLauro Hit the Floor*, NEW HAVEN INDEP. (Jan. 6, 2021, 10:12 PM), [https://www.newhavenindependent.org/index.php/archives/entry/as\\_battle\\_raged\\_delauro\\_hit\\_the\\_floor](https://www.newhavenindependent.org/index.php/archives/entry/as_battle_raged_delauro_hit_the_floor) [https://perma.cc/K9FZ-JQH2] (“Rioters broke the glass on the doors,” [Representative] DeLauro recounted. “Then they started to fire in. There was an exchange of gunfire.”); Rebecca Traister, ‘It Was No Accident’ Congresswoman Pramila Jayapal on Surviving the Siege, CUT (Jan. 8, 2021), <https://www.thecut.com/2021/01/pramila-jayapal-surviving-capitol-riots.html> [https://perma.cc/3C9M-N868] (interviewing Representative Pramila Jayapal about the guns, the shooting, and the rioters with zip ties, and drawing comparisons to those arrested for planning to invade the Michigan legislature and take officials hostage). At one point in the late afternoon when only thirteen people had been arrested, the Washington, D.C. police chief reported recovering at least five weapons. Associated Press, *5 Weapons Recovered, 13 Arrests at D.C. Protests*, PBS NEWS HOUR (Jan. 6, 2021, 5:57 PM), <https://www.pbs.org/newshour/politics/5-weapons-recovered-13-arrests-at-d-c-protests> [https://perma.cc/8N5L-B7AF]. In addition to recovering several pipe bombs and Molotov cocktails from the area, law enforcement observed that some invaders had zip ties to be used as handcuffs and law enforcement was investigating whether there was a plan to kidnap government officials as there was in Michigan. See Devlin Barrett, Spencer S. Hsu & Matt Zapotosky, *FBI Focuses on Whether Some Capitol Rioters Intended to Harm Lawmakers or Take Hostages*, WASH. POST (Jan. 8, 2021, 8:18 PM), [https://www.washingtonpost.com/national-security/capitol-riot-fbi-hostages/2021/01/08/df99ae5a-5202-11eb-83e3-322644d82356\\_story.html](https://www.washingtonpost.com/national-security/capitol-riot-fbi-hostages/2021/01/08/df99ae5a-5202-11eb-83e3-322644d82356_story.html) [https://perma.cc/8CBK-95S6] (“Fresh in investigators’ minds is the group of men charged last year in Michigan—self-styled militia members—who are accused of plotting to kidnap that state’s governor and allegedly discussed storming the state Capitol and taking lawmakers hostage.”); Elaine Godfrey, *It Was Supposed to Be So Much Worse*, ATLANTIC (Jan. 9, 2021), <https://www.theatlantic.com/politics/archive/2021/01/trump-rioters-wanted-more-violence-worse/617614/> [https://perma.cc/MM4H-LFZ7] (noting online plans to kill Vice President Mike Pence and reporting the construction of a gallows outside the Capitol). Pro-Trump protesters at the Georgia State Capitol that same day openly carried long guns. See Emily Shapiro, *Beyond DC: Protests Rock California, Utah, Michigan and More*, ABC NEWS (Jan. 7, 2021, 12:17 PM), <https://abcnews.go.com/US/dc-protests-rock-california-utah-michigan/story?id=75108241> [https://perma.cc/CCB3-4NKT].

<sup>17</sup> See, e.g., Nora McGreevy, *The History of Violent Attacks on the U.S. Capitol*, SMITHSONIAN MAG. (Jan. 8, 2021), <https://www.smithsonianmag.com/smart-news/history-violent-attacks-capitol-180976704180976704/> [https://perma.cc/M2H6-MK8X] (noting “assailants with a range of motives have launched attacks on the [U.S. Capitol] with varying levels of success” throughout history). See generally JOANNE B. FREEMAN, *THE FIELD OF BLOOD: VIOLENCE IN CONGRESS AND THE ROAD TO CIVIL WAR* 4–6, 268–69 (2018) (documenting threats and acts of violence among congressmen in the decades before the Civil War and reporting that before the war members came armed).

<sup>18</sup> See Rebecca Boone, *Armed Statehouse Protests Set Tone for US Capitol Insurgents*, AP NEWS (Jan. 7, 2021), <https://apnews.com/article/election-2020-coronavirus-pandemic-oregon-elections-idaho-688fc8894f44992487bb6ee45e9abd77> [https://perma.cc/ZP8E-YN2G] (calling the state capitol protests in Michigan, Idaho, and Oregon “dress rehearsals” for D.C.); *id.* (“There’s a direct relationship between the growing paramilitary activity in the state Capitols, for sure, and what’s happening in D.C.,” said Joe Lowndes, a political science professor at the University of Oregon who researches race, conservatism and social movements in politics. “They have the same kind of organizations and people involved.”).

the inauguration<sup>19</sup> and then leading Congress to cancel a session on March 4 in response to a threat by a militia group to breach the Capitol in support of President Trump's return to power.<sup>20</sup>

Such actions have claimed lives and might ultimately claim more. But they also threaten our *collective* lives. The nation witnessed its leaders crouched under benches in the Capitol unable to count the electoral vote. The threats, assaults, and failures to evenhandedly police them transform the public sphere on which a constitutional democracy depends. The current escalating threat of violence grows out of, and exacerbates, political mistrust and polarization.<sup>21</sup> Weapons caught in this cycle no longer threaten individual lives only, if they ever did. Gun regulation becomes a defense of the body politic.

### I. GUN THREATS AND THE BODY POLITIC

We have grown accustomed to assessing the costs of gun violence through reports of lives lost and persons injured. This mode of reasoning is so deeply entrenched on all sides of the gun debate, in the academy, and in popular media that it tends to obscure the many nonphysical but very significant social harms that guns can inflict. Taking account of the ways that gun use affects others' freedoms and other valued activities requires paying attention to the many—and evolving—modes of gun carry, including new forms of gun carry in public spaces. To illustrate the externalities of gun use and to enable examination of the government's public safety interest in

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<sup>19</sup> Leo Shane III & Joe Gould, *Biden Inaugurated Commander in Chief amid Heavy Military Presence at Capitol*, MIL. TIMES (Jan. 20, 2021), <https://www.militarytimes.com/news/pentagon-congress/2021/01/20/biden-inaugurated-commander-in-chief-amid-heavy-military-presence-at-capitol/> [<https://perma.cc/HKK5-BT5F>].

<sup>20</sup> See Mark Katkov & Scott Neuman, *House Cancels Thursday Session After Police Warn of Possible Attack on Congress*, NPR (Mar. 3, 2021, 12:27 PM), <https://www.npr.org/2021/03/03/973310942/capitol-police-warns-of-another-possible-right-wing-attack-on-congress> [<https://perma.cc/VBZ9-B9DF>]. In the wake of the Capitol attack, federal law enforcement mobilized in response to threats against state capitols and other democratic institutions. See, e.g., Craig Timberg, Drew Harwell & Marissa J. Lang, *Capitol Siege Was Planned Online. Trump Supporters Now Planning the Next One.*, WASH. POST (Jan. 9, 2021, 5:01 PM), <https://www.washingtonpost.com/technology/2021/01/09/trump-twitter-protests/> [<https://perma.cc/PL3U-BMZF>]; Tom Winter & Andrew Blankstein, *FBI Memo Warns Law Enforcement Across U.S. of Possible Armed Protests at 50 State Capitols*, NBC NEWS (Jan. 11, 2021, 2:07 PM), <https://www.nbcnews.com/politics/donald-trump/fbi-memo-warns-law-enforcement-across-u-s-possible-armed-n1253750> [<https://perma.cc/5G4R-SE7U>].

<sup>21</sup> Cf. Nathan P. Kalmoe & Lilliana Mason, *Lethal Mass Partisanship: Prevalence, Correlates, & Electoral Contingencies 37* (Jan. 2019) (unpublished manuscript), [https://www.dannyhayes.org/uploads/6/9/8/5/69858539/kalmoe\\_\\_\\_mason\\_ncapsa\\_2019\\_-\\_lethal\\_partisanship\\_-\\_final\\_lmedit.pdf](https://www.dannyhayes.org/uploads/6/9/8/5/69858539/kalmoe___mason_ncapsa_2019_-_lethal_partisanship_-_final_lmedit.pdf) [<https://perma.cc/3DZE-38YL>] (finding that “[a]s more Americans embrace strong partisanship, the prevalence of lethal partisanship is likely to grow”).

regulating weapons under *Heller*, we focus on the armed masses that flooded the Michigan legislature in the spring of 2020.

In the last several decades the law of public carry has evolved to allow more forms of gun carry in shared public spaces with less licensing.<sup>22</sup> Norms governing the practice of public carry have evolved as well. It is simply more common for people to openly carry weapons, including powerful classes of weapons, in social settings where they would not have done so a decade ago. Heavily armed and unarmed Americans comingle, not infrequently, in shared spaces—Walmarts,<sup>23</sup> parking lots,<sup>24</sup> movie theaters,<sup>25</sup> and restaurants<sup>26</sup> across the country. Many of these scenes increasingly involve forms of mass armed mobilization and intense political conflict.<sup>27</sup> At least since the Cliven Bundy ranching protests of 2014,<sup>28</sup> it is increasingly

<sup>22</sup> See *supra* notes 8–9 and accompanying text.

<sup>23</sup> Bill Chappell & Richard Gonzales, *Rifle-Carrying Man Faces Terrorism Charge After Causing Panic at Walmart in Missouri*, NPR (Aug. 9, 2019, 11:08 AM), <https://www.npr.org/2019/08/09/749763786/rifle-carrying-man-arrested-after-causing-panic-at-walmart-in-missouri> [<https://perma.cc/84LX-8ATG>]; Austen Erblat, *Shopper Charged with Pulling Gun in Walmart During Mask Dispute Posts \$15,000 Bond*, SUN SENTINEL (July 24, 2020, 1:22 PM), <https://www.sun-sentinel.com/news/crime/fl-ne-walmart-gun-mask-arrested-charged-20200723-tma2ajnkoraodlhjcuqt2szcaa-story.html> [<https://perma.cc/8BJR-XY8Z>].

<sup>24</sup> Jasmin Barmore & Sarah Rahal, *Two Arraigned After Gun Drawn Over Bump at Orion Twp. Chipotle*, DETROIT NEWS (July 3, 2020, 6:13 PM), <https://www.detroitnews.com/story/news/local/oakland-county/2020/07/02/woman-pulls-gun-orion-township-michigan/5365854002/> [<https://perma.cc/AN8F-2GB3>].

<sup>25</sup> *Evesham Township Police: Man Arrested After Bringing Loaded Gun into AMC Marlon 8*, CBS PHILLY (Nov. 21, 2019, 3:27 PM), <https://philadelphia.cbslocal.com/2019/11/21/evesham-township-police-dennix-alicea-loaded-gun-amc-marlon-8/> [<https://perma.cc/KY8N-4RZQ>].

<sup>26</sup> Justin Wise, *Armed Stay-at-Home Demonstrators Visit North Carolina Subway Shop*, HILL (May 11, 2020, 8:38 AM), <https://thehill.com/homenews/state-watch/497073-armed-demonstrators-protesting-stay-at-home-order-visit-north-carolina> [<https://perma.cc/V6ZM-CZ85>].

<sup>27</sup> Mobilization of heavily armed masses was rare in modern American politics before the Cliven Bundy protests in 2014 but as discussion in text demonstrates, it has become increasingly normalized since then. Armed mobilizations do have antecedents, as the centennial of the Tulsa Race Riot vividly illustrates. See, e.g., Yuliya Parshina-Kottas, Anjali Singhvi, Audra D.S. Burch, Troy Griggs, Mika Gröndahl, Lingdong Huang, Tim Wallace, Jeremy White & Josh Williams, *What the Tulsa Race Massacre Destroyed*, N.Y. TIMES (May 24, 2021), <https://www.nytimes.com/interactive/2021/05/24/us/tulsa-race-massacre.html> (last visited June 18, 2021) (reporting mob shooting and aerial attack in 1921 that demolished a Black neighborhood in Tulsa and left as many as 300 dead).

<sup>28</sup> Modern protests appear to share roots with the mobilization of the 2013 open-carry movement. See Katlyn E. DeBoer, *Clash of the First and Second Amendments: Proposed Regulation of Armed Protests*, 45 HASTINGS CONST. L.Q. 333, 337–38 (2018); Michelle L. Norris, *We Cannot Allow the Normalization of Firearms at Protests to Continue*, WASH. POST (May 6, 2020, 4:23 PM), [https://www.washingtonpost.com/opinions/firearms-at-protests-have-become-normalized-that-isnt-okay/2020/05/06/19b9354e-8fc9-11ea-a0bc-4e9ad4866d21\\_story.html](https://www.washingtonpost.com/opinions/firearms-at-protests-have-become-normalized-that-isnt-okay/2020/05/06/19b9354e-8fc9-11ea-a0bc-4e9ad4866d21_story.html) [<https://perma.cc/7ZPX-VAT4>] (“Advocates for open-carry have been carrying handguns and rifles to department stores, Starbucks and state capitols since 2013 in an effort to normalize firearms in public.”); Team Trace, *What You Need to Know About Open*

common for conservatives dressed in military-style garb to mass in protest bearing assault rifles, as they did in Charlottesville in 2017,<sup>29</sup> “gun sanctuary” rallies in 2019,<sup>30</sup> and racial-justice<sup>31</sup> and COVID-19-shutdown protests in 2020.<sup>32</sup>

The scenes of protesters armed with assault rifles invading the Michigan legislature may be extraordinary,<sup>33</sup> but they illuminate questions that guns present in “ordinary” cases as well.

#### A. *What Happened in Michigan*

On March 23, 2020, as the COVID-19 pandemic intensified, Michigan’s Democratic Governor Gretchen Whitmer issued the first in a series of executive orders forbidding residents to leave their homes unless they needed to perform essential jobs, go grocery shopping, or go to the

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*Carry in America*, TRACE (July 18, 2016), <https://www.thetrace.org/2016/07/rise-of-open-carry-explained> [<https://perma.cc/P8G7-R9B3>]. It has also been connected to the revitalization of the patriot militia movement in 2014. See Sam Jackson, “Nullification Through Armed Civil Disobedience”: *A Case Study of Strategic Framing in the Patriot/Militia Movement*, 12 DYNAMICS ASYMMETRIC CONFLICT 90, 93 (2019); see also Daniel Horwitz, *Open-Carry: Open-Conversation or Open-Threat*, 15 FIRST AMEND. L. REV. 96, 110–11 (2017) (referencing the Bundy demonstration as an example of an open-carry protest where the opposing party was not frightened to argue that guns at protests should only be banned in instances where the other side might be intimidated); Desni A. Scaife & Imani Robinson-McFarley, *The Hammond Guards and the Intersection of Race, Guns, and Patriotism*, 8 C.R. LITIG. 12, 14 (2020) (“Bundy’s criminal offenses were heralded as a ‘victory for all Americans.’”); Patrick J. Charles, *The Second Amendment in the Twenty-First Century: What Hath Heller Wrought?*, 23 WM. & MARY BILL RTS. J. 1143, 1160–61 (2015) (describing the political climate that gave rise to the Bundy standoff and conservative support for the armed resistance).

<sup>29</sup> Jon Sharman, *Militia Force Armed with Assault Rifles Marches Through US Town Ahead of White Nationalist Rally*, INDEPENDENT (Aug. 12, 2017, 4:33 PM), <https://www.independent.co.uk/news/world/americas/militia-assault-rifles-unite-right-rally-charlottesville-virginia-white-supremacy-latest-a7890081.html> [<https://perma.cc/69GT-9HV3>].

<sup>30</sup> Chelsea Parsons, Adam Skaggs & Erica Turret, *Second Amendment Sanctuaries: A Legally Dubious Protest Movement*, 48 J.L. MED. & ETHICS 105, 105–06 (2020); *Armed US Gun Rights Activists Rally Against Proposed Virginia Gun Laws*, REUTERS (Jan. 20, 2020, 10:05 AM), <https://www.cnn.com/2020/01/20/thousands-of-armed-activists-gather-at-virginias-pro-gun-rally.html> [<https://perma.cc/2PHE-H8WD>].

<sup>31</sup> See *infra* Section III.C.

<sup>32</sup> Abigail Censky, *Heavily Armed Protesters Gather Again at Michigan Capitol to Decry Stay-at-Home Order*, NPR (May 14, 2020, 10:01 AM), <https://www.npr.org/2020/05/14/855918852/heavily-armed-protesters-gather-again-at-michigans-capitol-denouncing-home-order> [<https://perma.cc/PE2M-CA2N>].

<sup>33</sup> For scenes from inside the Michigan legislature, see Michelle Mark, *Because of Michigan’s Gun Laws, Protesters Were Allowed to Carry Their Assault Weapons into the State Capitol—but Not Their Protest Signs*, BUS. INSIDER (May 1, 2020, 5:41 PM), <https://www.businessinsider.com/michigan-open-carry-laws-legal-protesters-guns-at-state-capitol-2020-5> [<https://perma.cc/8FJ3-3U7L>].

hospital.<sup>34</sup> The orders—which most Michiganders supported<sup>35</sup>—were opposed by a group that assembled outside the legislature to protest, some openly carrying firearms.<sup>36</sup> The morning after one such armed assembly, President Trump tweeted “LIBERATE MICHIGAN!”<sup>37</sup>

One month later, on April 30, a crowd of roughly 1,000 people gathered outside the Michigan capitol building to demonstrate against the lockdown order.<sup>38</sup> Again, many openly carried AR-15s and other long guns.<sup>39</sup> Law enforcement permitted some of the armed protesters—estimates range from

<sup>34</sup> See Ken Haddad, *Michigan Issues Stay-at-Home Order amid Coronavirus: Here's What It Means*, CLICK ON DETROIT (Mar. 23, 2020, 2:42 PM), <https://www.clickondetroit.com/news/2020/03/23/michigan-issues-stay-at-home-order-amid-coronavirus-heres-what-it-means/> [<https://perma.cc/8U4P-W98X>].

<sup>35</sup> A poll surveying 600 Michigan residents between April 15 and 16 found that 57% of Michiganders approved of Governor Whitmer's handling of the crisis, compared to 37% who disapproved. Grace Panetta, *Despite High-Profile Protests, Michiganders Overwhelmingly Approve of Gov. Gretchen Whitmer's Handling of the Coronavirus*, BUS. INSIDER (Apr. 20, 2020, 1:36 PM), <https://www.businessinsider.com/michiganders-approve-of-whitmer-on-coronavirus-despite-protests-poll-2020-4> [<https://perma.cc/Z5GE-MKXJ>]. In mid-May, 86% of the state's voters viewed the virus as a threat to public health and 69% of Michigan voters agreed that the protests sent the wrong message, including 55% of Republican-leaning voters. Todd Spangler, *Poll: Michigan Voters Show Support for Gov. Whitmer's Handling of Coronavirus*, DETROIT FREE PRESS (May 20, 2020, 3:40 PM), <https://www.freep.com/story/news/local/michigan/2020/05/20/republican-men-views-coronavirus/5227671002/> [<https://perma.cc/4QTC-CRND>]. Only one group had a majority that believed the protests sent the right message: Republican men, by a margin of 58%–30%. *Id.*

<sup>36</sup> See Mike Householder & Ed White, *'Not Prisoners': Conservative Protesters Converge on Michigan Capitol Over Governor's Stay-Home Order*, BALT. SUN (Apr. 15, 2020, 5:30 PM), <https://www.baltimoresun.com/coronavirus/ct-nw-lansing-michigan-state-capitol-protests-20200415-xgojwxczjhq7mtbyhifdbpcyy-story.html> [<https://perma.cc/L72J-3CKP>] (featuring photos of protesters in front of the state capitol toting arms).

<sup>37</sup> Donald Trump (@realDonaldTrump), TWITTER (Apr. 17, 2020, 11:22 AM), <https://twitter.com/realDonaldTrump/status/1251169217531056130?s=20> (since the initial writing of this Essay, Donald Trump's Twitter account has been suspended and his prior Tweets may be unavailable); Katelyn Burns, *Armed Protesters Entered Michigan's State Capitol During Rally Against Stay-at-Home Order*, VOX (Apr. 30, 2020, 9:04 PM), <https://www.vox.com/policy-and-politics/2020/4/30/21243462/armed-protesters-michigan-capitol-rally-stay-at-home-order> [<https://perma.cc/Q9E8-MRBY>] (reporting Trump's tweet).

<sup>38</sup> Craig Mauger, *Protesters, Some Armed, Enter Michigan Capitol in Rally Against COVID-19 Limits*, DETROIT NEWS (Apr. 30, 2020), <https://www.detroitnews.com/story/news/local/michigan/2020/04/30/protesters-gathering-outside-capitol-amid-covid-19-restrictions/3054911001/> [<https://perma.cc/AMF8-CFW9>].

<sup>39</sup> *Id.*; Josh K. Elliott, *'Very Good People': Trump Backs Armed Effort to Storm Michigan Capitol over Coronavirus Rules*, GLOBAL NEWS (May 1, 2020, 9:51 PM), <https://globalnews.ca/news/6892207/coronavirus-protest-michigan-donald-trump/> [<https://perma.cc/XW7M-AF4V>] (reporting and showing video of people carrying AR-15-style long guns).

dozens to hundreds—to enter the building while the legislature was debating whether to extend the Governor’s emergency declaration.<sup>40</sup>

Michigan State Senator Dayna Polehanki described the scene in a tweet: “Directly above me, men with rifles yelling at us. Some of my colleagues who own bullet proof vests are wearing them. I have never appreciated our Sergeants-at-Arms more than today. #mileg.”<sup>41</sup> She later told CNN: “I am no wimp. But what I saw at work yesterday at the Michigan State Capitol—which was a bunch of men on the balcony carrying rifles—I’m not embarrassed to say I was afraid.”<sup>42</sup> She was not alone. Representative Sarah Anthony recalled the armed protesters teeming through the legislature as “one of the most unnerving feelings I’ve ever felt in my life . . . . You could feel the floor rumbling. You could hear them yelling and screaming.”<sup>43</sup>

“It was intimidation,” said State Senator Jeremy Moss. “They were heckling Democrats because they knew what our position was, but they were also calling the Republicans spineless for delaying the action.”<sup>44</sup> Republican State Senate Majority Leader Mike Shirkey commended some of the protesters but criticized others for using “intimidation and the threat of physical harm to stir up fear and feed rancor.”<sup>45</sup> Moss said his social media feeds were flooded with questions from people across the country. “‘How can this happen?’ they asked, according to Moss. ‘You can’t carry a gun into a courthouse, you can’t even carry a phone into a courthouse, and yet we are literally operating with people hovering over us with their weapons.’”<sup>46</sup>

Despite continuing partisan disagreement about the scope of the Governor’s powers to order a lockdown, the events of April 30 inspired widespread condemnation from across the political spectrum—with most critics decrying “intimidation” as the problem. Shirkey condemned the

<sup>40</sup> Burns, *supra* note 37. A state-police spokesperson explained that it is “legal in Michigan to carry firearms as long as it’s done with lawful intent and the weapon is visible.” Dartunorro Clark, *Hundreds of Protesters, Some Carrying Guns in the State Capitol, Demonstrate Against Michigan’s Emergency Measures*, NBC NEWS (Apr. 30, 2020), <https://www.nbcnews.com/politics/politics-news/hundreds-protest-michigan-lawmakers-consider-extending-governors-emergency-powers-n1196886> [https://perma.cc/A6GF-KLWD].

<sup>41</sup> Dayna Polehanki (@SenPolehanki), TWITTER (Apr. 30, 2020, 12:38 PM), <https://twitter.com/SenPolehanki/status/1255899318210314241?s=20> [https://perma.cc/7BXR-N7CL].

<sup>42</sup> Mark, *supra* note 33.

<sup>43</sup> Lois Beckett, *Armed Black Citizens Escort Michigan Lawmaker to Capitol After Volatile Rightwing Protest*, GUARDIAN (May 7, 2020), <https://www.theguardian.com/us-news/2020/may/07/michigan-lawmaker-armed-escort-rightwing-protest> [https://perma.cc/C49C-WHNN].

<sup>44</sup> Jonathan Oosting, *Maybe It’s Time to Rethink Allowing Guns in Michigan Capitol, Officials Say*, BRIDGE MICH. (May 1, 2020), <https://www.bridgemi.com/michigan-government/maybe-its-time-rethink-allowing-guns-michigan-capitol-officials-say> [https://perma.cc/32M7-8Y3I].

<sup>45</sup> See Mike Shirkey (@SenMikeShirkey), TWITTER (May 1, 2020, 3:20 PM), <https://twitter.com/SenMikeShirkey/status/1256302431195070464?s=20> [https://perma.cc/A3RL-L8D5].

<sup>46</sup> Oosting, *supra* note 44.

“behavior and tactics” of some of the “so-called protestors.”<sup>47</sup> “These folks are thugs and their tactics are despicable. It is never OK to threaten the safety or life of another person, elected or otherwise, period. The moment an individual or group embraces the threat of physical violence to make a point is the moment I stop listening.”<sup>48</sup> Michigan Republican Party Chairwoman Laura Cox issued a statement saying that “violence and intimidation have no place in the American system and the Michigan Republican Party condemns any individuals who are resorting to such tactics.”<sup>49</sup> Fox News host Sean Hannity joined the chorus, announcing that “[n]o one should be attempting to intimidate officials with a show of force.”<sup>50</sup>

In the wake of the armed protests, the State Capitol Commission (the body responsible for maintaining the building and its grounds) met to decide whether it could prohibit weapons in the statehouse, or whether doing so would require a legislative act.<sup>51</sup> But the commission’s virtual meeting was inundated with threats. The commission’s vice-chairman warned that commentators “were saying things like they knew where people lived”; another commission member noted that “very vulgar” and “very racist” comments were posted.<sup>52</sup> Due to a concern for “public safety,” the committee adjourned its meeting early—before public discussion.<sup>53</sup>

The threats directed at the commission were just the tip of the iceberg. That same day, the *Detroit Metro Times* published an article revealing four private Facebook groups (with a combined 400,000 members) “filled with paranoid, sexist, and grammar-challenged rants, with members encouraging

<sup>47</sup> See Shirkey, *supra* note 45.

<sup>48</sup> Editorial, *A Call for Civility Amidst Protests*, BEAVER DAM DAILY CITIZEN (May 23, 2020), [hereinafter *A Call for Civility*] [https://www.wiscnews.com/bdc/opinion/editorial/editorial-a-call-for-civility-amidst-protests/article\\_d7cbee17-4f55-574a-84d5-6e665998cd67.html](https://www.wiscnews.com/bdc/opinion/editorial/editorial-a-call-for-civility-amidst-protests/article_d7cbee17-4f55-574a-84d5-6e665998cd67.html) [https://perma.cc/5452-6GB2].

<sup>49</sup> Steve Neavling, *Michigan GOP Leaders Condemn Death Threats Against Whitmer, but Oppose Banning Guns from Capitol*, DETROIT METRO TIMES (May 12, 2020, 1:15 PM), <https://www.metrotimes.com/news-hits/archives/2020/05/12/michigan-gop-leaders-condemn-death-threats-against-whitmer-but-oppose-banning-guns-from-capitol> [https://perma.cc/AE3K-QUJD].

<sup>50</sup> Politics Video Channel (@politvidchannel), TWITTER (May 5, 2020, 3:28 AM), <https://twitter.com/politvidchannel/status/1257572897763110912?s=20> [https://perma.cc/D4Y8-G8VL].

<sup>51</sup> Matt Durr, *Guns Can Be Banned at Michigan Capitol, Says AG Dana Nessel*, MLIVE (May 8, 2020), <https://www.mlive.com/public-interest/2020/05/guns-can-be-banned-at-michigan-capitol-says-ag-dana-nessel.html> [https://perma.cc/TV3P-CBTW] (reporting that Michigan’s Attorney General Dana Nessel asserted that the commission could ban guns at the statehouse, observing “[p]ublic safety demands no less, and a lawmaker’s desire to speak freely without fear of violence requires action be taken”); Craig Mauger, *Special Panel Formed to Study Michigan Capitol Gun Ban; Meeting Draws Threats*, DETROIT NEWS (May 11, 2020), <https://www.detroitnews.com/story/news/local/michigan/2020/05/11/nessel-issues-formal-opinion-guns-can-banned-capitol/3107509001/> [https://perma.cc/63GG-84VT].

<sup>52</sup> Mauger, *supra* note 51.

<sup>53</sup> *Id.*

violence and flouting the Governor’s social-distancing orders.”<sup>54</sup> The article cited dozens of calls for Whitmer to be assassinated, hanged, or shot.<sup>55</sup> In response to the article, Facebook deleted the page of Michigan United for Liberty,<sup>56</sup> which had begun organizing another protest—billed “Judgement Day”—scheduled for May 14.<sup>57</sup> A spokesperson for the group explained the rationale of the new protest: “We won’t be bullied and we won’t be happy until the state is back to normal again.”<sup>58</sup>

Others had a different view of who was bullying whom. On May 12, multiple Democratic state senators delivered speeches decrying the threats against Governor Whitmer and calling for action to limit guns in the Michigan State Capitol building.<sup>59</sup> Whereas the only arrest at the April 30 protest was of a thirty-five-year-old male who was arrested for assaulting another protester,<sup>60</sup> law enforcement authorities communicated their intention to aggressively police violence, brandishing, and intimidation at the upcoming Judgement Day protest.<sup>61</sup> Attorney General Dana Nessel issued a press release asserting that “[y]ou cannot use a weapon to threaten or intimidate someone”<sup>62</sup> and warned that “[t]he Attorney General’s office is prepared to prosecute actions [including brandishing] that may not have

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<sup>54</sup> Steve Neavling, *Gov. Whitmer Becomes Target of Dozens of Threats on Private Facebook Groups Ahead of Armed Rally in Lansing*, DETROIT METRO TIMES (May 11, 2020, 9:38 AM), <https://www.metrotimes.com/news-hits/archives/2020/05/11/whitmer-becomes-target-of-dozens-of-threats-on-private-facebook-groups-ahead-of-armed-rally-in-lansing> [<https://perma.cc/AE3K-QUJD>].

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Justin P. Hicks, *Another Stay-Home Protest Planned at Michigan Capitol*, MLIVE (May 12, 2020), <https://www.mlive.com/public-interest/2020/05/another-stay-home-protest-planned-at-michigan-capitol.html> [<https://perma.cc/ALS8-PPHX>]; Tom Perkins, *Protesters Descend on Michigan Capitol but Rain Washes Away Demonstration*, GUARDIAN (May 14, 2020, 2:05 PM), <https://www.theguardian.com/us-news/2020/may/14/michigan-protest-capitol-gretchen-whitmer> [<https://perma.cc/S8C7-ND4Z>].

<sup>58</sup> Hicks, *supra* note 57.

<sup>59</sup> Craig Mauger, *Senator: Threats Are “About Spreading Blood” on Michigan Capitol Lawn*, DETROIT NEWS (May 12, 2020, 1:59 PM), <https://www.detroitnews.com/story/news/local/michigan/2020/05/12/senator-threats-about-spreading-blood-capitol-lawn/3115275001/> [<https://perma.cc/AD8F-JGZC>].

<sup>60</sup> Lois Beckett, *Armed Protesters Demonstrate Against Covid-19 Lockdown at Michigan Capitol*, GUARDIAN (Apr. 30, 2020, 6:54 PM), <https://www.theguardian.com/us-news/2020/apr/30/michigan-protests-coronavirus-lockdown-armed-capitol> [<https://perma.cc/SXZ4-X2AD>]; Mauger, *supra* note 38.

<sup>61</sup> Todd Spangler, *New Stay Home Protest Planned in Lansing — and Cops, Leaders Have Message for Attendees*, DETROIT FREE PRESS (May 12, 2020, 5:34 PM), <https://www.freep.com/story/news/local/michigan/2020/05/12/michigan-lansing-protest-whitmer-stay-home-order/3115967001/> [<https://perma.cc/JF93-DYJ9>].

<sup>62</sup> Carol Thompson & Kara Berg, *A Key Question Before Thursday Protest at Capitol: What Does It Mean to Brandish a Weapon?*, LANSING ST. J. (May 13, 2020, 10:57 PM), <https://www.lansingstatejournal.com/story/news/2020/05/13/protest-michigan-brandish-gun-firearm-stay-home-order-capitol/5184735002/> [<https://perma.cc/7KT7-5LSV>].

received the same treatment during the April 30 protest.”<sup>63</sup> Republican Senate Leader Shirkey argued that anyone brandishing guns in an intimidating or threatening way should be “properly handcuffed, properly taken in (and) fingerprinted.”<sup>64</sup>

Despite these warnings and even though the legislature was in the midst of debate about regulating guns in the building, on the afternoon of May 13—one day before Judgement Day—both chambers of the Michigan legislature adjourned until May 19.<sup>65</sup> Though not explained as such, commentators noted that the adjournment seemed clearly to be a response to the threats and protest.<sup>66</sup> Despite the legislature’s adjournment—and the arrival of heavy rain and lightning—about 300 people turned out for Judgement Day.<sup>67</sup> Even though authorities had warned that they would more aggressively enforce gun laws prohibiting brandishing and intimidation, the police made no arrests and issued no citations.<sup>68</sup>

In early October 2020, the FBI arrested thirteen men in connection with a wide-ranging plot to kidnap and possibly kill Governor Whitmer<sup>69</sup> (and, it later emerged, Virginia Governor Ralph Northam, much reviled by some for his support for gun laws<sup>70</sup>). As captured in the affidavit accompanying the

<sup>63</sup> Beth LeBlanc, *Nessel: Protesters Breaking the Law Thursday Will Be Charged*, DETROIT NEWS (May 13, 2020, 2:44 PM), <https://www.detroitnews.com/story/news/politics/2020/05/13/michigan-attorney-general-nessel-capitol-protesters-breaking-law-charged/5184657002/> [<https://perma.cc/HGJ6-5X8H>].

<sup>64</sup> Spangler, *supra* note 61.

<sup>65</sup> David Welch, *Michigan Cancels Legislative Session to Avoid Armed Protesters*, BLOOMBERG NEWS (May 14, 2020, 10:52 AM), <https://www.bloomberg.com/news/articles/2020-05-14/michigan-cancels-legislative-session-to-avoid-armed-protesters> [<https://perma.cc/A6WA-TZZZ>].

<sup>66</sup> *Id.* (explaining that “Michigan closed down its capitol in Lansing on Thursday and canceled its legislative session rather than face the possibility of an armed protest and death threats against Democratic Governor Gretchen Whitmer”).

<sup>67</sup> Francis X. Donnelly, Craig Mauger & Beth LeBlanc, *Fight Erupts at Michigan Capitol Protest Over Noose; Police Take Ax*, DETROIT NEWS (May 14, 2020, 6:15 PM), <https://www.detroitnews.com/story/news/politics/2020/05/14/protesters-begin-gathering-thursday-demonstration/5186937002/> [<https://perma.cc/FP6Z-5QGF>]; Perkins, *supra* note 57.

<sup>68</sup> *MSP: Ax-Wielding Man Removed from Lansing Protests, but No Citations or Arrests Made*, WXYZ DETROIT (May 14, 2020, 6:38 PM), <https://www.wxyz.com/news/coronavirus/police-recover-ax-after-altercation-at-state-capitol-during-protest> [<https://perma.cc/H6BB-DUPH>].

<sup>69</sup> Giulia McDonnell Nieto del Rio & Neil MacFarquhar, *Virginia Governor Was Also a Possible Target of Anti-Government Plot, F.B.I. Says*, N.Y. TIMES (Oct. 18, 2020), <https://www.nytimes.com/2020/10/13/us/northam-kidnapping-whitmer.html> [<https://perma.cc/U8KK-EQCR>]; Nicholas Bogel-Burroughs, Shaila Dewan & Kathleen Gray, *F.B.I. Says Michigan Anti-Government Group Plotted to Kidnap Gov. Gretchen Whitmer*, N.Y. TIMES (Jan. 27, 2021), <https://www.nytimes.com/2020/10/08/us/gretchen-whitmer-michigan-militia.html> [<https://perma.cc/6ZC3-KQG8>].

<sup>70</sup> Kayla Ruble, Laura Vozzella & Devlin Barrett, *Whitmer Plotters Also Discussed Kidnapping Virginia Gov. Ralph Northam, FBI Agent Testifies*, WASH. POST (Oct. 13, 2020, 8:19 PM), <https://www.washingtonpost.com/national-security/ralph-northam-gretchen-witmer-kidnapping-plot/2020/10/13/26b>

criminal complaint, their language was both gendered (referring to Governor Whitmer as a “bitch”)<sup>71</sup> and inflected with constitutional justification.<sup>72</sup> At least two of the men had participated in the April 30 protest and were among those pictured in Polehanki’s viral tweet.<sup>73</sup> Campaigning in Michigan, President Trump continued to attack Governor Whitmer and joined supporters chanting “lock her up!” with a call to “lock them all up.”<sup>74</sup>

*B. “No One Has Ever Been Harmed”*

No one was shot during the Michigan protests, and many protest sympathizers suggested that without evidence of past physical harm, the state had no legitimate interest in restricting guns in the legislature. Noting that there were no shootings or accidental discharges at the event, one protester said, “it’s not a gun problem, it’s a people problem.”<sup>75</sup> Others discounted fear as a reason for limiting guns in the Michigan State Capitol. Ashley Phibbs, one of the organizers of the April 30 rally, said, “I don’t think that anyone was there to really make anyone fearful. I didn’t see anything that would have really caused fear, aside from loud noises from the people yelling. But

4e31a-0d5f-11eb-b1e8-16b59b92b36d\_story.html [https://perma.cc/RP67-TFW3]. Gun rights advocates organized a large protest in Richmond after Democrats won control of the General Assembly. Gregory S. Schneider, Laura Vozzella, Patricia Sullivan & Michael E. Miller, *Weapons, Flags, No Violence: Massive Pro-Gun Rally in Virginia Capital*, WASH. POST (Jan. 20, 2020, 5:14 PM), [https://www.washingtonpost.com/local/virginia-politics/2020/01/20/4b36852c-3baa-11ea-8872-5df698785a4e\\_story.html](https://www.washingtonpost.com/local/virginia-politics/2020/01/20/4b36852c-3baa-11ea-8872-5df698785a4e_story.html) [https://perma.cc/U97V-D443] (noting that a “homemade guillotine that had been set up on the street, inscribed with the words: ‘The penalty for treason is death’”).

<sup>71</sup> Complaint at 5–6, *United States v. Fox*, No. 1:20-mj-416 (W.D. Mich. Oct. 6, 2020) (referencing Governor Whitmer as a “bitch”).

<sup>72</sup> *Id.* at 2 (noting that conspirators “agreed to unite others in their cause and take violent action against multiple state governments that they believe are violating the U.S. Constitution”); *id.* at 2–3 (reporting that the “group talked about creating a society that followed the U.S. Bill of Rights and where they could be self-sufficient”); see also John E. Finn, *Plot to Kidnap Michigan’s Governor Grew from the Militia Movement’s Toxic Mix of Constitutional Falsehoods and Half-Truths*, CONVERSATION (Oct. 12, 2020, 2:17 PM), <https://theconversation.com/plot-to-kidnap-michigans-governor-grew-from-the-militia-movements-toxic-mix-of-constitutional-falsehoods-and-half-truths-147825> [https://perma.cc/2BX6-GVGV] (discussing beliefs of self-described militia groups, including the Wolverine Watchmen involved in the kidnapping plot, the Proud Boys, Michigan Militia, and the Oath Keepers).

<sup>73</sup> Vandana Rambaran, *Suspects in Whitmer Plot Photographed with Long Guns at Michigan Capitol*, FOX NEWS (Oct. 9, 2020), <https://www.foxnews.com/politics/2-charged-in-whitmer-kidnap-plot-photographed-with-long-guns-at-state-capitol-in-april-ag-says> [https://perma.cc/URB8-3EJF]; Polehanki, *supra* note 41; see *infra* notes 97–100 and accompanying text.

<sup>74</sup> Jonathan Martin, *‘Lock Them All Up’: Trump’s Whitmer Attack Fits a Damaging Pattern*, N.Y. TIMES, (Oct. 18, 2020), [www.nytimes.com/2020/10/18/us/politics/trump-whitmer-michigan.html](http://www.nytimes.com/2020/10/18/us/politics/trump-whitmer-michigan.html) [https://perma.cc/V8RL-DP4L].

<sup>75</sup> Oosting, *supra* note 44; Sarah Rahal & Craig Mauger, *Armed Protesters in Michigan Capitol Have Lawmakers Questioning Policy*, DETROIT NEWS (May 2, 2020), <https://www.detroitnews.com/story/news/local/michigan/2020/05/02/armed-protesters-michigan-capitol-have-lawmakers-questioning-policy/3071928001/> [https://perma.cc/LFV9-BZ7Q].

a lot of people are also sometimes afraid of guns in general.”<sup>76</sup> Opposing proposals to ban guns in the capitol, some echoed the slogan captured on one protester’s t-shirt (and popular among gun rights advocates): “My Rights . . . Don’t End Where Your Fear Begins.”<sup>77</sup>

Tom Lambert, the legislative director of Michigan Open Carry, Inc., combined both these arguments against regulation when he urged that guns should be permitted in the capitol building despite legislators’ expressed fears: “If that’s the standard we’re going to use for things, where does that stop?” he asked. “Do we limit constitutionally protected assembly based on a subjective fear, especially one where *no one has ever been harmed*?”<sup>78</sup>

Lambert’s question captures something important about the broader gun debate: transfixed by gun violence, we often reason about guns solely in terms of the physical harms they inflict. The claim of “no harm” makes sense in this universe. Yet Lambert’s assertion that *no one was harmed* exposes what is wrong with the “physical-harm-only” view: it fails to account for the death threats to the Governor, the intimidation of state legislators, the shutdown of the state legislature in the midst of a global pandemic, and the adjourning of the commission that was planning to discuss public carry in the legislature—all of it witnessed within the state and across the country. These *were* harms to democracy, to the public sphere, and to the body politic.

The protesters were not threatening acts of random violence; they were a small group of individuals using their firearms to amplify their political power and stop legislators from acting on views about public health held by

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<sup>76</sup> Patrik Jonsson & Noah Robertson, *Guns in Michigan Capitol: Defense of Liberty or Intimidation?*, CHRISTIAN SCI. MONITOR (May 4, 2020), <https://www.csmonitor.com/USA/Politics/2020/0504/Guns-in-Michigan-Capitol-Defense-of-liberty-or-intimidation> [<https://perma.cc/M3KN-2QHK>].

<sup>77</sup> Oosting, *supra* note 44 (including a photograph depicting a protester donning a shirt with the popular slogan). A tweet by the NRA, stating, “Our rights don’t end where your feelings begin,” was shared more than 9,000 times. NRA (@NRA), TWITTER (Aug. 8, 2020, 7:35 PM), <https://twitter.com/NRA/status/1292243058784952321> [<https://perma.cc/PY3T-BQ36>]; see also Tomi Lahren (@TomiLahren), TWITTER (Mar. 26, 2018, 9:58 PM), <https://twitter.com/TomiLahren/status/978451170447343617> [<https://perma.cc/AX8T-9ZYJ>] (“Sorry, #marchforourlives kids but my rights don’t end where your feelings begin!”). A more partisan version of the slogan appears on t-shirts and bumper stickers bearing versions of the legend: “TRUMP 2020: Fuck Your Feelings.” See, e.g., “Funny Trump 2020 FUCK Your Feelings T-Shirt,” AMAZON, <https://www.amazon.com/Funny-Trump-2020-FUCK-Feelings/dp/B07JFM1PT1/> [<https://perma.cc/AB3K-U3UZ>].

<sup>78</sup> Oosting, *supra* note 44 (emphasis added). Lambert acknowledged Michigan’s brandishing law but denied that any of the gun displays were intended to cause fear in a reasonable person. *Id.* One organizer of the event suggested that critics “should read the Constitution and ‘live life without fear.’” *Michigan Militia Puts Armed Protest in the Spotlight*, WMEM (May 2, 2020), [https://www.wnem.com/news/michigan-militia-puts-armed-protest-in-the-spotlight/article\\_f3a9e9de-8ca3-11ea-9333-d7c0fe0d4915.html](https://www.wnem.com/news/michigan-militia-puts-armed-protest-in-the-spotlight/article_f3a9e9de-8ca3-11ea-9333-d7c0fe0d4915.html) [<https://perma.cc/7XUW-73QM>]. As to Lambert’s question about regulation on the basis of fear, see *infra* notes 231–250 and accompanying text, which provide examples of areas where the Supreme Court has upheld the regulation of constitutional rights to prevent fear and to promote other nonphysical interests.

the majority of Michiganders.<sup>79</sup> All the participants understood the political character of the armed threat. As State Representative Anthony put it, “If I don’t vote the way that these people want me to vote, are they going to rush the [floor] and start shooting us?”<sup>80</sup> Senate Majority Leader Shirkey angrily announced that he refused to listen to the group’s political demands under “threat of physical violence,”<sup>81</sup> while President Trump argued that the legislators *should* listen, tweeting “[t]hese are very good people” and urging the Governor to “make a deal” with them.<sup>82</sup>

Despite some legislators’ expressions of defiance, the armed threats were effective in shutting down debate. As we have seen, a state commission met in the wake of the protests to discuss whether to ban carrying guns in the legislature. But once protesters doxxed and threatened the state commission’s members, the commission adjourned without taking action.<sup>83</sup> After warning that protesters who threatened officials would be arrested, the Republican-dominated legislature cancelled its own session, and the Judgement Day protest proceeded without a single arrest.<sup>84</sup>

So, if we ask what happened in Michigan—and value our *collective* life as well as our individual, physical lives—then we can identify the “harm” differently than those who focused exclusively on physical injury. Even though there was no shooting, there was an attack on public order and public safety. Armed protesters dominated and transformed the public sphere, employing their weapons to intimidate officials, to drown out the voices of others, and to elevate their claims over those of others.

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<sup>79</sup> See *supra* notes 35–40 and sources cited therein.

<sup>80</sup> Beckett, *supra* note 43.

<sup>81</sup> *A Call for Civility*, *supra* note 48 (“The moment an individual or group embraces the threat of physical violence to make a point is the moment I stop listening.”).

<sup>82</sup> Joan E. Greve, *Michigan: Trump Says Whitmer Should ‘Make a Deal’ with Protesters*, GUARDIAN (May 1, 2020), <https://www.theguardian.com/us-news/2020/may/01/trump-michigan-protesters-gretchen-whitmer> [<https://perma.cc/BDA6-889C>]; cf. Glenn Kessler, *The ‘Very Fine People’ at Charlottesville: Who Were They?*, WASH. POST. (May 8, 2020, 2:00 AM), <https://www.washingtonpost.com/politics/2020/05/08/very-fine-people-charlottesville-who-were-they-2/> [<https://perma.cc/UDJ3-VLCC>] (noting President Trump’s reference to “very fine people” on “both sides” at Charlottesville). Even after the FBI thwarted a plot to kidnap Governor Whitmer, President Trump continued to attack her publicly, saying among other things that she “wants to be a dictator.” Cameron Peters, *The Return of ‘Lock Her Up’: Trump Won’t Stop Attacking Gretchen Whitmer*, VOX (Oct. 18, 2020, 2:00 PM) <https://www.vox.com/2020/10/18/21521633/michigan-governor-lock-her-up-trump-attacking-gretchen-whitmer> [<https://perma.cc/9V4Q-2GS9>]; see also *infra* notes 69–74 (discussing the kidnapping plot).

<sup>83</sup> Mauger, *supra* note 51. After the January 6 assault on the U.S. Capitol, the Michigan commission voted unanimously to ban firearms in the state capitol. Kathleen Gray, *Michigan Commission Bans Open Carry at the State Capitol*, N.Y. TIMES (Jan. 11, 2021), <https://www.nytimes.com/2021/01/11/us/michigan-bans-guns-state-capitol.html> [<https://perma.cc/DZ6L-45J7>].

<sup>84</sup> Perkins, *supra* note 57.

The masses of heavily armed men flooding the state capitol asserted the authority of guns—authority many understood as gendered and raced—attacking the equality of membership at the root of a democracy. The protests at the capitol and online challenged women’s authority to serve as governors, as attorneys general, as leaders. “[A]ll the criticisms are subtly veiled in gender stereotypes,” said State Senator Adam Hollier. “You hear, ‘hey, this isn’t a nanny state.’ I’ve heard folks saying, ‘I didn’t elect a mommy to take care of the state.’ You’ve never heard someone refer to a male governor or the president saying ‘I don’t need my dad telling me what to do.’”<sup>85</sup> Online, the Governor was attacked “as an overbearing mother, a nanny, witch, queen[,] . . . a menopausal teacher,” “nasty woman” (President Trump’s sneering referent for Hillary Clinton), and “Tyrant b---h.”<sup>86</sup> Threats of violence supercharged this stream of misogyny, with protesters boasting to one another about how it would be most satisfying to kill the Governor.<sup>87</sup> The Governor eventually acknowledged the gender roles that fueled hostility to her exercise of authority: “When you see some of the ugly threats that have been made online around these protests, I think you can conclude there is a gender facet to this.”<sup>88</sup>

Many recognized the gun display as an expression of raced as well as gendered authority—a privileging of some citizens, views, and rights over others. Governor Whitmer condemned the demonstrators for “depict[ing] some of the worst racism and awful parts of our history in this country,” pointing out that “[t]here were swastikas and Confederate flags and nooses and people with assault rifles.”<sup>89</sup> Others commented on the implicit but unmistakable racial understandings the police response expressed.<sup>90</sup> That law

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<sup>85</sup> Malachi Barrett, *Sexist Attacks Cast Michigan Gov. Whitmer as Mothering Tyrant of Coronavirus Dystopia*, MLIVE (May 22, 2020), <https://www.mlive.com/public-interest/2020/05/sexist-attacks-cast-whitmer-as-mothering-tyrant-of-coronavirus-dystopia.html> [<https://perma.cc/LZ26-9RPD>].

<sup>86</sup> *Id.*; see also Kathleen Gray, *Trump vs. the Women Who Lead Michigan: A Battle with 2020 Implications*, N.Y. TIMES (July 12, 2020), <https://www.nytimes.com/2020/07/12/us/politics/trump-michigan-whitmer-benson-nessel.html> [<https://perma.cc/Y2HB-9265>] (recounting President Trump’s sexist animosity toward women, and specifically toward three female Michigan leaders, including Governor Whitmer).

<sup>87</sup> See Neavling, *supra* note 54.

<sup>88</sup> Barrett, *supra* note 85.

<sup>89</sup> Bryan Armen Graham, ‘Swastikas and Nooses’: Governor Slams ‘Racism’ of Michigan Lockdown Protest, GUARDIAN (May 3, 2020), <https://www.theguardian.com/us-news/2020/may/03/michigan-gretchen-whitmer-lockdown-protest-racism> [<https://perma.cc/M4E4-R53C>].

<sup>90</sup> Congressional hearings have explored law enforcement’s dramatically different responses to the January 6 riot and Black Lives Matter protests of the preceding summer. See, e.g., Luke Broadwater & Michael S. Schmidt, *Officials Put ‘Unusual’ Limits on D.C. National Guard Before Riot, Commander Says*, N.Y. TIMES (Mar. 3, 2021), <https://www.nytimes.com/2021/03/03/us/politics/dc-national-guard-capitol-riot.html> [<https://perma.cc/3XYB-8HHN>]. Senator Ron Johnson validated this differential

enforcement allowed masses of overwhelmingly white and male protesters, armed with rifles, to threaten the Governor and shut down the legislature with impunity did not pass unremarked. U.S. Representative Rashida Tlaib put the distinction in clear terms: “Black people get executed by police for just existing, while white people dressed like militia members carrying assault weapons are allowed to threaten State Legislators and staff.”<sup>91</sup> Journalist Michele Norris recognized Michigan as the outgrowth of armed protests that have increased in roughly the last decade.<sup>92</sup> During that time, it has become increasingly common to see groups armed with high-powered weapons and garbed in paramilitary gear, perhaps most dramatically in Charlottesville in 2017, as well as at gun-sanctuary rallies, anti-shutdown protests, Black Lives Matter counterprotests, and countless open-carry events in Walmarts and other retailers.<sup>93</sup> Like Representative Tlaib, Norris condemned the increasing “normalization of firearms at protests” as authorizing two-tiered racialized forms of citizenship: “Accepting the display of firearms at protests by some and not others means that we must also accept that some are rewarded with a kind of special citizenship that allows them to be seen as patriotic instead of threatening, and aggrieved instead of aggressive.”<sup>94</sup> Remarking on racial dynamics in the history of American vigilantism, Lindsay Livingston has observed, “Brandishing a

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response. See Bess Levin, *Senator Ron Johnson Says It’s Not Racist to Say He’s Afraid of Black People*, VANITY FAIR (Mar. 16, 2021), <https://www.vanityfair.com/news/2021/03/ron-johnson-blm-capitol-riot> [<https://perma.cc/8UAH-PMM7>].

<sup>91</sup> Graham, *supra* note 89.

<sup>92</sup> See Norris, *supra* note 28 (arguing that “Black or brown people . . . would not be tolerated” as armed white people are); see also Sara Burnett, *Michigan Militia Puts Armed Protest in the Spotlight*, U.S. NEWS (May 2, 2020), <https://www.usnews.com/news/politics/articles/2020-05-02/michigan-militia-puts-armed-protest-in-the-spotlight> [<https://perma.cc/HEB2-UVT9>] (“‘Systemically, blackness is treated like a more dangerous weapon than a white man’s gun ever will, while whiteness is the greatest shield of safety,’ said Brittany Packnett, a prominent national activist who protested in Ferguson. The Michigan demonstrators, she added, ‘are what happens when people of racial privilege confuse oppression with inconvenience. No one is treading on their rights. We’re all just trying to live.’”).

<sup>93</sup> Evelyn Holmes, *Armed Bystanders Line Black Lives Matter Protest in Indiana*, KABC-TV (June 7, 2020), <https://abc7.com/timely-armed-protesters-black-lives-matter-indiana-protest/6234854/> [<https://perma.cc/4L8G-CNB8>]; Norris, *supra* note 28. On open carry in the gun-sanctuary protests of 2020, see *supra* note 30. For analysis of the criminal law and Second Amendment implications of such gun displays, see generally Joseph Blocher, Samuel W. Buell, Jacob D. Charles & Darrell A.H. Miller, *Pointing Guns*, 99 TEX. L. REV. 1173 (2021).

<sup>94</sup> Norris, *supra* note 28; see also Lindsay Livingston, *Brandishing Guns: Performing Race and Belonging in the American West*, 17 J. VISUAL CULTURE 343, 351 (2018) (“The Bundys, by infiltrating public spaces and openly wielding their firearms, tap into a strain of American vigilantism that has almost always targeted racialized others . . .”).

gun, as a performance of belonging, is an exceptionalism afforded to only a very specific subset of US Americans.”<sup>95</sup>

After an armed seventeen-year-old, who traveled across state lines to monitor racial-justice protesters in Kenosha, Wisconsin, shot and killed two people in the crowd, the state’s Lieutenant Governor, Mandela Barnes (who is Black), said that white armed protest activity has been ignored for too long: “[H]ow many times across this country do you see armed gunmen, protesting, walking into state Capitols, and everybody just thinks it’s OK?” He continued, “People treat that like it’s some kind of normal activity that people are walking around with assault rifles.”<sup>96</sup>

Witnessing the invasion of the U.S. Capitol building on January 6, 2021, Michigan State Senator Erika Geiss recounted that it “really made me feel like what happened here this past spring and summer was a dress rehearsal for what happened” in Washington, D.C.<sup>97</sup> Amy Cooter of Vanderbilt University, an expert on domestic terror groups, connected the U.S. Capitol invasion to what happened in Michigan and at other state capitols. She noted that “given the general lack of consequences” in Michigan, “this becomes normalized and legitimate and made it easier to scale up.”<sup>98</sup> It took the invasion of the U.S. Capitol to tip the balance of debate in favor of restricting guns in the Michigan legislature.<sup>99</sup> Even then, the restriction applied only to open carry, eliciting criticism from Governor Whitmer and others, who argued that public safety demands a total ban on guns in the state capitol building.<sup>100</sup>

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<sup>95</sup> Livingston, *supra* note 94, at 352. This exceptionalism is longstanding and continues to pervade in historical understandings of memorials to past armed white mob actions. The plaque commemorating the Ku Klux Klan massacre at an armed march on the Grant Parish, Louisiana courthouse, reads “On this site occurred the Colfax Riot in which three white men and 150 negroes were slain. This event on April 12, 1873 marked the end of carpetbag misrule in the South.” CHRIS MURPHY, *THE VIOLENCE INSIDE US: A BRIEF HISTORY OF AN ONGOING AMERICAN TRAGEDY* 98 (2020).

<sup>96</sup> Stephen Groves & Scott Bauer, *17-Year-Old Arrested After 2 Killed During Unrest in Kenosha*, ASSOCIATED PRESS (Aug. 27, 2020), <https://apnews.com/97a0700564fb52d7f664d8de22066f88> [<https://perma.cc/S34Z-RK7Q>].

<sup>97</sup> Kathleen Gray, *In Michigan, a Dress Rehearsal for the Chaos at the Capitol on Wednesday*, N.Y. TIMES (Jan. 9, 2021), <https://www.nytimes.com/2021/01/09/us/politics/michigan-state-capitol.html> [<https://perma.cc/AUZ9-45XH>].

<sup>98</sup> *Id.*

<sup>99</sup> Joseph Choi, *Michigan Bans Open Carry of Guns Inside State Capitol*, HILL (Jan. 11, 2021, 3:14 PM), <https://thehill.com/homenews/state-watch/533668-michigan-bans-open-carry-of-guns-inside-state-capitol> [<https://perma.cc/KCP5-UFVM>].

<sup>100</sup> *Id.*

*C. The Threat to Public Safety Was, and Is, the Harm*

Why did Michigan officials fail to defend the public sphere and their own prerogative to govern in the public interest? Why were armed protesters allowed to threaten and dominate public spaces to such an extent that legislators were subject to what members of *both* parties described as intimidation?

A crucial part of the debate focused on whether we understand gun regulations as addressing physical safety only, or instead understand public safety as including social interests as well. Recall the argument of Tom Lambert, the legislative director of Michigan Open Carry, who claimed that guns cannot be regulated based on the fear they instill in others: “If that’s the standard we’re going to use for things, where does that stop?” he asked. “Do we limit constitutionally protected assembly based on a subjective fear, especially one where no one has ever been harmed?”<sup>101</sup>

A legal system in thrall to such a physical-harm-only conception of gun regulation will systematically fail to protect public safety. At stake is not only the constitutionality of laws regulating public carry, but many other forms of gun regulation. Like Tom Lambert, Justice Clarence Thomas has objected that guns cannot be regulated on the basis of public fear. Dissenting from the denial of certiorari in a challenge to the constitutionality of a ban on assault weapons and large-capacity magazines, Justice Thomas wrote, “If a broad ban on firearms can be upheld based on conjecture that the public might feel safer (while being no safer at all), then the Second Amendment guarantees nothing.”<sup>102</sup> As we show below, growing numbers of judges are adopting Justice Thomas’s approach to the Second Amendment.<sup>103</sup> These judges would dramatically restrict government’s ability to respond to weapons threats, in ways that take no account of the common law tradition of regulating weapons in the interests of public safety that orients *Heller* itself.

In legislative arenas, gun regulations are too often conceptualized, worded, and enacted as if their only function is to save lives, not to prevent terror and intimidation. Indeed, Michigan’s own brandishing law—the one that Lambert argued was not violated during the invasion of the Michigan legislature—was rewritten in 2015 with Lambert’s support so as to apply only when a gun is displayed menacingly “with the intent to induce fear in

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<sup>101</sup> Oosting, *supra* note 44.

<sup>102</sup> *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from the denial of certiorari) (emphasis omitted).

<sup>103</sup> See *infra* Section III.A (collecting examples of judges focusing exclusively on physical harms, with examples of judges quoting Justice Thomas).

another person.”<sup>104</sup> The inclusion of this *mens rea* requirement narrowed the brandishing statute<sup>105</sup> in a way that blinds the law to the experiences of others—others’ fear is irrelevant unless the gun carrier specifically *intends* it—and imposes liability only on “bad guys” who openly carry guns.<sup>106</sup> Laws denying guns to domestic abusers have similarly been conceptualized solely in terms of preventing physical harm—not the broader harms of coercive control and terror that armed abusers inflict.<sup>107</sup>

But when we take account of the social as well as physical interests protected by the regulation of weapons—the understanding of public safety that we will show was vindicated at common law and recognized in *Heller*—there is a much stronger common-sense and constitutional basis for laws that restrict gun threats, whether by prohibiting brandishing, banning the possession of large-capacity magazines, or limiting public carry that might inhibit democratic participation. This social understanding of public safety must guide not only litigation and legislation, but also the enforcement of gun laws. As we recognize that public safety protects collective life as well as individual lives, we can better appreciate why public officials enforcing weapons laws must ensure that neither weapons use, nor weapons enforcement, exacerbates inequality of citizenship—whether between the armed and unarmed, or along lines of race, class, sex, and viewpoint.<sup>108</sup>

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<sup>104</sup> Alex Mitchell, *Legal Uncertainties About Openly Carrying Guns in Michigan Present Challenges for Law Enforcement*, MLIVE (Jan. 20, 2019), [https://www.mlive.com/news/kalamazoo/2014/05/open\\_carry.html](https://www.mlive.com/news/kalamazoo/2014/05/open_carry.html) [<https://perma.cc/2GL2-EZRZ>]; see Tom Lambert, *MOC-Backed Brandishing Bills Take Effect*, MICH. OPEN CARRY (Aug. 10, 2015, 7:49 AM), <https://miopencarry.org/news/2015/08/Brandishing-Definition-Takes-Effect> [<https://perma.cc/KYP4-NW7H>]. For coverage of the Lambert demonstrations in Grand Rapids, see John Agar, *Open-Carry Advocates Target Grand Rapids City Commission, Streets to Share Message*, MLIVE (Apr. 3, 2019), [https://www.mlive.com/news/grand-rapids/2014/02/open-carry\\_advocates\\_target\\_gr.html](https://www.mlive.com/news/grand-rapids/2014/02/open-carry_advocates_target_gr.html) [<https://perma.cc/9A5N-W6YY>].

<sup>105</sup> Mitchell, *supra* note 104. According to at least one prosecutor, the change makes the brandishing prohibition duplicative of the crime of assault. *Id.*

<sup>106</sup> By the summer of 2020, newspapers were regularly reporting that groups of armed citizens were massing at racial-justice protests, usually with no police response. As shown in the video which accompanies the news story, an illustrative scene from a video shows white bystanders in Indiana carrying rifles standing on the side of the road along as Black Lives Matter protesters march past. The protesters saw a clear intent to intimidate: “They were just trying to stand there and intimidate us . . . We were very peaceful,” but the onlooking police responded, “You can carry a shotgun without a permit” and “[a]s long as they didn’t point their rifles at anyone, it’s legal to carry.” See Holmes, *supra* note 93. These protests share roots with the recent rise of the open-carry movement. See *infra* notes 22–32 and sources cited therein.

<sup>107</sup> See *infra* 263–268 and accompanying text.

<sup>108</sup> There may be interesting connections between our approach to public safety in the context of gun regulation and efforts to reconsider “public safety” in debates over policing. See Barry Friedman, *What Is Public Safety?*, 102 BOS. U. L. REV. (forthcoming Apr. 2022) (manuscript at 7), <https://papers.ssrn.com/a=3808187> [<https://perma.cc/Z2J4-ARXM>] (arguing that public safety—“government’s obligation to provide safety”—encompasses more than the “protection function” of preventing physical harm).

A concluding Section of the Essay therefore looks at concerns about selective enforcement of gun laws which this social conception of public safety helps make visible.<sup>109</sup> Certainly the armed protest in Michigan<sup>110</sup> elicited a different response from public officials than racial-justice protests in other settings, and a much more tolerant response than when armed Black Panthers entered the California legislature in the 1960s.<sup>111</sup> That incident prompted an immediate tightening of California’s gun laws, signed into law by none other than Governor Ronald Reagan.<sup>112</sup> Masses of white citizens armed with assault rifles do not elicit the same response from police that masses of Black citizens armed with assault rifles would.<sup>113</sup> And protesters’ political views also seem to matter to the police as they make decisions about how to respond.<sup>114</sup> In these accounts, state actors are responding in ways that violate principles of colorblindness and viewpoint neutrality that should guide law enforcement.

Recognizing the public safety interest in gun regulation does not necessarily require enacting more gun laws. Instead, it leads us to appreciate why concerns about racial and political evenhandedness should be a central part of all conversations about the passage and enforcement of gun laws and about killings in “self-defense.”<sup>115</sup> Failure to appreciate the social nature of public safety and the importance of evenhanded law enforcement leads to

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<sup>109</sup> See *infra* Section III.C.

<sup>110</sup> See *supra* Section I.A.

<sup>111</sup> Michael Sierra-Arévalo, *Is Armed Protest by African Americans Treated Differently? History Says Yes.*, WASH. POST. (May 21, 2020, 5:00 AM), <https://www.washingtonpost.com/outlook/2020/05/21/is-armed-protest-by-african-americans-treated-differently-history-says-yes/> [https://perma.cc/GX2J-JS9Q].

<sup>112</sup> *Id.*

<sup>113</sup> See *infra* notes 289–290 and accompanying text (recounting the story of a Louisiana congressman, who happens also to be a gun-rights advocate and former law enforcement officer, who responded to a peaceful Black Lives Matter protest by posting a picture of armed Black men along with a caption saying that he would “consider the armed presence a real threat” and would “drop any 10 of you where you stand”).

<sup>114</sup> See *supra* note 90 and sources cited therein.

<sup>115</sup> We resist efforts to associate race emancipation exclusively with gun rights. See, e.g., NICHOLAS JOHNSON, *NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS* (2014) (emphasizing the use of guns by Black Americans defending themselves against racist violence and other threats). Race plays a complex role in gun use, gun death, and gun regulation, as in every other part of American life and law. There are racial considerations supporting the case for gun regulation as well as for gun rights. See, e.g., JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 57, 71 (2017) (observing, in the context of the D.C. law later struck down by *Heller*, that in 1975, “85 percent of those killed by guns in the District of Columbia were black”); see also Tom Rosentel, *Views of Gun Control — a Detailed Demographic Breakdown*, PEW RSCH. CTR. (Jan. 13, 2011), <https://assets.pewresearch.org/wp-content/uploads/sites/12/old-assets/pdf/gun-control-2011.pdf> [https://perma.cc/9WRX-FEMQ] (finding in September 2010 that white respondents were roughly twice as likely as Black or Hispanic respondents to say that it is “more important to protect the right of Americans to own guns” rather than “to control gun ownership”).

forms of talk about guns and self-defense that privilege the fears and choices of an armed few. A growing number of articles use the racial-justice protests of 2020 as paradigmatic scenes to argue that the Constitution gives special protection to armed citizens in a time of “lawless violence.”<sup>116</sup> All citizens may act from fear, Professor Nelson Lund argues, but the Constitution privileges those who demonstrate the “virtue” and “courage” to arm in self-defense, rather than those who give in to “the urge to trade liberty for an illusion of safety” by relying on gun laws.<sup>117</sup> Such arguments make appeals to tradition. But as we now show, when the government regulates guns to preserve the peace and to protect citizens from weapons threats, it is exercising a traditional common law and constitutional authority that *Heller* itself recognizes.

## II. GOVERNMENT’S CONSTITUTIONAL AND COMMON LAW AUTHORITY TO ENFORCE PUBLIC SAFETY

In what follows we offer a new account of government authority to enforce public safety under the Supreme Court’s 2008 decision in *District of Columbia v. Heller*.<sup>118</sup> We do so in three steps. First, we show a longstanding common law tradition regulating weapons to protect public safety and not only to prevent physical harms. Second, we show that *Heller* incorporates this common law tradition in the portions of the decision that recognize government’s power to regulate guns. Finally, we show how this reading of

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<sup>116</sup> See, e.g., Nelson Lund, *The Future of the Second Amendment in a Time of Lawless Violence*, 116 NW. U. L. REV. 81, 84 (2021) (arguing, *inter alia*, that the Second Amendment “plays a significant role in fostering the kind of civic virtue that resists the urge to rely on the government for one’s well-being”); David E. Bernstein, *The Right to Armed Self-Defense in Light of Law Enforcement Abdication*, 19 GEO. J.L. & PUB. POL’Y 177, 180 (2021) (“[I]f law enforcement is unwilling or unable to preserve basic law and order, citizens will inevitably try to address the breach themselves, and it’s desirable that law-abiding individuals be given the lawful means to do so.”); Glenn Harlan Reynolds, *Riots of 2020 Have Given the Second Amendment a Boost*, USA TODAY (Oct. 8, 2020, 4:00 AM), <https://www.usatoday.com/story/opinion/2020/10/08/riots-2020-have-given-boost-second-amendment-column/5901798002> [<https://perma.cc/TYS3-DAUD>] (“Riots over George Floyd predictably resulted in billions in property damage, but it might be a surprise that they have strengthened the argument for gun rights.”); see also *Law Professors Make Case for Second Amendment Rights in Uncertain Times*, NRA-ILA (Oct. 19, 2020) <https://www.nra.org/articles/20201019/law-professors-make-case-for-second-amendment-rights-in-uncertain-times> [<https://perma.cc/TZE4-VEMX>] (“[A] trio of law professors from the George Mason University Antonin Scalia School of Law have released articles that highlight the importance of the right to armed self-defense during tumultuous periods and explain how the history of the Second Amendment makes clear that it was intended to preserve this right under the present conditions.”).

<sup>117</sup> Lund, *supra* note 116, at 83–84 (urging that in weighing the claims of democratic bodies to regulate, consideration should be given to the “broader and longer-term interest of the public in the preservation of a robust right to keep and bear arms,” and that “judges should give no weight to unsubstantiated fears about the dangers supposedly posed by an armed populace”).

<sup>118</sup> 554 U.S. 570 (2008).

*Heller* matters in the two prominent approaches judges employ to enforce the decision.

Regulating arms to protect public safety is a basic precept of sovereignty and of police power that has deep roots in the common law. In the Anglo-American tradition, governments have regulated guns to preserve public peace and public order, not only to prevent violence and save lives. This longstanding sovereign prerogative shaped weapons laws long before the Founding of our constitutional democracy and the writing of the Second Amendment. In England, the government regulated weapons to protect public order and community life, safeguarding the liberty and security of the polity through laws that prohibited armed members of the community from inflicting terror on others.<sup>119</sup> This legal tradition continued in the United States, through state laws that prohibited carrying weapons to the terror of the people.<sup>120</sup>

As we show, in *Heller*, the Supreme Court presented the Second Amendment as growing out of the Anglo-American common law. In the section of the opinion discussing government's authority to regulate weapons, *Heller* emphasized that the right to keep and bear arms is subject to "longstanding prohibitions,"<sup>121</sup> and looked to ancient common law traditions of weapon regulation for guidance,<sup>122</sup> even citing William Blackstone's discussion of weapons that are dangerous and unusual.<sup>123</sup> *Heller*'s analysis of "presumptively lawful" regulations<sup>124</sup> is not merely an enumeration of exceptions to the right, but rather an identification of the grounds for the government's regulatory authority—an authority that derives from the common law as it has evolved over the centuries, and in public-sphere regulatory contexts not at issue in *Heller* itself.

Two primary frameworks have been advanced for applying *Heller*. The first dominant approach focuses on the scope of the right and whether regulations that fall within that scope survive the requisite level of scrutiny. The primary alternative approach reasons directly from text, history, and tradition. In both of these frameworks, an accurate understanding of the government's regulatory interest is paramount—including its interest, under

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<sup>119</sup> See *infra* notes 125–137 and accompanying text.

<sup>120</sup> See *infra* notes 157–166 and accompanying text.

<sup>121</sup> 554 U.S. at 626.

<sup>122</sup> See *id.* at 593–94.

<sup>123</sup> See *id.* at 627 (recognizing an "important limitation on the right to keep and carry arms" and observing that the "limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,'" citing Blackstone's discussion of the Statute of Northampton).

<sup>124</sup> See *id.* at 627 n.26.

the common law tradition incorporated by *Heller*, to preserve public safety by preventing weapons from interfering with equal liberties of all citizens.

A. *Preserving the Peace: Historical Antecedents of Gun Regulation*

If heavily armed men had invaded the seat of government in England in 1328, the applicable law would have been straightforward: the Statute of Northampton provided that “no Man great nor small” except the King’s own men should “come before the King’s Justices, or other of the King’s Ministers doing their office, with force and arms.”<sup>125</sup> But the Statute did more than protect the sovereign; it also provided that no one may bring “force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere.”<sup>126</sup> The “fairs” and “markets” of fourteenth-century England were important sites of community life, meaning that the Statute had a significant reach in public places. Blackstone described the Statute as confirming a tradition as old as the “laws of Solon,” under which “every Athenian was finable who walked about the city in armour.”<sup>127</sup> He wrote that “riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land.”<sup>128</sup>

The “peace” that the law protected encompassed more than physical safety—to ride armed in fairs and markets was an offense to the crown itself (there being at the time no broader body politic).<sup>129</sup> And as Blackstone made clear, “terrifying the good people of the land”—not just attacking them—was itself “a crime against the public peace.”<sup>130</sup> Or, as William Hawkins put it in 1716, “where a Man arms himself with dangerous and unusual Weapons, in such a Manner as will naturally cause a Terror to the People,” he commits “an Offence at Common Law” and violates “many Statutes.”<sup>131</sup>

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<sup>125</sup> 2 Edw. 3, ch. 3 (1328), in 1 THE STATUTES OF THE REALM 258.

<sup>126</sup> *Id.* For extensive discussion of the Statute’s interpretation and application, see *Young v. Hawaii*, 992 F.3d 765, 786–93 (9th Cir. 2021) (en banc).

<sup>127</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*149. Notably, this discussion comes in Book 4, Chapter 11, of the *Commentaries*, which is titled “Of Offences Against the Public Peace.”

<sup>128</sup> *Id.*; see also *State v. Huntly*, 25 N.C. 418, 420 (1843) (stating the Statute of Northampton does not create the offense, but merely recognizes a common law crime).

<sup>129</sup> Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 LAW & CONTEMP. PROBS. 11, 26 (2017) (“Merely traveling with arms impugned the majesty of the crown . . .”).

<sup>130</sup> BLACKSTONE, *supra* note 127, at \*149.

<sup>131</sup> 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 135 (1716). Some prominent authorities specifically connected this rule to the legal interests of the unarmed. See, e.g., JOS. KEBLE, AN ASSISTANCE TO JUSTICES OF THE PEACE, FOR THE EASIER PERFORMANCE OF THEIR DUTY 147 (London, W. Rawlins, S. Roycroft & Edward Atkins 1683) (“Yet may an Affray be, without word or blow given;

Some advocates of broad gun rights argue that the Statute of Northampton applied only to “unusual” circumstances<sup>132</sup> or (echoing Lambert’s view of brandishing<sup>133</sup>) only those involving malicious intent.<sup>134</sup> Professor Saul Cornell, a scholar of the Founding Era, disputes claims that intent was required to make out a violation of the peace, pointing out that in this era of English history, proof of intent to harm was not an element of most crimes; instead, according to Blackstone and others, intent could be inferred from the illegal act itself.<sup>135</sup> Other Second Amendment scholars go further in arguing that the Statute of Northampton broadly prohibited public carrying.<sup>136</sup>

Disagreement about the historical record is commonplace in Second Amendment scholarship. What is critical to appreciate here is the ground of *agreement* about the historical record. Even those who read the Statute narrowly agree that *terror*, not just physical violence, could justify regulating the carrying of weapons.<sup>137</sup> Second Amendment advocate Stephen Halbrook recently concluded, “the right to bear arms does not include the carrying of dangerous and unusual weapons to the terror of one’s fellow citizens.”<sup>138</sup> Precisely what actions are terrifying may be a factual and contextual question

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as if a man shall shew himself furnished with Armour or Weapon which is not usually worn, it will strike fear upon others that be not armed as he is; and therefore both the Statutes of Northampton . . . made against wearing Armour, do speak of it . . .”).

<sup>132</sup> See, e.g., Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 101 (2009) (concluding that the Statute “cover[ed] only those circumstances where carrying of arms was unusual and therefore terrifying”).

<sup>133</sup> See *supra* note 78.

<sup>134</sup> David B. Kopel, *The First Century of Right to Arms Litigation*, 14 GEO. J.L. & PUB. POL’Y 127, 135–39 (2016).

<sup>135</sup> Cornell, *supra* note 129, at 22 & n.82 (illustrating the point with justice of the peace manuals); see also *Young v. Hawaii*, 992 F.3d 765, 793 (9th Cir. 2021) (en banc) (“According to Blackstone, going armed with dangerous or unusual weapons was all that was required to terrify the people of the land, and thus the law required neither proof of intent to terrify nor proof that actual terror resulted from the carrying of arms.”).

<sup>136</sup> See, e.g., Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 8 (2012) (“A textual reading of the Statute supports a broad prohibition on the public carrying of arms to prevent public injury, crime, and breaches of the peace.”); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1317–18 (2009) (“In eighteenth century common law tradition, therefore, the right to assemble in public did not include a right to assemble armed.”).

<sup>137</sup> See, e.g., Stephen P. Halbrook, *Going Armed with Dangerous and Unusual Weapons to the Terror of the People: How the Common Law Distinguished the Peaceable Keeping and Bearing of Arms* 4–7 (2016) [http://www.stephenhalbrook.com/law\\_review\\_articles/going\\_armed.pdf](http://www.stephenhalbrook.com/law_review_articles/going_armed.pdf) [<https://perma.cc/8VT9-FY74>] (“In sum, it was an offense under the Statute of Northampton to go or ride armed in a manner that creates an affray or terror to the subjects.”); Kopel, *supra* note 134, at 135–36 (“Everyone in the case [of *Rex v. Knight*] agreed that the Statute of Northampton outlawed only carrying in a terrifying manner.”).

<sup>138</sup> Stephen P. Halbrook, *The Common Law and the Right of the People to Bear Arms: Carrying Firearms at the Founding and in the Early Republic*, 7 LINCOLN MEM’L U. L. REV. 100, 135 (2020).

with debatable answers, but the government interest in regulating weapons to prevent terror and preserve public order has ancient common law antecedents recognized by advocates on all sides of the modern gun debate.

American law embraced this concept, with a number of colonies adopting restrictions on public carry of firearms modeled on the Statute of Northampton.<sup>139</sup> Some states essentially copied Northampton's "to the terror" prohibition,<sup>140</sup> and "[l]egal commentators, both in popular justice of the peace manuals and learned treatises, treated the Statute of Northampton as a foundational principle for enforcing the peace."<sup>141</sup> A range of laws regulating the carrying of weapons were enacted to preserve peace and prevent terror.<sup>142</sup> Echoing the language of Northampton, a 1790s Massachusetts law gave justices of the peace the authority to arrest those who "shall ride or go armed offensively, to the fear or terror of the good citizens."<sup>143</sup>

Similar laws across the country permitted disarmament and the imposition of "sureties" (essentially bonds that had to be posted before the weapon was returned). For instance, an 1839 Wisconsin law imposed penalties "on complaint of any other person having reasonable cause to fear

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<sup>139</sup> Young, 992 F.3d at 794 ("A number of colonies implemented restrictions on the carrying of arms similar to those found in the Statute of Northampton. Indeed, some colonies adopted the Statute of Northampton almost verbatim. The colonists shared the English concern that the mere presence of firearms in the public square presented a danger to the community."). See generally LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* (2009) (discussing how localized law between 1787 and 1840 maintained "the peace"); Alfred L. Brophy, "For the Preservation of the King's Peace and Justice": *Community and English Law in Sussex County, Pennsylvania 1682-1696*, 40 AM. J. LEGAL HIST. 167, 167 (1996) (explaining the role of the civil court and William Penn's laws in creating harmony in one middle-Atlantic county in the late seventeenth century); see also Cornell, *supra* note 129, at 31-32 ("The offense was now one that harmed the body politic, not the King's Majesty.").

<sup>140</sup> Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 CLEV. ST. L. REV. 373, 379-81 (2016); Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1719 (2016).

<sup>141</sup> Cornell, *supra* note 129, at 19.

<sup>142</sup> These and other examples are collected and discussed in Eric M. Ruben, *Justifying Perceptions in First and Second Amendment Doctrine*, 80 LAW & CONTEMP. PROBS. 149, 167-69 (2017), which similarly explores the government's power to regulate guns in the interests of perceived safety.

<sup>143</sup> 1795 Mass. Acts 436; see also Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J.F. 121, 129 (2015).

an injury *or* breach of the peace.”<sup>144</sup> The disjunctive is crucial: the law could act prophylactically to prevent both injuries *and* breaches of the peace.<sup>145</sup>

Justices of the peace, sheriffs, and constables had a variety of legal tools at their disposal for enforcing the peace, including the common law crime of affray<sup>146</sup> or the imposition of a surety, which could include having a person disarmed and placed under a peace bond.<sup>147</sup> The power to impose such sureties traces back at least as far as Northampton<sup>148</sup> and was specifically designed to promote and protect freedom from fear. Michael Dalton’s *The Countrey Justice* (1618)—an account of English common law that was popular in England and the colonies<sup>149</sup>—noted that “both ‘the peace’ and ‘the good behaviour’ could be infringed by the attendance of an extraordinary

<sup>144</sup> Prevention of Crime, ch. 144, § 18, *reprinted in* THE REVISED STATUTES OF THE STATE OF WISCONSIN 717, 719 (1849) (emphasis added). Near-identical language appears in various other contemporaneous statutes. ME. REV. STAT. ch. 169, § 16, *reprinted in* THE REVISED STATUTES OF THE STATE OF MAINE 707, 709 (1841) (omitting “reasonable” requirement); Proceedings to Prevent Crimes, ch. 112, § 18, *reprinted in* THE REVISED STATUTES OF THE TERRITORY OF MINNESOTA 526, 528 (1851); Proceedings to Detect the Commission of Crimes, § 6 (1861), *reprinted in* A DIGEST OF THE LAWS OF PENNSYLVANIA 248, 250 (John Purdon comp., 1862) (omitting “fear of injury”).

<sup>145</sup> The *exceptions* in those statutes, meanwhile—the situations in which gun use was legally authorized—were linked to physical harm, applying only to persons having “reasonable cause to fear an assault or other injury, or violence to his person, or to his family, or property.” *Supra* note 144 and the sources cited therein (nearly identical phrasings). This suggests that while guns’ capacity to inflict physical harm cuts in favor both of their use (for self-defense) and their regulation (to save bodies), their capacity to terrify others—to infringe the peace—cuts in favor of regulation alone.

<sup>146</sup> Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 501 (2004) (“Under common law, justices of the peace, sheriffs, and constables were empowered to disarm individuals who rode about armed in terror of the peace. Defining exactly what circumstances constituted the crime of affray was precisely the kind of complex, context-bound judgment that defined common law jurisprudence.”). In a televised interview after *Heller*, Justice Scalia similarly pointed to tort and criminal rules:

What the opinion in *Heller* said is that it will have to be decided in future cases what limitation[s] on the right to keep and bear arms are permiss[i]ble. Some undoubtedly are because there were some that were acknowledged at the time. For example, there was a tort called “afrighting,” which if you carried around a really horrible weapon, just to scare people, like a head axe or something, that was, I believe, a misdemeanor. So yes, there are some limitations that can be imposed.

Maggie’s Notebook, *Scalia: Full Transcript Video with Chris Wallace: Rocket Launchers, Privacy, Arizona Illegals*, FREE REPUBLIC (July 30, 2012), <https://freerepublic.com/focus/f-bloggers/2912502/posts> [<https://perma.cc/7H23-7QD7>].

<sup>147</sup> STEVE HINDLE, *THE STATE AND SOCIAL CHANGE IN EARLY MODERN ENGLAND, 1550–1640*, at 99 (2000) (discussing sureties).

<sup>148</sup> David Feldman, *The King’s Peace, The Royal Prerogative and Public Order: The Roots and Early Development of Binding Over Powers*, 47 *CAMBRIDGE L.J.* 101, 102, 118 (1988) (noting that “the Keepers of the Peace in London were taking sureties of the peace as early as 1281, without explicit authority from either statute or their commissions of appointment,” and that by 1361 this power encompassed “sureties for good behaviour”).

<sup>149</sup> *The Countrey Justice: Containing the Practice of the Justices of the Peace as Well in and out of Their Sessions*, W&M L. LIBR. WYTHEPEDIA [https://lawlibrary.wm.edu/wythepedia/index.php/Country\\_Justice](https://lawlibrary.wm.edu/wythepedia/index.php/Country_Justice) [<https://perma.cc/ZD4J-PF8L>].

number of people; by carrying arms; by issuing threats tending to the breach of the peace; or by any activity which ‘put the people in dread or fear.’”<sup>150</sup> Armed groups unauthorized by law were considered riots and punishable as such.<sup>151</sup>

The common law tradition grew across continents and centuries, evolving with the legal systems of which it was a part.<sup>152</sup> Reasoning within this tradition, states recognized the broad authority of the government to prohibit guns in what *Heller* would eventually call “sensitive places.”<sup>153</sup> Even some jurisdictions that generally permit public carry have excluded such activities at locations like polling places,<sup>154</sup> protecting them as what the Supreme Court has called in the First Amendment context “an island of calm in which voters can peacefully contemplate their choices.”<sup>155</sup> Such regulation is about more than physical safety, as the Georgia supreme court wrote in an 1874 decision: “The practice of carrying arms at courts, elections and places of worship, etc., is a thing so improper in itself, so shocking to all sense of propriety, so wholly useless and full of evil, that it would be strange if the framers of the constitution have used words broad enough to give it a constitutional guarantee.”<sup>156</sup>

This common law tradition concerned with preserving the peace and public order is also expressed in the broadly enacted and historically

<sup>150</sup> HINDLE, *supra* note 147, at 100. Then-Judge Amy Coney Barrett has recounted ways that the Statute of Northampton and longstanding common law traditions authorized governments to “disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety.” *Kanter v. Barr*, 919 F.3d 437, 454, 456–58 (7th Cir. 2019) (Barrett, J., dissenting).

<sup>151</sup> See generally Mark Anthony Frassetto, *To the Terror of the People: Public Disorder Crimes and the Original Public Understanding of the Second Amendment*, 43 S. ILL. U. L.J. 61, 77 (2018) (“The court made clear that weapon possession could turn a lawful assembly into a riot, without other threatening conduct.”).

<sup>152</sup> *Young v. Hawaii*, 992 F.3d 765, 849 (9th Cir. 2021) (en banc) (O’Scannlain, J., dissenting) (concluding that the right to carry weapons publicly did not include a right to “do so in a way that would ‘terrorize’ . . . fellow citizens or intrude upon particularly sensitive places like churches or schools”).

<sup>153</sup> *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008); see *infra* notes 175–176 and accompanying text.

<sup>154</sup> See Darrell A.H. Miller, *Constitutional Conflict and Sensitive Places*, 28 WM. & MARY BILL RTS. J. 459, 472–75 (2019) (describing the “history of keeping order [by] curtailing weapons in polling places and during elections”). States like Arizona, Georgia, Louisiana, and Texas have permissive public carry rules but prohibit guns at polling places. Reid J. Epstein, *It’s Legal to Bring Guns to Polling Places in Five Battleground States, a New Study Says*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/2020/09/23/us/elections/its-legal-to-bring-guns-to-polling-places-in-five-battleground-states-a-new-study-says.html> [<https://perma.cc/UJP6-MHD8>].

<sup>155</sup> *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1887 (2018). In *Mansky*, Chief Justice Roberts’s majority opinion specifically recognized the preservation of the “island of calm” as a state interest for purposes of scrutiny. *Id.*

<sup>156</sup> *Hill v. State*, 53 Ga. 472, 475 (1874).

longstanding rules against brandishing weapons.<sup>157</sup> While the laws are too numerous to fully canvass here,<sup>158</sup> it is clear that the law of brandishing was designed to preserve the peace and protect citizens from terror and intimidation in public places. Mississippi's 1840 law is representative:

If any person having or carrying any dirk, dirk knife, Bowie knife, sword, sword cane, or other deadly weapon, shall, in the presence of three or more persons, exhibit the same in a rude, angry and threatening manner, not in necessary self defence, or shall in any manner unlawfully use the same in any fight or quarrel, the person or persons so offending, upon conviction thereof in the circuit or criminal court of the proper county, shall be fined in a sum not exceeding five hundred dollars, and be imprisoned not exceeding three months.<sup>159</sup>

Over the next few decades, states and territories across the country adopted laws with nearly identical core language.<sup>160</sup> Some used different words to describe the prohibited action, with “draw” and “exhibit” being among the most common;<sup>161</sup> roughly half had a specific exemption for self-

<sup>157</sup> See Robert J. Spitzer, *Why Are People Bringing Guns to Anti-Quarantine Protests? To Be Intimidating.*, WASH. POST (Apr. 27, 2020, 7:30 AM), <https://www.washingtonpost.com/outlook/2020/04/27/why-are-people-bringing-guns-anti-quarantine-protests-be-intimidating/> [https://perma.cc/4HVH-EF8W] (cataloguing historical examples of historical rules against brandishing).

<sup>158</sup> The Duke Center for Firearms Law's Repository of Historical Gun Laws includes fifty-one brandishing laws adopted by twenty-seven states before 1934. *Repository of Historical Gun Laws*, DUKE CTR. FOR FIREARMS L., <https://firearmslaw.duke.edu/repository/search-the-repository/> [https://perma.cc/9SJW-MBUN]. For scholarly discussion, see ROBERT J. SPITZER, GUNS ACROSS AMERICA: RECONCILING GUN RULES AND RIGHTS 185–86 (2015) (listing twenty-seven state brandishing laws whose passages range from 1786 to 1909), and Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 LAW & CONTEMP. PROBS. 55, 63 (2017) (describing early American brandishing laws).

<sup>159</sup> VOLNEY ERSKINE HOWARD, THE STATUTES OF THE STATE OF MISSISSIPPI OF A PUBLIC AND GENERAL NATURE 676 (New Orleans, E. Johns & Co. Stationers' Hall 1840).

<sup>160</sup> For examples of state and territory laws with similar language to Mississippi's 1840 law, see 1864 Idaho Sess. Laws 304; 1873 Nev. Stat. 118; 1897 Fla. Laws 59; COLES BASHFORD, THE COMPILED LAWS OF THE TERRITORY OF ARIZONA 96 (Albany, Weed, Parsons & Co. 1871); WILLIAM H.R. WOOD, DIGEST OF THE LAWS OF CALIFORNIA: CONTAINING ALL LAWS OF A GENERAL CHARACTER 334 (San Francisco, S.D. Valentine & Son 1857).

<sup>161</sup> Of the laws surveyed, we found that twenty-three used the term “draw.” *E.g.*, 1867 Ariz. Sess. Laws 21–22; 1868 Ark. Acts 218; CONN. GEN. STAT. § 53-206(c) (2019); 1864 Idaho Sess. Laws 304; 1875 Ind. Acts 62; 1885 Mont. Laws 74; 1873 Nev. Stat. 118; UTAH CODE ANN. § 76-10-506 (West 2020); BASHFORD, *supra* note 160 at 96 (Arizona); DORSET CARTER, ANNOTATED STATUTES OF THE INDIAN TERRITORY 228 (1899) (Oklahoma); JOHN K. DAVIS, THE CODE OF THE CITY OF CEDARTOWN 73 (1900) (Georgia); ALBERT R. HEILIG, ORDINANCES OF THE CITY OF TACOMA, WASHINGTON 334 (1892); BRUCE L. KEENAN, BOOK OF ORDINANCES OF THE CITY OF WICHITA 45 (1900) (Kansas); JOSIAH A. VAN ORSDEL, REVISED STATUTES OF WYOMING 1252–53 (1899); WOOD, *supra* note 160 at 334.

Another twenty-one used the word “exhibit.” *E.g.*, 1867 Ariz. Sess. Laws 21–22; CONN. GEN. STAT. § 53-20(c) (2019); 1897 Fla. Laws 59; 1864 Idaho Sess. Laws 304; MO. REV. STAT. § 571.030 (2020); 1885 Mont. Laws 74; 1873 Nev. Stat. 118; UTAH CODE ANN. § 76-10-506 (West 2020); 1854 Wash. Sess. Laws 80; 1884 Wyo. Sess. Laws 114; 2 WILLIAM LAIR HILL, BALLINGER'S ANNOTATED CODES AND STATUTES OF WASHINGTON 1956 (1897); HOWARD, *supra* note 159 at 676.

defense.<sup>162</sup> But all these laws concerned the ways in which guns were displayed, not merely the ways they were fired.

Although modern gun-rights advocates have sought to limit the reach of gun laws by amending them to include strict *mens rea* requirements,<sup>163</sup> the language of these historical statutes was generally keyed to the display itself rather than the mental state of the gun carrier. For instance, Mississippi's 1840 law criminalized brandishing a weapon in a "rude, angry and threatening manner," focusing on the manner of the weapon wielding rather than the intent of the carrier.<sup>164</sup> Meanwhile, some state statutes specifically provided that brandishing be punishable whether done "with or without malice."<sup>165</sup> Such brandishing laws, and their contemporary descendants (which include prohibitions on menacing and assault<sup>166</sup>), further confirm government's longstanding authority to protect the public from threatened as well as actual injury.

This account shows how a body of common law that regulated arms in the service of preserving peace and preventing intimidation could evolve over time to include laws that restricted certain types of weapons, the modes in which persons carry weapons, and the locations in which weapons could be carried. As the Georgia supreme court declared in the 1874 decision cited above: "The preservation of the public peace, and the protection of the

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<sup>162</sup> See 1867 Ariz. Sess. Laws 21-22; 1868 Ark. Acts 218; CONN. GEN. STAT. § 53-206(c) (2019); 1897 Fla. Laws 59; 1880 Ga. Laws 151; 1864 Idaho Sess. Laws 304; 1875 Ind. Acts 62; 1885 Mont. Laws 74; 1873 Nev. Stat. 118; N.H. REV. STAT. Ann. § 631:4 (2019); 1886 N.M. Laws 56; 1893 Or. Laws 29-30; VT. STAT. ANN. tit. 13, § 4011 (2019); 1884 Wyo. Sess. Laws 114; CARTER, *supra* note 161 at 228; HOWARD, *supra* note 159 at 676; WOOD, *supra* note 160 at 334.

<sup>163</sup> See *supra* notes 104-106 and accompanying text.

<sup>164</sup> HOWARD, *supra* note 159 at 676.

<sup>165</sup> See, e.g., 1883 Ind. Acts 1712 ("[I]t shall be unlawful for any person over the age of ten years, with or without malice, purposely to point or aim any pistol, gun, revolver, or other firearm, either loaded or empty, at or toward any other person, and any person so offending shall be guilty of an unlawful act, and upon conviction shall be fined in any sum not less than five hundred dollars."); 1931 Mich. Pub. Acts 670 ("Any person who shall intentionally, without malice, point or aim any fire-arm at or toward any other person, shall be guilty of a misdemeanor."); 1925 Or. Laws 172-73 ("It shall be unlawful for any person over the age of twelve years, with or without malice, purposely to point or aim any pistol, gun, revolver or other firearm, within range of said firearm, either loaded or empty, at or toward any other person, except in self defense . . .").

<sup>166</sup> Blocher et al., *supra* note 93, at 111-17 (providing a brief overview of applicable rules). Notably, many of the contemporary versions of these laws do not require an intent to threaten. See, e.g., *United States v. Anthony*, 401 F. Supp. 3d 720, 731 (W.D. Va. 2019) ("[T]he Virginia brandishing statute makes it unlawful to engage in a display of a firearm in a manner so as to reasonably induce fear in another, and does not require proof of an intent to threaten or cause harm to another . . ."), *vacated on other grounds sub nom. United States v. Keene*, 955 F.3d 391 (4th Cir. 2020); *State v. Bartolon*, 495 P.2d 772, 777 (Or. Ct. App. 1972) ("[T]he offense is in the act of purposely pointing the gun, regardless of what the intention of the one doing the pointing may thereafter be. A person may, with a mistaken sense of humor, purposely point a gun at another and have no 'guilty intent' at all, but yet violate ORS 163.320 (now ORS 166.190).").

people against violence, are constitutional duties of the legislature, and the guarantee of the right to keep and bear arms is to be understood and construed in connection and in harmony with these constitutional duties.”<sup>167</sup> The Georgia court recognized the “preservation of public peace” and the “protection of the people against violence” as two important duties of the legislature and emphasized the right to bear arms was to be interpreted in light of the government’s ancient power and responsibility to regulate weapons.<sup>168</sup>

The sovereign imperative to regulate weapons in the name of public peace and public order is an ancient one, even as the prerogative—and the harms that the display of weapons can inflict—evolves with the structure of society itself.<sup>169</sup> Today, the government’s authority to regulate weapons to promote public safety is rooted in democratic will and flows from the police power, or federal sources of power such as Congress’s authority to regulate commerce and to enforce the guarantees of the Fourteenth Amendment.<sup>170</sup>

As we now show, the Supreme Court reasoned from this ancient and evolving common law tradition when it affirmed and described the scope of government’s authority to regulate weapons in *Heller*.

### B. Heller

In 2008, *Heller* recognized a constitutional right of “law-abiding citizens”<sup>171</sup> to keep and bear arms for certain private purposes, defining the “core” of the Second Amendment as self-defense<sup>172</sup> and noting that “the home [is] where the need for defense of self, family, and property is most acute.”<sup>173</sup> “Whatever else it leaves to future evaluation,” the majority went on, the Second Amendment “surely elevates above all other interests the

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<sup>167</sup> Hill v. State, 53 Ga. 472, 476–77 (1874).

<sup>168</sup> *Id.* at 477.

<sup>169</sup> Cf. Cornell, *supra* note 129, at 14 (observing that “[t]he American Revolution republicanized the concept of the King’s Peace by transmuting it into the people’s peace” and tracing the spread of English common law arms restrictions through justice of the peace manuals in the United States).

<sup>170</sup> See U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. amend. XIV, § 5. See generally WILLIAM J. NOVAK, THE PEOPLE’S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA (1996) (demonstrating the pervasive history of government regulation in many different areas of American political, economic, and social life).

<sup>171</sup> District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

<sup>172</sup> *Id.* at 630; *id.* at 599 (“central component”).

<sup>173</sup> *Id.* at 628 (noting that the D.C. handgun law “extends . . . to the home, where the need for defense of self, family, and property is most acute”). The Court repeatedly invoked the “home,” often connecting it to that self-defense interest, see *id.* at 573, 575–77, 615–16, and indeed the first sentence of the opinion says the case is about the home, *id.* at 573 (“We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.”).

right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>174</sup>

*Heller* depicted this “pre-existing” right as growing out of English common law traditions<sup>175</sup> and recognized government’s authority to regulate weapons as growing out of this same tradition. Because few have examined the latter point—*Heller*’s derivation of government’s authority to regulate weapons from the common law—we pause to examine these portions of the majority opinion.

In part III of *Heller*, Justice Scalia addressed the ways that government can regulate the right to bear arms, emphasizing that “[l]ike most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>176</sup> In this portion of the opinion, Justice Scalia prominently relied on Blackstone’s account of the Statute of Northampton as support for government’s authority to ban “dangerous and unusual weapons.”<sup>177</sup> Recall that, in discussing the Statute of Northampton, Blackstone explained “*riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land.*”<sup>178</sup>

In relying on the Statute of Northampton as precedent for government’s authority to restrict the right to bear arms, *Heller* affirmed a body of law recognizing that government has an ancient prerogative to regulate guns, not only to prevent injury but also to preserve the “public peace” and to restrict use of arms that would “terrify[] the good people of the land.”<sup>179</sup> Other sources cited by Justice Scalia in this same passage of *Heller* make clear that the common law restricted the use of arms that inflicted terror, and not

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<sup>174</sup> *Id.* at 635. For further discussion of the constitutionality of regulating arms in the home, see *infra* note 180 and accompanying text.

<sup>175</sup> Justice Scalia discussed how the right to bear arms grew out of English law so that “[b]y the time of the founding, the right to have arms had become fundamental for English subjects,” citing “Blackstone, whose works, we have said ‘constituted the preeminent authority on English law for the founding generation,’” and who “cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen.” *Heller*, 554 U.S. at 592–94 (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)).

<sup>176</sup> *Id.* at 626.

<sup>177</sup> *See id.* at 627 (“We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” (quoting BLACKSTONE, *supra* note 127, at \*148–49)).

<sup>178</sup> BLACKSTONE, *supra* note 127, at \*149.

<sup>179</sup> *Id.*

merely physical injury.<sup>180</sup> These passages of *Heller*, and the authorities that Justice Scalia cites, give historical, common law, and constitutional warrant to government's public safety interest in enacting laws that restrict the right to bear arms in order to protect the public from weapons threats.<sup>181</sup>

*Heller* prominently relies on the Statute of Northampton in explaining government's authority to regulate the right the decision recognizes. The reasoning of these passages of the opinion makes clear that government has authority to regulate weapons to prevent threats, terror, and harm to public order, as well as to prevent physical injury. But the source of government's authority to regulate gun rights is not limited to the Statute of Northampton or its immediate American analogues.<sup>182</sup> Justice Scalia explains government's authority to regulate arms by invoking these ancient sources, as well as other laws that protected persons and activities from weapons threats in new ways. Part III of the *Heller* opinion not only appealed to an English common law tradition banning weapons that terrorize the public; the decision also sanctioned laws subsequently enacted in the United States banning weapons in "sensitive places"<sup>183</sup>—places where important social activities occur.<sup>184</sup> Drawing on a common law tradition spanning continents and centuries, Justice Scalia emphasized that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions" like those "forbidding

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<sup>180</sup> Several sources to which Justice Scalia cites immediately after Blackstone repeatedly authorize the regulation of weapons to prevent conduct that would terrify the people and emphasize that no actual violence need be shown. *See, e.g.*, ELLIS LEWIS, AN ABRIDGMENT OF THE CRIMINAL LAW OF THE UNITED STATES 64 (Philadelphia, Thomas, Cowperthwait & Co. 1847) ("[W]here persons openly arm themselves with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law, an affray may be committed without actual violence."); 1 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 271 (Philadelphia, P.B. Nicklin & T. Johnson 1831) ("[I]t seems certain that in some cases there may be an affray where there is no actual violence; as where persons arm themselves with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people . . ."); FRANCIS WHARTON, TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 727 (2d ed. 1852) ("It has been said generally, that the public and open exhibition of dangerous weapons by an armed man, to the terror of good citizens, is a misdemeanor at common law."); 3 BIRD WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 79 (Philadelphia, Lorenzo Press 1804) ("In some cases, there may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people.").

<sup>181</sup> *See* Sandra Day O'Connor, *Testing Government Action: The Promise of Federalism*, in PUBLIC VALUES IN CONSTITUTIONAL LAW 35, 36 (Stephen E. Gottlieb ed., 1993) ("History can illuminate the nature and strength of a state interest and also may suggest the degree of 'fit' between a challenged regulation and its objective.").

<sup>182</sup> *See supra* notes 139–151 and accompanying text.

<sup>183</sup> *Heller*, 554 U.S. at 626.

<sup>184</sup> *See supra* text accompanying notes 153–156.

the carrying of firearms in sensitive places such as schools and government buildings.”<sup>185</sup>

*Heller*’s understanding of government’s authority to regulate weapons is deeply historical, yet practical, and responsive to functional needs that evolve in history. Part III of the *Heller* opinion recognizes that government has authority to regulate weapons in the interests of preventing threats as well as physical injury, that the threats weapons pose to public life have evolved in history, and that government has the constitutional authority to respond to these threats by regulating weapons in the interests of public safety. As Chief Justice John Roberts put it at oral argument in *Heller*, “[W]e are talking about lineal descendants of the arms but presumably there are lineal descendants of the restrictions as well.”<sup>186</sup> By invoking the Statute of Northampton as authority for regulating weapons and by reaffirming the constitutionality of laws forbidding the carrying of firearms in sensitive places, *Heller* aligned itself with those aspects of Anglo-American common law that recognize the power of governments to regulate weapons so as to prevent terror and preserve the peace—a power that applies equally to medieval “fairs and markets” and to modern polling places unknown in Blackstone’s time.

The events in Michigan in 2020 and at the U.S. Capitol in 2021 vividly illustrate the logic and stakes of this tradition, which is rooted in both our Constitution and our common law. At stake in these location- or function-based restrictions on the right to bear arms is society’s own “self-defense”—its determination to protect against disruption, intimidation, or other injury to the relationships and activities that are critical to the survival and health of the social order as a whole.

In short, the discussion of “sensitive places” in part III of the *Heller* opinion is not an exception to an otherwise absolute constitutional right to bear arms. To the contrary, the discussion of “sensitive places” is an expression of the common law tradition on which the opinion as a whole draws. In these portions of the opinion, *Heller* affirms and incorporates the ancient common law tradition which, transplanted to America, developed in the law of the several states which authorized government to protect citizens’ liberties against weapons threats and to preserve public peace and order.<sup>187</sup>

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<sup>185</sup> *Heller*, 554 U.S. at 626.

<sup>186</sup> Transcript of Oral Argument at 77, *Heller*, 554 U.S. 570 (No. 07-290); see also *Kanter v. Barr*, 919 F.3d 437, 465 (7th Cir. 2019) (Barrett, J., dissenting) (quoting this passage).

<sup>187</sup> Transplanted from England to the United States, this sovereign power to regulate weapons assumed democratic form. Its sources are rooted outside the Second Amendment in state police power, and in various sources of federal constitutional authority, including the Commerce Clause, the Spending Clause, and the power to enforce the Reconstruction Amendments.

Consistent with this tradition, *Heller* reaffirmed the Court’s holding in *Presser v. Illinois* that the Second Amendment does not prevent the prohibition of private paramilitary organizations.<sup>188</sup>

Thus, in the same opinion that recognized the Second Amendment right to bear arms in self-defense, the Court explained that that right was to be interpreted in light of government’s “longstanding” power to restrict the use of weapons to intimidate or otherwise unlawfully dominate members of the community. That governmental interest in regulation supports restrictions on the use of weapons that threaten valued civic activities—which we believe includes the activities and relationships of family life—whether that threat occurs inside or outside the home.<sup>189</sup> In these ways, *Heller* affirms that a constitutional democracy has authority to regulate guns to promote public safety and to protect against weapons threats which it can exercise to protect valued civic activities and the ability of all citizens to live free of terror and intimidation.

### C. Applying *Heller*

Having shown how *Heller* recognizes the government’s interest in public safety, we now demonstrate how this understanding of public safety matters in applying *Heller*.

We observe, first, that an understanding of the common law tradition of regulating weapons that Justice Scalia discusses in part III of *Heller* will be especially important in applying *Heller* to cases involving regulations of weapons employed outside the home, including the licensing of public carry.<sup>190</sup> Because the *Heller* decision involved the use of handguns for self-defense in the home, the Court in *Heller* did not have the occasion to address in any detail the externalities of gun use in the public sphere, nor to discuss how gun use can be coordinated with liberties and activities of other law-abiding citizens. The common law traditions of regulating guns Justice

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<sup>188</sup> *Heller*, 554 U.S. at 620 (citing *Presser v. Illinois*, 116 U.S. 252, 264–65 (1886)).

<sup>189</sup> *Heller*’s account of self-defense in the home presupposed that the head of household was himself law-abiding. *See id.* at 628, 635 (observing that the Second Amendment “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home”). For a critique of the opinion’s gendered (and raced) presuppositions, see Liebell, *supra* note 5, at 207.

<sup>190</sup> *See, e.g.,* N.Y. State Rifle & Pistol Ass’n v. Bruen, No. 20-843 (U.S. Apr. 26, 2021), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-843.html> [<https://perma.cc/V2JA-ME2E>] (granting certiorari on the question of whether New York’s denial of “applications for concealed-carry licenses for self-defense violated the Second Amendment.”); *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021) (en banc) (dismissing challenge to state law requiring license for open carry of firearms); *id.* at 794 (“A number of colonies implemented restrictions on the carrying of arms similar to those found in the Statute of Northampton. Indeed, some colonies adopted the Statute of Northampton almost verbatim. The colonists shared the English concern that the mere presence of firearms in the public square presented a danger to the community.”).

Scalia approvingly invokes in part III of *Heller* do, however. As we have seen, in England and in the United States, weapons employed in public were subject to many forms of regulation designed to protect valued activities and law-abiding persons (whether armed or unarmed) from threat and intimidation.<sup>191</sup> In recognizing the right of armed self-defense, *Heller* approvingly discussed these longstanding traditions of regulating weapons, some of which took root before the birth of our constitutional democracy and others of which grew up as a part of it.

We observe, second, that an understanding of the common law tradition of regulating weapons discussed in part III of *Heller* is important in enforcing the decision, whether a court implements the decision through the currently dominant two-part framework, or through the emerging “text, history, and tradition” alternative favored by some conservative judges.

So far, the dominant doctrinal framework for enforcing the right recognized in *Heller* is a two-part approach endorsed throughout the federal courts of appeals.<sup>192</sup> The first part of that framework asks whether the challenged regulation impacts arms,<sup>193</sup> people,<sup>194</sup> or activities<sup>195</sup> covered by the Second Amendment. For those that do, courts move on to some kind of means–ends scrutiny, the stringency of which typically depends on how close the law comes to the Amendment’s “core” and “central component” of self-defense.<sup>196</sup> The public interest in regulation is most easily legible in the second part of the framework, when judges ask whether a particular

<sup>191</sup> See *supra* Section I.A.

<sup>192</sup> See *Gould v. Morgan*, 907 F.3d 659, 668 (1st Cir. 2018); *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Nat’l Rifle Ass’n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 703–04 (7th Cir. 2011); *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

<sup>193</sup> See *Heller*, 554 U.S. at 627 (excluding “dangerous and unusual” weapons from constitutional coverage).

<sup>194</sup> *Id.* at 626 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . .”).

<sup>195</sup> *Id.* at 610–14; see also *Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc) (“We therefore conclude 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 firearms in public.”).

<sup>196</sup> See, e.g., *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (“[A] regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify.”); see also Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63, 64–69 (2020) (noting that, despite the identification of self-defense as the “core” interest of the right to keep and bear arms, Second Amendment doctrine has done little to incorporate self-defense principles such as necessity and proportionality, which are designed to steer confrontations away from life-threatening violence).

regulation is appropriately tailored to serve a sufficiently important governmental interest.<sup>197</sup>

But in applying the two-part approach, courts need to determine whether a law is appropriately tailored to achieve some government end, and the critical question then becomes how courts understand the government's interest in regulating guns. Do courts view the government's interest as preventing physical injury only—or do judges recognize government's ancient role in regulating weapons to prevent terror and preserve peace? This, of course, was the form of authority exercised by the Statute of Northampton and the many laws modeled on it in American colonies and states, and it is the form of authority exercised by state laws that restrict how and where gun owners can carry weapons.<sup>198</sup> As we have shown, Justice Scalia's discussion of the government's authority to regulate weapons references many of these laws, which offer historical antecedents for restricting weapons that threaten public safety and the security of rights exercised in sensitive places.

And yet few judges have examined the historical roots of the public safety interest that the Supreme Court recognized in *Heller*. As we demonstrate in Part III of this Essay, courts are likely to ask the wrong questions and demand the wrong types of evidence if they only recognize the government interest in protecting individuals from physical injury and fail to recognize the government interest in securing public safety as protecting both the individual's and society's ability to engage in valued activities—from child-rearing to education, commerce, worship, voting, and governing—free from weapons threats and intimidation.

Some prominent conservative judges and Justices have argued that the two-part framework should be jettisoned in favor of a test that would evaluate the constitutionality of gun laws based *solely* on text, history, and tradition<sup>199</sup>—an argument often traced to a dissenting opinion by then-Judge Brett Kavanaugh,<sup>200</sup> and applied in various forms by others, including then-Judge Amy Coney Barrett.<sup>201</sup> Judge Kavanaugh recognized that historical sources will not always speak directly to a modern question, in which case

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<sup>197</sup> For examples of courts focusing on the governmental interest in preventing physical harm—and the pitfalls of that focus—see *infra* notes 220–231 and accompanying text.

<sup>198</sup> See *supra* Section II.A.

<sup>199</sup> See Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 893–907 (2013).

<sup>200</sup> *Heller II*, 670 F.3d at 1276 (Kavanaugh, J., dissenting).

<sup>201</sup> *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting).

one must reason by analogy<sup>202</sup>—identifying “principles” that are relevantly similar in the two time periods: “The constitutional principles do not change (absent amendment), but the relevant principles must be faithfully applied not only to circumstances as they existed in 1787, 1791, and 1868, for example, but also to modern situations that were unknown to the Constitution’s Framers.”<sup>203</sup>

In *Kanter v. Barr*, Judge Barrett reasoned from the common law tradition that Justice Scalia invoked in *Heller* and concluded that “the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety.”<sup>204</sup> Judge Barrett looked beyond the specific subjects of historical gun laws to identify the underlying function of the regulations, concluding that “[t]here is no question that the interest identified by the governments and supported by history—keeping guns out of the hands of those who are likely to misuse them—is very strong.”<sup>205</sup> Judge Barrett was undoubtedly correct to emphasize that ancient practices can be expected to evolve in form, and that English common law regulations of weapons “appeared in the American colonies, adapted to the fears and threats of that time and place.”<sup>206</sup>

In this Essay and in other work, we draw on history in interpreting the Second Amendment without employing originalist methods, including the method of historical analogies.<sup>207</sup> That said, we understand the history we have reviewed to be of consequence to interpreters who employ very different methods. Those who interpret the Amendment through originalist methods must reckon with the common law history of regulating weapons to preserve the peace and prevent terror—the history Justice Scalia invokes in *Heller* when reasoning about the government’s prerogative to enact laws that

<sup>202</sup> *Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting); see also *United States v. Skoiein*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) (“[A]lthough the Justices have not established that any particular statute is valid, we do take from *Heller* the message that exclusions need not mirror limits that were on the books in 1791.”).

<sup>203</sup> *Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting).

<sup>204</sup> 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting).

<sup>205</sup> *Id.* at 465.

<sup>206</sup> *Id.* at 457.

<sup>207</sup> Each of us looks to history for guidance in interpreting the Constitution, without endorsing originalist methods as a preferred framework, and each of us has raised questions about the ways that originalist methods function in the Second Amendment context. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 194 (2008) (showing through extensive historical analysis how the self-defense understanding of the Second Amendment in *Heller* grew out of twentieth-century law-and-order politics). For a brief arguing against adoption of the historical test as the sole means of Second Amendment analysis, see Brief of Second Amendment Law Professors at 7, *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280), 2019 WL 2173981, at \*7–8 (brief coauthored by Joseph Blocher, Darrell A.H. Miller, and Eric Ruben).

restrict guns.<sup>208</sup> Consulting this history, judges endeavoring to apply a strictly historical approach to *Heller* would find a “constitutional principle” that government can regulate weapons for reasons that go beyond saving lives—they would find support for the constitutional principle that government can regulate weapons to prevent armed members of the polity from terrorizing or dominating others.<sup>209</sup>

Constitutional interpreters who do not understand the Second Amendment’s meaning as fixed at the Founding or at the Fourteenth Amendment’s ratification would find a history and tradition of regulating weapons that has continued to develop under state police power and under federal law. Not surprisingly, on this view, the understanding of the public safety interest in regulating weapons is dynamic, has evolved with our constitutional democracy, and continues to evolve with changing understandings of equal membership on the basis of sex and race. Indeed, judges committed to preserving original understandings are quick to emphasize that changing views of race are relevant to the interpretation of the Second Amendment—not only to our understanding of gun rights, but also to the state’s authority to regulate the right to keep and bear arms under the Second Amendment.<sup>210</sup>

In the final Part, we explore how arguments about the government’s public safety interest in regulating weapons—and an alternative account of the government’s authority limited to protecting persons from physical injury—have manifested both inside and outside of courts.

### III. PROTECTING PUBLIC SAFETY INSIDE AND OUTSIDE THE COURTS

The modern gun debate focuses overwhelmingly on the staggering number of Americans wounded and killed by guns, without fully attending

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<sup>208</sup> See *supra* notes 175–180 and accompanying text. Unfortunately, advocates of the text, history, and tradition approach regularly minimize the breadth of the relevant history and tradition. Compare *Mai v. United States*, 974 F.3d 1082, 1084 (9th Cir. 2020) (Bumatay, J., dissenting from the denial of rehearing en banc) (“When the Second Amendment was ratified, times were different. Firearms were ubiquitous and their regulation was sparse.”), with *Repository of Historical Gun Laws*, DUKE CTR. FOR FIREARMS L., <https://firearmslaw.duke.edu/repository/search-the-repository/> [https://perma.cc/WH2Q-RARD] (providing text of more than 200 gun regulations prior to 1800, and—illustrating the broader “tradition”—1,635 such laws prior to 1936).

<sup>209</sup> A constitutional interpreter would need to apply that principle with attention to changing forms of community “unknown to the Constitution’s Framers” that endow some members of the polity (women, racial minorities) with freedom, status, and voice they lacked at the Founding. For these reasons, regulation of weapons preventing terror and securing the peace would recognize that members of the community have freedoms in a constitutional democracy that they did not in the era of Blackstone as well as equal standing to assert them that those charged with enforcing gun laws can and should protect.

<sup>210</sup> See, e.g., *Kanter*, 919 F.3d at 458 n.7 (Barrett, J., dissenting) (observing that “[i]t should go without saying that [historic] race-based exclusions [from the right to bear arms] would be unconstitutional today”).

to the literally uncounted number of people traumatized by those shootings and the risks to community and harms they present. Consider that some efforts to count school shooting “victims” tally only students shot or killed,<sup>211</sup> rather than those harmed by the *threat* of violence: the millions every year who must endure active-shooter drills (which themselves can be terrifying events),<sup>212</sup> or the fact that children exposed to gun violence have psychological difficulties and perform worse in school.<sup>213</sup> A recent Pew survey reports that “[o]verall, roughly one-in-four Americans (23%) say someone has used a gun to threaten or intimidate them or their family”; this includes a third of Black Americans (32%).<sup>214</sup>

Just as the government has historically had the power to protect people from weapons threats in “fairs” and “markets,” as we have described in Part II, government today can enact laws in response to modern weapons threats, so vividly recounted in story-telling briefs that are starting to appear in litigation.<sup>215</sup> Our conception of public safety makes these harms legally

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<sup>211</sup> See, e.g., *10 Years. 180 School Shootings. 356 Victims.*, CNN (2019), <https://www.cnn.com/interactive/2019/07/us/ten-years-of-school-shootings-trnd/> [<https://perma.cc/2R7D-9VCL>].

<sup>212</sup> Nona Willis Aronowitz, *Fake Blood and Blanks: Schools Stage Active Shooter Drills*, NBC NEWS (Feb. 14, 2014, 3:48 AM), <https://www.nbcnews.com/news/us-news/fake-blood-blanks-schools-stage-active-shooter-drills-n28481> [<https://perma.cc/N4NU-MZDT>].

<sup>213</sup> Marco Ghiani, Summer Sherburne Hawkins & Christopher F. Baum, *Gun Laws and School Safety*, 73 EPIDEMIOLOGY & CMTY. HEALTH 509, 510 (2019) (finding 7% of students reported “having been threatened or injured with a weapon at school,” with 6.1% saying they missed at least one day of school because they felt unsafe). The study also found that stronger gun control was associated with a 0.8-percentage-point decrease in students being threatened or injured with a weapon at school, and a 1.1-percentage-point drop in the probability of missing school due to feeling unsafe. *Id.* at 513. Advocates are beginning to focus on these costs in gun-related litigation beyond the Second Amendment context. Safia Samee Ali, *Lawsuit’s Novel Approach: State Is Responsible for Children ‘Disabled’ by Gun Violence*, NBC NEWS (Dec. 14, 2019), <https://www.nbcnews.com/news/us-news/lawsuit-s-novel-approach-state-responsible-children-disabled-gun-violence-n1092711> [<https://perma.cc/NK5H-KFVU>].

<sup>214</sup> Kim Parker, Juliana Menasce Horowitz, Ruth Igielnik, J. Baxter Oliphant & Anna Brown, 2. *Guns and Daily Life: Identity, Experiences, Activities and Involvement*, PEW RSCH. CTR. (June 22, 2017), <https://www.pewsocialtrends.org/2017/06/22/guns-and-daily-life-identity-experiences-activities-and-involvement/> [<https://perma.cc/RW76-WU6Q>]; see also Eugenio Weigend Vargas & Rukmani Bhatia, *No Shots Fired: Examining the Impact and Trauma Linked to the Threat of Gunfire Within the U.S.*, CTR. FOR AM. PROGRESS (Oct. 20, 2020), <https://www.americanprogress.org/issues/guns-crime/reports/2020/10/20/491823/no-shots-fired/> [<https://perma.cc/8SFC-JTRD>] (“[I]n addition to the 103 victims killed and the 210 victims injured with a gun every day, at least another 1,100 victims are threatened with a gun during a violent crime.”).

<sup>215</sup> See, e.g., Brief for March for Our Lives Action Fund as *Amicus Curiae* in Support of Respondents at 3, 5, *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280) (“present[ing] the voices and stories of young people from Parkland, Florida, to South Central Los Angeles who have been affected directly and indirectly by gun violence,” and painting a graphic picture of the direct and indirect costs of gun violence on young people, in an effort to “acquaint the Court with the pain and trauma that gun violence has inflicted on them, and the hope that their ability to advocate for change through the political process affords them”); Brief of Survivors of the 101 California Shooting

cognizable, in sharp contrast to the currently dominant focus on physical harm. The principle that government’s public safety interest extends to threats as well as physical injuries is applicable to a wide range of gun laws, from rules regarding guns in polling places<sup>216</sup> to domestic-violence-linked restrictions.<sup>217</sup> Such laws—including those restricting particular classes of weapons—can protect people from the threat of weapons, whether or not weapons are directly pointed or fired at them.<sup>218</sup>

In this Part, we show that this understanding of public safety is crucial in debates over the enforcement of *Heller* in the courts, where judges in Second Amendment cases are increasingly demanding evidence that gun laws prevent *physical* harms. We then show that this understanding of public safety is crucial in arguments over the Second Amendment outside of the courts, where advocates are invoking physical harm as the only legitimate basis for limiting the public carry of firearms. Respect for public safety, properly understood, requires that regulatory power be exercised in ways that protect the freedom of non-gun owners “in being and feeling safe from armed violence”<sup>219</sup> and in pursuing their own constitutional interests on equal footing with those of gun owners. We conclude by demonstrating that a proper appreciation of the public safety interest is critical not only in litigation and legislation, but also in debates over the evenhanded enforcement of gun laws.

#### A. *Adjudicating the Public Safety Interest*

Courts have rejected the majority of Second Amendment claims, usually finding that the challenged gun law is “longstanding” enough to be exempt from scrutiny or else appropriately tailored to a sufficient government interest—typically described as the prevention of “violent crime, injury, and death.”<sup>220</sup>

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and Giffords Law Center to Prevent Gun Violence as *Amici Curiae* in Support of Appellee and Affirmance at 22, *Rupp v. Becerra*, No. 19-56004 (9th Cir. argued Oct. 8, 2020) [hereinafter Giffords Brief] (arguing for the constitutionality of California’s assault weapons prohibition in part because “[g]overnments also have a significant interest in securing for their communities the ability to engage in public and political life without the fear wrought by particularly intimidating weapons—those that are used to intimidate while they kill”).

<sup>216</sup> See *infra* notes 260–261 and accompanying text.

<sup>217</sup> See *infra* notes 240–243 and accompanying text.

<sup>218</sup> In *Kanter v. Barr*, then-Judge Barrett extended this understanding of the common law tradition on which *Heller* draws to laws restricting gun possession by felons. See *supra* notes 205–206 and accompanying text.

<sup>219</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 891 (2010) (Stevens, J., dissenting).

<sup>220</sup> *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*, 775 F.3d 308, 329, 335 (6th Cir. 2014), *reh’g en banc granted*, *opinion vacated* (6th Cir. Apr. 21, 2015), *on reh’g en banc*, 837 F.3d 678 (6th Cir. 2016); see

But if we focus on the set of opinions upholding Second Amendment claims, a different frame emerges: one in which this narrow conception of the government interest is paired with skepticism about the available empirical evidence. Judges in this frame simultaneously acknowledge the importance of saving lives while voting to strike down gun laws they say are insufficiently tailored to that physical-safety interest.<sup>221</sup> The undoubtedly compelling state interest in preventing physical harm thus becomes a dead end. For a variety of reasons, including longstanding limitations on research funding,<sup>222</sup> it will not always be possible to empirically demonstrate a link between a particular gun law—against brandishing, for example—and a reduction in gun violence.<sup>223</sup> The inquiry looks much different if one recognizes that the interest in gun regulation goes beyond the prevention of wrongful shootings.

Framing the governmental interest exclusively as the prevention of gun violence leads judges to ask the wrong questions and demand the wrong kinds of evidence—and it appears outcome determinative in some cases (and also in a rising tide of dissents). In *United States v. Chester*, for example, the Fourth Circuit remanded a challenge to the federal law prohibiting gun possession by domestic violence misdemeanants after finding that the government “ha[d] not attempted to offer sufficient evidence to establish a substantial relationship between § 922(g)(9) and an important governmental goal,” which the court identified as “reducing domestic gun violence.”<sup>224</sup> As

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*also* *Peruta v. County of San Diego*, 742 F.3d 1144, 1148–49 (9th Cir. 2014) (“California’s ‘important and substantial interest in public safety’—particularly in ‘reduc[ing] the risks to other members of the public’ posed by concealed handguns’ ‘disproportionate involvement in life-threatening crimes of violence’—trumped the applicants’ allegedly burdened Second Amendment interest.” (quoting the district court opinion for this case)).

<sup>221</sup> This is in part, of course, a result of how government lawyers frame their own interests. *See, e.g.,* *Duncan v. Becerra*, 970 F.3d 1133, 1164 (9th Cir. 2020) (noting that the state attorney general characterized the government’s interest as “preventing and mitigating gun violence, particularly public mass shootings and the murder of law enforcement personnel” (internal quotation marks omitted)); *see also id.* at 1164 n.27 (“We remind future litigants that it is still necessary to show that the stated interest is compelling and may not simply be presumed.”).

<sup>222</sup> *See* Allen Rostron, *The Dickey Amendment on Federal Funding for Research on Gun Violence: A Legal Dissection*, 108 AM. J. PUB. HEALTH 865 (2018).

<sup>223</sup> As noted further below, the push to empiricize Second Amendment analysis is itself a notable doctrinal development seemingly out of step with other areas of constitutional law. Our approach would not make evidence of physical harm-reduction irrelevant but would broaden the base of relevant evidence to include prevention of terror and intimidation.

<sup>224</sup> 628 F.3d 673, 683 (4th Cir. 2010) (emphasis omitted); *see also* *Binderup v. Att’y Gen.*, 836 F.3d 336, 353–54 (3d Cir. 2016) (“Here the Government falls well short of satisfying its burden—even under intermediate scrutiny. The record before us . . . contains no evidence explaining why banning people like them (i.e., people who decades ago committed similar misdemeanors) from possessing firearms promotes public safety. The Government . . . must ‘present some meaningful evidence, not mere assertions, to

we describe in more detail below, this demand for proof that a law restricting guns reduces *physical* harm minimizes the role of gun threats in maintaining relations of terror, coercion, and domination and in inflicting the life-altering emotional, dignitary, and material harms of domestic violence on individuals and their families.<sup>225</sup> In *Duncan v. Becerra*, a Ninth Circuit panel struck down California’s prohibition on large-capacity magazines with a similar demand for proof that the law prevented physical injury: “Put simply, California fails to show a reasonable fit between [the law’s] sweeping restrictions and its asserted interests,”<sup>226</sup> which the court identified as “preventing and mitigating gun violence, particularly public mass shootings and the murder of law enforcement personnel.”<sup>227</sup> Missing from the analysis was any consideration (or, apparently, any argument from the State) that the government could ban high-capacity magazines to protect the public from gun *threats*, especially in light of recent mass shootings.<sup>228</sup>

A similar focus on the available evidence supporting physical harm reduction animated the D.C. Circuit’s influential decision in *Heller v. District of Columbia (Heller II)*. In that case, the court considered Second Amendment challenges to several D.C. gun laws, including prohibitions on certain semiautomatic rifles and large-capacity magazines and a registration requirement.<sup>229</sup> The panel majority noted that “the District has advanced, albeit incompletely—almost cursorily—articulated, two important

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justify its predictive [and here conclusory] judgments.’ In these cases neither the evidence in the record nor common sense supports those assertions.” (quoting *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1259 (D.C. Cir. 2011)); *Ezell v. City of Chicago*, 651 F.3d 684, 709 (7th Cir. 2011) (striking down Chicago’s ban on shooting ranges because “the City must demonstrate that civilian target practice at a firing range creates such genuine and serious risks to public safety that prohibiting range training throughout the city is justified. At this stage of the proceedings, the City has not come close to satisfying this standard”); *Wrenn v. District of Columbia*, 864 F.3d 650, 655 (D.C. Cir. 2017) (“Constitutional challenges to gun laws create peculiar puzzles for courts. In other areas, after all, a law’s validity might turn on the value of its goals and the efficiency of its means. But gun laws almost always aim at the most compelling goal—saving lives—while evidence of their effects is almost always deeply contested.”); *Rhode v. Becerra*, 445 F. Supp. 3d 902, 946 (S.D. Cal. 2020) (striking down California’s law requiring background checks for ammunition sales in part because “none of the studies suggest the new regulations will achieve the State’s interest of reducing gun violence. In fact, it is not even close . . . . To be clear, at this point in the case, the evidence does not fairly support the notion of Proposition 63 that background check and anti-importation provisions for ammunition acquisition will make the public safer”).

<sup>225</sup> See *infra* notes 263–272 and accompanying text.

<sup>226</sup> 970 F.3d at 1168 (9th Cir. 2020).

<sup>227</sup> *Id.* at 1164 (quotation marks omitted). The court added in closing: “Let us be clear: We are keenly aware of the perils of gun violence. The heartbreak and devastation caused by criminals wielding guns cannot be overstated. And we also understand the importance of allowing state governments the ability to fashion solutions to curb gun violence.” *Id.* at 1168–69.

<sup>228</sup> See, e.g., Giffords Brief, *supra* note 215, at 24 (defending California’s assault weapons ban and emphasizing the nonphysical harms inflicted by mass shootings involving those weapons).

<sup>229</sup> 670 F.3d 1244, 1247–48 (D.C. Cir. 2011).

governmental interests it may have in the registration requirements, *viz.*, to protect police officers and to aid in crime control.”<sup>230</sup> And although the panel upheld most of the challenged laws, it concluded that the registration requirement could not “survive intermediate scrutiny based upon the record as it stands because the District has not demonstrated a close fit [as required by intermediate scrutiny] between those requirements and its governmental interests.”<sup>231</sup> The court thus effectively demanded evidence that the registration requirement could be shown to protect police officers or citizens from physical injury, and remanded on the basis that such evidence was insufficient.

The demand that government prove that laws restricting guns prevent physical injury is even more prominent in the rising tide of concurrences, dissents, and other nondeterminative opinions that might be signaling the future of Second Amendment doctrine. Consider Justice Thomas’s attack on the reasoning of *Friedman v. City of Highland Park*,<sup>232</sup> in which the Seventh Circuit upheld a local ordinance prohibiting assault weapons and high-capacity magazines based, in part, on public safety grounds.<sup>233</sup> Judge Frank Easterbook explained, “If it has no other effect, Highland Park’s ordinance may increase the public’s sense of safety . . . . If a ban on semiautomatic guns and large-capacity magazines reduces the perceived risk from a mass shooting, and makes the public feel safer as a result, that’s a substantial benefit.”<sup>234</sup> In his dissent from the denial of certiorari, Justice Thomas (whose views have been a harbinger of Second Amendment change in the past<sup>235</sup>), wrote, “If a broad ban on firearms can be upheld based on conjecture that the public might *feel* safer (while being no safer at all), then the Second Amendment guarantees nothing.”<sup>236</sup> Dissenting from a recent Third Circuit decision upholding New Jersey’s prohibition on large-capacity magazines (LCMs), Judge Paul Matey echoed Justice Thomas’s warning<sup>237</sup> and voted to

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<sup>230</sup> *Id.* at 1258.

<sup>231</sup> *Id.* In a dissenting opinion, then-Judge Kavanaugh acknowledged that “D.C. alludes to the possibility that other rationales might be asserted to support a registration requirement. Therefore, if I were applying a form of heightened scrutiny to the registration requirement, I would remand for further analysis of the interests that might be asserted.” *Id.* at 1295 (Kavanaugh, J., dissenting).

<sup>232</sup> *Friedman v. City of Highland Park*, 136 S. Ct. 447 (2015) (Thomas, J., dissenting from the denial of certiorari).

<sup>233</sup> 784 F.3d 406, 412 (7th Cir. 2015).

<sup>234</sup> *Id.* at 412.

<sup>235</sup> *Printz v. United States*, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring) (inviting consideration of whether the Second Amendment protects a “personal” right, as *Heller* would eventually hold).

<sup>236</sup> *Friedman*, 136 S. Ct. at 449 (Thomas, J., dissenting from the denial of certiorari).

<sup>237</sup> *Ass’n of N.J. Rifle & Pistol Clubs v. Att’y Gen. N.J.*, 974 F.3d 237, 260 (3d Cir. Sept. 1, 2020) (Matey, J., dissenting) (internal citations and quotation marks omitted).

strike down the law on the ground that the government should have provided even more proof of the link between the ban and physical injury to the public: “[T]he State rests on the ambiguous argument that ‘when LCM-equipped firearms are used, more bullets are fired, more victims are shot, and more people are killed than in other gun attacks.’ Perhaps, but ‘this still begs the question of whether a 10-round limit on magazine capacity will affect the outcomes of enough gun attacks to measurably reduce gun injuries and death.’”<sup>238</sup>

A similar logic—demanding empirical evidence to show the vindication of physical safety—has surfaced in other opinions as well.<sup>239</sup> In *United States v. Skoelin*, the en banc Seventh Circuit upheld the constitutionality of the federal law prohibiting gun possession by those convicted of domestic violence misdemeanors.<sup>240</sup> Writing for the majority, Judge Easterbrook focused on three physical-safety-based reasons for the prohibition, highlighting the “data” supporting them.<sup>241</sup> In the dissenting opinion, Judge Diane Sykes accused the majority of relying on “several pages of social-science research,” most of which had “been supplied by the court.”<sup>242</sup> Judge Sykes argued that “it [was] the government’s burden to make a ‘strong showing’ of the danger-reduction justification . . . but in the end [the court made] the case for itself.”<sup>243</sup>

Requiring government to prove, by empirical evidence, that gun laws save lives imposes demands on laws regulating guns that the Court has not imposed on other laws subject to constitutional challenge. In *Williams-Yulee*

<sup>238</sup> *Id.*; see also *Ass’n of N.J. Rifle & Pistol Clubs v. Att’y Gen. N.J.*, 910 F.3d 106, 131 (3d. Cir. 2018) (Bibas, J., dissenting) (“True, the government has a compelling interest in reducing the harm from mass shootings. No one disputes that. But New Jersey has failed to show how the ban advances its interest. Nor does it provide evidence of tailoring.”).

<sup>239</sup> See, e.g., *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1129 (10th Cir. 2015) (Tymkovich, J., concurring in part and dissenting in part) (“Of course I agree public safety—at not too amorphous a level of generality—qualifies as an important government interest. But the government has not shown that successfully combating potential crime at this location—a run-of-the-mill post office parking lot in a Colorado ski town—hinges on restricting the Second Amendment rights of lawfully licensed firearms carriers.”); cf. *Kanter v. Barr*, 919 F.3d 437, 469 (7th Cir. 2019) (Barrett, J., dissenting) (“[W]hile both Wisconsin and the United States have an unquestionably strong interest in protecting the public from gun violence, they have failed to show, by either logic or data, that disarming Kanter substantially advances that interest.” (internal citation omitted)).

<sup>240</sup> 614 F.3d 638, 642–45 (7th Cir. 2010) (en banc).

<sup>241</sup> *Id.* at 643 (“[F]irst that domestic abusers often commit acts that would be charged as felonies if the victim were a stranger, but that are charged as misdemeanors because the victim is a relative (implying that the perpetrators are as dangerous as felons); second that firearms are deadly in domestic strife; and third that persons convicted of domestic violence are likely to offend again, so that keeping the most lethal weapon out of their hands is vital to the safety of their relatives. Data support all three of these propositions.”).

<sup>242</sup> *Id.* at 651 (Sykes, J., dissenting).

<sup>243</sup> *Id.* at 651–52.

*v. Florida Bar*, for example, the Court rejected a First Amendment challenge to a Florida law prohibiting judicial candidates from soliciting campaign funds.<sup>244</sup> Chief Justice Roberts’s majority opinion upheld the law under strict scrutiny, finding that it not only helped prevent quid pro quo corruption but also advanced the “State’s compelling interest in preserving public confidence in the integrity of the judiciary.”<sup>245</sup> Importantly, this conception of the state interest had direct implications for the state’s evidentiary burden on the tailoring prong. As the Chief Justice put it: “The concept of public confidence in judicial integrity does not easily reduce to precise definition, *nor does it lend itself to proof by documentary record*. But no one denies that it is genuine and compelling.”<sup>246</sup> If speech can be limited in the name of increasing public confidence in judicial integrity, why could guns not be limited in the name of increasing public confidence in other shared institutions and spaces?

Similarly, in the voting rights context, the Court has suggested that voting restrictions can be upheld in the name of the government’s compelling interest in preserving citizens’ “right to vote in an election conducted with integrity and reliability.”<sup>247</sup> The Court has even been willing to uphold restrictions on voter registration on the grounds that “public confidence in the integrity of the electoral process has independent significance” above and beyond the prevention of fraud, because the regulation might “encourage[] citizen participation in the democratic process.”<sup>248</sup> If the hypothetical benefit of voter-fraud restrictions on registration is sufficient to sustain such legislation despite its burden on the exercise of a fundamental right, then should the same not be true of gun regulations that might encourage, for example, student participation in education?

Yet another example comes from the abortion cases, where the Court’s conservatives have voted to uphold regulations that burden the exercise of a constitutional right on the ground that such laws express public values. In *Gonzales v. Carhart*, for example, the Court sanctioned a ban on a particular *method* of performing abortions, even though the ban would not stop abortions or save potential lives.<sup>249</sup> Rather, the Court reasoned that the law was justified because of the message of respect for human life it sent the

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<sup>244</sup> 575 U.S. 433, 444 (2015).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 447 (emphasis added); *see also* *Burson v. Freeman*, 504 U.S. 191, 208–09 (1992) (“[T]his Court never has held a State ‘to the burden of demonstrating empirically the objective effects on political stability that [are] produced’ by the voting regulation in question.” (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986))).

<sup>247</sup> *Burson*, 504 U.S. at 199.

<sup>248</sup> *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008).

<sup>249</sup> 550 U.S. 124, 169 (2007).

public and the medical profession.<sup>250</sup> If the Constitution permits legislation that restricts citizens' choice of what can medically be done to their bodies based on such a message, why should it forbid weapons regulations designed to protect a shared sense of public safety?

It is easy enough to multiply examples from throughout constitutional doctrine.<sup>251</sup> Why should courts hold the government to higher empirical standards in Second Amendment cases than in these other constitutional contexts? Of course, there is already robust empirical evidence that gun-related harms go far beyond physical loss,<sup>252</sup> and that these harms—like the direct gun casualties of gun violence—disproportionately impact vulnerable communities.<sup>253</sup> A law that demonstrably lessens those harms should survive scrutiny.

But not every gun law will, as the Chief Justice put it in the First Amendment context in *Williams-Yulee*, “lend itself to proof by documentary record.”<sup>254</sup> In various contexts, the threat of gun violence undoubtedly chills

<sup>250</sup> See, e.g., *id.* at 157 (“The government may use its voice and its regulatory authority to show its profound respect for the life within the woman.”); see also *id.* at 160 (observing that “[i]t is objected that the standard D & E [dilation and evacuation, a method of abortion] is in some respects as brutal, if not more, than the intact D & E, so that the legislation accomplishes little,” but arguing that “[i]t was reasonable for Congress to think that partial-birth abortion, more than standard D & E, undermines the public’s perception of the appropriate role of a physician during the delivery process” (internal quotation marks omitted)).

<sup>251</sup> Richard H. Fallon Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1321–25 (2007); *id.* at 1322 (noting that judicial conservatives are “more willing to find compelling interests implicit in the Constitution than to conclude that the Constitution implicitly creates or recognizes fundamental rights”).

<sup>252</sup> PHILIP J. COOK & JENS LUDWIG, GUN VIOLENCE: THE REAL COSTS, at vii, ix (2000) (concluding that gun violence costs \$100 billion per year, including investments in prevention, avoidance, and harm reduction, both public and private); David Hemenway, Sara J. Solnick & Deborah R. Azrael, *Firearms and Community Feelings of Safety*, 86 J. CRIM. L. & CRIMINOLOGY 121, 128 (1995) (providing “suggestive evidence that possession of firearms imposes, at minimum, psychic costs on most other members of the community”); Cary Wu, *How Does Gun Violence Affect Americans’ Trust in Each Other?*, 91 SOC. SCI. RSCH. 1, 3 (2020) (demonstrating “that America’s gun violence affects not only just those killed, injured, or present during gunfire, but it can also sabotage the social and psychological well-being of all Americans”).

<sup>253</sup> Matthew Miller, Deborah Azrael & David Hemenway, *Community Firearms, Community Fear*, 11 EPIDEMIOLOGY 709, 710–11 (2000) (finding that fifty percent of respondents said they would feel less safe if more people in their community owned guns, compared to fourteen percent who would feel safer; women were 1.7 times more likely to report feeling less safe, and minorities were 1.5 times more likely).

<sup>254</sup> 575 U.S. 433, 447 (2015); see also *Burson v. Freeman*, 504 U.S. 191, 208–09 (1992) (“[T]his Court never has held a State ‘to the burden of demonstrating empirically the objective effects on political stability that [are] produced’ by the voting regulation in question.” (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986))). Analogous limitations of empirical argument arise outside of courts as well. Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perception*, 151 U. PA. L. REV. 1291, 1292 (2003) (arguing *inter alia* that “empirical analyses of the effect of gun control . . . are unlikely to have much impact” on individuals’ positions, and that scholars should instead work to “construct[] a new expressive idiom that will allow citizens to debate the cultural issues that divide them in an open and constructive way”).

the exercise of rights, depriving Americans of the security to speak, protest, learn, shop, pray, and vote.<sup>255</sup> It will not always be possible to demonstrate that a particular gun law—a restriction on open carrying near polling places, for example—measurably increases people’s confidence or security in exercising their rights. But that should not be fatal to gun laws any more than it would be to laws in other constitutional contexts.

Given the multiplicity of gun laws and enforcement contexts, it is impossible to translate the public safety interest into a single transsubstantive decision rule. Our goal here is to make it legally legible, so that judges do not systematically understate the case for gun laws by looking only for evidence of the physical harms they prevent.

### B. Legislating Public Safety

The state’s interest in public safety arises not only in the courtroom; it is also at issue in legislatures when gun laws are enacted or revised.

Legislative efforts to regulate—or deregulate—public carrying of weapons provide a striking illustration of governmental interests that are overwhelmingly articulated in terms of physical harm alone. In recent years, even as some states have tightened their gun laws,<sup>256</sup> others have broadly expanded the legality of public carry—some even doing away with permit requirements and allowing open carry.<sup>257</sup> Whatever their impact on violent crime,<sup>258</sup> these legislative changes must also be evaluated and justified in

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<sup>255</sup> For some examples of chilling, consider the discussion of the use of weapons in intimate-partner stalking and domination discussed *infra* note 269, or the threat of weapons in schools and on the street, *supra* notes 211–213. For other examples of chilling, consider the shutdown protests directed at the Michigan legislators and Governor recounted in *supra* Part I, or the presence of armed militia and vigilante groups at Black Lives Matter protests, see *infra* notes 288–296 and accompanying text.

<sup>256</sup> See, e.g., Mike Riopell, *Gov. J.B. Pritzker Signs Law Requiring State Licensing of Illinois Gun Dealers; Rifle Association Threatens Lawsuit*, CHI. TRIB. (Jan. 17, 2019), <https://www.chicagotribune.com/politics/ct-met-jb-pritzker-signs-gun-legislation-20190117-story.html> [<https://perma.cc/2YQ8-3RZT>] (describing Illinois law requiring “gun stores to get state certification[.]”); Gregory S. Schneider, *Va. Governor Signs Gun-Control Laws, Delivering on Democrats’ Campaign Promises*, WASH. POST (Apr. 10, 2020, 5:17 PM), [https://www.washingtonpost.com/local/virginia-politics/va-governor-signs-gun-control-laws-delivering-on-democrats-campaign-promises/2020/04/10/b3a8acec-7b4d-11ea-a130-df573469f094\\_story.html](https://www.washingtonpost.com/local/virginia-politics/va-governor-signs-gun-control-laws-delivering-on-democrats-campaign-promises/2020/04/10/b3a8acec-7b4d-11ea-a130-df573469f094_story.html) [<https://perma.cc/3ZCY-S9J5>] (describing Virginia enacting laws that “limit handgun purchases to one per month; establish universal background checks” and to “give authorities the power to temporarily seize weapons from someone deemed a threat” among other things).

<sup>257</sup> See Matt Vasilogambros, *Another Big Year Expected for Gun Control in the States*, PEW TRS. (Feb. 7, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/02/07/another-big-year-expected-for-gun-control-in-the-states> [<https://perma.cc/E7HD-HDPV>].

<sup>258</sup> See John J. Donohue, Abhay Aneja & Kyle D. Weber, *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis*, 16 J. EMPIRICAL LEGAL STUD. 198 (2019) (linking right-to-carry concealed-handgun laws with increased rates of violent crime).

light of the public interests that we describe here: the freedom of citizens to be secure and confident in public spaces and in exercising their constitutional liberties. The expansion of gun rights into public spaces—whether accomplished legislatively or judicially—does not fit easily into *Heller*'s private-self-defense paradigm,<sup>259</sup> which makes it all the more crucial that the public safety interest be made legible.

For some, the public safety interest we have discussed will support restrictions on certain kinds or sites of public carry. After the 2020 protests and the discovery of the plot to kidnap Governor Whitmer, Michigan's secretary of state issued guidance to local election officials stating that the open carrying of firearms at polling places, clerk's offices, and absentee-ballot counting boards is prohibited.<sup>260</sup> This time, the language of public safety—not just physical safety—was paramount: “The presence of firearms at the polling place, clerk's office(s), or absent voter counting board may cause disruption, fear or intimidation for voters, election workers and others present.”<sup>261</sup> Within days, Tom Lambert's Michigan Open Carry and other gun-rights groups challenged the constitutionality of the restriction.<sup>262</sup>

Appeals to the public safety interest are relatively rare in contemporary legislative debates about gun laws. Just as opponents of gun regulation suggest that prevention of physical harm is the *only* ground for gun regulation, advocates for such regulation too often treat the prevention of physical harm as the only interest they might vindicate. Our review of the legislative histories and debates surrounding many state and federal gun bills revealed little effort to frame, describe, or defend regulation on grounds other than violence prevention.

For example, federal law and the laws of many states restrict gun possession by those convicted of domestic violence misdemeanors or subject

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<sup>259</sup> In its recent rejection of a challenge to California's public carry restrictions, the en banc Ninth Circuit conducted an extensive review of historical materials, noting that the law has “long distinguished between an individual's right of defense of his household and his business and his right to carry a weapon in public for his own defense, absent exceptional circumstances.” *Young v. Hawaii*, 992 F.3d 765, 813 (9th Cir. 2021) (en banc).

<sup>260</sup> Craig Mauger & Beth LeBlanc, *Michigan Bans Open Carry of Guns Inside and Near Polling Places*, DETROIT NEWS (Oct. 17, 2020), <https://www.detroitnews.com/story/news/politics/2020/10/16/michigan-bans-open-carry-guns-polling-places/3676462001/> [<https://perma.cc/RXL7-RACF>].

<sup>261</sup> *Id.* (quoting Jocelyn Benson, *Open Carry of Firearms at Polling Places on Election Day Prohibited*, MICH. DEP'T STATE (Oct. 16, 2020), [https://www.michigan.gov/documents/sos/BOE\\_Open\\_Carry\\_Polling\\_Place\\_Instructions\\_10\\_16\\_2020\\_705274\\_7.pdf](https://www.michigan.gov/documents/sos/BOE_Open_Carry_Polling_Place_Instructions_10_16_2020_705274_7.pdf) [<https://perma.cc/2ED5-RLSK>]).

<sup>262</sup> Dave Boucher & Paul Egan, *Open Carry Ban at Polls Prompts Lawsuits Against Michigan Secretary of State*, DETROIT FREE PRESS (Oct. 22, 2020), <https://www.freep.com/story/news/politics/elections/2020/10/22/open-carry-polls-voting-lawsuit-michigan/6004659002/> [<https://perma.cc/AN9M-LR28>].

to a domestic violence restraining order.<sup>263</sup> When Congress adopted the Lautenberg Amendment in 1996, which prohibits gun possession by anyone convicted of misdemeanor domestic violence, the overwhelming focus was on the prevention of physical harms.<sup>264</sup> There can be no doubt that this interest is compelling and well documented. Roughly half of female murder victims in the United States are killed by an intimate partner, most of them with a gun.<sup>265</sup> Firearm-ownership rates are positively related to rates of domestic homicide,<sup>266</sup> especially in abusive situations.<sup>267</sup>

The number of women killed with guns is horrific. This horror can, perversely, direct attention away from a broader problem: the coercive control that is central to domestic abuse, and which “reflects the deprivation of rights and resources that are critical to personhood and citizenship.”<sup>268</sup> Research has shown that most abusers use guns to intimidate their victims,

<sup>263</sup> See Joseph Blocher, *Domestic Violence and the Home-Centric Second Amendment*, 27 DUKE J. GENDER L. & POL’Y 45, 47 (2020).

<sup>264</sup> See *infra* note 272 and accompanying text.

<sup>265</sup> Emiko Petrosky, Janet M. Blair, Carter J. Betz, Katherine A. Fowler, Shane P.D. Jack & Bridget H. Lyons, *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003–2014*, 66 WEEKLY 741, 743 (2017); see also Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L.J. 1257, 1278 n.109 (2017) (noting that, in cases in which the perpetrator could be identified, half of female homicide victims were killed by intimate partners, as compared to just 6% of male homicide victims); Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 EVALUATION REV. 313, 313 (2006) (concluding that roughly 60% of intimate-partner homicides are committed with a firearm).

<sup>266</sup> Aaron J. Kivisto, Lauren A. Magee, Peter L. Phalen & Bradley R. Ray, *Firearm Ownership and Domestic Versus Nondomestic Homicide in the U.S.*, 57 AM. J. PREVENTATIVE MED. 311, 311 (2019), [https://www.ajpmonline.org/article/S0749-3797\(19\)30197-7/pdf](https://www.ajpmonline.org/article/S0749-3797(19)30197-7/pdf) [<https://perma.cc/U5ZN-DZLB>].

<sup>267</sup> Jacquelyn C. Campbell, Daniel Webster, Jane Koziol-McLain, Carolyn Block, Doris Campbell, Mary Ann Curry, Faye Gary, Nancy Glass, Judith McFarlane, Carolyn Sachs, Phyllis Sharps, Yvonne Ulrich, Susan A. Wilt, Jennifer Manganello, Xiao Xu, Janet Schollenberger, Victoria Frye & Kathryn Laughon, *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003) (finding that the presence of a gun makes homicide five times more likely); see also Stephanie E.F. Folks, N. Zoe Hilton & Grant T. Harris, *Weapon Use Increases the Severity of Domestic Violence but Neither Weapon Use nor Firearm Access Increases the Risk or Severity of Recidivism*, 28 J. INTERPERSONAL VIOLENCE 1143, 1148–49 (2013) (finding that the presence of a firearm intensifies domestic violence).

<sup>268</sup> See EVAN STARK, *COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE* 5 (2007) (arguing that “the primary harm abusive men inflict is political, not physical” and developing a conception of “coercive control,” “an objective state of subordination”); Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 210 (1992) (arguing that “some battered women are held in involuntary servitude” and that “a civil constitutional claim as well as a criminal constitutional claim could be brought against the batterer”); see also RACHEL LOUISE SNYDER, *NO VISIBLE BRUISES* 35–77 (2019) (chronicling incidents of intimate-partner violence, including but not limited to physical violence).

rather than physically harm them.<sup>269</sup> Hostile weapon displays “can create an ongoing environment of threat and intimidation” that encompasses psychological (and not just physical) abuse,<sup>270</sup> and are a significant predictor of post-traumatic stress disorder symptom severity.<sup>271</sup> On at least one occasion, Senator Frank Lautenberg (sponsor of the federal law prohibiting possession by domestic violence offenders) noted these broader harms:

We are not just talking about the use of a gun in a murder; we are talking about a gun that is used in intimidation, to threaten and to strike fear and harass. Imagine what a child must think when he sees a man holding a gun, threatening a woman, even if he does not pull the trigger.<sup>272</sup>

But the law was framed, and has been evaluated by courts,<sup>273</sup> in terms of physical violence alone. Had Congress articulated a more inclusive public safety interest (in a preamble, for example), and provided evidence to support it, it would be easier for courts and litigators to see the full range of governmental interests at play when they evaluate the constitutionality of such laws.<sup>274</sup> Consider that the federal law protecting the gun industry from civil liability lists among its purposes: “To protect the right, under the First

<sup>269</sup> Susan B. Sorenson, *Guns in Intimate Partner Violence: Comparing Incidents by Type of Weapon*, 26 J. WOMEN’S HEALTH 249 (2017). Gun threats are commonly accompanied by other threatening behaviors, such as stalking. T.K. Logan & Kellie R. Lynch, *Dangerous Liaisons: Examining the Connection of Stalking and Gun Threats Among Partner Abuse Victims*, 33 VIOLENCE & VICTIMS 399, 403 (2018) (finding that three-fourths of callers to the National Domestic Violence Hotline who reported being threatened with a gun also reported stalking).

<sup>270</sup> Maura Ewing, *An Estimated 4.5 Million Women Have Been Bullied with Guns by Abusive Partners*, TRACE (Oct. 3, 2016), <https://www.thetrace.org/2016/10/nonfatal-gun-use-domestic-violence/> [<https://perma.cc/63M2-AGJ5>]; see also Susan B. Sorenson & Rebecca A. Schut, *Nonfatal Gun Use in Intimate Partner Violence: A Systematic Review of the Literature*, 19 TRAUMA, VIOLENCE & ABUSE 431, 437 (2018) (concluding that “about 4.5 million U.S. women have been threatened by an intimate partner with a gun and nearly 1 million have had an intimate actually use a gun against them”).

<sup>271</sup> Tami P. Sullivan & Nicole H. Weiss, *Is Firearm Threat in Intimate Relationships Associated with Posttraumatic Stress Disorder Symptoms Among Women?*, 4 VIOLENCE & GENDER 31, 34 (2017).

<sup>272</sup> 142 CONG. REC. S9459 (daily ed. Aug. 2, 1996).

<sup>273</sup> See *supra* notes 240–243 and accompanying text (describing intrapanel debate in *United States v. Skoein*, 614 F.3d 638 (7th Cir. 2010)); see also *United States v. Chester*, 628 F.3d 673, 692 (4th Cir. 2010) (David, J., concurring) (“[S]ound research of unquestionable reliability (much of it empirical) indicates that the presence of firearms greatly increases the risk of death for women suffering from domestic abuse.”); *United States v. Staten*, 666 F.3d 154, 167 (4th Cir. 2011) (“[W]e have no trouble concluding that the government has indeed established that the use of firearms in connection with domestic violence is all too common, increases the risk of injury or homicide during domestic violence, and often leads to injury or homicide.”); *Stimmel v. Sessions*, 879 F.3d 198, 209 (6th Cir. 2018) (“Essential here is that the victim is more likely to be killed when a gun is present.”); *United States v. Lippman*, 369 F.3d 1039, 1044 (8th Cir. 2004) (“Congress had a compelling government interest in enacting § 922(g)(8) to decrease domestic violence.”).

<sup>274</sup> To be clear, litigants and courts evaluating government interests are not strictly limited to those specifically enumerated in legislative history. See Fallon, *supra* note 251, at 1321 (“[T]he Supreme Court has frequently adopted an astonishingly casual approach to identifying compelling interests.”).

Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.”<sup>275</sup> If Congress can act to protect gun manufacturers’ rights “to speak freely” and “to assemble peaceably,” then surely it can do the same for private citizens. Clearly articulating the public safety interest in the text of legislation is all the more important as gun-rights advocates seek to shift more and more issues from legislatures to courts.

### *C. Enforcing Equal Liberties*

Once we recognize that public safety includes the protection of social as well as physical interests, we can begin to reason differently about the underenforcement and selective enforcement of existing gun laws, including prohibitions on brandishing, assault, menacing with a firearm, reckless display, and the like.<sup>276</sup> In many cases, law enforcers defer to persons openly carrying guns. Yet deference to gun displays is not mandated by the right to keep and bear arms, as many suppose; instead, it privileges some people’s safety and security over that of others in ways not required by *Heller* or the common law tradition on which it draws.

Perhaps believing that *Heller* mandates deference to gun displays, some law enforcement officers and prosecutors have failed to hold citizens accountable for wielding weapons to threaten or intimidate. This lack of enforcement has enabled the new and increasingly prevalent practice of armed groups engaging in displays of force as previously discussed in Part I. None of the overwhelmingly white and male gun carriers were arrested at any of the Michigan protests despite plausibly violating a variety of legal prohibitions and threatening public officials.<sup>277</sup> Under the state’s common law, threatening behavior—even without physical contact—can constitute assault.<sup>278</sup> Michigan’s code also criminalizes, as misdemeanors, “recklessly or heedlessly or wil[l]fully [handling] any firearm without due caution and circumspection for the rights, safety or property of others”<sup>279</sup> and “intentionally but without malice point[ing] or aim[ing] a firearm at or toward another person.”<sup>280</sup> And yet Michigan officials made no attempt to enforce these laws against those who invaded the state legislature. Many

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<sup>275</sup> Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901(b)(5) (2018).

<sup>276</sup> Blocher et al., *supra* note 93.

<sup>277</sup> Barrett, *supra* note 85 (observing that one Detroit man was later arrested for allegedly making online death threats against the Governor).

<sup>278</sup> *People v. Carlson*, 125 N.W. 361, 362 (Mich. 1910).

<sup>279</sup> MICH. COMP. LAWS § 752.863a (2021).

<sup>280</sup> *Id.* § 750.233.

criticizing the dramatic failure of the Capitol Police to contain pro-Trump rioters on January 6 have drawn direct connections to the events in Michigan, construing the lack of enforcement as demonstrating a failure of evenhandedness along the lines of race and political viewpoint.<sup>281</sup>

The scene in Michigan is part of a growing trend. The FBI sent a memo to law enforcement around the country indicating that massive, nationwide armed protests were planned to oppose Joe Biden's inauguration.<sup>282</sup> Throughout that same period, open-carry activists have tried to normalize gun displays in shared public spaces, from big-box stores to coffee shops—a movement that even some gun-rights advocates have opposed.<sup>283</sup> When open-carry advocates in Texas started taking their rifles into fast-food restaurants in 2014, the NRA issued a statement saying that such activity “not only defies common sense, it shows a lack of consideration and manners . . . . Let's not mince words, not only is it rare, it's downright *weird*.”<sup>284</sup> That statement led to backlash among gun-rights extremists, and the organization almost immediately retracted it.<sup>285</sup>

And just as the NRA backed down, so too do many law enforcement officers, in patterns sufficiently pronounced to create public meaning and to provoke public comment. Whether due to fear of, or perhaps agreement with, armed conservative protesters, police across the country have been slow to restrict—or apparently even to recognize—these displays of guns.<sup>286</sup> Armed vigilante groups have patrolled citizen protests, using weapons to intimidate if not terrorize those protesting police misconduct, with apparent permission and sometimes even the coordination of law enforcement.<sup>287</sup> At least in some

<sup>281</sup> See *supra* notes 89–100 and sources cited therein.

<sup>282</sup> See *supra* note 20 and sources cited therein.

<sup>283</sup> See, e.g., David French, *Christians, Gun Rights, and the American Social Compact*, DISPATCH (Sept. 6, 2020), <https://frenchpress.thedispatch.com/p/christians-gun-rights-and-the-american> [<https://perma.cc/KU2L-N8GA>] (demonstrating the opposition of gun rights advocates to normalizing gun displays).

<sup>284</sup> Eric Lach, *NRA Issues Amazing Statement Admitting Bringing AR-15s to Chipotle Is Dumb*, TALKING POINTS MEMO (June 2, 2014), <https://talkingpointsmemo.com/muckraker/nra-open-carry-texas-weird-statement> [<https://perma.cc/VK6P-NFCF>].

<sup>285</sup> Eric Lach, *NRA Apologizes for Calling Guns-in-Restaurants Crowd 'Weird,'* TALKING POINTS MEMO (June 3, 2014), <https://talkingpointsmemo.com/muckraker/nra-apologizes-open-carry-texas> [<https://perma.cc/JN59-RJBG>].

<sup>286</sup> See *supra* text at notes 89–95 (recounting public commentary).

<sup>287</sup> Mara Hvistendahl & Alleen Brown, *Armed Vigilantes Antagonizing Protestors Have Received a Warm Reception from Police*, INTERCEPT (June 19, 2020, 12:55 PM) <https://theintercept.com/2020/06/19/militia-vigilantes-police-brutality-protests/> [<https://perma.cc/W6GD-ZF4F>] (reporting on the spread of armed vigilantes in response to protests against police brutality and documenting how law enforcement has differently responded to those protesting police and to the armed vigilantes who are “policing” the protesters); Eric Litke, *Yes, Police Gave Kyle Rittenhouse Water and Thanked His Armed Group Before*

cases, this selective enforcement of gun laws has had the desired effect of driving people from the public sphere and chilling their ability to engage in free speech, assembly, and a host of other constitutional rights and interests.<sup>288</sup> We point out that, if not interrupted, the influence of evolving social practice on the interpretation of the law will only intensify. The expansion of open carry—often by persons dressed in militia gear and traveling in groups to new settings—will progressively alter the forms of conduct that law enforcers interpret as brandishing.

Contrast this lack of enforcement to the crushing public and private violence inflicted on many people attending Black Lives Matter protests throughout the spring and summer of 2020, often justified on the basis that a particular victim appeared “intimidating,” especially if armed. Race helps code a person of color as threatening and warranting measures of self-defense, especially if people mass in groups. In the midst of Black Lives Matter protests following the police-involved killing of a young Black man in Lafayette, Louisiana, U.S. Representative Clay Higgins (R-La.) posted a photo of armed Black men to his campaign page, writing, “If this shows up, we’ll consider the armed presence a real threat . . . . I wouldn’t even spill my

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*Kenosha Shooting*, POLITIFACT (Aug. 28, 2020), <https://www.politifact.com/factchecks/2020/aug/28/facebook-posts/yes-police-gave-kyle-rittenhouse-water-and-thanked/> [<https://perma.cc/X79L-NM72>] (noting “[t]he relationship between Rittenhouse and police has drawn particular scrutiny” and describing how “15 minutes before Rittenhouse allegedly shot and killed two people . . . [p]olice thanked [Rittenhouse’s] group for their presence and gave them water”); see also Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR JUST. (Aug. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law> [<https://perma.cc/72Y4-8K3M>] (citing FBI counterterrorism policy documents and other sources documenting “active links” between militia and white supremacist groups and law enforcement officers); Rachel E. Greenspan, *Oregon Police Told Armed White Men That They Didn’t Want to Look Like They Were ‘Playing Favorites’ When They Advised Them to Stay Inside After Curfew*, INSIDER (June 5, 2020, 3:00 PM) <https://www.insider.com/police-salem-oregon-protesters-stay-inside-curfew-proud-boys-white-2020-6> [<https://perma.cc/6KMB-XEH2>] (discussing an incident in Salem, Oregon in which “[a]rmed white men . . . were given a warning by a police officer to ‘discreetly remain inside’ before post-curfew arrests began during protests against police brutality”).

<sup>288</sup> See, e.g., Heath Druzin, *Bolstered by Lax Gun Laws, Armed Protesters Confront Anti-Racism Rallies*, KCUR (June 30, 2020, 1:24 PM), <https://www.kcur.org/2020-06-30/bolstered-by-lax-gun-laws-armed-protesters-confront-anti-racism-rallies> [<https://perma.cc/Y95F-XCJP>] (describing the prevalence of armed anti-racist protesters across the country); Holmes, *supra* note 93; Nicolle Okoren, *The Birth of a Militia: How an Armed Group Polices Black Lives Matter Protests*, GUARDIAN (July 27, 2020), <https://www.theguardian.com/us-news/2020/jul/27/utah-militia-armed-group-police-black-lives-matter-protests> [<https://perma.cc/9TCK-EFQQ>]; see also Miller, *supra* note 154 (arguing that safety is a sufficient but not necessary reason to regulate guns in “sensitive places”); Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1475 (2013) (noting guns as a possible kind of heckler’s veto).

beer. I'd drop any 10 of you where you stand."<sup>289</sup> At the same time as Representative Higgins (a former law enforcement officer and prominent gun-rights advocate) posted the message, heavily armed members of a right-wing militia group appeared at a peaceful Black Lives Matter protest in Lafayette. The group's "commander" announced, "[W]e're just not gonna let them go around burning flags and intimidating."<sup>290</sup>

Such comments are consistent with a general and well-established tendency to see African Americans as threatening.<sup>291</sup> Young Black men are seen as larger and more physically threatening than young white men,<sup>292</sup> and there is a direct, bidirectional link between Blackness and guns, such that police officers<sup>293</sup> and others<sup>294</sup> are more likely to connect the two. For many, armed and even violent responses to Black Lives Matter protesters are

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<sup>289</sup> *Facebook Removes Congressman's Post Over 'Incitement'*, ASSOCIATED PRESS (Sept. 2, 2020), <https://apnews.com/630a73be38d81e173fd66fd2fc2308d0> [<https://perma.cc/28GX-HPCS>]; Cristina Marcos, *Facebook Removes GOP Lawmaker's Post for Inciting Violence*, HILL (Sept. 2, 2020), <https://thehill.com/homenews/house/514814-facebook-removes-gop-lawmakers-post-for-inciting-violence> [<https://perma.cc/GNB9-FVMP>].

<sup>290</sup> Bryn Stole & Jerry DiColo, *Clay Higgins Says on Facebook that Armed Demonstrators 'Won't Walk Away' from Louisiana Protests*, ACADIANA ADVOCATE (Sept. 1, 2020), [https://www.theadvocate.com/acadiana/news/article\\_77138836-ecc4-11ea-a8d0-772b482469cb.html](https://www.theadvocate.com/acadiana/news/article_77138836-ecc4-11ea-a8d0-772b482469cb.html) [<https://perma.cc/4Y3U-4BPU>].

<sup>291</sup> Michael C. Gearhart, Kristen A. Berg, Courtney Jones & Sharon D. Johnson, *Fear of Crime, Racial Bias, and Gun Ownership*, 44 HEALTH & SOC. WORK 241, 244 (2019).

<sup>292</sup> See, e.g., H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCH. 590, 590 (1980) ("Cultural differences between subject groups were apparent in the greater tendency of the white children to read threat into ambiguously aggressive behaviors involving no physical contact and to assume that the perpetrators of such behaviors were stronger than the recipients."); John Paul Wilson & Kurt Hugenberg, *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. PERSONALITY & SOC. PSYCH. 59 (2017) (pointing to seven different studies reaching this conclusion); see also Cynthia Lee, *Race, Policing, and Lethal Force: Remediating Shooter Bias with Martial Arts Training*, 79 LAW & CONTEMP. PROBS. 145 (2016) (exploring the relationship between race and the decision to shoot).

<sup>293</sup> Lois James, *The Stability of Implicit Racial Bias in Police Officers*, 21 POLICE Q. 30, 41–42 (2018) ("[O]fficers tended to have moderate (35%) to strong (37%) bias associating Black Americans with weapons. Approximately 12% of officers had slight anti-Black bias and a further 12% had no bias. Finally, a combined 3% of the sample had anti-White bias (associating White Americans with weapons).").

<sup>294</sup> Dee Lisa Cothran, *Facial Affect and Race Influence Threat Perception*, 30 IMAGINATION, COGNITION & PERSONALITY 341, 348 (2010) (finding that those primed with a white face were more likely to mistake a gun for a tool, while those primed with a Black face were more likely to mistake a tool for a gun); see also B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCH. 181, 190 (2001) ("Results of this research strongly support the hypothesis that the race of faces paired with objects does influence the perceptual identification of weapons. . . . Harmless distracters were more likely to be classified as guns when primed by a Black face than when primed by a White face.").

reasonable measures of “self-defense,”<sup>295</sup> whereas others see the gun displays as the expression of these underlying associations.<sup>296</sup>

The emergence of this public debate is a welcome development. Here, as in other aspects of law enforcement, Americans are now beginning to focus on the social dimensions of the public safety interest. Americans may not agree on what it means to enforce guns laws evenhandedly with respect to race or ideology, and in ways that respect the rights of both the armed and the unarmed. But sustained debate over these fundamental questions of public safety is likely to transform the standards by which we assess the enforcement of gun laws and promote the kind of security that protects all citizens’ liberties.

### CONCLUSION

The government’s reasons for passing gun laws are rarely interrogated beyond the obvious and undoubtedly compelling interest in preventing direct physical harm. But guns threaten more—and government can protect more—than bodily integrity.<sup>297</sup> For centuries, gun laws have ensured citizens’ sense

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<sup>295</sup> See, e.g., Eric Mack, *Mark McCloskey to Newsmax TV: Media Race-Baiting Case of Self Defense*, NEWSMAX (Aug. 26, 2020), <https://www.newsmax.com/newsmax-tv/markmccloskey-selfdefense-race-mc/2020/08/26/id/984034/> [<https://perma.cc/XZS6-ZENN>] (“Mark McCloskey detailed to host Sean Spicer how the dangerous situation at their home was defused, despite the protesters brandishing weapons, too. He hailed it as an example of why the Second Amendment works for public safety in America.”); Tucker Carlson, *Ordinary Americans Stand Up as Politicians Continue to Cower to the Rage Mob*, FOX NEWS (June 30, 2020), <https://www.foxnews.com/opinion/tucker-carlson-ordinary-americans-politicians-cower-rage-mob> [<https://perma.cc/7J5F-4C8K>] (praising the McCloskeys’ use of guns against a “murderous” mob); Justin Jouvenal, *Suspects in Kenosha, Portland Shootings Have Self-Defense Claims in Common*, WASH. POST (Sep. 4, 2020), [https://www.washingtonpost.com/local/legal-issues/kyle-rittenhouse-kenosha-self-defense/2020/09/04/d1981726-ed1f-11ea-b4bc-3a2098fc73d4\\_story.html](https://www.washingtonpost.com/local/legal-issues/kyle-rittenhouse-kenosha-self-defense/2020/09/04/d1981726-ed1f-11ea-b4bc-3a2098fc73d4_story.html) [<https://perma.cc/WHC5-J7ZY>] (“President Trump and other supporters of Kenosha, Wis., shooting suspect Kyle Rittenhouse have rallied around the teen, arguing he, too, was defending himself when, police said, he shot and killed two protesters and injured a third during unrest there last week.”).

<sup>296</sup> See, e.g., Jamelle Bouie, *Kenosha Tells Us More About Where the Right Is Headed Than the R.N.C. Did*, N.Y. TIMES (Aug. 28, 2020), <https://www.nytimes.com/2020/08/28/opinion/sunday/kenosha-kyle-rittenhouse-trump.html> [<https://perma.cc/E5LL-D43N>] (condemning commentators who “elevate Rittenhouse as a symbol of self-defense” because he “travel[ed] to protests ready [to] use . . . lethal force against protesters” and characterizing the McCloskey brandishing as “threatening protesters with death”); Robert Mackey, *Trump Supporters Rush to Defend One of Their Own Who Killed Protesters in Kenosha*, INTERCEPT (Aug. 27, 2020), <https://theintercept.com/2020/08/27/tucker-carlson-defends-kenosha-shooter/> [<https://perma.cc/DU4K-3H9M>] (describing the “consensus explanation” among “pro-Trump” commentators that Rittenhouse, “the young man who had traveled to Kenosha from his home in neighboring Illinois to defend the city from residents enraged by the shooting of Jacob Blake, was merely acting in self-defense”); Eric Ruben, *Claiming Self-Defense Isn’t a Get-Out-of-Jail-Free Card*, BRENNAN CTR. (July 23, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/claiming-self-defense-isnt-get-out-jail-free-card> [<https://perma.cc/7T36-PGLL>] (discussing the McCloskey case as a “demonstration of how self-defense and the right to keep and bear arms are warped for political ends”).

<sup>297</sup> See Siegel & Blocher, *supra* note 2, at 11.

of safety, their trust in public institutions, and their ability to engage in constitutionally salient conduct like education, speech, assembly, and voting. Laws enforcing public safety protect both individual and collective constitutional interests. Given the commitments that define our constitutional democracy, government can regulate weapons to ensure that all persons have equal claims to security and to the exercise of liberties whether or not they are armed and however they may differ by race, sex, or viewpoint.

We have attempted to identify and describe the government's public safety interest, but breathing life into it will require the work of many others. Legislators can create records—including fact-finding, legislative history, and precatory language—making clear that proposed gun laws are designed not only to protect life, but also to ensure that Americans have the security to equally enjoy the full range of constitutional freedoms, whether or not they choose to arm.<sup>298</sup> Police and prosecutors with responsibility to enforce those laws need not wait, as in Michigan, for a trigger to be pulled. In appropriate situations, they can and should arrest those who wield guns recklessly or dangerously.<sup>299</sup> Lawyers and judges debating and evaluating the constitutionality of those laws can consider the government's interest not only in preventing physical injuries, but also in promoting the kind of security necessary for individuals, families, and communities to flourish.

Analyzed from this vantage point, claims about values, freedom, feelings, and flourishing—the demand for security to protect family and to exercise rights—appear on both sides of the Second Amendment debate. Justice Thomas has disparaged laws that Americans have enacted in an effort to protect their families and their freedoms from gun threats, suggesting that such regulations are not constitutional if their only purpose is to make Americans feel safer.<sup>300</sup> Gun-rights advocates in Michigan and elsewhere are equally ready to discount the feelings of those who support laws restricting guns.<sup>301</sup> The argument echoes a slogan that President Trump's supporters display on t-shirts and other merchandise: “Fuck your feelings.”<sup>302</sup> And yet,

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<sup>298</sup> Cf. Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 4 (2013) (“A person who believes her home to be safer without a gun is attempting to protect herself from a risk of future violence, just like a person who chooses to keep a handgun on her bedside table. If self-defense is the ‘core’ of the Second Amendment, why should only one of these decisions be constitutionally protected? Shouldn’t the interests giving rise to the affirmative right also protect a person’s freedom not to exercise it?”).

<sup>299</sup> Blocher et al., *supra* note 93, at 112.

<sup>300</sup> See *supra* text accompanying note 236.

<sup>301</sup> See *supra* notes 75–78, 101–104 and accompanying text.

<sup>302</sup> See *supra* note 77.

as with so many other issues that divide our polarized society, the emphasis is on discounting the feelings of others. Fuck *your* feelings, not all feelings.

After all, many gun owners and gun-rights advocates are *also* acting on feelings, seeking safety and security in guns.<sup>303</sup> A recent Ninth Circuit opinion striking down California’s prohibition on LCMs emphasized that “[m]any Californians may find solace in the security of a handgun equipped with an LCM.”<sup>304</sup> Gun manufacturers tout their products as providing, in the words of one Beretta advertisement, “Protection, Peace of Mind and Self Confidence.”<sup>305</sup> Others argue that the Framers believed gun ownership “foster[s] both personal and societal virtue.”<sup>306</sup> And a growing body of scholarship defends broad gun rights as especially necessary in response to “months of wild and unchecked violence in cities across the country,”<sup>307</sup> “a time of lawless violence,”<sup>308</sup> or what an NRA article promoting such

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<sup>303</sup> See Ruth Igielnik & Anna Brown, *Key Takeaways on Americans’ Views of Guns and Gun Ownership*, PEW RSCH. CTR. (Jun. 22, 2017), <https://www.pewresearch.org/fact-tank/2017/06/22/key-takeaways-on-americans-views-of-guns-and-gun-ownership/> [<https://perma.cc/82XK-P7DY>] (“While many gun owners say they have more than one reason for owning a firearm, 67% cite protection as a major reason.”); Kate Masters, *Fear of Other People Is Now the Primary Motivation for American Gun Ownership, a Landmark Survey Finds*, TRACE (Sep. 19, 2016), <https://www.thetrace.org/2016/09/harvard-gun-ownership-study-self-defense/> [<https://perma.cc/3WAV-CGJ2>] (observing that 63% of gun owners cited protection against people as a primary reason for owning a firearm); American Conservative Union, *CPAC 2015 - Wayne LaPierre, NRA*, YOUTUBE (Feb. 27, 2015), <https://www.youtube.com/watch?v=wFpkD4oqCvI> [<https://perma.cc/8D7H-B7TJ>] (“You know what can protect you when no one else can, when no one else will? The ironclad, absolute safeguard of the Second Amendment right to keep and bear arms.”); Clayton E. Cramer & David B. Kopel, “*Shall Issue*”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 722 (1995) (“[I]f people feel safer because they carry a gun and in turn lead happier lives because they feel safer and more secure, then the carrying of guns makes a direct and nontrivial contribution to their overall quality of life.”).

<sup>304</sup> *Duncan v. Becerra*, 970 F.3d 1133, 1141 (9th Cir. 2020).

<sup>305</sup> David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMP. L. REV. 1, 4 (1998).

<sup>306</sup> Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 468 n.32 (1995) (attributing this view to Thomas Jefferson, who wrote to a nephew that “[a]s to the species of exercise, I advise the gun. While this gives a moderate exercise to the body, it gives boldness, enterprise, and independence to the mind”).

<sup>307</sup> Joyce Lee Malcolm, *Self Defense, an Unalienable Right in a Time of Peril: Protected and Preserved by the Second Amendment* 1 (Liberty & L. Ctr. Research Paper No. 20-02, 2020), <https://papers.ssrn.com/a=3703895> [<https://perma.cc/T3WT-AA6Z>]; *id.* at 17 (“The Second Amendment right to armed self-defense is more necessary than ever as Americans are left to protect themselves.”). For similar arguments, *supra* notes 116–117 and sources cited therein; Josh Blackman, *The “Essential” Second Amendment*, 26 TEX. REV. L. & POL. (forthcoming 2021) (manuscript at 26–27), <https://papers.ssrn.com/a=3827441> [<https://perma.cc/XPY9-YYD5>] (arguing that gun stores are “essential” businesses in times of civil unrest); John O. McGinnis, *Gun Rights Delayed Can Be Gun Rights Denied*, 2020 U. ILL. L. REV. ONLINE 302, 302 (“The looting and violence that occurred in cities across the nation provide new insights into the relation of the First and Second Amendments and raise new questions about the scope of Second Amendment rights.”).

<sup>308</sup> Lund, *supra* note 116, at 81.

scholarship referred to as “uncertain times.”<sup>309</sup> Such arguments read the summer’s racial-justice protests through the law-and-order lens of *Heller*—coding them as crime, rather than speech or assembly. Doing so effectively conflates those *public* scenes with *Heller*’s paradigmatic scene: the use of a handgun against a home invader.

But the Second Amendment—the judicially enforceable right to keep and bear arms—does not resolve this debate in favor of gun owners. Laws protecting public safety remain, in the first instance, a prerogative of our democratic government, acting with the warrant of an ancient common law tradition that *Heller* recognized.<sup>310</sup> Even as courts expand the right recognized in *Heller*, judges must still address the government’s interest in enacting laws to protect public safety that burden the exercise of the right—especially as that right expands into shared spaces where the public safety interest is implicated in ways that *Heller*’s home-based analysis does not adequately address. That is the logic of constitutional adjudication in a constitutional democracy.

Nor does the existing empirical evidence clearly resolve the question of whether guns “actually” make people more or less safe.<sup>311</sup> While the effects of some gun laws can be determined through strong empirical evidence,<sup>312</sup> further research is needed to assess the efficacy of others. Given the conflicting evidentiary record, courts evaluating the constitutionality of gun laws owe “substantial deference to the predictive judgments of [the legislature].”<sup>313</sup> As importantly, ongoing empirical contestation shows that there is no clear tradeoff between physical safety and public safety as we have described it.<sup>314</sup>

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<sup>309</sup> See *Law Professors Make Case for Second Amendment Rights in Uncertain Times*, NRA-ILA (Oct. 19, 2020) <https://www.nra.org/articles/20201019/law-professors-make-case-for-second-amendment-rights-in-uncertain-times> [<https://perma.cc/2TAH-Y7ZA>].

<sup>310</sup> See *supra* Section II.B.

<sup>311</sup> *What Science Tells Us About the Effects of Gun Policies*, RAND CORP. (Apr. 22, 2020), <https://www.rand.org/research/gun-policy/key-findings/what-science-tells-us-about-the-effects-of-gun-policies.html> [<https://perma.cc/WE7P-ZV9W>] (broadly surveying existing research and concluding that “[w]ith a few exceptions, there is a surprisingly limited base of rigorous scientific evidence concerning the effects of many commonly discussed gun policies. This does not mean that these policies are ineffective; they might well be quite effective”).

<sup>312</sup> *Id.* (noting strong evidence that child-access-prevention laws save lives and that stand-your-ground laws raise homicide rates).

<sup>313</sup> *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997); see also *Holder v. Humanitarian L. Project*, 561 U.S. 1, 33 (2010) (“That evaluation of the facts by the Executive, like Congress’s assessment, is entitled to deference.”).

<sup>314</sup> Compare JOHN LOTT, *MORE GUNS LESS CRIME* (1998) (arguing that violent crime rates fall when states issue more concealed-carry permits for private citizens), with Ian Ayres & John J. Donohue III, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 STAN. L. REV. 1193 (2003) (arguing to the

All too often, gun owners view their claims to security and freedom like constitutional trump cards. They are not. Claims to security and freedom of this constitutional magnitude support the case for gun regulation, as well as for gun rights. The increasing role of weapons in our polarized politics makes certain things clear. If we do not recognize the ancient role that weapons laws play in securing the peace and public order, we will allow the use of guns to define our constitutional democracy, rather than the other way around.

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contrary that, while some seemingly plausible approaches might support Lott's hypothesis, more sophisticated approaches actually undermine it).