THE RIGHT OF AMERICANS TO BE PROTECTED FROM GUN VIOLENCE

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INTRODUCTION

There is an average of 40,000 gun deaths per year in the U.S. and, in 2020, the U.S. experienced what amounts to more than one mass shooting a day.[1] Virtually no setting has been spared. During the summer of 2019, mass shootings occurred in a Walmart in El Paso (Tex.), a California garlic festival, and in Dayton's entertainment district—places where Americans shop or seek respite from the strains of everyday life. While much has been said and written about the Second Amendment and the extent to which it protects gun rights, little has been written about the responsibility of federal and state governments to protect their populations from unrelenting attacks on the lives and liberties of citizens by individuals wielding guns.

This article seeks to answer the following questions: Do Americans have the right to be safe in their communities? Do children have the right to attend school without the constant threat of a mass shooting? Do people have the right to express themselves on controversial issues at public rallies and in educational institutions without the constant fear of being shot? Do Americans have the right to worship and participate in leisure activities without being shot?

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1. For yearly data, see *Past Summary Ledgers*, GUN VIOLENCE ARCHIVE, https://www.gunviolencearchive.org/past-tolls [https://perma.cc/5YGA-C7WZ]. The definition of a mass shooting as four or more people shot in one incident, excluding the shooter, is adopted here from the Gun Violence Archive. *General Methodology*, GUN VIOLENCE ARCHIVE, https://www.gunviolencearchive.org/methodology [https://perma.cc/5YZQ-3R6E].

GUNS INCREASE THE LETHALITY OF VIOLENCE

The harms associated with firearms have been well documented. There is considerable agreement among researchers that guns are many times more likely to be used to harm others, in suicides, and deadly accidents than they are used for self-defense or in defense of family members.[2] Guns escalate the lethality of violence as attacks or altercations involving firearms are far more likely to end in a death than those involving other weapons or no weapons at all.[3] Guns turn everyday disputes into homicides. A gun in the home is twenty-two times more likely to be used in a domestic homicide, suicide, or accidental shooting than in self-defense.[4] African Americans and other minority groups are disproportionately affected by gun violence.[5] Women in abusive relationships are at a substantially elevated risk of being murdered when their abuser has access to a firearm.[6] States with higher gun ownership levels tend to have higher gun death rates by firearm than those with lower levels of gun ownership.[7]

The increasing prevalence of gun violence and mass shootings in the U.S. has been attributed to weaker regulations.[8] In particular, states continue to ease controls on the carrying of guns.[9] Another illustration of the ease of access to firearms is that many mass shooters purchase guns legally despite the fact that individuals such as the Parkland, Florida school shooter, have displayed troubling behavior.[10]

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2. THOMAS GABOR, CONFRONTING GUN VIOLENCE IN AMERICA 133–62 (2016).

3. FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 106–23 (1997).

4. Arthur L. Kellermann, Grant Somes, Frederick P. Rivara, Roberta K. Lee & Joyce G. Banton, *Injuries and Deaths Due to Firearms in the Home*, 45 J. TRAUMA: INJURY, INFECTION, & CRITICAL CARE 263 (1998).

5. *Impact of Gun Violence on Black Americans*, EVERYTOWN FOR GUN SAFETY, https://everytownresearch.org/issue/gun-violence-black-americans/ [https://perma.cc/F7NZ-TP67].

6. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003).

7. GABOR, *supra* note 2, at 119–29.

8. Frederic Lemieux, *Effect of Gun Culture and Firearm Laws on Gun Violence and Mass Shootings in the United States: A Multi-Level Quantitative Analysis*, 9 INT'L J. OF CRIM. JUST. SCIS. 74, 90 (2014).

9. *Concealed Carry*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/concealed-carry/ [https://perma.cc/DJH9-YD9V].

10. Mark Follman, Gavin Aronsen, & Deanna Pan, *A Guide to Mass Shootings in America*, MOTHER JONES (Mar. 17, 2021), https://www.motherjones.com/politics/2012/07/mass-shootings-map/ [https://perma.cc/8FZX-U5ND]; Bart Jansen, *Florida Shooting Suspect Bought Gun Legally,*

MEANING OF THE RIGHT TO KEEP AND BEAR ARMS

When the conversation turns from science to rights, the Second Amendment to the U.S. Constitution dominates the discussion. The Amendment reads: "A well-regulated Militia, necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[11]

Does this Amendment confer on every American an absolute right to acquire any firearm he or she chooses? Does it afford a constitutional right to carry? No, some Americans (e.g., felons, the mentally ill) are prohibited from gun ownership by federal law, "dangerous and unusual weapons" can be prohibited, and there is no unlimited constitutional right to carry guns.[12] For example, seven states require concealed weapons permit applicants to demonstrate good cause or a justifiable need in order to carry a concealed gun.[13]

The Second Amendment was interpreted historically by the courts as the right to bear arms only within the context of militia service.[14] In 2008, the U.S. Supreme Court in *District of Columbia v. Heller* ruled for the first time that individuals had the right to own an operable gun in their homes for protection.[15] However, writing for the majority in the 5-4 decision, Justice Antonin Scalia—a hunter and a conservative—made it clear that this right was not unlimited and that laws regulating the carrying of firearms, denying gun ownership to "felons and the mentally ill", and "prohibiting the carrying of "dangerous and unusual weapons" did not violate the Second Amendment.[16] The *Heller* majority noted that historically "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

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Authorities Say, USA TODAY (Feb. 15, 2018), https://www.usatoday.com/story/news/2018/02/15/florida-shooting-suspect-bought-gun-legally-authorities-say/340606002/ [https://perma.cc/D4PE-G2NN].

11. U.S. CONST. amend. II.

12. District of Columbia v. Heller, 554 U.S. 570, 627–28 (2008).

13. *Concealed Carry*, *supra* note 9.

14. *See, e.g.*, United States v. Miller, 307 U.S. 174 (1939).

15. *Heller*, 554 U.S. at 635; Ariane de Vogue, *Supreme Court Affirms Right to Keep Handguns in Home*, ABC NEWS (June 28, 2010), https://abcnews.go.com/Politics/Supreme_Court/supreme-court-affirms-gun-handguns-home/story?id=10727952#:~:text=In%202008%2C%20the%20Court%20issued,'s%2C%20strict%20handgun%20ban [https://perma.cc/J7PQ-BZ6E].

16. *Id.* at 626–27 (internal citations omitted).

purpose."[17] Since *Heller*, an overwhelming majority of Second Amendment challenges to gun laws have been rejected by the courts.[18]

During a TV interview "[i]n 1991, Warren E. Burger, the conservative chief justice of the Supreme Court" spoke "about the meaning of the Second Amendment's 'right to keep and bear arms.'" Burger said, "the Second Amendment 'has been the subject of one of the greatest pieces of fraud—I repeat the word 'fraud'—on the American public by special interest groups that I have ever seen in my lifetime.'"[19] Burger also asserted "that 'the Second Amendment doesn't guarantee the right to have firearms at all.'" Instead, its purpose "was 'to ensure that'" militias "would be maintained for the defense of the state."[20]

Michael Waldman, president of the Brennan Center for Justice and author of *The Second Amendment: A Biography*, notes that "the phrase 'bear arms'" in the 18th century "referred to military activities."[21] According to Waldman, James "Madison's notes from the Constitutional Convention" did not contain "a single word about an individual's right to a gun for self-defense or recreation."[22] Gun laws throughout the country regulated everything from the storage of gunpowder to the carrying of weapons, and courts consistently upheld these restrictions.[23] Waldman underscores the fact that "[f]our times between 1876 and 1939, the U.S. Supreme Court declined to rule that the Second Amendment protected individual gun ownership outside the context of a militia."[24]

Following "the Civil War, many states [adopted] new constitutions."[25] While several granted citizens some right to bear arms, the majority

17. *Id*. at 626.

18. *The Second Amendment*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://lawcenter.giffords.org/gun-laws/the-second-amendment/second-amendment-basics/ [https://perma.cc/Q2CK-YR36].

19. Cass R. Sunstein, *The Most Mysterious Right*, THE NEW REPUBLIC (Nov. 17, 2007), https://newrepublic.com/article/76368/second-amendment-gun-rights [https://perma.cc/NU87-5GU6].

20. *Id.*

21. Michael Waldman, *How the NRA Rewrote the Second Amendment*, POLITICO (May 19, 2014), https://www.politico.com/magazine/story/2014/05/nra-guns-second-amendment-106856 [https://perma.cc/G4SP-9WWM].

22. *Id.*

23. *Id.*

24. *Id.*

25. Jonathan Lowy & Kelly Sampson, *The Right Not to be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties*, 14 GEO. J.L. & PUB. POL'Y 187, 201 (2016).

empowered state legislatures to regulate this right.[26] A number of states at the time also outlawed the carrying of military grade weapons by civilians, contradicting claims today by those advocating the expansion of gun rights that citizens have an unfettered right to these weapons.[27]

Waldman asserts "[f]rom 1888, when law review articles first were indexed, through 1959, every single one on the Second Amendment concluded it did not guarantee an individual right to a [firearm]."[28] Nevertheless, the NRA's campaign to influence public opinion has been successful in convincing a majority of Americans that "the Second Amendment 'guaranteed the rights of Americans to own guns' outside" of militia service.[29]

Jonathan Lowy, chief counsel of the Brady Center to Prevent Gun Violence, asserts that the right to life constrains the scope of the Second Amendment right. He notes that the right to bear arms is about more than possessing lethal firearms; it is about their use. No other right exposes the public to such grave risks of lethal harm. "Exercising the right to bear and use firearms can have a detrimental effect on the exercise of other constitutional rights, like [the] right to peaceably assemble, to worship, and to speak freely."[30]

Washington University School of Law Professor Gregory Magarian adds: "The right to keep and bear arms is predicated on the ability to do great physical harm . . . . So the right to keep and bear arms is never going to have even the partial claim to a relatively innocuous character that the right to the freedom of speech has."[31] Magarian further asserts that the First Amendment does not protect speech that serves to incite violence. This is additional proof that gun regulations designed to reduce violence are consistent with limits imposed in relation to other rights. [32]

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26. *Id.* at 200.
27. *Id.*
28. Waldman, *supra* note 21.
29. Jeffrey M. Jones, *Public Believes Americans Have Right to Own Guns*, GALLUP (Mar. 27, 2008), https://news.gallup.com/poll/105721/public-believes-americans-right-own-guns.aspx [https://perma.cc/KJ9U-YXX2].
30. Katherine Toohill, *The New Supreme Court Sets its Sights on the Second Amendment*, GIFFORDS (Jan. 25, 2019), https://giffords.org/blog/2019/01/the-new-supreme-court-sets-its-sights-on-the-second-amendment/ [https://perma.cc/E6NA-UTNR].
31. *Id.*
32. *Id.*

THE RIGHT OF CITIZENS TO BE PROTECTED FROM VIOLENCE

Conversations dealing with gun rights tend to be one-sided as they inevitably revolve around the scope of the right to keep and bear arms; for example, the extent to which citizens have a constitutional right to carry guns and whether they can acquire guns originally designed for military use. The idea that citizens have a right not to be terrorized by mass shootings and to attend schools, shows, and engage in daily activities without facing lethal violence rarely comes up as a bona fide right. The following sections make the case that the right to be protected from private violence by government is a fundamental one. Some scholars refer to the duty to protect citizens from violence as the government's first duty. In fact, it is the oldest justification for the existence of government.

SOCIAL CONTRACT THEORY AND THE STATE'S DUTY TO PROTECT

The English philosopher Thomas Hobbes' book *Leviathan* describes a world of unremitting violence and insecurity where there is no government to provide safety from other citizens and foreign enemies.[33] The oldest justification for government is the protection of citizens and this requires that taxes be collected to support an army and police force, to maintain courts and jails; and to elect or appoint officials responsible for implementing laws.[34] Government as protector also requires the ability to engage with or to fight foreign entities.

Sir Edward Coke, a 17th century English jurist, wrote of the concept of a contract between the King and his subjects according to which the latter obey, and the King protects.[35] The King was viewed as providing such protection through the legal process.[36] Philosopher John Locke then built on this concept of a social contract, basing it instead on the democratic concept

33. THOMAS HOBBES, LEVIATHAN 74–81 (Oxford Univ. Press 1909) (1651).

34. Anne-Marie Slaughter, *Three Responsibilities Every Government Has Toward Its Citizens*, WORLD ECON. F. (Feb. 13, 2017), https://www.weforum.org/agenda/2017/02/government-responsibility-to-citizens-anne-marie-slaughter/ [https://perma.cc/KBM7-CEQ2].

35. Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, 514 (1991).

36. *Id.* at 513.

of a free people entering into society and establishing a government for the preservation of their natural rights.[37] Individuals agree to form a community to preserve their lives, liberties, and property. Individuals agree to give up their power to act for their own preservation and to be regulated by the laws of the society.[38] Each individual also engages to assist "the Executive Power of the society" as required by law.[39] In return, citizens receive the benefits, assistance, and protection of the community.[40] According to Locke, the role of government is to secure life, liberty, and property.[41] When it fails to accomplish this, "[it] is dissolved, and the community gains the right to form a new form of government."[42]

In the 18th century, the English jurist Sir William Blackstone asserted that society is an association for mutual protection whereby an individual contributes to subsistence and peace of society, helping enforce laws and defending the community against rebellion or invasion and then receives protection from the community.[43] Personal security, personal liberty and private property were viewed as absolute rights, originating in the state of nature.[44]

Steven Heyman of the Chicago-Kent College of Law has written that the rule of law implies that the rights of individuals are protected by law and are not dependent on the whims of government.[45] "The legislature has a duty to enact laws" that protect "individual rights, the executive has a duty to enforce them, and the courts have a duty to apply them."[46]

Heyman points out that a number of the original state constitutions in the United States adopted the view that society was founded on a contract and affirmed the right to life, protection and security.[47] To the present day, in its Preamble, the Massachusetts Constitution explicitly refers to a social contract: "The body politic is formed by a voluntary association of

37. *Id.* at 514.
38. *Id.* at 515.
39. *Id.* at 515.
40. *Id.* at 515.
41. *Id.* at 515.
42. *Id.* at 515.
43. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 45-48 (Oxford, Clarendon Press 1765), https://www.gutenberg.org/files/30802/30802-h/30802-h.htm [https://perma.cc/2MFA-FA37].
44. *Id.* at 125.
45. Heyman, *supra* note 35, at 520.
46. *Id.*
47. *Id.* at 522.

individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."[48]

Another example is The Virginia Constitution (Article 1, Section 3), which underscores the notion of a social compact and the importance of the population's security and protection:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety . . . and, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.[49]

Following the Civil War, members of the 39th Congress asserted the notion that citizens had the right to protection by their government and that, in return, citizens offered their obedience.[50] "Protection and allegiance are reciprocal. . . . It is the duty of the Government to protect; of the subject to obey," said Senator Alvin Stewart of Nevada.[51] Senator Justin Morrill of Vermont chimed in: "These are the essential elements of citizenship. . . allegiance on one side and protection on the other."[52] In the same Congress, Senator Lyman Trumbull agreed, saying: "American citizenship . . . would be little worth if it did not carry protection with it."[53] He added that if the nation fails to protect fundamental rights, ". . . our Constitution fails in the first and most important office of government.[54]

48. MASS. CONST. pmbl.; Heyman, *supra* note 35, at 523.
49. VA. CONST. art. I, § 3.
50. Heyman, *supra* note 35, at 546.
51. *Id.* at 546.
52. *Id.* at 546.
53. *Id.* at 553.
54. *Id.*

THE CONSTITUTION, LAWS AND ENFORCEMENT SUPPORT THE RIGHT TO PROTECTION

Attorney Jonathan Lowy, one of America's most active litigators in cases involving guns, argues:

> "America's First Freedom" is not the right to firearms; it is the freedom that the Founders, in fact, announced first: the right to life, liberty, and the pursuit of happiness. The right to life—or to live—is protected by the Constitution and is the bedrock principle on which our government and civil society are founded . . . courts have recognized that public safety (which derives from, and is intended to protect, that right) is paramount, and no rights may expose people to the risk of imminent harm.[55]

Lowy and Sampson add that the right to live had been recognized by philosopher John Locke as the foremost natural right prior to America's founding.[56] William Blackstone explained that life "cannot legally be disposed of or destroyed by any individual."[57] These natural law concepts were incorporated into the Declaration of Independence by the Founding Fathers and the Declaration was the United States' first official act. The Declaration reads: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[58] Thomas Jefferson later emphasized that "the care of human life & happiness . . . is the first and only legitimate object of good government."[59]

Areto Imoukhuede, a Professor of Law at Nova Southeastern University, asserts that "The federal government has a constitutional affirmative duty to ensure domestic tranquility, and the founding fathers expressly imposed a duty on the federal government to protect the safety and security of the citizens of the newly formed nation."[60] The reference to

55. Lowy & Sampson, *supra* note 25, at 189–90.
56. *Id.* at 196.
57. BLACKSTONE, *supra* note 43, at 129.
58. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
59. Lowy & Sampson, *supra* note 25, at 197.
60. Areto A. Imoukhuede, *Gun Rights and the New Lochnerism*, 47 SETON HALL L. REV. 329,

"domestic tranquility" is contained in the Preamble to the Constitution, which spells out the Constitution's purpose.[61]

According to James Wilson, a Framer of the U.S. Constitution, "under Article IV, Section 2" of the Constitution all citizens should be afforded "security and protection of personal rights."[62]

The debates over the 14th amendment—which guaranteed all citizens equal protection of laws—and the Civil Rights Act of 1866 show that the constitutional right to protection included protection from private violence.[63] The aforementioned statements by Senators serving during the 39th Congress indicate the importance of the government's obligation to provide security and protect personal rights.

The right to live is recognized in the Constitution's Fifth and Fourteenth Amendments, which prohibit the government from depriving any person of "life, liberty, or property without due process of law."[64] Chicago-Kent College of Law's Steven Heyman indicates that when the Framers referred to "life, liberty, and property . . . these rights were understood in the legal tradition not merely as negative rights against invasion by others, but also as positive rights ."[65] In other words, they were '"absolute rights' . . . : the rights to personal security, personal liberty, and private property."[66] Thus, in the mid-19th century "a state might violate" due process provisions "not only by directly taking life, liberty, or property, but also by denying legal protection to an individual or his rights."[67] One judge during that era stated:

> [T]o hold that the due process clause only applies where there is some manual interference by the state with the rights of person or property . . . would virtually nullify the provision, as the most oppressive and tyrannical ends may be accomplished by simply withdrawing from individual rights the protection of the law.[68]

At the state level, the Constitution of the Commonwealth of Pennsylvania

360 (2017).

61. U.S. CONST. pmbl.
62. Heyman, *supra* note 35, at 556.
63. *Id.* at 546, 551–52.
64. U.S. CONST. amends. V, XIV.
65. *Id.* at 561–62.
66. *Id.* at 561–62.
67. *Id.* at 560–62.
68. *Id.* at 560.

(Article 1, Section 1) affirms that certain rights, such as the right to life are "natural" and cannot be lost or overturned.[69] These rights are not limited to actions by the state, "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."[70]

That public safety is, in fact, a *bona fide* high priority of federal, state, and local governments is demonstrated by the emphasis today on the enactment and enforcement of laws for the security of life, liberty, and property. "By the mid-1850s, this referred to both the enforcement of laws once harms occurred and the prevention by government of violence and disorder."[71] Modern police forces were created in the U.S. in the 1830s to keep the peace (i.e., prevent violence) as well as to enforce laws once they were broken.[72] In 2017, state and local governments alone spent $115 billion on law enforcement.[73] The Supreme Court asserted that just as the prevention of disease is preferable to its cure, "So also the law, which is intended to prevent crime . . . is more efficient than punishment of crimes after they have been committed.[74]

In 1803, Chief Justice John Marshall declared that every person has the right to claim protection of laws whenever he is injured and one of the first duties of government is to afford that protection.[75]

In the mid-19th century, a number of states held cities and counties liable for injuries and property damage arising from riots.[76] In Pennsylvania, a failure to protect against property damage could lead to recovery from the county which, in turn, could recover from the rioters or officers charged with maintaining the peace.[77]

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69. PENN. CONST. art. I, § 1.
70. PENN. CONST. art. I, § 1.
71. Heyman, *supra* note 35, at 510.
72. Gary Potter, *The History of Policing in the United States*, EKU, https://plsonline.eku.edu/sites/plsonline.eku.edu/files/the-history-of-policing-in-us.pdf [https://perma.cc/3T7R-Q3JD].
73. *Criminal Justice Expenditures: Police, Corrections, and Courts*, URBAN INST. https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures [https://perma.cc/3DC7-RUTP].
74. Cunningham v. Neagle, 135 U.S. 1, 59 (1890).
75. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).
76. Heyman, *supra* note 35, at 541–42.
77. *Id.* at 542.

THE CONCEPT OF PEACE SETS LIMITS ON RIGHT TO ARMS

"The 14th century 'Statute of Northampton,'" prohibited "carrying pistols and daggers" in public "whether 'secretly' or in the 'open' . . . 'to the terrour [sic] of all people professing to travel and live peaceably.'"[78] "The prohibition migrated to the American colonies, such that, for instance, Massachusetts passed a law . . . barring residents from going out to 'ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth.'"[79]

By the mid-1800s, close to half the states enacted laws against the carrying of weapons that resembled North Carolina's "going armed to the terror of the public" law.[80] Saul Cornell, a legal historian, explained that the rationale underlying such laws was a balancing of gun rights and public safety.[81]

Jeff Welty, a Professor of Public Law and Government with the University of North Carolina, notes that "going armed to the terror of the public" laws are designed to deal with situations in which people with firearms are menacing others in public and appear to be at risk of committing crimes.[82] The laws allow for police intervention at the sight of worrisome gun carrying, without requiring that officers wait until a shot is fired.[83] Recent examples of menacing behavior and gun carrying include the clash of white nationalists and anti-racist protestors in Charlottesville, Virginia and the following/stalking of the March for Our Lives students by a Utah gun rights group when the students were traveling around the country promoting gun law reforms.[84] Laws banning such menacing behavior show that protections for the individual can be checked when they infringe on the

78. Olivia Li & Dahlia Lithwick, *When Does Openly Carrying a Gun at a Protest Become a Criminal Act?*, THE TRACE (Oct. 17, 2017), https://www.thetrace.org/2017/10/open-carry-protest-gun-crime-terror-public/ [https://perma.cc/PZH5-RPCF].

79. *Id.*

80. *Id.*

81. Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 LAW & CONTEMP. PROBS. 11, 30–43 (2017).

82. Li & Lithwick, *supra* note 80.

83. *Id.*

84. Josh Meyer, *Antifa, White Supremacists Exploit Loose Gun Laws*, POLITICO (Sept. 11, 2017), https://www.politico.com/story/2017/09/11/antifa-white-supremacists-exploit-gun-laws-242506 [https://perma.cc/ZGN2-2CKM]; Taylor Anderson, *The Utah Gun Exchange is Following the Parkland Students Around the Country to Combat Their Call for More Gun Laws*, SALT LAKE TRIBUNE (July 10, 2018), https://www.sltrib.com/news/politics/2018/07/10/utah-gun-exchange-is/ [perma.cc/7F4J-RZBJ].

rights of the members of the public to be safe when walking on their own streets.[85]

"The Constitution's Habeas Corpus provision is expressly limited by public safety concerns, allowing for the great Writ to be suspended 'when in Cases of Rebellion or Invasion the public Safety may require it.'"[86] When southern Blacks were being terrorized by the Ku Klux Klan, President Grant urged Congress to enact legislation that would suspend the Writ.[87] Thus, threats to public safety from "private actors can have significant constitutional relevance."[88]

Lowy and Sampson argue that it makes no sense to stop someone from using threatening speech or performing harmful religious rituals (snake handling) when guns, which can take a life in a second, can be brought into places of worship.[89] Public safety is a consideration in all these cases but, in the case of gun carrying, Lowy and Sampson argue that courts need to address the imbalance between gun rights and public safety.[90]

REGULATION AS A FORM OF COLLECTIVE SELF-DEFENSE

The right to self-defense is a long-standing doctrine in law which implicitly recognizes a right to life. The Supreme Court's 2008 *Heller* ruling, which recognized an individual's right to possess a firearm in the home for self-defense, accepted the legitimacy of the self-defense justification for gun rights.[91]

However, it has been argued that the right to self-defense and, hence, life is not limited to the right to gun ownership.[92] Another path to the defense of oneself and one's family—arguably a more effective one—is through the regulation of guns. Joshua Feinzig and Joshua Zoffer of Yale Law School argue that the limitation of access to lethal force by the state

85. Li & Lithwick, *supra* note 80.
86. Lowy & Sampson, *supra* note 25, at 200.
87. *Id.* at 200–01.
88. *Id.*
89. *Id.* at 205.
90. *Id.*
91. *See* District of Columbia v. Heller, 554 U.S. 570, 632–36 (2008).
92. Joshua Feinzig & Joshua Zoffer, *A Constitutional Case for Gun Control*, THE ATLANTIC (Oct. 28, 2019), https://www.theatlantic.com/ideas/archive/2019/10/constitutional-case-gun-control/600694/ [https://perma.cc/F3JC-7KJD].

represents a form of preemptive self-defense.[93] Feinzing and Zoffer add:

> In addition to self-defense, other obvious rights and interests of constitutional magnitude are imperiled by gun violence and vindicated by regulation. The right to assembly is put at risk when a single shooter can rain bullets on a peaceful political protest. Freedom of the press is undermined when published words can give way to mass murder, as occurred at *The Capital*'s Annapolis, Maryland, office in 2018. Other cherished constitutional interests, such as the freedom to vote or access to public education, cannot be secured when mass shootings are a constant specter outside polling places or at the schoolhouse gate. And this is to say nothing of the value of protecting life, a fundamental basis of the Constitution itself that is incompatible with an ever-expanding conception of the Second Amendment.[94]

Rights have limited value if they are not supported. The right to vote of an elderly person with limited mobility is meaningless if she lacks transportation to get to the polls or the option to vote by mail.[95] The right to personal security also requires support in the form of laws that make it harder for individuals prone to violence to access lethal weapons or that make it less likely that children are shot by accident.[96]

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93. *Id.*
94. *Id.*
95. David Degrazia, *Gun Rights Include the Right Not to be Shot*, BALT. SUN (Mar. 15, 2016, 2:56 PM), https://www.baltimoresun.com/opinion/op-ed/bs-ed-shooting-rights-20160315-story.html [https://perma.cc/2SVM-2WJK].
96. *Id.*

COURT RULINGS REJECTING AND SUPPORTING A DUTY TO PROTECT

In several cases, the Supreme Court has declined to find that the Constitution imposes affirmative obligations on the government, such as the right to security from private violence, except in cases in which the citizen has been involuntarily confined and in the custody of the state.[97] However, a number of rulings have placed public safety considerations over rights protected by the constitution.

In the 1989 landmark case of *DeShaney v. Winnebago County*, the U.S. Supreme Court held that the failure of a government agency to protect an individual from physical violence did not violate any substantive constitutional duty.[98] Four-year-old Joshua DeShaney faced severe physical abuse at the hands of his father leading to permanent, serious brain injuries.[99] Joshua's mother sued the County's Department of Social Services, alleging it deprived Joshua of his "liberty interest in bodily integrity, in violation of his rights under the substantive component of the Fourteenth Amendment's Due Process Clause, by failing to intervene to protect him against his father's violence."[100] While the Department had taken various steps to protect the boy after receiving numerous complaints of the abuse, the Department did not remove Joshua from his father's custody.[101]

Despite the horrific nature of the abuse and the Department's failure to protect Joshua, the Supreme Court found that the government had no affirmative duty to protect any person from harm by another person.[102] Writing for the majority, Chief Justice Rehnquist asserted:

> Nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors, even where

97. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307 (1982); Castle Rock v. Gonzales, 545 U.S. 748 (2005).
98. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).
99. *Id.* at 191–93.
100. *Id.* at 193.
101. *Id.* at 192–93.
102. *Id.* at 202.

> such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.[103]

In an especially strong dissent, Justice Blackmun stated:

> the Court today claims that its decision, however harsh, is compelled by existing legal doctrine. On the contrary, the question presented by this case is an open one, and our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a "sympathetic" reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.[104]

Brady's Lowy notes that the Supreme Court, in *New York v. Quarles*, recognized that the public safety risks produced by a single unsecured gun can outweigh Fifth Amendment rights.[105] In that case, a woman claimed she was raped by an armed man.[106] When the suspect was apprehended, the officer questioned him about the location of his gun without giving *Miranda* warnings.[107] The Supreme Court refused to exclude the suspect's response as to the location of the gun because the danger created by the gun "presents a situation where concern for public safety must be paramount . . . ."[108] The firearm, which the suspect had concealed in a supermarket, posed a potential danger to public safety as an accomplice might use it or an employee might gain possession of it.[109] The Court's ruling regarding the admissibility of the suspect's response showed that the public safety issues raised by a gun in this case outweighed the Fifth Amendment right of suspects.[110]

Some Supreme Court rulings show that public safety considerations override rights protected by the constitution. It is often said that people cannot incite violence or yell "fire" in a crowded theater. In *Schenck v.*

103. *Id.* at 195.
104. *Id.* at 212–13 (Blackmun, J., dissenting).
105. Lowy & Sampson, *supra* note 25, at 199; New York v. Quarles, 467 U.S. 649, 657 (1984).
106. *Id.* at 651–52.
107. *Id.* at 652.
108. *Id.* at 653.
109. *Id.* at 657.
110. *Id.*

United States, the Court ruled that the freedom of speech protection afforded in the U.S. Constitution's First Amendment could be restricted if the words spoken represented a "clear and present danger" [111] Thus, such rulings show that public safety takes precedence over religious practices deemed to be harmful.

A ruling of the Georgia Supreme Court in 1874 in the case of *Hill v. State* illustrates how public safety today in gun-friendly states like Georgia is being subordinated to gun rights.[112] In *Hill*, the court held that the state's prohibition relating to the carrying of guns in churches, polling places, and courts was constitutional as the right to bear arms does not override safety considerations:

> It is as well the duty of the general assembly to pass laws for the protection of the person and property of the citizen as it is to abstain from any infringement of the right to bear arms. The preservation of the public peace, and the protection of the 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 . . . To suppose that the framers of the constitution ever dreamed, that in their anxiety to secure to the state a well regulated militia, they were sacrificing the dignity of their courts of justice, the sanctity of their houses of worship, and the peacefulness and good order of their other necessary public assemblies, is absurd. To do so, is to assume that they took it for granted that their whole scheme of law and order, and government and protection, would be a failure, and that the people, instead of depending upon the laws and the public authorities for protection, were each man to take care of himself, and to be always ready to resist to the death, then and there, all opposers . . . On the contrary . . . in guaranteeing the right to keep and bear arms, they never dreamed they were authorizing practices,

111. Schenck v. United States, 249 U.S. 47, 52 (1919).
112. Hill v. State, 53 Ga. 472 (1874).

> common enough, it is true, among savages . . . when every man was at war with his neighbor, but utterly useless and disgraceful in a well ordered and civilized community.[113]

Similarly, in 1872, the Texas Supreme Court in *English v. State* upheld a ban on gun carrying in some circumstances.[114] As in *Hill*, the court took the position that a civilized society should not encourage individuals to take the law into their own hands:

> [I]n the great social compact under and by which states and communities are bound and held together, each individual has compromised the right to avenge his own wrongs, and must look to the state for redress. We must not go back to that state of barbarism in which each claims the right to administer the law in his own case; that law being simply the domination of the strong and the violent over the weak and submissive . . . 'It is one of the undisputed functions of government, to take precautions against crime before it has been committed, as well as to detect and punish afterwards.'[115]

113. *Id.* at 476–78.
114. 35 Tex. 473, 478–81 (1872).
115. *Id.* at 477–78.

INTERNATIONAL COVENANTS SIGNED AND/OR RATIFIED BY THE UNITED STATES

The absence of attention to the public's right to safety is surprising given that the U.S. has signed or ratified a number of human rights conventions that can be applied to gun violence.[116] Article 3 of the Universal Declaration of Human Rights affirms that "Everyone has the right to life, liberty and security of person."[117] The International Covenant on Civil and Political Rights states that no person "shall be arbitrarily deprived of his life" (Article 6).[118]

The U.S. has also signed the International Convention on the Elimination of all Forms of Racial Discrimination;[119] however, African Americans have exceptionally high levels of gun mortality relative to the rest of the population,[120] are disproportionately the victims of police-involved shootings and of vigilante-type shootings enabled by the Stand Your Ground laws passed by half the states.[121] While the U.S. has signed, but not ratified, the Convention on the Elimination of all Forms of Discrimination Against Women,[122] the country has also been slow to protect women in the U.S., as they are far more likely to be murdered by gunfire than in other advanced countries.[123] An abuser's access to guns increases five-fold the risk of death to women,[124] yet legal loopholes generally allow men with a history of violence to get around background checks by

116. *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

117. *Id.*

118. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

119. G.A. Res. 2106, International Convention on the Elimination of all Forms of Racial Discrimination (Dec. 21, 1965).

120. Dan Keating, *Gun Deaths Shaped by Race in America*, WASH. POST (Mar. 22, 2013), https://www.washingtonpost.com/sf/feature/wp/2013/03/22/gun-deaths-shaped-by-race-in-america/ [https://perma.cc/SS6D-VABQ].

121. AMERICAN BAR ASSOCIATION, NATIONAL TASK FORCE ON STAND YOUR GROUND LAWS – REPORT AND RECOMMENDATIONS 25 (2015) available at https://www.americanbar.org/content/dam/aba/administrative/diversity/SYG_Report_Book.pdf [https://perma.cc/W7ZG-ASZV].

122. Linda Lowen, *Why Won't the US Ratify the CEDAW Human Rights Treaty?*, THOUGHT CO. (Jan. 3, 2020), https://www.thoughtco.com/why-wont-u-s-ratify-cedaw-3533824 [perma.cc/3WPD-DZC7].

123. David Hemenway, Tomoko Shinoda-Tagawa & Matthew Miller, *Firearm Availability and Female Homicide Victimization Rates Among 25 Populous High-Income Countries*, 57 J. OF THE AM. MED. WOMEN'S ASS'N 100 (2002).

124. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1091 (2003).

purchasing guns on the private market, permit abusive boyfriends to own guns, and generally fail to require the surrender of guns by those who threaten women.[125] The U.S. has signed but not ratified the Convention of the Rights of the Child.[126] Still, American children and teens are fifteen times more likely to incur a fatal injury from a gun than children in other high-income countries combined.[127]

The human rights group Amnesty International (AI) argues in a 2018 report, *In the Line of Fire*, that the U.S. has breached its commitments under international human rights law.[128] AI writes: "The USA has failed to implement a comprehensive, uniform and coordinated system of gun safety laws and regulations particularly in light of the large number of firearms in circulation, which perpetuates unrelenting and potentially avoidable violence, leaving individuals susceptible to injury and death from firearms."[129]

AI further notes that, as part of the right to life and other human rights, the responsibilities of nations to prevent gun violence requires: (1) restricting access to firearms, especially on the part of those at an elevated risk of misusing them; and (2) implementing violence reduction measures where firearm misuse persists.[130] The human rights group asserts that nations "should establish robust regulatory systems," including licensing, registration, restriction of certain weapon types, safe storage, research, and policy development. [131] Nationally, the U.S. has done little or nothing in relation to any of these policies and, due to the influence of the gun lobby, has seen Congress suppress funding for research on gun violence dating back to 1996.[132] AI notes that countries not only have obligations to protect the life of individuals from state agents but from actual or foreseeable

125. *Gun Laws, Loopholes, and Violence*, BRADY UNITED, https://www.bradyunited.org/issue/laws-and-loopholes [https://perma.cc/V348-XX26].

126. AMNESTY INT'L, IN THE LINE OF FIRE: HUMAN RIGHTS AND THE US GUN VIOLENCE CRISIS 11 (2018), https://www.amnestyusa.org/wp-content/uploads/2018/09/egv_exec_sum.pdf [https://perma.cc/YG93-HHTJ].

127. CHILD.'S DEF. FUND, PROTECT CHILDREN NOT GUNS 2019 5 (2019), https://www.childrensdefense.org/wp-content/uploads/2019/09/Protect-Children-Not-Guns-2019.pdf [https://perma.cc/5SB8-S398].

128. AMNESTY INT'L, *supra* note 128, at 5.

129. *Id.*

130. *Id.* at 4.

131. *Id.*

132. *Id.* at 8.

threats at the hands of private actors as well.[133] Violence is especially foreseeable in low income neighborhoods with persistently high levels of violence, poor public services, and policing that may not comply with international standards.[134]

CONCLUSION

Americans face unrelenting gun violence at significantly higher levels than those of other high-income countries.[135] The presence of guns in a dispute increases the likelihood of a fatal outcome and evidence is compelling that gun violence rates increase with increases in gun ownership and with weaker gun laws.[136]

When the discussion about guns turns to rights, conversations focus on the Second Amendment to the U.S. Constitution. Historically, the Second Amendment was interpreted by the courts as the right to bear arms within the context of militia service.[137] In 2008, in a landmark decision, the U.S. Supreme Court in *District of Columbia v. Heller* ruled for the first time[138] that individuals had the right to own an operable gun in their homes for protection.[139] However, the Court made it clear that this right was not unlimited and that laws such as those denying gun ownership to felons and the mentally ill, and prohibiting the carrying of dangerous and unusual weapons, did not violate the Second Amendment.[140]

This Article addressed the issue as to whether the general public, gun owners and non-owners alike, have the right to be protected from the unremitting onslaught of gun violence in their communities. Such a conversation is usually drowned out by discussions of the scope of the Second Amendment right. Is there a right to be safe at work, in school, during public meetings, while attending a place of worship, or during leisure

133. *Id.* at 4–5.
134. *Id.* at 10.
135. *See generally*, Hemenway et al., *supra* note 125.
136. Paul M. Reeping et al., *State Gun Laws, Gun Ownership, and Mass shootings in the US: Cross-Sectional Time Series*, 364 BRIT. MED. J. 1542 (2019).
137. *See, e.g.*, United States v. Miller, 307 U.S. 174 (1939).
138. James Vicini, *Americans Have the Right to Guns Under Landmark Ruling*, REUTERS (June 26, 2008), https://www.reuters.com/article/us-usa-guns-court/americans-have-right-to-guns-under-landmark-ruling-idUSWBT00928420080626 [https://perma.cc/5YN3-6REL].
139. District of Columbia v. Heller, 554 U.S. 570 (2008).
140. *Id.*

activities? Do federal and state governments have a duty to protect their citizens when they undertake these activities?

The U.S. Supreme Court, in several cases in which an individual was murdered or suffered severe abuse after local or state authorities became aware of the danger, ruled that the state had no affirmative duty to protect a person from harm by another person unless the state had a special relationship with the victim (e.g., they were in the state's custody).[141] The landmark *DeShaney* case elicited a strong dissenting opinion from three justices.[142]

Despite these rulings, the state's duty to protect its citizens has a firm basis in social theory, the Declaration of Independence, the U.S. and some state constitutions, the existence and mandates of law enforcement agencies, laws setting limits on the right to acquire and carry firearms, the concept of collective self-defense, court rulings prioritizing public safety over rights protected by the Constitution, and international covenants signed or ratified by the U.S. Collectively, these considerations make a compelling argument that our national and state governments need to be held accountable when public safety is subordinated to the interests of a minority[143] of citizens to own and carry a wide array of weapons, including those designed for military uses.

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141. *See* Castle Rock v. Gonzales, 545 U.S. 748 (2005); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

142. *Id.* at 203.

143. According to a 2019 Pew Research Center poll, 30% of Americans are gun owners. *See* John Gramlich & Katherine Schaeffer, *Seven Facts About Guns in the U.S.*, PEW RSCH. CTR. (Oct. 22, 2019), https://www.pewresearch.org/fact-tank/2019/10/22/facts-about-guns-in-united-states/ [https://perma.cc/FN27-NUNL]. About 8% of gun owners (2% of all adults) own four or more guns. *See* GABOR, *supra* note 2, at 24. Military-style weapons, like the AR-15, make up anywhere between three and five percent of the national civilian arsenal. *See* Joe Walsh, *U.S. Has At Least 20 Million Assault Rifles. A Ban Wouldn't Reduce That Number.*, FORBES, (Mar. 25, 2021, 2:24 PM), https://www.forbes.com/sites/joewalsh/2021/03/25/us-has-at-least-20-million-assault-rifles-a-ban-wouldnt-reduce-that-number/?sh=2749ca324978 [https://perma.cc/8N2Q-Z7HA] (The U.S. has an estimated 20 Million assault rifles); *Aaron Karp, Estimating Global Civilian-Held Firearms Numbers*, SMALL ARMS SURVEY, (June 2018), http://www.smallarmssurvey.org/fileadmin/docs/T-Briefing-Papers/SAS-BP-Civilian-Firearms-Numbers.pdf (The estimated national arsenal is about 400 million firearms). Based on this information, military weapons percentage share of the national arsenal is about three to five percent, with variation accounted for by study.