

# Why Regulate Guns?

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In Second Amendment cases, courts regularly ask how effectively gun laws serve public safety — yet typically discuss public safety narrowly, without considering the many dimensions of that interest gun laws serve. Gun laws protect bodies from bullets — and Americans’ freedom and confidence to participate in every domain of our shared life, whether to attend school, to shop, to listen to a concert, to gather for prayer, or to assemble in peaceable debate. It is time to take a full accounting of the reasons gun laws are enacted, so that courts review those laws with attention to the many constitutional values Americans vindicate when they regulate guns. Constitutional precedent, much of it authored by sitting conservative justices, directs courts to protect constitutional rights in ways that respect the prerogatives of democratic self-government. Lawyers, health and public health officials, legislators, and citizen advocates can help, by creating a richer record of the government’s reasons for enacting laws that regulate guns.

Observing the wide range of activities gun laws protect is urgent at a time when federal judges are asserting a more active oversight role and the Supreme Court’s new conservative majority seems poised to expand the right to keep and bear arms. In 2008’s *District of Columbia v. Heller*, the Court first recognized an individual right to keep arms for self-defense in the home, but said nothing explicit about whether that right extends to public places.<sup>1</sup> In 2020, the Court considered but ultimately dismissed another Second Amendment case, *New York State Rifle & Pistol Associ-*

*ation v. City of New York (NYSRPA)*, which concerned the transport of guns. And gun rights advocates are pushing hard for recognition of a right to public carry — that is, to bear a gun outside one’s home. Whenever the Court hears another Second Amendment case, it will almost certainly consider the constitutionality of gun regulations designed to keep people safe in public, either through direct restrictions on public carry or through rules regarding the manufacture, sale, transport, possession, and use of weapons more generally.

This creates a risk: that the Court could begin to extend constitutional protection to the use of guns outside the home without taking account of the full range of reasons why citizens look to their government to regulate guns — as well as the discretion and flexibility government needs to respond to local circumstances and emergency conditions. Whatever framework for reviewing guns laws the Court develops, that framework needs to recognize the many dimensions public life that gun laws protect. But the debate, though robust in so many other ways, has been strangely silent on just this point.

Judges and legislators often recite the government’s interest in protecting “public safety” without full consideration of what is encompassed in that concept — freedom from intimidation, for example, not just physical pain. “Public safety” is a social good: it includes the public’s interest in physical safety as a good in itself, *and* as a foundation for community and for the exercise of many of our most cherished constitutional liberties. As we show, gun laws protect the physical safety of citizens to free them to participate, without intimidation, in a wide variety of domains and activities (family, education, political protest, prayer, commerce, travel, voting). Gun laws thus serve many constitutional values, and governments enact them

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under complex political and practical conditions. If courts do not properly account for this complex balance of considerations, judges could call into question the constitutionality of mainstream laws like those restricting high capacity magazines<sup>2</sup> or requiring permits for carrying loaded weapons in public places like Walmart<sup>3</sup> — some of the very regulations that *Heller* itself describes as “presumptively constitutional,”<sup>4</sup> but which are subject to growing litigation pressure.

In short, gun laws are designed to do much more than save lives, and courts evaluating their constitutionality should recognize this. If Second Amendment doctrine instead limits the government’s interest in regulation to protecting citizens’ physical safety

sons government regulates guns that reach beyond securing the simple physical safety of its citizenry. One powerful illustration in that regard is the remarkable amicus brief filed by the March for Our Lives (MFOL) Action Fund in *NYSRPA*.<sup>8</sup> The brief “presents 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 paints 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.”

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only, courts are likely to ask the wrong questions and demand the wrong kinds of evidence. Far from relegating the Second Amendment to a “second class right,”<sup>5</sup> such a narrow account of state interests would put the government at a substantial disadvantage it does not face in other areas of constitutional law. The Supreme Court has “long recognized that a State’s interests in the health and well-being of its residents extend beyond mere physical interests.”<sup>6</sup> As with other forms of constitutionally protected conduct — speech, for example — the reasons for regulating guns include, but are not limited to, securing the physical safety of citizens.

Courts need not defer to every reason a legislature proffers. Instead, case law drawn from outside the Second Amendment context — and written by some of the Court’s conservative members — provides guidance about the kind of deference to legislative judgment that is warranted here. Given that federal judges seem increasingly inclined to exert close judicial oversight in Second Amendment cases,<sup>7</sup> these questions will be before courts, and it so is now critical that legislators and other interested parties begin to record — throughout the legislative process — the many reasons they have for enacting gun laws.

### **Why We Look to Government to Regulate Guns**

We start our discussion with an appeal to connect law to our lived worlds — and consider some of the rea-

The MFOL brief recounts the stories of young Americans whose lives have been convulsed by gun violence and who turned to the political process in an effort to manage the trauma. They seek to persuade others of the importance of enacting gun laws that would protect their families, friends and communities from similar violence in the future, and that would rebuild confidence in public institutions in their communities. Their message is not only about students and schools. It is that Americans living in fear of gun violence can turn to their government to enact gun laws, not simply to keep people from being shot, but also to protect people from being terrorized and intimidated — so that they can participate in freedoms many Americans take for granted, to walk on the streets and gather in public spaces where they can exercise constitutionally protected interests including speech, religion, and peaceable assembly.

Schools illustrate the point, and the stakes. Guns in schools do much more than threaten individual students’ physical safety. One recent headline reported “356 victims” of school shooting over the past ten years — counting only those killed or injured in 180 incidents during that period.<sup>9</sup> But even if one focuses only on students present in the schools where shootings occurred, the true number of students victimized by guns is many hundreds of times higher. Consider the children who hid, or fled, or were marched out of school with their hands in the air, or who lost friends,

or watched their friends die, or wake up with nightmares. Anyone present in a school where a shooting takes place runs a risk of suffering lifelong trauma. By one count, approaching a quarter of a million school children have experienced gun-related school violence since Columbine.<sup>10</sup> For many, guns transform schools and surrounding neighborhoods into dangerous spaces. *Most* teenagers in the United States now report being “very” or “somewhat” worried about the possibility of a shooting taking place at their school,<sup>11</sup> and the preparations for such a possibility (including unannounced active shooter drills with gunshots and fake blood) can themselves be traumatizing.<sup>12</sup> These are harms that government has a legitimate interest in preventing, above and beyond the shootings themselves.

As the MFOL brief illustrates, gun laws protect and preserve a wide range of institutions and activities, from Walmarts to synagogues to concerts to state legislatures to public parks. In all these places, the threat of gun violence can dramatically restrict exercise of a wide range of freedoms, many of them constitutionally guaranteed liberties. Gun laws enable the public to participate in these institutions, activities, and spaces in security and confidence and freedom from fear.

Physical safety captures a core purpose of gun regulation, but it does not do justice to the many reasons Americans enact gun safety laws. Americans who enter politics to enact gun laws seek the freedom to act without fear, in order to exercise constitutionally protected freedoms of many kinds. When government legislates in response, it is doing more than preventing particular deaths — it is protecting the citizenry’s liberty to exercise a wide range of constitutional freedoms, including speech, peaceable assembly, travel, and others. Such lawmaking is an exercise in responsive local democracy that simultaneously affirms the lives and voices of a new generation of citizens, and the long-standing role of states as laboratories of democracy, as the MFOL brief puts it, “to devise solutions to social problems that suit local needs and values.” Courts must protect Second Amendment rights in ways that respect the many weighty constitutional values at stake — recognizing not only the many freedoms that gun safety laws vindicate but also, given democracy and federalism, the prerogatives of other branches of government to promote those ends.

### **What the Architecture of Governmental Interests in Other Areas Can Teach**

In a constitutional democracy, government inevitably legislates in ways that can burden the exercise of constitutionally protected rights; the Supreme Court

has accordingly adopted frameworks of review that coordinate and balance considerations of individual liberties with the values of democratic self-governance and of federalism.<sup>13</sup> Cases outside the Second Amendment context, many written by the Court’s conservative members, provide some guidance about how the Second Amendment’s doctrinal framework can best coordinate these same considerations.

The Court has recognized that, even when the government is burdening the exercise of First Amendment rights, the government has an interest in legislating to promote social values and interests that go beyond remedying or preventing particular instances of wrongful conduct. In *Roberts v. Jaycees*, for example, the Court upheld a law prohibiting discrimination in public accommodations against a freedom of association challenge, noting that the law was designed to protect citizens “from a number of serious social and personal harms,” that discrimination in public accommodations “deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life,” and that the state’s interest is not limited to “assuring equal access limited to the provision of purely tangible goods and services.”<sup>14</sup> The *Jaycees* case is important because it recognizes that government can legislate in ways that burden freedom of association rights in order to promote public values including dignity and equal opportunity for individuals and communities as well as to fairly distribute access to goods and services.

The discussion of state interests in the *Jaycees* case suggests, first, that states enacting gun laws can vindicate societal as well as individual interests. Beyond that, *Jaycees* shows us that government’s interests in legislating reach far beyond the critical task of protecting citizens’ bare interest in survival or freedom from physical harm. Just as critically, government exists to support and enable public participation in community life, and to be able to serve that purpose, the government must cultivate the confidence of citizens in the responsiveness, effectiveness, integrity and safety of its institutions.

Consider a more recent state interest analysis — Chief Justice Roberts’ majority opinion in *Williams-Yulee v. Florida Bar*, which rejected a First Amendment challenge to a Florida law prohibiting judicial candidates from soliciting campaign funds.<sup>15</sup> The Chief Justice’s majority opinion upheld the challenge to a law burdening candidates’ speech rights despite applying the most restrictive level of review, “strict scrutiny.” In doing so, the Chief Justice found that the Florida law was narrowly tailored. Not only did the law further the prevention of *quid pro quo* corruption, but it advanced the “State’s compelling interest

in preserving public confidence in the integrity of the judiciary.”<sup>16</sup> Can public confidence in schools be any less compelling?

In confirming that certain threatening speech (termed “true threats”) can be proscribed without violating the First Amendment, the Court has repeatedly emphasized that a prohibition on such threats does more than “protect[] people from the possibility that the threatened violence will occur,” but also “protect[s] individuals from the fear of violence” and “from the disruption that fear engenders.”<sup>17</sup> Is preventing fear and disruption a valid government interest only when fear and disruption are caused by speech, but not guns?

Recognizing the wider range of state interests that gun legislation may serve has important implications for the law’s constitutionality going forward. When courts enforcing the Second Amendment employ heightened scrutiny and demand a close fit between a challenged law and the narrow conception of the state’s interest in regulating guns, courts may strike down legislation that the government has a wholly legitimate interest in enacting.

If judges understand the government’s public safety interest in enacting gun laws narrowly — as only consisting in an interest in deterring wrongful shootings that can be measured by deaths and injuries that a law can be shown to prevent — then judges might make the constitutionality of a gun regulation depend on a concrete empirical showing. And while there is plenty of good empirical evidence of this kind,<sup>18</sup> requiring a means-ends showing could impose a heavy and sometimes insurmountable burden on the government. Evidentiary burdens of this kind may prove impossible to meet in cases involving new laws designed to address novel problems or emerging technologies, where evidence (empirical comparisons of jurisdictions with and without such laws, for example) might not be available, especially given the political and even legal obstacles to funding research on gun violence<sup>19</sup> or even collecting information about it.<sup>20</sup> That, in turn, could lead a skeptical judge to strike down a law, even while recognizing a compelling state interest in protecting public safety.

New kinds of gun regulation will not come with a deep empirical record one way or the other. But that fact should not prevent governments from trying to address a problem in new ways. States and local governments have a constitutionally appropriate role to play as laboratories of experimentation attempting to fashion locally appropriate solutions to complex problems of gun violence. *Heller* does not limit those laboratories to repeating only those experiments they have

tried before, nor should the government have to face the impossible burden of proving that a new law will certainly save lives.

Recognizing that gun regulations protect not only physical bodies, but the freedom and confidence to participate in community life, means that the constitutionality of a gun law need not pivot exclusively on how many shootings the law can be shown to prevent. Instead the government may justify its reasons for enacting the law both in terms of its hoped-for deterrence effects and in terms of the ways it contributes to public confidence and to the public’s sense of safety.<sup>21</sup> These public goods are rooted in social relationships whose existence cannot be measured by the same kind of body-counting empirical analysis used to measure lives saved or lost. One prominent study found that heavily armed communities have lower levels of mutual trust and civic engagement.<sup>22</sup> The fact that the study could only demonstrate correlation in these complex social relationships is not surprising — and certainly no reason for a court to dismiss the study’s evidentiary value, or worse, to block innovative government efforts to address the social relationships the study is analyzing.

In fact, there are many Supreme Court cases outside the Second Amendment context that uphold laws that burden the exercise of constitutional rights without requiring empirical proof of how the law advances the government’s interest. The Justices — who in some cases have outright rejected invitations to consider empirical evidence<sup>23</sup> — generally do not require government to justify the government interest advanced through legislation burdening a constitutional right through statistical showings of causation, especially when the interest being asserted is not readily susceptible to measurement. Rather, in case after case, the Court has recognized that government has authority to legislate to vindicate public values and public confidence in government institutions. In abortion cases, for example, courts do not require empirical evidence of how a particular restriction furthers state interests like the respect for potential life. Or, as the Chief Justice put it in *Williams-Yulee*, “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>24</sup>

### What Government Needs to Show and When Courts Need to Defer

How might the many dimensions of the government interest in enacting gun laws be made more visible and concrete? So far we have told a story that taps our ordi-

nary-life understanding of why gun laws are enacted. To ensure that gun laws are strengthened against the risk of judicial invalidation (where until now their greatest challenge was surviving threats in politics), it is important that these ordinary-life understandings be explicitly articulated in the legislative process.

Legislatures considering gun regulations might build and preserve (by formal or informal means) more developed legislative records, through hearings and statements by public officials and engaged citizens that speak to the wide range of concerns that animate passage of gun laws. Citizens supporting might speak of their many reasons for supporting the legislation as March for Our Lives does in advocating “the right not to be shot”<sup>25</sup> and in their *NYSRPA* brief.<sup>26</sup> Whether preserving a more developed record is feasible as a formal matter, law makers can explicitly incorporate into a law’s title, preamble, and language an account of the government’s core concerns in enacting the legislation — an account that will make clear that the government’s interest in public safety includes but is hardly limited to protecting persons from physical harm.

In addition to acknowledging the loss of life to gun violence, prefatory language can note the broader goal of, for example, ensuring feelings of safety and confidence in shared public spaces. Prefatory language might also affirm citizens’ equal freedom to inhabit, or exercise rights in, shared public spaces. The existence of such language would make it easier for lawyers to articulate and plausibly defend the laws without having to identify undisputed empirical evidence of bullets stopped and lives saved.

Another possibility is for attorneys defending gun regulations to build more thorough records at trial. In the vast majority of Second Amendment challenges, the government interest will be uncontested, and the regulation upheld.<sup>27</sup> But the success rate for Second Amendment challenges rises within certain subsets of cases (those involving challenges to public carry restrictions, for example<sup>28</sup>), and is higher on appeal than at trial.<sup>29</sup> In appellate cases, the attorneys tasked with defending gun laws will be better served if they can point to record evidence that, for example, a particular restriction on public carrying contributes to people’s enjoyment of public spaces, rather than simply (as in *NYSRPA*) an affidavit from a law enforcement officer speculating about how the rule will prevent certain crimes. That evidence might take the form of citizen testimony — as has been done in abortion cases, and as exemplified in the MFOL brief discussed above.

More generally, how can lawyers, advocates, and others better articulate the government interests in

gun regulation? We have suggested a few possible answers here, but nothing like a full taxonomy — if such a thing is even possible. Our point in this short piece has simply been that gun laws do more than protect bodies from bullets; they are about much more than this narrow conception of “public safety.” We hope to help start a conversation, not to resolve a debate. Identifying and articulating the full range of interests gun laws vindicate will require the attention of advocates, policymakers, litigators, scholars, and others, and will demand attention and expertise to the wide range of contexts and laws that give rise to both gun laws and gun rights claims. And answering those claims is all the more important as we move from a world in which the primary obstacles to reasonable gun regulation have been legislative to one in which an increasing number of judges seem poised to play an assertive role.

## Conclusion

Gun regulation implicates — and also serves — multiple constitutional liberties and interests. Too often, the gun debate is presented as if there are constitutional rights on one side (that of gun owners) and only nebulous policy “interests” on the other. But that frame misses precisely what is hard about the gun debate, and on which our account of the state interests focuses. In enacting gun laws, the government acts for a majority of citizens who believe that not only their families’ physical safety, but their communities’ fundamental freedoms — to travel, to speak, to learn, to pray, and to vote without fear or intimidation — are at stake. *Both* sides feel urgently that they must do all they can to keep themselves and their children safe from gun violence. *Both* sides can appeal to constitutional values. As Justice Stevens recognized, “In evaluating an asserted right to be free from particular gun-control regulations, liberty is on both sides of the equation. Guns may be useful for self-defense, as well as for hunting and sport, but they also have a unique potential to facilitate death and destruction and thereby to destabilize ordered liberty. Your interest in keeping and bearing a certain firearm may diminish my interest in being and feeling safe from armed violence.”<sup>30</sup>

Gun owners regularly point to reassurance they feel in owning or carrying guns, even knowing that only a small fraction of them will ever use a gun in self-defense. That *feeling* of security is part of the argument for a broad right to keep and bear arms. We have tried to show that the argument goes both ways: advocates of gun regulation seek the same freedom and security through the democratic politics. There are

constitutional values and interests on both sides, and articulating them is an increasingly crucial task.

#### Note

The authors do not have any conflicts of interest to disclose.

#### Acknowledgments

For thoughtful suggestions, we are grateful to Ian Ayres, Jake Charles, Mike Dorf, Abbe Gluck, Duncan Hosie, Spurthi Jonnalagadda, Tracey Meares, Matt Post, and Robert Post.

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