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## Article

# Everything's at Stake: Preserving Authority to Prevent Gun Violence in the Second Amendment's Third Chapter

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There is a scene in the Coen Brothers' film, "No Country for Old Men," in which a menacing customer (played by Javier Bardem) asks a store clerk to pick heads or tails of a coin. The clerk asks what he has to win or lose from the toss.<sup>1</sup> "Everything," Bardem tells him.<sup>2</sup> The clerk does not know what the audience does: that Bardem has a loaded gun and will, if the clerk guesses wrong, shoot him dead.

As courts consider whether the Second Amendment should restrict authority to enact and enforce strong gun laws, we are all that clerk—except we know the consequences. More than 100,000 Americans are shot each year and nearly 40,000 killed; meanwhile, mass shootings terrorize people everywhere from churches to movie theaters to elementary schools to street corners.<sup>3</sup> As Americans are demanding solutions to this gun violence epidemic, courts are contemplating a sweeping construction of the Second Amendment that could place those solutions at risk; everything is at stake.

These legal coin tosses will become riskier as we potentially enter a third chapter of Second Amendment litigation. During the first

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1. NO COUNTRY FOR OLD MEN (Scott Rudin Prods. 2007).

2. *Id.*

3. *Key Statistics*, BRADY, <https://www.bradyunited.org/key-statistics> [<https://perma.cc/PDZ4-7ZR7>]; John Gramlich, *What the Data Says About Gun Deaths in the United States*, PEW RSCH. CTR. (Aug. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/08/16/what-the-data-says-about-gun-deaths-in-the-u-s> [<https://perma.cc/66XZ-TLSH>].

chapter (1789–2008), the idea “that the Second Amendment poses no barrier to strong gun laws,” as former Solicitor General and Harvard Law School Dean Erwin Griswold said, was “perhaps the most well-settled proposition in American constitutional law.”<sup>4</sup> The second chapter (2008–2021) began with *District of Columbia v. Heller*, in which the Supreme Court jettisoned the “well-regulated militia,” instead construing the Second Amendment as protecting private gun rights, thus empowering courts to strike down gun laws.<sup>5</sup> But, with few exceptions, most courts in the second chapter have not expanded on *Heller*’s right of “law-abiding, responsible citizens” to have a gun in the home for self-defense.<sup>6</sup> They have followed Part III of Justice Scalia’s *Heller* opinion, which explained that the Second Amendment is “not unlimited,” and allows for many gun laws.<sup>7</sup>

Gun rights advocates are hoping for a third chapter, in which courts will vastly expand the scope of private gun rights. They hope the Supreme Court launches this new era in *New York State Rifle and Pistol Association (“NYSRPA”) v. Bruen*.<sup>8</sup>

In *Bruen*, the Court will decide to what extent New York (or any state) can restrict carrying concealed handguns in public.<sup>9</sup> “Gun rights” advocates seek to establish a sweeping interpretation of the Second Amendment, unprecedented in American law, that could entitle virtually anyone to carry loaded guns virtually anywhere, to fire when they see fit, and deprive states of the authority to stop them before it is too late.<sup>10</sup> The Court could also adopt a standard of review that could empower judges to strike down virtually any gun law. This would put the United States into uncharted waters, because Americans have always decided gun policy through democratic processes, not judges.

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4. Erwin N. Griswold, *Phantom Second Amendment ‘Rights’*, WASH. POST (Nov. 4, 1990), <https://www.washingtonpost.com/archive/opinions/1990/11/04/phantom-second-amendment-rights/f4381818-fed9-4e63-8d62-f62056818181> [https://perma.cc/EZM7-YDQZ].

5. *District of Columbia v. Heller*, 554 U.S. 570, 621–22 (2008) (stating that the Court upheld challenged provisions of the National Firearms Act in *United States v. Miller*, 307 U.S. 174 (1939) because the *type* of weapon at issue was dangerous and unusual, not because the Second Amendment failed to protect a right unconnected to militia service).

6. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

7. *Id.* at 626.

8. *N.Y. State Rifle & Pistol Ass’n v. Beach*, 818 Fed.App’x 99 (2d Cir. 2020), *appeal docketed sub nom.*, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, No. 20-843 (U.S. Dec. 23, 2020).

9. *Id.*

10. *See id.*

The efficacy of gun laws indicates the life and death consequences of these decisions. Comprehensive gun regulation<sup>11</sup> has led other comparable countries to reach a gun violence rate that is twenty-five times lower than the United States' rate.<sup>12</sup> It is now more likely that an American will be killed by a gun than a car crash, whereas in Japan, for example, a resident is as likely to die from gunfire as a lightning strike.<sup>13</sup>

States with strong gun laws generally experience lower gun violence rates than states with weak laws. In 1993, California had the sixteenth highest gun death rate in the country; but by 2017, after enacting strong gun laws, it had the seventh lowest rate.<sup>14</sup> Conversely, the 2007 repeal of Missouri's background check laws was associated with a 14% increase in the overall murder rate, and a 25% increase in firearm homicide specifically.<sup>15</sup> Gun laws work. The proof is in the data.

A 2019 RAND study associated state laws that permissively allow public gun carrying and stand your ground laws (which relax standards for gun use in self-defense) with a 3% increase in firearm homicide rates.<sup>16</sup> On the other side, a study found that handgun waiting periods reduce firearm homicides by 17%,<sup>17</sup> while handgun purchaser

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11. See generally FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* (1999).

12. Erin Grinshteyn & David Hemenway, *Violent Death Rates: The US Compared with Other High-Income OECD Countries, 2010*, 129 *AM. J. MED.* 266, 268–72 (2015).

13. See Kevin Quealy & Margot Sanger-Katz, *In Other Countries, You're as Likely to Be Killed by a Falling Object as by a Gun*, *N.Y. TIMES* (Dec. 4, 2015), <https://www.nytimes.com/2015/12/05/upshot/in-other-countries-youre-as-likely-to-be-killed-by-a-falling-object-as-a-gun.html> [<https://perma.cc/5US5-EYDX>].

14. Memorandum from Giffords Law Ctr. to Prevent Gun Violence to Interested Parties (Nov. 22, 2019), <https://giffords.org/press-release/2019/11/memo-california-gun-laws> [<https://perma.cc/K5RL-XDT9>] (citing data compiled by the CDC and publicly available through WISQARS at <https://webappa.cdc.gov/sasweb/ncipc/mortrate.html>). See also Bindu Kalesan et al., *Firearm Legislation and Firearm Mortality in the USA: A Cross-Sectional, State-Level Study*, 387 *LANCET* 1847, 1853 (2016); Alex Yablon, *What We Know About the Effectiveness of Universal Gun Background Checks*, *THE TRACE* (Jan. 10, 2019), <https://www.thetrace.org/2019/01/universal-background-checks-reduce-gun-violence-research> [<https://perma.cc/HU5V-W776>].

15. Daniel Webster, Cassandra Kercher Crifasi, & Jon S. Vernick, *Effects of the Repeal of Missouri's Handgun Purchaser Licensing Law on Homicides*, 91 *J. URB. HEALTH* 293, 293–302 (2014).

16. Terry L. Schell et al., *Changes in Firearm Mortality Following the Implementation of State Law Regulating Firearm Access and Use*, 117 *PROC. NAT'L ACAD. SCI. U.S.* 14906, 14907 (2020).

17. Michael Luca, et al., *Handgun Waiting Periods Reduce Gun Deaths*, 114 *PROC. NAT'L ACAD. SCI. U.S.* 12162, 12162 (2017).

licensing laws were linked to a 14% decrease in firearm homicides in urban counties.<sup>18</sup>

There is good reason for concern that the Court in *Bruen* could place these and other demonstrably effective policy measures at risk. Now, three Trump nominees join with three Justices from the 5–4 majority in *Heller*.<sup>19</sup> Do the math.

But the gun lobby should not start shooting off their celebratory gunfire just yet. *Heller*, and the historical traditions on which it relies, support upholding New York's law, and other longstanding gun laws. And *Heller*, intentionally or not, tracked what many Americans believe—that they have some right to firearms, but restrictions are generally allowed.<sup>20</sup> Indeed, more sweeping conceptions of the Second Amendment are at odds with most Americans' views.<sup>21</sup> Limiting *Heller* to its narrow holding might therefore hit the political sweet spot.

This Article argues that preserving Americans' authority to enact strong gun laws is consistent with *Heller* and longstanding tradition. And *Heller's* historical and doctrinal shortcomings make it far too shaky a foundation to expand upon.

#### I. THE ISSUES POSED IN *BRUEN*

*NYSRPA v. Bruen* involves a challenge to New York's concealed handgun carry licensing scheme, which has been in place since 1913.<sup>22</sup> New York law generally requires anyone who wishes to possess a handgun to obtain a license from local authorities.<sup>23</sup> The state does not issue licenses to openly carry handguns. The state only licenses individuals to carry firearms in public who have “proper cause,” which

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18. Cassandra K. Crifasi et al., *Association Between Firearm Laws and Homicide in Urban Counties*, 95 J. URB. HEALTH 383, 383–90 (2018).

19. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

20. See, e.g., Jeffrey M. Jones, *Public Believes Americans Have a Right to Own Guns*, GALLUP (Mar. 27, 2008), <https://news.gallup.com/poll/105721/public-believes-americans-right-own-guns.aspx> [<https://perma.cc/64CN-GU5L>].

21. See, e.g., Eli Yokley, *Voters Are Nearly United in Support of Expanded Background Checks*, MORNING CONSULT (Mar. 10, 2021), <https://morningconsult.com/2021/03/10/house-gun-legislation-background-checks-polling> [<https://perma.cc/5T3E-HUXY>] (finding that 84% of voters support universal background checks); *Americans Favor Stricter Gun Laws, Though Support Has Declined from 2019*, IPSOS (Mar. 24, 2021), <https://www.ipsos.com/en-us/americans-favor-stricter-gun-laws-though-support-has-declined-from-2019> (last visited Nov. 1, 2021) (noting that 65% of Americans believe gun laws should be stricter).

22. *N.Y. State Rifle & Pistol Ass'n v. Beach*, 818 Fed.App'x 99 (2d Cir. 2020), *appeal docketed sub nom.*, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (U.S. Dec. 23, 2020).

23. N.Y. PENAL LAW § 400.00 (McKinney 2021).

includes target practice, hunting, or a “special need for self-protection that is distinguishable from the general community or of persons engaged in the same profession.”<sup>24</sup> The Petitioners in *Bruen* claim that New York’s licensing law infringes on their Second Amendment rights by not issuing concealed-carry licenses for generalized self-defense purposes.<sup>25</sup>

The Second Circuit upheld New York’s law, relying on a similar 2012 ruling that held that, under *Heller*, the law was a “presumptively lawful” longstanding regulation that does not implicate the Second Amendment.<sup>26</sup> The court also found the law constitutional under intermediate scrutiny, because the restriction does not implicate the core right to self-defense in the home and is substantially related to an important government interest.<sup>27</sup>

The *Bruen* Petitioners asked the Supreme Court to establish the right to use a firearm in self-defense outside the home; but the Court narrowed the question presented to “[w]hether the state of New York’s denial of petitioners’ applications for concealed-carry licenses for self-defense violated the Second Amendment.”<sup>28</sup> Regardless, a ruling by the Court could address, either in its holding or persuasive dicta, broader issues regarding state authority to regulate carrying guns in public, and what standard of review should govern Second Amendment challenges.

## II. *HELLER* AND HISTORY “FROM TIME IMMEMORIAL”

It is unquestionable that some Justices have an appetite to vastly limit governmental authority to enact gun laws. In dissents before nomination to the Court, Justice Kavanaugh opined that the Constitution entitles civilians to possess military-style assault weapons;<sup>29</sup> Justice Barrett claimed that the government could not deprive individuals convicted of certain felons from owning guns.<sup>30</sup> Justices Thomas

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24. *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012), *cert. denied sub nom.*, *Kachalsky v. Cacace*, 569 U.S. 918 (2013).

25. Brief for Petitioners at 2, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, No. 20-843 (U.S. Dec. 23, 2020), 2021 WL 3017303, at \*1.

26. *Kachalsky*, 701 F.3d at 100.

27. *Id.* at 96.

28. Brief for Petitioners, *supra* note 25, at i.

29. *Heller v. District of Columbia*, 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

30. *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

and Gorsuch have complained that some courts treat the Second Amendment as a “second class” right.<sup>31</sup>

On the other hand, the Justices may not be willing to take the unprecedented leap that would deprive Americans of the authority to protect public spaces from gun violence and give judges broad veto power over life-saving gun laws. Such a decision could damage not just Americans’ safety, but the Court’s institutional credibility. Indeed, *Heller* was a controversial decision, sharply criticized by many as inconsistent with the Framers’ text, purpose, and history. A ruling that restricts governmental authority to keep hidden handguns out of public places would run counter to over a century of Supreme Court precedent.

*Heller*’s holding was narrow—the majority found “that the District’s ban on handgun possession *in the home* violates the Second Amendment, as does its prohibition against rendering any lawful firearms *in the home* operable for the purpose of immediate self-defense.”<sup>32</sup> “And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms *in defense of hearth and home*.”<sup>33</sup>

While “gun rights” advocates argue that *Heller* implies a right to use guns wherever one deems they are needed for self-defense,<sup>34</sup> the Court appeared to reject this argument. In section three of the majority opinion, the *Heller* Court went out of its way to explain that its ruling did not deprive governments of their authority to address gun violence.<sup>35</sup> Section three announced that the Second Amendment is “not unlimited,” and is consistent with strong gun laws.<sup>36</sup> As such, the Court noted that the government may restrict who can possess guns, where guns can be brought, how guns are sold, and what guns can be sold.<sup>37</sup> In apparent response to the brief submitted by the United States (represented by then-Solicitor General, now NYSRPA and NRA-counsel Paul Clement), which sought protection of existing federal gun laws,

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31. See *Friedman v. Highland Park*, 577 U.S. 1039, 1039 (2015) (Thomas, J., dissenting); *Silvester v. Becerra*, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting); *Peruta v. California*, 137 S. Ct. 1995, 1996 (2017) (Thomas, J. and Gorsuch, J., dissenting).

32. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (emphasis added).

33. *Id.* (emphasis added).

34. See, e.g., *id.* at 599, 630.

35. *Id.* at 626–28.

36. *Id.* at 626.

37. *Id.* at 626–27.

the Court included a non-exhaustive list of gun laws that remain “presumptively lawful.”<sup>38</sup>

The Court also was explicit that the Second Amendment did not include a right to carry concealed guns in public. The Court recognized that “[f]rom Blackstone through the 19th century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever and for whatever purpose.”<sup>39</sup> *Heller* noted approvingly that “the majority of the 19th century courts to consider the question held that *prohibitions on carrying concealed weapons* were lawful under the Second Amendment or state analogues.”<sup>40</sup>

This limitation accorded with the century-old Supreme Court precedent on which *Heller* relied. The Court’s 1897 *Robertson v. Baldwin* decision stated that “the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons . . . .”<sup>41</sup> *Robertson* explained that the Bill of Rights

were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed.<sup>42</sup>

*Heller* cited *Robertson* for this very proposition.<sup>43</sup> Hence, the Second Amendment effectively “formally express[es]” that it does not protect a right to carry concealed weapons. While “gun rights” advocates suggest that *Heller*’s reference to a right to use arms in “confrontation” supports a broad right to carry guns, that language is followed by reference to the “pre-existing right” to arms, which excludes a right to carry concealed weapons.

*Heller* also cited the 1872 Texas Supreme Court’s *English v. State* decision which upheld a law largely prohibiting the carrying of pistols and other concealable weapons.<sup>44</sup> *English* found arguments that civilians were entitled to bring handguns into places “where ladies and gentlemen are congregated together” “little short of ridiculous.”<sup>45</sup>

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38. *Id.*

39. *Id.* at 626.

40. *Id.* at 629 (emphasis added).

41. *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897).

42. *Id.* at 281.

43. *Heller*, 554 U.S. at 559–600.

44. *Id.* at 627.

45. *English v. State*, 35 Tex. 473, 478–79 (1872).

Strongly rejecting the premise that a civil society should entitle armed civilians to use guns to respond to crime, *English* noted that people should accept that,

in 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.<sup>46</sup>

*English* quoted John Stuart Mill's recognition of "[t]he right inherent in society to ward off crimes against itself by antecedent precautions" as justification for keeping guns out of public spaces.<sup>47</sup>

Longstanding principles give the state far broader authority to protect safety in public spaces than in private homes. As Professor Darrell Miller notes, some constitutional rights are at their apex in, or confined to, the home.<sup>48</sup> Judge J. Harvie Wilkinson IV explained: "It is not far-fetched to think that the *Heller* Court wished to leave open the possibility that such a danger would rise exponentially as one moved the [Second Amendment] right from the home to the public square."<sup>49</sup>

The Court is, of course, free to embrace a more sweeping conception of the Second Amendment in *Bruen* and subsequent cases. However, if it does, it will reject limits accepted by the *Heller* majority, as well as century-old Supreme Court precedent, which relied on traditions accepted "from time immemorial."<sup>50</sup>

### III. THE TRADITION OF GUN REGULATION IN AMERICA

A sweeping Second Amendment decision would run counter to America's historic tradition of gun regulation, which courts have recognized as wholly compatible with the Second Amendment.

The very same English gun rights that *Heller* claimed the Second Amendment rests upon, allowed for strong gun laws, including prohibitions on public gun carrying.<sup>51</sup> The English Bill of Rights of 1689 recognized that the right to own firearms "was vested not in individuals but in Parliament, which remained free to determine 'by law' which

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46. *Id.* at 477.

47. *Id.*

48. Darrell A. H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1303–10 (2009); see also Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 226 (2008).

49. *United States v. Masciandaro*, 638 F.3d 458, 475–76 (4th Cir. 2011) (Wilkinson, J., concurring).

50. *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897).

51. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

Protestant subjects could own which weapons and how they could be used.”<sup>52</sup> The 1328 Statute of Northampton was enacted to prevent individuals going or riding armed.<sup>53</sup> A 1285 law greatly restricted carrying arms in London; a 1299 decree from King Edward generally barred “going armed within the realm without the King’s special license.”<sup>54</sup>

Following this tradition, many cities in colonial America restricted gun firing<sup>55</sup> and gunpowder storage and transportation,<sup>56</sup> and several early American laws prohibited the public carrying of firearms.<sup>57</sup> “[C]olonial and early state governments routinely exercised their police powers to restrict the time, place, and manner in which Americans used their guns.”<sup>58</sup>

Numerous states during Reconstruction restricted—or prohibited—most public gun carrying.<sup>59</sup> For example, Tennessee outlawed any carrying of any pistol “except the army or navy pistol” and Wyoming barred anyone from “bear[ing] upon his person, concealed or openly, any fire-arm or other deadly weapon, within the limits of any city, town or village.”<sup>60</sup> Courts repeatedly upheld these regulations against constitutional challenges.<sup>61</sup> The *Heller*-cited *English* opinion

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52. Brief of Amici Curiae Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, Lois G. Schworer et al. in Support of Petitioners at 2, *Heller v. District of Columbia*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 157183, at \*2.

53. Brief of Amicus Curiae Everytown for Gun Safety in Support of Appellants and Reversal at 4, *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2015) (No. 15-7057), 2015 WL 5169122, at \*4.

54. Mark Anthony Frassetto, *Firearms and Weapons Legislation up to the Early 20<sup>th</sup> Century* (Jan. 15, 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2200991](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200991) [<https://perma.cc/M69J-4L8F>].

55. See, e.g., Patrick J. Charles, *Scribble Scrabble, The Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 NW. U. L. REV. COLLOQUY 227, 241 n.98 (2011); Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 L. & HIST. REV. 139, 163 (2007).

56. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 505 n.119 (2004).

57. Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 36–41 (2012).

58. Churchill, *supra* note 55, at 162.

59. Brief of Thirty-Four Professional Historians and Legal Historians as Amici Curiae in Support of Respondents at 9, *McDonald v. City of Chi.*, 561 U.S. 742 (2010) (No. 08-1521), 2010 WL 59025, at \*9.

60. *Id.* at 17.

61. See, e.g., *Andrews v. State*, 50 Tenn. 165, 171 (1871); *Fife v. State*, 31 Ark. 455, 461 (1876).

relied on the Statute of Northampton as precedent for upholding Texas's broad ban on gun carrying.<sup>62</sup>

These courts recognized that a broad right to carry and use guns in public is incompatible with a civil society. Similar to *English*, the Supreme Court of Georgia, in 1874, explained that expansive gun rights are inconsistent with the Framers' vision of "a well ordered and civilized community":

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.<sup>63</sup>

To be sure, there were instances in which courts embraced a right to carry guns in public, but, as Professors Saul Cornell and Eric Ruben have explained, these anomalous cases generally arose from Southern states seeking to sanction armed suppression of enslaved people.<sup>64</sup> For example, the *Bruen* Petitioners claim the antebellum *Bliss v. Commonwealth* is "particularly instructive, given its proximity to the founding."<sup>65</sup> *Bliss* struck down a ban on concealed carry as inconsistent with Kentucky's analogue to the Second Amendment, which it "assumed [] codified a preexisting right" to carry weapons in public for self-defense.<sup>66</sup> But *Bliss* is contrary to *Robertson's* recognition that the "preexisting right" did not include concealed carry, and *Bliss* was overruled by an amendment to the state constitution.<sup>67</sup> The *Bruen* Petitioners point to other cases from the antebellum South, including *Nunn v. State*.<sup>68</sup> But *Nunn* was rejected by the same court twenty-eight

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62. *English v. State*, 35 Tex. 473, 476 (1872).

63. *Hill v. State*, 53 Ga. 473, 478 (1874); see also Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 *FORDHAM URB. L.J.* 1695, 1718 (2016).

64. See Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry*, 125 *YALE L.J.* 121, 124–28 (2015); Saul Cornell & Eric M. Ruben, *The Slave-State Origins of Modern Gun Rights*, *ATLANTIC* (Sept. 30, 2015), <https://www.theatlantic.com/politics/archive/2015/09/the-origins-of-public-carry-jurisprudence-in-the-slave-south/407809/> [<https://perma.cc/N44N-VZTV>].

65. Petition for a Writ of Certiorari at 20, *N.Y. State Rifle & Pistol Ass'n v. Corlett*, No. 20-843, 2021 WL 1602643 (Apr. 26, 2021), 2020 WL 7647665, at \*20.

66. *Id.*

67. See Cornell, *supra* note 63, at 1715 n.116 (citing KY. CONST. of 1850 art. XIII, § 25).

68. Petition for a Writ of Certiorari, *supra* note 65, at 21.

years later, when Georgia's Supreme Court was "at a loss to follow the line of thought that extends the guarantee to the right to carry pistols, disk, Bowie-knives, and those other weapons of like character, which, as all admit, are the greatest nuisances of our day."<sup>69</sup> Moreover, these outlier cases reflect practices adopted in slaveholding in the South, but historian Saul Cornell explains: "Outside of the South, a robust model of weapons regulations emerged and gained widespread acceptance . . . [including] [p]rohibitions on concealed carry . . ."<sup>70</sup>

The tradition of strong gun regulation is in keeping with the founding vision of American government as focused on the public good and public safety. The Declaration of Independence set out the grounding principles for the new United States: life, liberty, and the pursuit of happiness.<sup>71</sup> James Madison explained to Congress that "government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of . . . pursuing and obtaining happiness and safety."<sup>72</sup> Thomas Jefferson reiterated that "the care of human life & happiness & not their destruction, is the first and only legitimate object of good government."<sup>73</sup>

The Framers' conception of public safety was forged from the Anglo-American tradition of bounding rights within the "public good,"<sup>74</sup> which accepted that the greater population's right to safety was greater than individuals' liberty to carry out dangerous activities. The concept of "public good," as defined by Blackstone, allows the legislature to require individuals to regulate certain rights when the public's benefit is substantial enough to justify it.<sup>75</sup>

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69. Cornell, *supra* note 63, at 1718 (citing *Hill v. State*, 53 Ga. 473, 474 (1874)).

70. *Id.* at 1718–19.

71. See Letter from John Hancock, President of Congress, to the New York Convention (July 6, 1776), in 1 AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE UNITED STATES OF AMERICA 33 (Peter Force ed., Ser. No. 5, 1846).

72. 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834).

73. Thomas Jefferson, Letter to the Republicans of Washington County, Maryland (Mar. 31, 1809), <http://founders.archives.gov/documents/Jefferson/03-01-02-0088> [<https://perma.cc/FM5P-MT8U>].

74. See, e.g., JOHN ADAMS, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (1794); see also Samuel Adams, Mass. Lieutenant-Governor, Speech to the Massachusetts House of Representatives and Senate (Jan. 17, 1794), in RESOLVES OF THE GENERAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS 33, 34 (1794); Patrick J. Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 WM. & MARY BILL RTS. J. 457, 477–523 (2011).

75. See Charles, *supra* note 57, at 48–49.

From the Framers to today, Americans have never viewed the Second Amendment as a suicide pact, a homicide pact, or a recipe for insurrection. Individuals carrying weapons have not been seen as a method for *enforcing* public safety, but rather as a disturbance to it.

#### IV. THE DANGERS POSED BY ENSHRINING A BROAD RIGHT TO CARRY GUNS IN PUBLIC

Courts should account for the real toll that guns inflict on Americans every day: dangers that wholly differ from the historical antecedents which some contend should limit current gun policy. While the Framers recognized the need to prevent dangers posed by carrying single shot pistols and knives in a largely rural, sparsely populated nation, those dangers pale in comparison to those created by semi-automatic guns in today's America.

A broad Second Amendment right to guns in public would preclude policy responses that could prevent tragedies. Imagine the bloodbath that would have resulted if the insurrectionists on January 6, 2021 were constitutionally entitled to carry guns.<sup>76</sup> As white supremacist terrorism is a severe ongoing threat to public safety,<sup>77</sup> a ruling that prevents authorities from restricting guns in public could lead to far more deadly uprisings.

Experience tells us what happens when people feel empowered to carry and use guns when they deem necessary. Consider the men who claimed to be conducting a citizen's arrest and acting in self-defense when they killed Ahmaud Arbery while he was jogging in Georgia.<sup>78</sup> Or the man who claimed to be securing his neighborhood when he killed Trayvon Martin in Florida.<sup>79</sup> Not to mention the hot-headed

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76. Steve Holland, Jeff Mason & Jonathan Landay, *Trump Summoned Supporters to "Wild" Protest, and Told Them to Fight. They Did*, REUTERS (Jan. 6, 2021), <https://www.reuters.com/article/uk-usa-election-protests-idUKKBN29B2CZ> [<https://perma.cc/6N1F-XMFB>].

77. U.S. DEP'T OF JUST., OFF. OF THE DIR. OF NAT'L INTEL., DOMESTIC VIOLENT EXTREMISM POSES HEIGHTENED THREAT IN 2021 (2021).

78. Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Apr. 29, 2021), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> [<https://perma.cc/GLU3-JVAC>].

79. Karen Grigsby Bates, *A Look Back at Trayvon Martin's Death and the Movement it Inspired*, NPR (Jul. 31, 2018), <https://www.npr.org/sections/codeswitch/2018/07/31/631897758/a-look-back-at-trayvon-martins-death-and-the-movement-it-inspired> [<https://perma.cc/D54Y-TLTP>].

dad convinced that his child was robbed of playing time,<sup>80</sup> or the woman aggrieved because she was cut off in traffic.<sup>81</sup>

Social science confirms that restricting public gun carrying is an effective measure to prevent injury and death. Guns are used “far more often to kill and wound innocent victims than to kill and wound criminals . . . [and] guns are also used far more often to intimidate and threaten than they are used to thwart crimes.”<sup>82</sup> Studies show that public gun carrying *increases* the risk of victimization to violent crime, and does “not protect those who possessed them from being shot in an assault.”<sup>83</sup> An increase in guns in public may cause increased criminal violence.<sup>84</sup>

Public gun carrying creates danger to police as well. When five police officers were shot and killed at a protest in Dallas in 2016, many protestors were carrying firearms, which made it harder for police to identify and stop the shooter.<sup>85</sup> Dallas’s then-police chief said, “[w]e don’t know who the ‘good guy’ versus who the ‘bad guy’ is, if everybody starts shooting.”<sup>86</sup> After a man open-carrying a rifle in Louisiana shot and killed three officers, the police union president said that open carry “scares the hell out of me.”<sup>87</sup> A survey found 75% of responding

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80. Sarah McRitchie, *Basketball Coach Held on \$500,000 Bond After Sandusky Tournament Shooting*, ABC NEWS (Apr. 17, 2021), <https://www.13abc.com/2021/04/17/suspect-in-custody-after-basketball-tournament-shooting> [<https://perma.cc/AAV5-P6MK>].

81. NBC Washington Staff, *Man Shot by Woman in D.C. Road Rage Attack Dies: Police*, NBC WASH. (Apr. 28, 2021), <https://www.nbcwashington.com/news/local/man-shot-by-woman-in-dc-road-rage-attack-dies-police/2654538> [<https://perma.cc/4D8X-NVVP>].

82. David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results from a National Survey*, 15 VIOLENCE & VICTIMS 257, 271 (2000).

83. Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 AM. J. PUB. HEALTH 2034, 2037 (2009); *see, e.g.*, John J. Donohue, *The Impact of Concealed-Carry Laws*, in EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE (Jens Ludwig & Phillips J. Cook eds., 2003); Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence from State Panel Data*, 18 INT’L REV. L. & ECON. 239, 248 (1998).

84. Philip J. Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, 90 J. PUB. ECON. 379, 387 (2006).

85. Ernest Scheyder, *Dallas Police Chief Says Armed Civilians in Texas ‘Increasingly Challenging’*, REUTERS (Jul. 10, 2016), <https://www.reuters.com/article/us-usa-police-protests/dallas-police-chief-says-armed-civilians-in-texas-increasingly-challenging-idUSKCN0ZQ0V8> [<https://perma.cc/V7SY-BGNS>].

86. *Id.*

87. Maya Lau & Jim Mustian, *Baton Rouge Police Shooting Brings Renewed Attention to Louisiana’s ‘Open Carry’ Rights*, ADVOCATE (Aug. 6, 2016), [https://www.theadvocate.com/baton\\_rouge/news/baton\\_rouge\\_officer\\_shooting/](https://www.theadvocate.com/baton_rouge/news/baton_rouge_officer_shooting/)

Texas police chiefs opposed open carry and 90% said that any open carry should require licenses.<sup>88</sup>

Racial bias, implicit or explicit,<sup>89</sup> makes civilian carry particularly risky for people of color. For example, in 2018, Emantic Bradford, Jr., a Black licensed gun owner, sought to protect himself and others when a shooting broke out at the mall.<sup>90</sup> Responding officers mistook him as the assailant and shot him to death.<sup>91</sup> Eleven days earlier, police shot and killed Jemel Roberson, a Black security guard, while he subdued a suspect.<sup>92</sup>

The police killings of Ma'Khia Bryant, Daunte Wright, Jacob Blake, Breonna Taylor, Walter Scott, Philando Castile, Michael Brown, Tamir Rice, Laquan MacDonald, and many more demonstrate how the presence of guns can quickly escalate to lethal violence where police perceive themselves to be in danger. Whatever one believes caused those deaths, civilians are far *less* trained than law enforcement to use firearms, de-escalate potentially violent situations, or deal with stressful situations. And studies show that despite their training, police miss their target over half the time.<sup>93</sup> Armed civilians will likely have worse results, and when they miss a target, they can easily hit another, unintended person.

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article\_83d7317a-5b60-11e6-84b4-13cf89c9f22f.html (last visited Nov. 1, 2021).

88. Tom Benning, *75 Percent of Texas Police Chiefs Responding to Survey Oppose Open Carry*, DALLAS NEWS, (Feb. 13, 2015), <https://www.dallasnews.com/news/politics/2015/02/13/75-percent-of-texas-police-chiefs-responding-to-survey-oppose-open-carry> [<https://perma.cc/U2F8-5E7X>].

89. See, e.g., Brentin Mock, *What New Research Says about Race and Police Shootings*, CITY LAB (Aug. 6, 2019), <https://www.citylab.com/equity/2019/08/police-officer-shootings-gun-violence-racial-bias-crime-data/595528> [<https://perma.cc/QDB8-2Y79>]; German Lopez, *There Are Huge Racial Disparities in How US Police Use Force*, VOX (Nov. 14, 2018), <https://www.vox.com/identities/2016/8/13/17938186/police-shootings-killings-racism-racial-disparities> (last visited Nov. 1, 2021).

90. CNN Wire, *Family Sues Hoover, Alabama, and the Officer Who Killed Emantic Bradford Jr. at a Mall on Thanksgiving*, FOX43 (Nov. 25, 2019), <https://www.fox43.com/article/news/family-sues-hoover-alabama-and-the-officer-who-killed-emantic-bradford-jr-at-a-mall-on-thanksgiving/521-ab538c75-6807-41ae-ab91-9ef37e41732d> [<https://perma.cc/T4ZW-YN9P>].

91. *Id.*

92. Holly Yan, *"Hero" Security Guard Killed By Police Was Working Extra Shifts for His Son's Christmas*, CNN (Nov. 15, 2018), <https://www.cnn.com/2018/11/15/us/chicago-area-security-guard-police-shooting/index.html> [<https://perma.cc/AEG2-448Z>].

93. BERNARD D. ROSTKER ET AL., RAND CORP., EVALUATION OF THE NEW YORK CITY POLICE DEPARTMENT FIREARM TRAINING AND FIREARM-DISCHARGE REVIEW PROCESS 14 (2008) (finding hit rates below 30%); LOS ANGELES POLICE DEP'T, USE OF FORCE YEAR-END REVIEW 29 (2016) (finding a 33.4% hit ratio).

Evidence compiled by the Violence Policy Center reveals numerous incidents of persons who were entitled by law to carry concealed firearms and used those guns to needlessly kill or injure.<sup>94</sup> The daily barrage of gun violence continues to add to the list. Modern reality supports upholding restrictions on public gun carrying.

#### V. HELLER'S UNSTABLE FOUNDATION

While some suggest that *Heller's* historical and legal conclusions support vastly expanding the Second Amendment to include a right to carry guns in public, *Heller* is too unstable a foundation to be so extended. This is not to suggest that *Heller* must be reversed in order to hold that the Second Amendment does not protect a right to carry guns in public. But the Court should not compound *Heller's* historical errors and tortured constructions by expanding on them.

The Court has recognized that some decisions do not provide sturdy enough support for expansion, even if they remain precedent under stare decisis.<sup>95</sup> For example, *Harris v. Quinn* confined a prior opinion to its narrow holding where the Court had relied on “unwarranted” assumptions and “failed to appreciate” the impact of its application to new facts.<sup>96</sup> The Court frequently narrows precedent, which Professor Richard Re described as “the second cousin of a familiar and firmly entrenched jurisprudential technique: the canon of constitutional avoidance.”<sup>97</sup> Judicial modesty is particularly appropriate with *Heller*, which is controversial, and based on questionable assumptions about history and the Second Amendment’s intended meaning—and its extension would infringe on other rights and traditions.

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94. *More than 1,360 Non-Self Defense Deaths Involving Concealed Carry Killers Since 2007, Latest Violence Policy Center Research Shows*, VIOLENCE POL'Y CTR. (Mar. 18, 2020), <https://vpc.org/press/more-than-1360-non-self-defense-deaths-involving-concealed-carry-killers-since-2007-latest-violence-policy-center-research-shows> [https://perma.cc/3S9M-9Q8Q].

95. *See Harris v. Quinn*, 573 U.S. 616 (2014).

96. *Id.* at 636–38.

97. Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1865 (2014) (citing *Gonzales v. Carhart*, 550 U.S. 124, 154 (2007) (narrowing *Stenberg v. Carhart*, 530 U.S. 914 (2000)); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 476 (2007) (narrowing *McConnell v. FEC*, 540 U.S. 93 (2003)); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007) (narrowing *Flast v. Cohen*, 392 U.S. 83 (1968)); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 725 (2007) (narrowing *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003)); *Herring v. United States*, 555 U.S. 135, 144 (2009) (narrowing *Mapp v. Ohio*, 367 U.S. 643 (1961)); *Florida v. Powell*, 130 S. Ct. 1195, 1199–1200 (2010) (narrowing *Miranda v. Arizona*, 384 U.S. 436, 471 (1966))).

A. *HELLER'S SHAKY FOUNDATION*

*Heller*, by a single vote, radically altered over two hundred years of American jurisprudence. From 1791 to 2008, most courts and commentators agreed that the Second Amendment's first clause ("A well-regulated militia, being necessary for the security of a free State") defined the scope of the second ("the right of the people to keep and bear arms shall not be infringed").<sup>98</sup> The notion adopted by *Heller*—that the Second Amendment restricted laws regulating private gun possession and use—was, according to former Chief Justice Warren Burger, "one of the greatest pieces of fraud, I repeat the word fraud, on the American people by special interest groups I have seen in my lifetime."<sup>99</sup>

Not only was *Heller's* holding radical, its reasoning was sharply criticized, even by fervent gun rights supporters. Professor Nelson Lund, a strong supporter of gun rights, affiliated with the Federalist Society and Heritage Foundation, wrote of *Heller*:

The Court's reasoning is at critical points so defective—and so transparently non-originalist in some respects—that *Heller* should be seen as an embarrassment for those who joined the majority opinion.<sup>100</sup>

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Justice Scalia flunked his own test . . . Justice Scalia's majority opinion makes a great show of being committed to the Constitution's original meaning, but fails to carry through on that commitment.<sup>101</sup>

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Justice Scalia's *Heller* opinion itself shows that his use of history and tradition is little more than a disguised version of the kind of interest balancing that he purported to condemn.<sup>102</sup>

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98. See, e.g., *United States v. Miller*, 307 U.S. 174, 178 (1939) ("In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."); Saul Cornell, *The Second Amendment Goes To Court*, ORIGINS (Nov. 7, 2008), <https://origins.osu.edu/article/second-amendment-goes-court> [<https://perma.cc/RU6T-QEW7>]; Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL'Y REV. 593 (2006).

99. Joan Biskupic, *Guns: A Second (Amendment) Look*, WASH. POST (May 10, 1995), <https://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/courtguns051095.htm> [<https://perma.cc/Y84E-RB7F>].

100. Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1345 (2009).

101. *Id.*

102. Nelson Lund, *No Conservative Consensus Yet: Douglas Ginsburg, Brett Kavanaugh, and Diane Sykes on the Second Amendment*, 13 ENGAGE: J. FEDERALIST SOC'Y

Reagan-appointee Judge Richard Posner wrote:

[*Heller*] is questionable in both method and result, and it is evidence that the Supreme Court, in deciding constitutional cases, exercises a freewheeling discretion strongly flavored with ideology.

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The irony is that the “originalist” method would have yielded the opposite result.<sup>103</sup>

Judge Wilkinson, another Reagan-appointee and formerly short-listed for Supreme Court nominations, wrote that *Heller* “represents a failure—the Court’s failure to adhere to a conservative judicial methodology in reaching its decision. In fact, *Heller* encourages Americans to do what conservative jurists warned for years they should not do: bypass the ballot and seek to press their political agenda in the courts.”<sup>104</sup>

Historians called the Court’s historical analysis “at best confused,”<sup>105</sup> a “conscious fraud,”<sup>106</sup> and “an example of judicial activism that rivals the most controversial decisions in modern Supreme Court history.”<sup>107</sup> Even a cursory analysis shows why the opinion received such poor reviews.

#### B. *HELLER’S* ANTI-TEXT TEXTUALISM

“The text is the law,” instructed Justice Scalia, “and it is the text that must be observed.”<sup>108</sup> But if *Heller* “flunked” the originalism test, it got an F- in textualism.

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PRAC. GRPS. 22, 24 (2012).

103. Richard A. Posner, *In Defense of Looseness*, THE NEW REPUBLIC (Aug. 27, 2008), <https://newrepublic.com/article/62124/defense-looseness> [https://perma.cc/3KQF-XVJG].

104. J. Harvie Wilkinson III, *Of Guns, Abortions and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009); see, e.g., David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295 (2009); Paul Finkelman, *It Really Was About a Well Regulated Militia*, 59 SYRACUSE L. REV. 267 (2008); William G. Merkel, *The District of Columbia v. Heller and Antonin Scalia’s Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349 (2009); Richard A. Epstein, *A Structural Interpretation of the Second Amendment: Why Heller Is (Probably) Wrong on Originalist Grounds*, 59 SYRACUSE L. REV. 171 (2008).

105. See Finkelman, *supra* note 104, at 267.

106. See Merkel, *supra* note 104, at 349.

107. Saul Cornell, *Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss”*, 56 UCLA L. REV. 1095, 1096 (2009).

108. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136 (1997) (quoting Antonin Scalia, *Common-Law Courts in a*

The Second Amendment is the only amendment that states its purpose in its text: "A well-regulated militia, being necessary for the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."<sup>109</sup> The Framers could have written it like the First Amendment ("Congress shall make no law infringing on the right to keep and bear arms"), or the Fourth Amendment ("The right of the people to keep and bear arms shall not be infringed").<sup>110</sup> Textualism demands recognition that the Framers included the militia clause for a reason.<sup>111</sup>

The first half of the amendment conveys its "obvious purpose," as the Supreme Court put it in its unanimous *Miller v. United States* decision in 1939, "to assure the continuation and render possible the effectiveness" of the "well-regulated militia."<sup>112</sup> For over two centuries the Second Amendment was "interpreted and applied with [that] end in view."<sup>113</sup>

The pre-*Heller* reading of the Second Amendment was essentially: "Since a well-regulated militia is necessary to the security of a free State, the right of the people to keep and bear arms for use in the militia shall not be infringed." Meaning is found in every word; the clauses are consistent. The right effectuates the purpose.

*Heller*, in contrast, interprets the Amendment more like: "Since a well-regulated militia is necessary to the security of a free State, the right of the people to have and use guns, with nothing to do with militias, shall not be infringed." The first clause is an inconvenience; the right has little to do with the purpose and may even contravene it.

Linguistic gymnastics were needed to arrive at this odd construction. Justice Scalia labeled the militia clause a "preamble," and announced that it should be analyzed last, merely "to ensure that our reading of the operative clause is consistent with the announced purpose."<sup>114</sup> There was no apparent reason why the Court declined to

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*Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22 (Amy Gutmann ed., 1997)).

109. U.S. CONST. amend II.

110. *United States v. Menasche*, 348 U.S. 528 (1955); see also ANTONIN SCALIA & BRYAN A. GARDNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 63–66 (2012).

111. *Marbury v. Madison*, 5 U.S. 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect."); see also SCALIA & GARDNER, *supra* note 110, at 174.

112. *United States v. Miller*, 307 U.S. 174, 178 (1939); see also *District of Columbia v. Heller*, 554 U.S. 570, 625–27 (2008).

113. *Miller*, 307 U.S. at 178.

114. *Heller*, 554 U.S. at 578.

read how judges, like other humans, usually do: start at the beginning of a sentence, then read to the end.

Historian David Konig explains that the Court's slice-and-dice reading "dismembers the amendment and does violence not only to the intent of those who drafted it, but also to the public that read it, gave it meaning, and ratified it."<sup>115</sup> Konig explains that the militia language supports an "original public meaning" of the Second Amendment to protect militias.<sup>116</sup> While Justice Scalia opined that the Amendment's first half did not inform the meaning of the second, Konig explains that is not what the Framers, or their public, understood.<sup>117</sup> Konig quotes 1790's Judge John Jay that "[a] preamble cannot annul enacting clauses; but when it evinces the intention of the legislature and the design of the act, it enables us, in cases of two constructions, to adopt the one most consonant to their intention and design."<sup>118</sup> The construction of the Second Amendment "consonant to [its] intention and design" was the pre-*Heller* reading that related solely to the well-regulated militia the Framers put front and center.

Nor was the Second Amendment an anachronistic way to protect private gun rights. Madison chose not to follow a New Hampshire proposal that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion," or a Pennsylvania minority proposal that protected people's "right to bear arms for the defense of themselves and their state, or the United States, or for the purpose of killing game."<sup>119</sup>

The Framers' use of "keep and bear arms" further emphasizes the right's militia scope. A searching examination of government records from colonial America "conclusively demonstrated that Congress overwhelmingly used 'bear arms' in a military context."<sup>120</sup> Scholar Nathan Kozuskanich examined the use of "bear arms" in early American writings and Congressional proceedings from 1763 to 1791, and found that the term was overwhelmingly used in an "explicitly

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115. Konig, *supra* note 104, at 1297.

116. *Id.* at 1298–317.

117. *Id.*

118. *Id.* at 1331.

119. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS 169 (Neil H. Cogan ed., 1997); THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 623–24 (Merrill Jensen et al. eds., 1976).

120. Nathan Kozuskanich, *Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?*, 10 U. PA. J. CONST. L. 413, 414 (2008); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, 49 L. & CONTEMP. PROBS. 151 (1989).

collective or military context” without reference to a personal right to self-defense.<sup>121</sup>

Justice Scalia engaged in more gymnastics to evade this meaning. He construed “keep arms” and “bear arms” separately (though that’s not what the Framers wrote), and proclaimed, “we find no evidence that [keep and bear arms] bore a military meaning.”<sup>122</sup> Even if that were true in 2008 (it wasn’t), it certainly isn’t now. Scholarship since *Heller* and *McDonald* confirms that “keep and bear Arms” was an idiomatic military phrase in founding-era America.<sup>123</sup> Professor Dennis Baron evaluated 1,300 instances of the use of “bear arms” in context and found the overwhelming majority “refer to war, soldiering, or other forms of armed action by a group rather than an individual” and only seven uses of the term “were either ambiguous or carried no military connotation.”<sup>124</sup>

The military meaning of “bear arms” persisted. The Supreme Court of Tennessee noted in 1840, “[t]he words ‘bear arms’ [] have reference to their military use,” and went on: “A man in the pursuit of deer, elk, and buffaloes might carry his rifle every day for forty years, and yet it would never be said that he had borne arms . . . .”<sup>125</sup>

In the name of “textualism,” *Heller* rendered the first thirteen words of the Second Amendment perhaps the most irrelevant in the Constitution.

### C. CONTRA-HISTORY ORIGINALISM

Justice Scalia claimed to employ a “public meaning” “originalist” methodology, to construe the text as understood by the public at the

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121. See Kozuskanich, *supra* note 120, at 416.

122. *District of Columbia v. Heller*, 554 U.S. 570, 591 (2008).

123. Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 163 (2007); see also Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 HASTINGS CONST. L.Q. 509 (2019); Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, 29 J. EARLY REPUBLIC 585, 589 (2009).

124. Baron, *supra* note 123, at 510. The Corpus of Founding Era American English (COFEA) includes more than 120,000 texts and 154 million words and the Corpus of Early Modern English (COEME) includes over 40,000 texts and 1.3 billion words. *Corpus of Founding Era American English (COFEA)*, BYU LAW, <https://lcl.byu.edu/projects/cofea> [<https://perma.cc/C5M6-QPVV>].

125. Dennis Baron, *Antonin Scalia Was Wrong About the Meaning of Bear Arms*, WASH. POST. OP. (May 21, 2018), [https://www.washingtonpost.com/opinions/antonin-scalia-was-wrong-about-the-meaning-of-bear-arms/2018/05/21/9243ac66-5d11-11e8-b2b8-08a538d9dbd6\\_story.html](https://www.washingtonpost.com/opinions/antonin-scalia-was-wrong-about-the-meaning-of-bear-arms/2018/05/21/9243ac66-5d11-11e8-b2b8-08a538d9dbd6_story.html) (last visited Nov. 1, 2021) (citing *Aymette v. State*, 21 Tenn. 152 (1840)).

time of the Framers.<sup>126</sup> It's questionable why American gun policy today should be governed by the supposed understanding of the Second Amendment by, say, a 1791 blacksmith, or even how such an understanding could be determined. Regardless, history confirms the Second Amendment's "obvious purpose" to protect state militias, not private arms.<sup>127</sup>

The Framers drafted and ratified the Second Amendment to address the Anti-Federalists' fears that Congress could destroy the institution of the state militia.<sup>128</sup> George Mason, for example, argued that Congress could use the authority provided in the Constitution's militia clause<sup>129</sup> to destroy the militia by "rendering them useless—by disarming them . . . Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them."<sup>130</sup>

*Heller* trivializes this history by divining purposes for the right that are unexpressed in its text or history. Justice Scalia wrote, "The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting."<sup>131</sup> He did not explain why the Framers would write a less important purpose (militias) into the text, but not mention the purposes that the nameless "most" "undoubtedly" found "more important."<sup>132</sup> He then conceded that "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that the right . . . was codified," but declared "that can only show that self-defense had little to do with the right's *codification*; it was the *central component* of the right itself."<sup>133</sup> For good reason there is no citation or support for this series of speculations.

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126. *Heller*, 554 U.S. at 576–77 ("In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'") (citing *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

127. *Heller*, 554 U.S. at 661–62 (citing *United States v. Miller*, 307 U.S. 174, 178 (1939)).

128. See *Perpich v. Dep't of Def.*, 496 U.S. 334, 340 (1990).

129. U.S. CONST. art. I, § 7, cl. 15–16.

130. JONATHAN ELLIOTT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 379 (2d ed. 1941).

131. *Heller*, 554 U.S. at 599.

132. ELLIOTT, *supra* note 130.

133. *Id.*

History tells us that self-defense was *not* the right's "central component."<sup>134</sup> Historians Saul Cornell and Nathan DeDino explain that in the eighteenth century, "the right of individual self-defense was well-established under common law, but was legally distinct from the constitutional right to bear arms included in the various state constitutions."<sup>135</sup> The Framers only included the right to bear arms in the constitution "in response to their fear that [the] government might disarm the militia, not restrict the common law right of self-defense."<sup>136</sup> Even if some Framers may have wished to protect some private gun rights, as Professor Akhil Reed Amar observed, "to see the [Second] Amendment as primarily concerned with an individual right to hunt, or protect one's home," would be "like viewing the heart of the speech and assembly clauses as the right of persons to meet to play bridge."<sup>137</sup>

The drafting history confirms the Second Amendment's militia focus. James Madison's first proposal to Congress read: "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."<sup>138</sup> The conscientious objector exemption was only needed because the "right" concerned mandatory service that necessitated exemptions. Madison's draft also treated "bearing arms" as synonymous with "render[ing] military service."<sup>139</sup>

As there was no concern that people would be required to engage in armed self-defense, there would be no need for exemption if the Second Amendment concerned private self-defense, any more than the First Amendment would need to state that the government may not compel speech. Further, the Framers ultimately rejected the conscientious objector clause because of concerns that the federal government would designate which people were "religiously scrupulous"

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134. *Id.*

135. Cornell & DeDino, *supra* note 52, at 499; *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*183–86 (William Carey Jones ed., 1916) (outlining common law self-defense in English law, which holds that a person who is attacked with force can respond with force but make no allusion to firearms); RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY (1991) (examining the right of self-defense).

136. Cornell & DeDino, *supra* note 56, at 499.

137. Akil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1164 (1991).

138. *District of Columbia v. Heller*, 554 U.S. 570, 660 (2008) (Stevens, J., dissenting) (citing THE COMPLETE BILL OF RIGHTS 182–183 (N. Cogan ed. 1997)).

139. *See id.*

and thereby weaken the militia.<sup>140</sup> This may be an example of what Professor Nelson Lund notes: “At crucial points, [Justice Scalia] simply issued ipse dixits unsupported by any historical evidence, and at other points, he misrepresented historical facts.”<sup>141</sup>

A few more examples of *Heller*’s historical flaws: to argue that the Second Amendment was not limited to a military purpose, *Heller* cites Joseph Story—who exclusively focused on the militia in his commentary on the Second Amendment;<sup>142</sup> St. George Tucker—who viewed the right to arms in a military context;<sup>143</sup> and Blackstone—who “referred to the right of the people ‘to take part in the militia’ to defend their political liberties and to the right of Parliament (which represented the people) to raise a militia even when the King sought to deny it that power.”<sup>144</sup> Second Amendment historian Saul Cornell summed up Justice Scalia’s misreading of history as “a lawyer’s version of a magician’s parlor trick.”<sup>145</sup>

Five votes cannot declare history, or excise constitutional text.

## VI. THE RIGHT TO LIVE VERSUS THE RIGHT TO GUNS

Tradition also supports interpreting the Second Amendment to preserve the first freedom announced in the Declaration of Independence that created America: the right to live.

All constitutional rights give way to strong interests in public safety—that is, to protect people’s right to live.<sup>146</sup> The right to free speech does not entitle the speaker to engage in “fighting words” because they create too great a risk of a fist fight.<sup>147</sup> The right to freely exercise religion does not entitle snake handlers to endanger

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140. *See id.*

141. Lund, *supra* note 100, at 1356–67.

142. *Heller*, 554 U.S. at 608.

143. *Young v. Hawaii*, 896 F.3d 1044, 1053 n.6 (9th Cir. 2018) (citing *Heller*, 554 U.S. at 626)).

144. *McDonald v. City of Chi.*, 561 U.S. 742, 915–16 (2010) (Breyer, J. dissenting) (internal citations omitted) (emphasis added).

145. Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 626 (2008); *see also* Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721 (2013).

146. *See generally* Jonathan Lowy & Kelly Sampson, *The Right Not to Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties*, 14 GEO. L. J. & PUB. POL’Y 187 (2016).

147. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

worshippers.<sup>148</sup> *Miranda* rights give way when police are in search of a gun, because of its risk to public safety.<sup>149</sup>

Running through America's founding documents, jurisprudence, and history is a recognition—sometimes implicit—of the right to live and the government's broad authority to protect that right. Those concerns certainly constrain the Second Amendment right to lethal arms. After all, while the exercise of free speech, assembly, or other rights has the potential to result in injury to others, no other right directly implicates the potential to kill another person like the Second Amendment. As one federal district judge noted in upholding New Jersey's law restricting the public carrying of firearms:

[T]his Court shall be careful—most careful—to ascertain the reach of the Second Amendment right that the plaintiffs advance. That privilege is unique among all other constitutional rights to the individual because it permits the user of a firearm to cause serious personal injury—including the ultimate injury, death—to other individuals, rightly or wrongly. In the protection of oneself and one's family in the home, it is a right use. In the deliberate or inadvertent use under other circumstances, it may well be a wrong use. A person wrongly killed cannot be compensated by resurrection.<sup>150</sup>

This is not hyperbole. The right sought by the NRA and NYSRPA is not to carry guns as fashion accessories; it is to carry guns in order to use them in “armed confrontation.” That means, a right to shoot people when the carrier deems it necessary. But American law and tradition has long recognized the authority of government to restrict guns in public spaces to prevent people from being shot.<sup>151</sup> A sweeping Second Amendment ruling could infringe on this fundamental “right inherent in society to ward off crimes against itself by antecedent precautions.”<sup>152</sup>

## VII. DEATH IN FACT

While this Article focuses on whether the Supreme Court should extend the Second Amendment into public spaces, the Court may also decide an issue potentially even more impactful: what standard of review is applied to gun laws.

*Heller* did not decide what standard of review should be applied in Second Amendment cases, but most courts have gravitated to a two-

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148. *State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975).

149. *New York v. Quarles*, 467 U.S. 649 (1984).

150. *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 816 (D.N.J. 2012), *aff'd sub nom. Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013).

151. *See Lowy & Sampson, supra* 146, at 205 n.113.

152. John Stuart Mills, *On Liberty*, <http://fountainheadpress.com/expandingthearc/assets/millliberty.pdf> [<https://perma.cc/G2AD-SS3K>].

part test and intermediate scrutiny. Courts generally ask if the regulated conduct is within the scope of the Second Amendment, and if it is, they apply rational basis, intermediate scrutiny or (rarely) strict scrutiny, depending on the extent the regulation implicates Second Amendment activity.<sup>153</sup> In some cases, however, courts uphold laws that come with categories of “longstanding” laws identified in *Heller* as “presumptively lawful.”<sup>154</sup> For the most part, courts applying these tests have upheld gun laws as constitutional, including most laws restricting carrying of guns in public.<sup>155</sup>

Strict scrutiny or a similarly restrictive test would prevent governments from adequately protecting the public, and it would cost lives. Gun regulation must be preemptive—if a dangerous person is allowed to carry a gun on the street, there is little means to stop him from unlawfully shooting someone until it is too late. Nor can gun laws always be narrowly tailored—regardless of how many assault weapons are not used for mass killings, one AR-15 can be used to terrorize a community and massacre people—and they often are.

Strict scrutiny is also inconsistent with *Heller*, which noted that the Second Amendment leaves legislatures with “a variety of tools for combating” the “problem of handgun violence.”<sup>156</sup> *McDonald* reaffirmed that “reasonable firearms regulation will continue under the Second Amendment.”<sup>157</sup> *Heller* included a non-exhaustive list of “*presumptively lawful*” gun laws,<sup>158</sup> many of which would likely not survive strict scrutiny.

A “text, history and tradition” standard, which then-Judge Brett Kavanaugh has embraced,<sup>159</sup> could be equally perilous. While the Second Amendment’s text, history, and tradition support broad gun regulation, a problem arises if this standard is applied using what historian Saul Cornell calls “law office history—a results oriented methodology in which evidence is selectively gathered and

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153. See, e.g., *Silvester v. Harris*, 843 F.3d 816, 820–21 (9th Cir. 2016).

154. *Young v. Hawaii*, 896 F.3d 1044, 1073–74 (2018).

155. See, e.g., *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018); *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Drake v. Filko*, 724 F.3d 426, 426 (3d Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Young v. Hawaii*, 896 F.3d 1044 (2018). *But see* *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

156. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

157. *McDonald v. City of Chi.*, 561 U.S. 742, 785 (2010).

158. *Heller*, 554 U.S. at 626–27 n.26 (emphasis added).

159. *Heller v. District of Columbia*, 670 F.3d 1244, 1285 (D.C. Cir. 2011).

interpreted to produce a preordained conclusion.”<sup>160</sup> After all, then-Judge Kavanaugh’s dissent applied his “text, history and tradition” test<sup>161</sup> to find that the Second Amendment—which was intended to protect the use of muskets in well-regulated armies—entitled civilians unrelated to any militia to semi-automatic assault weapons. Judge Kavanaugh found no precedent for an assault weapon ban in the early nineteenth century, but that was only because “assault weapons” did not exist; tellingly, states *did* ban pistols and other weapons considered especially dangerous at that time. Such laws accord with longstanding police power authority to protect public safety.

#### VIII. GUN POLICY AS A DEMOCRACY ISSUE

It bears reminding that the fundamental issue the Supreme Court will consider is not, what gun laws we should have in America but, *who will decide* what gun laws Americans should have. If Americans decide that their communities would be safer if military style assault weapons were restricted to military, or that guns should be kept out of public spaces, then can Americans enact the public safety laws they want?

Throughout American history, democratic processes have determined gun policy. Deciding what gun laws to enact is often a complicated, drawn-out business, involving fierce debate between interest groups with sharply divergent views. Even legislation that 84% of Americans support, like universal Brady background checks for gun sales, has failed to pass in Congress.<sup>162</sup> A ruling that laws could only be permissible if they survive “fatal in fact” strict scrutiny, or if they have clear historical antecedents, would have little to do with how Americans have historically decided public safety problems, which is: What makes us safer? Do the safety benefits outweigh the infringements on liberty, convenience, or cost?

An analogy reflects how bizarre this system would be. Imagine if gun laws could not be enforced in America, even after prevailing in multi-decade, drag-out political fights, unless they received the Historical Tribunal Seal of Approval (to save space, HTSA). Even if a gun law is widely popular, and experts agree that many Americans would die if the law was not implemented, the law would be

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160. Cornell, *supra* note 107, at 1098.

161. *Heller*, 670 F.3d at 1276 (Kavanaugh, J., dissenting) (“I read *Heller* and *McDonald* as setting forth a test based wholly on text, history, and tradition.”).

162. Eli Yokley, *Voters Are Nearly United in Support for Expanded Background Checks*, MORNING CONSULTS (Mar. 10, 2021), <https://morningconsult.com/2021/03/10/house-gun-legislation-background-checks-polling> [<https://perma.cc/GG3Q-7766>].

invalidated unless the HTSA finds it sufficiently similar to some previous law that has been enacted at some other time in history. The HTSA will not consider whether the challenged law might not have a historical analogue because the problem it seeks to address was not of serious concern in the past, or that the law only failed to be enacted earlier because of gun industry lobbying clout.

If the HTSA sounds absurd, it is. Historical precedent does not constrain responses to any other public health or safety issue. And it is not readily apparent why Americans should be prevented from addressing a 21st century gun epidemic if earlier generations did not enact similar laws. Whether the lack of similar laws was because muskets were not conducive to mass shootings, crime in rural America was very different, or politicians were unresponsive to the problem, why should that determine what laws can save Americans today from being killed?

Of course, gun rights advocates have been largely happy with democratic solutions when Congress, and many states have enacted permissive laws favored only by a small minority of gun enthusiasts and the gun industry and failed to enact strong gun laws supported by majorities of Americans. But now times are a-changing. A sweeping Second Amendment decision could effectively freeze United States gun policy, just when legislative help is on the way for Americans suffering from a deadly epidemic. Depriving Americans of their voice to decide gun policy could resign them to a death sentence.

#### CONCLUSION

The coin is in the air, and it will be decided, in the end, by counting to five on the Supreme Court. There is reason for concern. But there is also reason to question whether the Court will take such a radical step as defying America's history and tradition of gun regulation—especially now, when Americans are demanding solutions to our gun violence epidemic in record numbers. The Justices, like all Americans, must recognize that everything is at stake when gun policy is at issue.