

## Why Regulate Guns?

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Courts reviewing gun laws that burden Second Amendment rights ask how effectively the 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 common sense accounting of the reasons gun laws are enacted, so that courts review the laws with attention to the many constitutional values Americans vindicate when they regulate guns. Constitutional precedent, much of it authored by sitting conservative justices, suggests ways courts can protect constitutional rights while respecting the prerogatives of democratic self-government. Lawyers and citizen advocates can help, by creating a richer record of their reasons in seeking to enact laws regulating 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 may expand restrictions on gun laws beyond the right to keep arms for self-defense in the home first recognized in *District of Columbia v. Heller* in 2008.<sup>1</sup> In 2020, the Court considered but ultimately dismissed another Second Amendment case, *New York State Rifle & Pistol Association v. City of New York*,<sup>2</sup> which Justice Alito in dissent described as involving “the same core Second Amendment right, the right to keep a handgun in the home for self-defense.”<sup>3</sup> But in coming years as judges assert their prerogative to oversee the legislature’s role in enacting gun laws that protect activities *outside* the home, will they do so in ways that take 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?

Judges have often recited the government’s real and indisputable interest in protecting “public safety” without full consideration of what is encompassed in that concept—freedom from

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<sup>1</sup> 554 U.S. 570, 629 (2008).

<sup>2</sup> 2020 WL 1978708 (U.S. Apr. 27, 2020).

<sup>3</sup> *Id.* at 26.

intimidation, for example, not just physical pain. Beyond a narrow focus on physical safety, gun laws protect many different activities and serve many different constitutional values, and governments enact them under complex political and practical conditions. If the Roberts Court mandates increased scrutiny of gun laws, demanding evidence that a law is narrowly tailored to achieve the state's interests—without properly accounting for this complex balance of considerations—it could call into question the constitutionality of mainstream laws restricting high capacity magazines<sup>4</sup> or requiring permits for carrying loaded weapons in public places like Walmart<sup>5</sup>—some of the very regulations that *Heller* itself describes as “presumptively constitutional.”<sup>6</sup>

In short, gun laws are designed to do more than save lives, and courts should recognize as much. If Second Amendment doctrine takes a rigid view of the government's interest in regulation—focusing solely on “public safety,” narrowly defined—it is 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>7</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. 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.

In this time of great insecurity, it is clear that people look to their government to secure the basic institutions of their common life, and that government needs the freedom to respond to exigent circumstances. Courts need not defer to every reason a legislature proffers, but case law drawn from outside the Second Amendment context—and written by some of the Court's

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<sup>4</sup> B. Bruno, *Ninth Circuit Panel Skeptical About California Ban on Big Gun Magazines* (Apr. 2, 2020), Courthouse News Service, available at <<https://www.courthousenews.com/ninth-circuit-panel-skeptical-about-california-ban-on-big-gun-magazines/>>.

<sup>5</sup> B. Chappell and R. Gonzales, *Rifle-Carrying Man Faces Terrorism Charge After Causing Panic At Walmart In Missouri* (Aug. 9, 2019), NPR, available at <<https://www.npr.org/2019/08/09/749763786/rifle-carrying-man-arrested-after-causing-panic-at-walmart-in-missouri>> (last visited March 26, 2020) (describing case of 20-year-old man arrested for carrying a loaded rifle and more than 100 rounds of ammunition into a Walmart because, in his words, “I wanted to know if that Walmart honored the 2nd Amendment”).

<sup>6</sup> *Heller*, 554 U.S. at 626-27.

<sup>7</sup> See, e.g., D. Kopel and R. Barnett, *Supreme Court Should Address Lower Court Nullification of the Second Amendment*, (Nov. 20, 2019), SCOTUSBlog, available at <<https://www.scotusblog.com/2019/11/symposium-supreme-court-should-address-lower-court-nullification-of-the-second-amendment/>> (last visited March 26, 2020); J. Yoo and J.C. Phillips, “The Second(-Class) Amendment,” *National Review*, November 19, 2019, available at <<https://www.nationalreview.com/2018/11/supreme-court-second-amendment-rights/>>.

Although it is beyond the scope of this article to pursue the point, there are empirical reasons to doubt this claim. See E. Ruben and J. Blocher, “From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After *Heller*,” *Duke Law Journal* (2018): 1433-1509, 1445-51.

conservative members—does provide guidance about the kind of deference to legislative judgment that is warranted here. Given that Republican-appointed federal judges seem increasingly inclined to exert close judicial oversight in Second Amendment cases,<sup>8</sup> these questions will be before courts, and it seems critical that legislators and other interested parties begin to articulate the many reasons for enacting laws during the legislative process.

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#### A. 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 reasons 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>9</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.”

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 exercise freedoms many other Americans take for granted, to walk on

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<sup>8</sup> A. Samaha and R. Germano, “Judicial Ideology Emerges, at Last, in Second Amendment Cases,” *Charleston L. Rev.* (2018): 315-345 (noting, based on empirical study, a growing partisan divide beginning in around 2016). Some of President Trump’s nominees have issued prominent gun rights opinions, many of them embracing the “second-class right” argument. *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019) (Barrett, J., dissenting); *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 126 (3d Cir. 2018) (Bibas, J., dissenting); *Mance v. Sessions*, 896 F.3d 390, 396 (5th Cir. 2018) (Willet, J., dissenting, and joined by all other Trump nominees to the Fifth Circuit).

<sup>9</sup> See Brief for March for Our Lives Action Fund as Amicus Curiae, *NYSRPA*, 139 S. Ct. 939 (2019) (No. 18-280).

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 so much more than threaten individual students' physical safety. One recent headline reported "356 victims" over the past ten years—counting only those killed or injured in 180 school shootings during that period.<sup>10</sup> But even if one focuses only on students present in the schools where shootings occurred, the true number of students victimized by gun violence is many hundreds 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>11</sup> Through graphic accounts by survivors, the MFOL brief makes plain that shootings ravage the lives of many more people than those who are shot, and not only in the ways that make national news. Shootings tear through communities. They haunt families, and transform the experience of 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>12</sup> and the preparations for such a possibility (including unannounced active shooter drills with gunshots and fake blood) can themselves be traumatizing.<sup>13</sup>

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.

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<sup>10</sup> *10 Years. 180 School Shootings. 356 Victims.*, CNN.com, available at <<https://www.cnn.com/interactive/2019/07/us/ten-years-of-school-shootings-trnd/>> (last visited March 6, 2020).

<sup>11</sup> J.W. Cox et al., *More Than 240,000 Students Have Experienced Gun Violence at School Since Columbine*, Washington Post available at <<https://www.washingtonpost.com/graphics/2018/local/school-shootings-database/>> (last updated Jan. 24, 2020).

<sup>12</sup> N. Graf, *A majority of U.S. teens fear a shooting could happen at their school, and most parents share their concern*, Pew Research Center (Apr. 18, 2018), <<https://www.pewresearch.org/fact-tank/2018/04/18/a-majority-of-u-s-teens-fear-a-shooting-could-happen-at-their-school-and-most-parents-share-their-concern/>>.

<sup>13</sup> N.W. Aronowitz, *Fake Blood and Blanks: Schools Stage Active Shooter Drills*, NBC News (Feb. 14, 2014), <<https://www.nbcnews.com/news/us-news/fake-blood-blanks-schools-stage-active-shooter-drills-n28481>>.

The managerial language of public safety captures a core purpose of gun regulation but it does not do justice to the many reasons Americans enact gun safety laws. The “young people coming of age in an era of school shootings and rampant urban gun violence” and the many other Americans who enter politics to enact gun laws act to protect constitutionally protected freedoms of many kinds. And when government legislates in response, it is doing more than preventing particular deaths. It is practicing responsive local democracy that simultaneously affirms the lives and voices of a new generation of citizens, and affirming 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.” If courts are to protect Second Amendment rights, they must do so in ways that respect the many weighty constitutional values at stake—the structural considerations of democracy and federalism and the many freedoms that gun safety laws vindicate.

#### B. 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 Court has adopted frameworks of review that coordinate and balance considerations of individual liberties with the values of democratic self-governance and of federalism. The Second Amendment’s new doctrinal framework will coordinate these same structural considerations, explicitly or implicitly, as they necessarily play a part when courts review laws that burden constitutional rights.<sup>14</sup> Cases outside the Second Amendment context, many written by the Court’s conservative members, provide some guidance.

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 “in assuring equal access limited to the provision of purely tangible goods and services.”<sup>15</sup> The *Jaycees* case is important because it recognizes that government can legislate in ways that burden

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<sup>14</sup> For one study that examines principles guiding the development of doctrine across different constitutional rights, see R. Fallon, Jr., “Implementing the Constitution,” *Harvard Law Review* (1997) 111: 56-152.

<sup>15</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984).

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>16</sup> The Chief Justice's majority opinion upheld the challenge to a law burdening candidates' speech rights despite applying 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>17</sup> Can public confidence in the safety of schools be any less compelling?

In confirming that "true threats" can be proscribed without violating the First Amendment, the Court has repeatedly emphasized that a prohibition on such threats does more than "protecting 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>18</sup> Is the prevention of fear and disruption a valid government interest only when they are caused by speech, but not guns?

Recognizing the wider range of state interests that gun legislation may serve has important implications for their constitutionality going forward. Once judges begin to take account of the range of public values that go beyond preventing particular shootings—including citizens' confidence in attending schools and traveling and assembling in public places—the question becomes how are judges to assess the state's interest in enacting any particular gun law?

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<sup>16</sup> *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015).

<sup>17</sup> *Id.*; *id.* at 457 ("States have a compelling interest in preserving public confidence in their judiciaries.").

<sup>18</sup> *Virginia v. Black*, 538 U.S. 343, 360 (2003) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)). See also J. Blocher & B. Vaseghi, "True Threats and the Second Amendment," 48(4) *J.L. Med. & Ethics* (forthcoming 2020).

If the government interest in enacting gun laws is understood as an interest in public safety, and public safety is narrowly translated into an interest in deterring wrongful shootings, measurable by deaths and injuries that a law can be shown to prevent, then judges may 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>19</sup> requiring a means-ends showing could impose a heavy, and sometimes, insurmountable, burden on the government. The difficulties may be particularly acute for new laws designed to address novel problems or emerging technologies, where evidence (empirical comparisons of jurisdictions with and without such laws, for example) may not always be available, especially given the political and even legal obstacles to funding research on gun violence<sup>20</sup> or even collecting information about it.<sup>21</sup> That, in turn, could lead a skeptical judge to strike down a law on the tailoring prong, even while recognizing the compelling state interest in preventing wrongful deaths.

New forms of gun regulation—like new forms of gun technology—won't come with a deep empirical record one way or the other. But that fact should not prevent government 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* doesn't 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 public interests, institutions, and confidence—not just bodies—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

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<sup>19</sup> See, e.g., I. Ayres and J.J. Donohue III, "Shooting Down the 'More Guns, Less Crime' Hypothesis," 55 *Stanford Law Review* (2003): 1193-1312, 1216; J.J. Donohue, A. Aneja, and K.D. Weber, "Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis," NBER Working Paper No. 23510 (Nov. 2018 rev.) (reporting results of "synthetic control approach" which "strongly confirms that RTC laws are associated with 13-15 percent higher aggregate violent crime rates ten years after adoption").

<sup>20</sup> Allen Rostron, "The Dickey Amendment on Federal Funding for Research on Gun Violence: A Legal Dissection," *Am J Public Health* (2018 July) 108(7): 865-867.

<sup>21</sup> "Why Data On Tracing Guns Is So Difficult To Find," WBUR, (April 3, 2018), <<https://www.wbur.org/hereandnow/2018/04/03/gun-research-trace-data>> (describing impact of Tiahrt Amendment).

contributes to public confidence and a sense of safety.<sup>22</sup> These public goals may be documented, even if the evidence is not of a kind that is amendable to scientific evaluation. In a democracy, the public often wants action undertaken before its efficacy can be fully proven, and in certain exigent circumstances—for example violence afflicting young children, or places of public accommodation, learning, or deliberation, action will be warranted, precisely as a means of uncovering what can work. As we are writing this, in late spring 2020, the importance of feeling secure in public spaces is being illustrated with remarkable intensity, and although there are debates about *how* the government can promote that sense of security, there seems to be widespread agreement that we need government to discover what is best to do in such circumstances. Why should the problem of gun violence be any different?

In short, a Court building out *Heller* into a framework of review can reasonably require the government to justify its action when it burdens a constitutionally protected right. But 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>

### C. 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 ordinary-life understanding of why gun laws are enacted. To ensure that gun laws are strengthened against the risk of judicial

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<sup>22</sup> E. M. Ruben, “Justifying Perceptions in First and Second Amendment Doctrine,” 80 *Law and Contemporary Problems* (2017): 149-177.

<sup>23</sup> See, e.g., O. Roeder, “The Supreme Court Is Allergic To Math,” Five Thirty Eight Blog, N.Y. Times (Oct. 17, 2017), <<https://fivethirtyeight.com/features/the-supreme-court-is-allergic-to-math/>> (reporting, *inter alia*, Chief Justice’s dismissal of empirical evidence of gerrymandering as “gobbledygook”).

<sup>24</sup> *Williams-Yulee*, 575 U.S. at 447.



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 range of interests animating passage of gun laws. Citizens supporting the legislation might speak of their many reasons for supporting the legislation as the voices of March for Our Lives have done in public advocacy<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 several interests in enacting the legislation.

In addition to noting the loss of life to gun violence, prefatory language can (and perhaps in some cases does; we have not done a comprehensive review) note the broader goal of, for example, ensuring feelings of safety and confidence in shared public spaces. The existence of such language would expand accounts of the government's interests available in the event of constitutional challenge, as it 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. In the words of a 19<sup>th</sup> century treatise, "where the body of the statute is distinct, it will prevail over a more restricted preamble.... We look to this introductory matter for the general intent of the legislature,—the reasons and principles upon which the law proceeds. So that, to the extent to which these can influence the interpretation, the preamble becomes important."<sup>27</sup> Even the majority opinion in

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<sup>25</sup> Z. Kelly and M. Post, "The Supreme Court's Second Amendment Case is a Matter of Life and Death for Us," *Newsweek*, Dec. 2, 2019, available at <<https://www.newsweek.com/supreme-courts-second-amendment-case-matter-life-death-us-opinion-1475123>> (urging the court to allow citizens to debate and enact gun legislation that would protect people like the author's brother, killed at 16 near the Supreme Court while studying for college and who "had the right not to be shot").

<sup>26</sup> As the MFOL brief observes, "If any area of constitutional law requires leaving room for political engagement to shape policy choices, it is this one: No other constitutional right directly implicates other Americans' rights to stay alive, and in one piece." MFOL brief, *supra* note 9, at 25 (citing J. Lowy and K. Sampson, "The Right Not To Be Shot: Public Safety, Private Guns, and The Constellation of Constitutional Liberties," 14 *Geo. L.J. & Pub. Pol'y* (2016): 187-206 (describing the "right to live" and public safety interests as "paramount")).

<sup>27</sup> Joel P. Bishop, *Commentaries on the Written Laws and Their Interpretation* (Little, Brown, 1882): at 49 (footnotes omitted). The relationship between "preamble" and "substantive guarantee" was of course central to debates about the Second Amendment prior to *District of Columbia v. Heller*, 554 U.S. 570 (2008), and in fact the Bishop quotation here appears in the first court of appeals decision to embrace the individual rights reading later endorsed in *Heller*. See *United States v. Emerson*, 270 F.3d 203, 233 n.32 (5th Cir. 2001).

*Heller*, while largely disregarding the first half of the Second Amendment as “prefatory,” acknowledged that such language can play a “clarifying function.”<sup>28</sup>

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>29</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>30</sup>), and is higher on appeal than at trial.<sup>31</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.

#### D. 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

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<sup>28</sup> *Heller*, 554 U.S. at 578.

<sup>29</sup> See generally Ruben & Blocher, *supra* note 7, at 1472 (noting a success rate of just nine percent for Second Amendment challenges after *Heller*).

<sup>30</sup> *Id.* at 1484.

<sup>31</sup> *Id.* at 1473.

laws, the government acts for a majority of citizens who believe 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>32</sup>

Gun owners regularly point to the 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 democratic politics. There are constitutional values and interests on both sides, and articulating them is an increasingly crucial task.

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<sup>32</sup> *McDonald v. Chicago*, 561 U.S. 742, 891 (2010) (Stevens, J., dissenting).