

PROTESTS, INSURRECTION, AND THE SECOND AMENDMENT

Guns and Democracy

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Introduction

The gun debate overwhelmingly focuses on whether and how gun regulation can prevent death and physical injury. But armed protests in legislatures and in the streets show that guns can do more than inflict physical injury. Gun regulation can protect the public sphere on which a constitutional democracy depends.

Recognizing that government regulates guns to prevent social as well as physical harms is a critical first step in building a constitutional democracy in which 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. We reason from this principle in our forthcoming article, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*,¹ on which this essay draws.

Reframing the Gun Debate

Too often, the gun debate is presented as if there are constitutional rights on one side (that of gun owners) and only public health and policy interests on the other. But as the recent assaults on sites of democracy make clear, there are constitutional arguments on all sides. As Justice John Paul Stevens recognized, “in evaluating an asserted right to be free from particular gun-control regulations, liberty is on both sides of the equation. . . . *Your* interest in keeping and bearing a certain firearm may diminish *my* interest in being and feeling safe from armed violence.”² While some gun owners seek reassurance in owning or carrying guns, expanding gun rights without attention to the rights of others risks putting the interests of the armed above those of the unarmed and interfering with others’ freedom to speak, assemble, worship, and vote without fear. Protecting Americans’ equal freedom to engage in these social practices is a goal of gun regulation no less than the saving of individual lives.

Unfortunately, the full stakes of gun regulation are obscured by conventional ways of reasoning about gun rights. The modern Second Amendment right, as interpreted by the Supreme Court in *District of Columbia v. Heller* (2008),³ assumes a paradigmatic scene of gun use. In *Heller*, the Court held that the Second Amendment “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”⁴ Following what was then the popular understanding of the Second Amendment, the Court defined the Amendment’s “core” as man’s interest in defending himself and his family, which, the Court noted, was “most acute” in the home.⁵ The Court struck down a ban on handgun possession, reasoning “that the American people have considered the handgun to be the quintessential self-defense weapon,” explaining that a handgun “is easier to use for those without the upper-body strength to lift and aim a long gun” and “can be pointed at a burglar with one hand while the other hand dials the police.”⁶ The paradigm scene for Justice Antonin Scalia’s “originalist” account of the Second Amendment was a “law-abiding citizen” defending his household against a criminal invader.⁷

Heller’s distinctive focus poses a threat because the Court — changed by Trump appointments — is poised to expand constitutional protections for gun rights *outside* the home, without taking into account how the practice of public carry has changed in the last decade. “Open carry” advocates have sought, self-consciously and with some success, to normalize the presence of firearms in public spaces, from Starbucks to Walmart.⁸ (The National Rifle Association initially called this movement “downright weird,”⁹ but quickly backed down.¹⁰) Heavily armed right-wing groups, many explicitly invoking gun rights rhetoric, have dominated public spaces in scenes ranging from the Bundy ranch protests in 2014 to Charlottesville in 2017 and, more recently, a

growing number of “gun sanctuary” rallies, Covid-19 lockdown demonstrations, and Black Lives Matter counterprotests. Law enforcement officials have broadly deferred to the firearms displays of these massed crowds dressed in paramilitary gear, leading observers to highlight the unequal enforcement of gun laws along racial and political lines.¹¹

These scenes raise different questions than the scene of home defense on which *Heller* focused. In this new class of cases, law-abiding Americans are not wielding guns against criminals invading their homes. Though armed protesters may speak *Heller*’s language of home defense, armed protesters invading Charlottesville or the Michigan legislature, massing in gun sanctuary demonstrations, or “patrolling” Black Lives Matter protests are bringing their guns to public spaces inhabited by others *with whom they disagree*, often with the specific intention of claiming and dominating those spaces. Some subscribe to the “insurrectionist theory” of the Second Amendment, casting themselves as defending the republic against its enemies.¹² But many simply read public life — including disagreement in democratic politics — through *Heller*’s lens: threats, however an individual identifies them, authorize self-defense, and that in turn means guns.

Public health arguments for gun control do not fully capture all the harms these incidents inflict. Following the same script as the armed protesters who forced Michigan’s legislature to temporarily shut down in the spring of 2020,¹³ Stop the Steal protesters invaded the U.S. Capitol in January of 2021, and the nation witnessed its leaders crouched under benches to avoid attack, unable to count the electoral vote. These threats and assaults — and the failure to evenhandedly police them — transform the public sphere. The escalating threat of violence under which we are living grows out of and exacerbates political mistrust and polarization.¹⁴ Weapons caught in this cycle no longer threaten individual lives only, if they ever did. Gun regulation becomes a defense of the body politic.

As gun rights advocates expand practices of gun use and urge the Supreme Court to extend *Heller*’s constitutional protections to public carry outside the home, advocates of gun regulation too often focus exclusively on physical injury. There are compelling reasons to be horrified by the mass shootings, intimate partner violence, and daily homicides that account for roughly 40,000 deaths and 100,000 injuries in the United States every year.¹⁵ But we need an account of public safety that encompasses those harms and more.

What Is Public Safety?

What we need is an account of public safety that is concerned with preventing the social as well as physical injuries that guns can inflict. In a constitutional democracy, government has authority to regulate weapons not only to save lives but also to prevent gun use that threatens and intimidates without inflicting physical injury — not only when armed masses flood the legislature (Washington, DC, or Michigan) or when individuals pull guns on citizens in a protest march (St. Louis), but also when people use guns to assert coercive control over intimate partners or to threaten those who are learning, working, or praying (everywhere). We regulate guns not only to protect life but to protect Americans’ equal freedoms to speak, assemble, worship, and vote without fear.

Is there a constitutional basis for this expanded account of public safety? Gun rights supporters regularly claim that constitutional history elevates the rights of armed citizens over all others. It does not. As we show in *When Guns Threaten the Public Sphere*, for centuries, the Anglo-American common law has regulated weapons not only to keep members of the polity alive but to protect their liberties against weapons threats and to preserve public peace and order. William Blackstone 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.”¹⁶ The “peace” that the law protected included more than physical safety. Blackstone explained that “terrifying the good people of the land” — not just attacking them — was “a crime against the public peace.”

That regulatory tradition has long shaped state and federal law. Critically, our article demonstrates that it also grounds the understanding of the Second Amendment set forth in *Heller*, where Justice Scalia specifically invoked it as a basis for reasoning about the regulation of guns. In explaining the government’s power to regulate arms, Justice Scalia emphasized that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions” like those “forbidding the carrying of firearms in sensitive places such as schools and government buildings.”¹⁷ Invoking Blackstone and other authorities, *Heller* recognized that weapons regulations can prevent terror and preserve the peace.

Recovering that tradition and emphasizing the constitutional stakes of securing public safety can change the way that gun laws are enacted, litigated, and enforced. Legislatures seeking to fully enforce the public interest in regulation can draft laws specifically tailored to preventing intimidation: prohibiting guns at polling places,¹⁸ for example, or limiting open carry, or tightening restrictions on armed domestic abusers, who use guns inside and outside the home to threaten, coerce, and terrorize their victims even more often than to kill them.¹⁹

Advocates for guns have seized on the events of the past year — especially racial justice protests — as occasion to argue for an expanded right to keep and bear arms.²⁰ Some scholars argue that the state has no monopoly on tools of violence, “especially in times of emergency and civil unrest;”²¹ they contend that armed self-defense is critical “in a time of lawless violence”²² and that “in the absence of a viable, effective police presence, [it is] in practice the primary mechanism citizens have to protect themselves, their businesses, their employees, and their property from violence”²³ or from “tyrannous factions.”²⁴ Such arguments effectively read the racial justice protests through *Heller*’s law and order lens, coding them as crime rather than speech or assembly. Doing so obscures the harms to public life that public carry can inflict, and it privileges the claims of citizens who rely on guns — rather than gun laws — to respond to fears of violence. Reading all gun use through the lens of self-defense defers reckoning with the increasing role that guns are playing in our politics, and it obscures how guns, and the enforcement of gun laws, reflect and enforce inequalities of many kinds.

Open carry protests in the last year have made starkly evident that law enforcement responds in different ways depending on the race and viewpoint of the protesters.²⁵ Deference to gun displays is not mandated by the right to keep and bear arms, as many suppose, but results from a systematic privileging of some people’s safety and security over that of others in ways not mandated by *Heller* or the common law tradition on which it draws. Calls to increase law enforcement undoubtedly raise concerns about exacerbating inequalities and the carceral state. We can start by demanding evenhanded enforcement of the law. Failure to enforce the law against those who dominate the public sphere by force of arms further inscribes another kind of inequality — one in which armed citizens, who are overwhelmingly white and male, exclude others from full participation in democratic life.

It does not have to be this way. Guided by core principles of our constitutional democracy and traditions informing the Second Amendment itself, government can enact and enforce gun laws that secure public and private spaces for equal enjoyment by all citizens. 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. This debate is not limited to the federal courts. The debate over the kind of public safety that will protect all — not some — must also unfold in constitutional politics where it can guide lawmaking and law enforcement.

Politics at Gunpoint

The relationship between guns and democratic lawmaking is reciprocal in underappreciated ways. Public debate focuses on how lawmaking can shape gun use. But, as we show, there are many ways in which gun use has come to shape lawmaking. Increasingly, citizens (and sometimes politicians) deploy guns in ways that change how stakeholders and lawmakers engage with each other in politics. Understanding that influence is an essential part of accounting for the role of guns in democratic life.

Supporters of gun rights have long argued that the right to keep and bear arms is in some sense “pre-political,” by which they mean that it is a natural right with which men are endowed prior to politics, and therefore it is a right that is outside the reach of democratic control. In *Heller*, Justice Scalia emphasized his conclusion that the Second Amendment “codified a *pre-existing* right,” quoting *United States v. Cruikshank* (1876) for the proposition that “[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The [S]econd [A]mendment declares that it shall not be infringed.”²⁶ This frame places guns beyond not only democratic lawmaking but beyond the reach of judges interpreting the Constitution as well.

Today, one hears similar strains in the arguments of those who invoke insurrectionist theories to suggest that the right to keep and bear arms (broadly understood, of course) is legitimately deployed against political developments they regard as threatening or tyrannical. As we note above, such arguments still invoke the language of self-defense — hence the emphasis is on “violence” and threat — but the paradigm has shifted. The right to keep and bear arms becomes self-defense *against politics*.

Those who would defend bodies — and the body politic — against gun threats must grapple with this frame. This means recognizing that guns are “pre-political” in a different sense — not because they are immune from democratic lawmaking, but because they shape and distort it. As many of the contributions to this symposium demonstrate, gun use can transform the public sphere not through public reason but through shows of force. And it is not merely gun regulation that guns target, but other forms of lawmaking. The Michigan and Washington, DC, riots, after all, were not protesting attempts at gun regulation, but Covid-19 lockdown measures and the ratification of the presidential election results.

While Justice Scalia took guidance from *Cruikshank* (a case, it should be noted, that involved mass murder committed by an armed white mob),²⁷ another Supreme Court decision from that era presents a different paradigm. In *Presser v. Illinois* (1886),²⁸ the Supreme Court upheld the government’s power to regulate a citizen militia group seeking to parade with arms: “The right voluntarily to associate together as a military company or organization or to drill or parade with arms, without, and independent of, an act of [C]ongress or law of the [S]tate authorizing the same, is not an attribute of national citizenship. . . . Under our political system [such acts] are subject to the regulation and control of the [S]tate and [F]ederal governments, acting in due regard to their respective prerogatives and powers.”²⁹ Those prerogatives and powers, we have shown, include the right to preserve public peace and order — not just to save lives.

Building on our prior work, our observations here all come back to a single theme: a constitutional democracy must define the legitimate use of guns rather than allowing gun uses to define the legitimate boundaries of constitutional democracy. Doing so means recognizing the traditional and legitimate role of weapons laws in protecting not just individual bodies from physical harm but the body politic from threats to public order.

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Endnotes

¹ See generally Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 116 NW. U. L. REV. (forthcoming 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3764258. We further elaborate this frame in Joseph Blocher & Reva B. Siegel, *Why Regulate Guns?* 48 J.L. MED. & ETHICS 11 (2020); and Joseph Blocher & Reva Siegel, *Guns Are a Threat to the Body Politic*, ATLANTIC (Mar. 8, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/guns-are-threat-body-politic/618158>, from which this article draws.

² McDonald v. City of Chicago, 561 U.S. 742, 891 (2010) (Stevens, J., dissenting) (emphasis in original).

³ Dist. of Columbia v. Heller, 554 U.S. 570 (2008).

⁴ *Id.* at 635.

⁵ *Id.* at 628.

⁶ *Id.* at 629.

⁷ Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008) (showing through extensive historical analysis how the self-defense understanding of the Second Amendment in *Heller* grew out of 20th-century law and order politics and demonstrating that, despite its claim to rest on original meaning, the Court's interpretation of the Second Amendment in *Heller* "is responsive to contemporary constitutional deliberation — forged in the very culture wars Justice Scalia insists should play no part in constitutional interpretation").

⁸ Michele L. Norris, *We Cannot Allow the Normalization of Firearms at Protests to Continue*, WASH. POST (May 6, 2020), https://www.washingtonpost.com/opinions/firearms-at-protests-have-become-normalized-that-isnt-okay/2020/05/06/19b9354e-8fc9-11ea-a0bc-4e9ad4866d21_story.html ("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.").

⁹ 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>.

¹⁰ 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>.

¹¹ Norris, *supra* note 8 (arguing that "Black or brown people . . . would not be tolerated" as armed white people are).

¹² Olivia Li, *The Gun Rights Rhetoric That Helped Seed the Insurrectionist Mindset*, TRACE (Jan. 9, 2021), <https://www.thetrace.org/2021/01/gun-rights-rhetoric-insurrectionist-mindset-capitol-trump>.

¹³ Rebecca Boone, *Armed Statehouse Protests Set Tone for US Capitol Insurgents*, ASSOCIATED PRESS (Jan. 7, 2021), <https://apnews.com/article/election-2020-coronavirus-pandemic-oregon-elections-idaho-688fc8894f44992487bb6ee45e9abd77> (calling the state capitol protests in Idaho, Michigan, and Oregon "dress rehearsals" for DC).

¹⁴ Daniel A. Cox, *After the Ballots Are Counted: Conspiracies, Political Violence, and American Exceptionalism*, SURVEY CTR. ON AM. LIFE (Feb. 11, 2021), <https://www.americansurveycenter.org/research/after-the-ballots-are-counted-conspiracies-political-violence-and-american-exceptionalism>.

¹⁵ Data taken from Centers for Disease Control and Prevention, Web-based Injury Statistics Query and Reporting System (WISQARS). NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, *Fatal Injury and Violence Data*, <https://www.cdc.gov/injury/wisqars/fatal.html> (last visited May 8, 2021).

¹⁶ 4 WILLIAM BLACKSTONE, COMMENTARIES *149. Notably, this discussion comes in Book 4, Chapter 11, of the Commentaries, which is titled "Of Offenses Against the Public Peace." See also State v. Huntly, 25 N.C. 418, 420 (1843) (statute of Northampton does not create the offense, but merely recognizes a common law crime).

¹⁷ *Heller*, 554 U.S. at 626.

¹⁸ Joseph Blocher & Alan Chen, *Why Do States Ban "Electioneering" but Allow Guns at Polling Places?*, SLATE (Jan. 5, 2021), <https://slate.com/news-and-politics/2021/01/guns-polling-places-georgia.html>.

¹⁹ Susan B. Sorenson, *Guns in Intimate Partner Violence: Comparing Incidents by Type of Weapon*, 26 J. WOMEN'S HEALTH 249, 249 (2017).

²⁰ *Law Professors Make Case for Second Amendment Rights in Uncertain Times*, NRA-INST. LEGIS. ACTION (Oct. 19, 2020), <https://www.nraaila.org/articles/20201019/law-professors-make-case-for-second-amendment-rights-in-uncertain-times>.

²¹ Robert Leider, *The State's Monopoly of Force and the Right to Bear Arms*, 116 NW. U. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3711661.

²² Nelson Lund, *The Future of the Second Amendment in a Time of Lawless Violence*, 116 NW. U. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3701185.

²³ David E. Bernstein, *The Right to Armed Self-Defense in the Light of Law Enforcement Abdication* 40 (George Mason Legal Studies Rsch. Paper No. LS 20-19, Oct. 2020).

²⁴ Patrick M. Garry, *The Second Amendment as a Guard Against Government-Sanctioned Tyrannous Factions* 1, 9 (Liberty & Law Center Rsch. Paper No. 20-06, Oct. 2020) ("The riots of 2020 reveal an important role of the Second Amendment as a constitutional protection against government-encouraged violent factions.").

²⁵ Lois Beckett, *US Police Three Times as Likely to Use Force Against Leftwing Protesters, Data Finds*, GUARDIAN (Jan. 14, 2021), <https://www.theguardian.com/us-news/2021/jan/13/us-police-use-of-force-protests-black-lives-matter-far-right>.

²⁶ *Heller*, 554 U.S. at 592 (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1876) (emphasis in original)).

²⁷ See generally CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (2008).

²⁸ *Presser v. Illinois*, 116 U.S. 252 (1886).

²⁹ *Id.* at 267.