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The First Amendment Weaponized: When Guns Become Public Discourse

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THE FIRST AMENDMENT WEAPONIZED: WHEN GUNS BECOME PUBLIC DISCOURSE

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This Article discusses First Amendment challenges asserted against gun control measures—inside and outside our courts. It explains at length why existing doctrinal approaches to resolving these challenges fail, providing an alternative account of why the First Amendment should not be construed liberally to protect the open carry of firearms. As guns in public spaces and protests become commonplace, we can expect not only continual First Amendment challenges to gun control measures, but also the growing prevalence of First Amendment claims asserted in the public by advocates and gun owners to justify open carry—and the forging of new constitutional meanings and social norms. This Article maps a doctrinal path that judges should take to reject these challenges while providing a conceptual language for bystanders to reassert and reclaim their rights to public safety and participation from open carriers trying to weaponize the First Amendment.

To courts, the Article argues that the practice of open carry is too divorced from the value of democratic self-governance to constitute public discourse deserving of First Amendment coverage. Courts should deny First Amendment coverage to gun carry both because bearing arms in public does not facilitate the formation of public opinion and because doing so preserves the social and legal norms that exclude guns from the public sphere. These norms—encoded in commonplace gun control laws—serve important constitutional values and interests central to the First Amendment.

To nonjudicial audiences, the Article calls for advocates of gun control to flip the script on these First Amendment claims and forcefully articulate the ways that guns in public spaces threaten the free and equal exercise of constitutional rights to free speech, assembly, and political participation more broadly. These First Amendment challenges illustrate the extent to which pro-gun rights movements transcend the jurisprudential boundaries of the Second Amendment. Evolving popular beliefs about the right to bear arms trickle down into popular beliefs about other, adjacent constitutional rights like the First Amendment right to freedom of speech. Through considering these First Amendment challenges to gun control measures and looking beyond their lack of judicial success, we can begin to see how popular beliefs about the right to bear arms are gradually evolving to incorporate First Amendment values. Guns are transformed into public discourse—symbols and forms of political speech.

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INTRODUCTION

Each year, the Virginia Citizens Defense League—a gun-rights group—holds "Lobby" Day in Richmond, Virginia.[1] In 2020, gun-rights advocacy groups planned large rallies to protest a number of gun-control bills under consideration by the Democrat-controlled Virginia legislature.[2] In response to intelligence reports that armed militia and extremist groups planned on joining these rallies and storming the state capital, Virginia Governor Ralph Northam declared a state of emergency and temporarily banned guns on Capitol grounds in advance of Lobby Day.[3]

The next day, Gun Owners of America—one of the groups involved in planning Lobby Day—sued Northam, seeking a preliminary injunction on the temporary gun ban.[4] As expected, the plaintiff organization challenged the temporary ban on grounds that it violated their Second Amendment rights to bear arms at the State Capitol.[5] More notably, Gun Owners of America advanced another constitutional claim—a First Amendment challenge. In their complaint, they argued:

> [T]he unique nature, and power of Lobby Day is the combination of the two rights, exercised together. More specifically, the act of peaceably and openly carrying firearms—which has been done at numerous other "Lobby Day" rallies at the same location over many years without incident—is itself a form of protected speech,

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[1] Lobby Day is an annual event for the Virginia Citizens Defense League where pro-gun activists lobby members of the state government and voice their disagreement with various gun control measures. Jane Coaston, *The Virginia Gun Rights Rally Raising Fears of Violence, Explained*, VOX (Jan. 17, 2020), https://www.vox.com/2020/1/17/21067627/virginia-lobby-day-gun-laws-extremism [https://perma.cc/9UYY-64NL].

[2] The measures under consideration included:

> a bill requiring background checks on all firearms purchases and transfers; a bill limiting a number of handguns that can be purchased per month, a bill to permit localities to ban guns from specific events and venues, and 'red flag' legislation that would permit law enforcement to take guns from people deemed risks to themselves or others.

Id.

[3] Laura Vozzella, *Northam Declares Emergency, Temporarily Bans Weapons on Capitol Grounds*, WASH. POST (Jan. 15, 2020), https://www.washingtonpost.com/local/virginia-politics/northam-temporarily-bans-firearms-other-weapons-on-capitol-grounds/2020/01/15/c432b55a-37a8-11ea-bb7b-265f4554af6d_story.html [https://perma.cc/M7QW-SJWG].

[4] Ali Rockett & Mel Leonor, *Gun Activists Appeal to Virginia Supreme Court After Judge Rejects Bid to Halt Gun Ban in Capitol Square*, RICHMOND TIMES-DISPATCH (Jan. 16, 2020), https://richmond.com/news/virginia/update-gun-activists-appeal-to-virginia-supreme-court-after-judge-rejects-bid-to-halt-gun/article_7ce8eb14-e2ed-5e6c-a012-7ef3816aa791.html [https://perma.cc/4WB2-6M49].

[5] *Id.*

> particularly when the Rally is specifically intended to express opinions to public officials through the *symbolic act of bearing arms*. . . . It is difficult to imagine a more clear example of an event where carrying firearms is intended to convey an unambiguous political message.[6]

A Richmond circuit court judge denied the injunction request in a three-page order, citing the Supreme Court's caveat in *Heller* that nothing in their decision should be interpreted as casting doubt on "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."[7] The order completely ignored the First Amendment claim.[8] The plaintiffs appealed to the Virginia Supreme Court, arguing that "the Circuit Court erred in completely disregarding petitioners' First Amendment argument."[9] The Virginia Supreme Court promptly dismissed the appeal without a discussion of the merits.[10]

With Governor Northam's Executive Order still in place, an estimated 22,000 people gathered to demonstrate in Richmond on Lobby Day.[11] Although demonstrators within the Capitol Square were prohibited from bearing arms, nothing stopped the thousands of protestors marching down Richmond streets from carrying their weapons in plain sight.[12] Some demonstrators were dressed in camouflage and helmets, others donned Revolutionary War uniforms, and still others dressed casually but slung rifles across their chests.[13]

First Amendment challenges to gun regulations are on the rise—in courts and in the public.[14] These challenges all appeal to what the Gun Owners of America called the "symbolic act of bearing arms."[15] They claim that bearing arms constitutes speech covered by the First Amendment.[16] However, judges faced with these claims have been quick to dismiss First Amendment arguments for expanding the right to bear arms. Likely as a result, First and Second Amendment scholars have only

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[6] Complaint at 7–8, Gun Owners of Am., Inc. v. Northam, No. CL20-279-4 (Va. Cir. Ct. Jan. 16, 2020) (emphasis added).

[7] Gun Owners of Am., Inc. v. Northam, No. CL20-279, at 2 (Va. Cir. Ct. Jan. 16, 2020).

[8] *Id.*

[9] Emergency Petition for Review at 2, Gun Owners of Am., Inc. v. Northam, No. CL20-279 (Va. Jan. 16, 2020).

[10] *See generally Gun Owners of Am.*, No. CL20-279 (Va. Cir. Ct. Jan. 16, 2020).

[11] Bill Chappell, *Richmond Gun Rally: Thousands of Gun Owners Converge on Virginia Capitol on MLK Day*, NPR (Jan. 20, 2020), https://www.npr.org/2020/01/20/797895183/richmond-gun-rally-thousands-of-gun-owners-converge-on-virginia-capitol-on-mlk-d [https://perma.cc/A8RU-WPKT].

[12] *Id.*

[13] *Id.*

[14] *See infra* Sections II.A and II.B.

[15] Complaint at 7–8, *Gun Owners of Am., Inc.*, No. CL20-279-4 (emphasis added).

[16] *Id.*

begun to consider whether bearing arms can itself be a form of constitutionally protected speech.[17]

But these challenges deserve a closer look. Since *Heller*,[18] the Supreme Court has repeatedly refused to definitively extend Second Amendment protection outside the home.[19] In contrast, the Court has enthusiastically transformed the First Amendment into a deregulatory tool, expanding its scope of protection to all kinds of conduct—conduct which previously would never have been conceived of as "speech".[20] Or, as Justice Kagan put bluntly, the Court is "weaponizing the First Amendment."[21] And even in rejecting First Amendment challenges to gun laws, courts have confined their holdings to the facts and expressed a willingness to accept them in future cases under a different set of facts.[22]

Meanwhile, the incidence of armed demonstrations shows no signs of decline. A year after Governor Northam's temporary ban on firearms at the Virginia Capitol, state legislatures across the country are moving forward with *permanent* bans on the carrying of firearms on state capitol grounds in the wake of violent riots at the U.S. Capitol (and state houses) on January 6, 2021.[23] Gun-rights organizations have vowed to challenge these measures in court and continue to publicly advocate using the First Amendment to strategically supplement the Second.

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[17] For existing discussions of this issue, see TIMOTHY ZICK, THE DYNAMIC FREE SPEECH CLAUSE 219–25 (2018) [hereinafter ZICK, DYNAMIC FREE SPEECH CLAUSE] ("In some very limited circumstances, the keeping and bearing of firearms might be sufficiently expressive to constitute speech covered by the Free Speech Clause."); Daniel Horwitz, *Open-Carry: Open-Conversation or Open-Threat?*, 15 FIRST AMEND. L. REV. 96, 112 (2017) ("Simply put, no, guns are not speech."); Luke Morgan, Note, *Leave Your Guns at Home: The Constitutionality of a Prohibition on Carrying Firearms at Political Demonstrations*, 68 DUKE L.J. 175, 186–90 (2018) (arguing that gun possession at public demonstrations should be "categorically excluded from First Amendment coverage" and that public demonstrations fall under the *Heller* "sensitive places" exception because of their expressive significance); Eric Tirschwell & Alla Lefkowitz, *Prohibiting Guns at Public Demonstrations: Debunking First and Second Amendment Myths After Charlottesville*, 65 UCLA L. REV. DISC. 172 (2018); and Timothy Zick, *Arming Public Protests*, 104 IOWA L. REV. 228 (2018).

Recently, Michael Dorf refuted a related but distinct argument that the First Amendment's assembly clause—rather than the free speech clause—might, in conjunction with the Second Amendment, guarantee a right to armed assembly. *See* Michael C. Dorf, *When Two Rights Make a Wrong: Armed Assembly Under the First and Second Amendments*, 116 NW. U. L. REV.111, 114 (2021).

[18] District of Columbia v. Heller, 554 U.S. 570 (2008).

[19] *See infra* Section I.A.

[20] *See infra* Section I.B.

[21] Janus v. Am. Fed'n of State, City, & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501–02 (2018) (Kagan, J., dissenting) (citations omitted).

[22] Zick, *Arming Public Protests*, *supra* note 17, at 223.

[23] *See* Rebecca Falconer, *Guns in Statehouses in the Spotlight After Armed Protests*, AXIOS (Feb. 21, 2020), https://www.axios.com/guns-statehouses-spotlight-armed-protests-23952653-0d5b-41e5-a90c-66687a26c1e8.html [https://perma.cc/KD7E-VS9N].

This Article provides a roadmap for how judges, litigators, and the public at-large ought to analyze—and ultimately reject—these First Amendment challenges. It considers at length when and how bearing arms is speech covered by the First Amendment. In doing so, it also provides the first extensive survey of these challenges.

The Article proceeds as follows: Part I situates First Amendment open-carry challenges in the context of developing trends in First and Second Amendment jurisprudence.[24] Part II presents the Article's positive argument.[25] It begins with a comprehensive survey of the case law, showing that courts have largely dismissed First Amendment open-carry challenges on grounds that bearing guns in public fails the *Spence* test for First Amendment coverage.[26] It then argues that the *Spence* test is an analytically unworkable standard for First Amendment coverage and, as a result, has left the door open to future First Amendment protection for arms bearing.[27]

As an alternative, the Article urges courts to adopt a value-sensitive approach to First Amendment coverage. It uses the example of guns at protests as a test case for modeling this approach. Part III elaborates and concludes the jurisprudential argument, explaining that to overcome radically divergent social interpretations of arms bearing, courts must engage in normative analysis that takes account of the constitutional values at stake in extending First Amendment coverage to public carry.[28] Courts should deny First Amendment coverage to gun carry both because bearing arms in public does not facilitate the formation of public opinion and because doing so preserves the social and legal norms that exclude guns from the public sphere.[29] These norms—encoded in commonplace gun-control laws—serve important constitutional values and interests central to the First Amendment.

Finally, Part IV expands the frame beyond the First Amendment challenges asserted in courts.[30] It suggests that these challenges illustrate the extent to which pro-gun-rights movements transcend the jurisprudential boundaries of the Second Amendment.[31] Evolving popular beliefs about the right to bear arms trickle down into popular beliefs about other, adjacent constitutional rights like the First Amendment right to freedom of speech. Once we consider these First Amendment challenges to gun control measures and look beyond their lack of judicial success, we can begin to see how popular beliefs about the right to bear arms are gradually evolving to incorporate First Amendment values. Guns are transformed into public discourse—symbols and forms of political speech.[32]

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[24] *See infra* Part I.
[25] *See infra* Part II.
[26] *See infra* Sections II.A–B.
[27] *See infra* Sections II.C–D.
[28] *See infra* Part III.
[29] *Id.*
[30] *See infra* Part IV.
[31] *See infra* Section IV.A.
[32] *See infra* Section IV.B.

The Article concludes with a call for advocates of gun control to flip the script on these First Amendment claims and forcefully articulate the way that guns in public spaces threaten the free and equal exercise of constitutional rights to free speech, assembly, and political participation more broadly.[33]

I. FIRST AMENDMENT BACKUP

This Section situates First Amendment open-carry challenges in the context of developing trends in First and Second Amendment jurisprudence. Doing so will help us to make sense of why these seemingly counterintuitive claims continue to be advanced by gun-rights advocates and gun owners. The basic claim is simple: Whereas the Second Amendment (until recently) has remained stuck at a jurisprudential standstill, confined largely within the home, the First Amendment's reach continues to expand, its protection strongest in the public domain.

A. A Homebound Second Amendment

As a preface, it is worth observing that commentators who characterized *Heller* as the death knell of gun-control regulation in the United States were mistaken.[34] On the one hand, prior to the D.C. Circuit's *Heller* ruling, no federal appellate court had ever invoked the Second Amendment to invalidate a gun-control law.[35] But on the other hand, predictions about the potential havoc *Heller* would wreck on state gun laws have surely been overstated. Since *Heller*, the overwhelming majority of Second Amendment challenges have failed.[36] In a 2018 survey of 1,153 Second Amendment challenges since *Heller*, Joseph Blocher and Eric Ruben discovered that only 108 were not rejected, for a total success rate of nine percent.[37] As an initial matter, then, the Second Amendment remains a limited tool for dismantling gun control laws.

But doctrinally speaking, the Second Amendment is even more constrained when applied to public-carry regulations, because in *Heller* the Supreme Court made clear that Second Amendment protection is strongest in the home. The *Heller* Court

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[33] *See infra* Conclusion.

[34] *See, e.g.*, Editorial, *Lock and Load*, N.Y. TIMES (June 27, 2008), at A18 (arguing that *Heller* gave "gun-rights advocates a powerful new legal tool to try to strike down gun-control laws"); Patrik Jonsson, *Cities' Gun Restrictions Begin to Topple*, CHRISTIAN SCI. MONITOR (June 20, 2009), http://www.csmonitor.com/USA/2009/0620/p02s02-usgn.html [https://perma.cc/7WLM-LMWY].

[35] Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. REV. 813, 816–17 (2014).

[36] *Id.* at 818–19.

[37] Joseph Blocher & Eric Ruben, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433, 1472 (2018). Blocher and Ruben note, however, that "[t]he low success rate of Second Amendment claims does not show that the right is being underenforced," but rather "the low rate of success probably has more to do with the claims being asserted than with judicial hostility to the right." *Id.* at 1507.

invalidated a District of Columbia law which essentially prohibited "the possession of usable handguns in the home."[38] The Court explained that the law extends

> to the home, where the need for defense of self, family, and property is *most acute*. Under any standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' would fail constitutional muster.[39]

That does not, of course, mean that the Second Amendment value of self-defense is not operative *outside* the home.[40] In *Moore v. Madigan*, the Seventh Circuit struck down an Illinois law prohibiting the carrying of firearms outside the home or places of business.[41] Writing for the court, Judge Richard Posner explained that the Court's reasoning in *Heller* "doesn't mean [the interest in self-defense] is not acute outside the home. . . . Confrontations are not limited to the home."[42] Even so, there is no consensus among federal appellate courts as to whether the Second Amendment protects a right to bear arms outside the home. In *United States v. Masciandaro*,[43] for instance, the Fourth Circuit concluded that *Heller* is silent on this issue, and that appellate courts should wait for clearer direction from the Supreme Court.[44] Writing for the court, Judge Harvie Wilkinson explained:

> There may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions.[45]

The Second Circuit, on the other hand, has held that because home defense lies at the core of the Second Amendment, restrictions on the public carry of firearms

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[38] District of Columbia v. Heller, 554 U.S. 570, 573 (2008).

[39] *Id.* at 628–29 (emphasis added).

[40] For a survey of appellate court treatments of the Second Amendment to regulations of gun use outside the home, see David Kopel & Joseph Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 256–74 (2017).

[41] *Id.* at 258.

[42] Moore v. Madigan, 702 F.3d 933, 935–36 (7th Cir. 2012). Judge Posner also argued that, "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home." *Id.*

[43] United States v. Masciandaro, 638 F.3d 458 (4th Cir. 2011).

[44] "On the question of *Heller*'s applicability outside the home environment, we think it prudent to await direction from the Court itself." *Id.* at 475.

[45] *Id.* In Hightower v. City of Boston, the First Circuit echoed Judge Wilkinson's decision not to extend Second Amendment protections beyond the home. 693 F.3d 61, 74 (1st Cir. 2012).

should be subject to a lower level of scrutiny.[46] And in the strongest repudiation of Second Amendment rights in public by a federal appellate court, the en banc panel of the Ninth Circuit held in *Peruta v. City of San Diego* that "there is no Second Amendment right for members of the general public to carry concealed firearms in public."[47] Given that the open carrying of firearms is prohibited in California, the Ninth Circuit's decision effectively banned the possession of firearms in public altogether.[48]

In years past, the Court has repeatedly turned down opportunities to extend Second Amendment protection outside the home. *New York State Rifle & Pistol Association v. City of New York* (*NYSRPA*),[49] the Court's first Second Amendment case since its decision in *McDonald v. City of Chicago*[50] ten years earlier, presented one such opportunity. When the Court granted review in *NYSRPA*, a case involving a Second Amendment challenge to a New York City law banning the transport of handguns outside the city, many expected a clear pronouncement from the Court on the Second Amendment's reach outside the home.

A few months after the Court granted certiorari, however, New York City changed its regulations to allow gun owners to transport their guns to, among other places, second homes and shooting ranges outside the city.[51] In a 6–3 decision, the Court concluded that, because of changes to New York City's gun-control regulations, the case had become moot.[52] On the same day that *NYSRPA* was decided, the Court distributed for consideration ten other Second Amendment cases that had been on hold. But a month later, the Court denied review in all ten cases.[53] Justice Thomas dissented from the denial of review in *Rogers v. Grewal*, a case from New Jersey, which grants licenses to carry a handgun in public only if the applicant can show a "justifiable need."[54] Justice Thomas lamented that "[o]ne would think that such an onerous burden" as the New Jersey scheme "on a fundamental right would warrant this Court's review."[55] He observed that the Court "would almost certainly review the constitutionality of a law requiring citizens to establish a justifiable need before exercising their free speech rights."[56]

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[46] *See* Kachalsky v. City of Westchester, 701 F.3d 81, 93–95 (2d Cir. 2012).

[47] Peruta v. City of San Diego, 824 F.3d 919, 927 (9th Cir. 2016).

[48] Kopel & Greenlee, *supra* note 40, at 268.

[49] New York State Rifle & Pistol Ass'n, Inc. v. City of New York, 140 S. Ct. 1525 (2020).

[50] McDonald v. City of Chicago, 561 U.S. 742 (2010).

[51] Alexandra Jones, *New York Gun Rights Case Tossed as Moot From Top Court*, COURTHOUSE NEWS SERV. (Apr. 27, 2020), https://www.courthousenews.com/new-york-gun-rights-case-tossed-as-moot-from-top-court/ [https://perma.cc/NCM2-JKPE].

[52] *Id.*

[53] Amy Howe, *Court to Take Up Major Gun-Rights Case*, SCOTUSBLOG (April 26, 2021), https://www.scotusblog.com/2021/04/court-to-take-up-major-gun-rights-case/ [https://perma.cc/Z4RF-D27X].

[54] Rogers v. Grewal, 140 S. Ct. 1865, 1865 (2020) (Thomas, J., dissenting from denial of certiorari).

[55] *Id.*

[56] *Id.* Some Justices, including Justice Thomas, have alleged that the Second Amendment

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At the time of this writing, the Court granted review in *New York State Rifle & Pistol Association v. Bruen*, a case which will likely produce the first major Second Amendment decision in more than a decade.[57] *Bruen* is about whether a New York law that, much like the New Jersey law at issue in *Grewal*, requires applicants seeking an unrestricted license to carry a concealed handgun to demonstrate "proper cause" complies with the Second Amendment.[58] The open-carry of handguns is prohibited in New York. New York courts have interpreted the "proper cause" requirement to mean that a person must "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."[59]

How far reaching the Court's decision in *Bruen* will be remains to be seen, but early signs suggest a willingness to move more slowly than plaintiffs would like.[60] Although plaintiffs asked the Court to resolve a broad question—"Whether the Second Amendment allows the government to prohibit ordinary law-abiding citizens from carrying handguns outside the home for self-defense"[61]—the Court presented a narrower question for parties to argue: "Whether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second

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has been abandoned as a "second-class right," compared to other fundamental rights (e.g., those guaranteed by the First Amendment). *See* Silvester v. Becerra, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from denial of certiorari) (accusing lower courts and the Supreme Court of treating the Second Amendment as a disfavored right); *see also* Peruta v. California, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (similar); Friedman v. City of Highland Park, 136 S. Ct. 447, 449 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (similar). For further discussion of the "second-class right" framing, see Gregory P. Magarian, *Political and Non-Political Speech and Guns*, 28 WM & MARY BILL RTS. J. 429, 429–30 (2019) ("To put normative meat on that complaint's positive bones, and following their frequent tendency to press for stronger Second Amendment rights by simple analogies to the First Amendment, gun rights advocates make the specific claim that courts improperly enforce the First Amendment's protections of free expression more vigorously than the Second Amendment's protection of the right to keep and bear arms.") and Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L.Q. 621 (2019).

[57] New York State Rifle & Pistol Ass'n., Inc. v. Bruen, 141 S. Ct. 2566, No. 20-843 (*cert. granted* Apr. 26, 2021).

[58] New York State Rifle & Pistol Ass'n., Inc. v. Beach, 818 F. App'x 99 (2d Cir. 2020) (unpublished), *cert. granted in part sub nom.* New York State Rifle & Pistol Ass'n., Inc. v. Corlett, 141 S. Ct. 2566 (2021); *Grewal*, 140 S. Ct. at 1865.

[59] *In re* Klenosky v. N.Y. City Police Dep't, 75 A.D.2d 793, 793 (N.Y. App. Div. 1980).

[60] Early signs from oral argument suggest that the Court is ready to extend the right to keep and bear arms outside the home. *See, e.g.*, Amy Howe, *Majority of Court Appears Dubious of New York Gun-Control Law, But Justices Mull Narrow Ruling*, SCOTUSBLOG (Nov. 3, 2021, 1:43 PM), https://www.scotusblog.com/2021/11/majority-of-court-appears-dubious-of-new-york-gun-control-law-but-justices-mull-narrow-ruling/ [https://perma.cc/Q2KF-MRCU].

[61] Petition for Writ of Certiorari, *Bruen*, at I (2020) (No. 20-843).

Amendment."[62] Even if the Court recognizes a Second Amendment right to carry in public, its ruling is unlikely to disturb the bedrock principle that the right to bear arms for self-defense is strongest in the home, and public understandings of the First Amendment will continue to evolve with respect to guns alongside understandings of the Second.

B. First Amendment Expansionism

Unlike its constitutional neighbor, the First Amendment's protection is most acute in the public. And unlike the Second Amendment, First Amendment jurisprudence is currently undergoing significant and dynamic doctrinal growth. Therefore it is, in many ways, better suited to challenging public carry gun-control laws.

As a doctrinal and theoretical matter, the right to freedom of speech guaranteed by the First Amendment is a public-facing one. The Court famously maintained that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[63] And regardless of a person's preferred theory of the First Amendment, it is undeniable that courts, in interpreting and applying the First Amendment, are guided by the value of democratic self-governance. From the very beginning, the First Amendment has been understood to protect freedom of expression in order to safeguard the capacity of persons to participate in the formation "of that *public* opinion which is the final source of government in a democratic state."[64]

The First Amendment is currently undergoing dramatic transformation. Once a shield for progressive activists, the First Amendment has been covertly co-opted by the legal right as a deregulatory tool to constitutionalize large swaths of social life and limit state power.[65] Key to this strategy has been the expansion of First Amendment *coverage*—that is, the expansion of what kinds of activity constitute "speech" for constitutional purposes. Plaintiffs have sought to expand the scope of the First Amendment in order to contract the scope of the administrative state by bringing claims about the regulation of types of activities that historically no one believed implicated the First Amendment at all—from laws requiring business licenses,[66] to

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[62] *No. 20-843*, SUP. CT. U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-843.html [https://perma.cc/34TV-U46E] (presenting the question in a docket entry dated Apr. 26, 2021).

[63] Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

[64] Masses Pub. Co. v. Patten, 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917) (emphasis added).

[65] Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html [https://perma.cc/KP32-SCNR].

[66] *See, e.g.*, Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014).

the regulation of offers,[67] credit card fees,[68] the labeling of foodstuffs,[69] the treatment of customers[70] and professional practices,[71] to minimum wage laws,[72] among others. Leslie Kendrick has argued that given the significant protection afforded to speech covered by the First Amendment, this recent phenomenon, which she calls "First Amendment expansionism," makes a lot of sense: "As constitutional rights go, the First Amendment speech right provides an unusually robust amount of protection for activities that fall within its ambit. If a litigant can squeeze her claims under the First Amendment umbrella, the rewards are great."[73]

These trends can help make sense of why plaintiffs have continued to bring First Amendment challenges against open-carry laws. They also explain why these challenges deserve further attention. First Amendment expansionism has only just begun. Given the importance of gun rights in constitutional culture and the contemporary conservative movements—and a Second Amendment long stuck in limbo—the incentives to leverage the First Amendment to protect the bearing of firearms outside the home are great. The remainder of this Article discusses these challenges in-depth.

II. IS OPEN CARRY SPEECH? GUNS AND FIRST AMENDMENT COVERAGE

A. A Survey of Existing Challenges

First, an account of the case law. Section A surveys nine First Amendment challenges to various gun-control regulations. These challenges have appeared in both state and federal court. All but one[74] are post-*Heller* cases decided in the past decade. The gun-control measures at issue regulate a variety of public spaces where plaintiffs

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[67] *See* Nordyke v. King, 319 F.3d 1185 (9th Cir. 2003).

[68] *See* Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1146–47 (2017).

[69] *See, e.g.*, Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014) (en banc); Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 69 (2d Cir. 1996) (granting preliminary injunction on First Amendment grounds against a Vermont law requiring labeling of milk from cows treated with synthetic growth hormone); Monster Beverage Corp. v. Herrera, No. EDCV 13-00786-VAP, 2013 WL 4573959, at *12 (C.D. Cal. Aug. 22, 2013) (denying motion to dismiss First Amendment challenges to City Attorney's labeling demands for highly caffeinated energy drinks).

[70] *See, e.g.*, Conn. Bar Ass'n v. United States, 620 F.3d 81, 91–102 (2d Cir. 2010) (rejecting First Amendment challenge to Bankruptcy Abuse Prevention and Consumer Protection Act's requirements that debt relief agencies provide bankruptcy clients with certain disclosures and written contracts).

[71] *See, e.g.*, Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014); Planned Parenthood v. Rounds, 530 F.3d 724 (8th Cir. 2008).

[72] Int'l Franchise Ass'n v. City of Seattle, 803 F.3d 389 (9th Cir. 2015).

[73] Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1209 (2015).

[74] Nordyke v. King, 319 F.3d 1185 (9th Cir. 2003).

carried guns: public sidewalks,[75] county fairgrounds,[76] shopping malls,[77] and a pool hall.[78] These plaintiffs challenged a wide range of gun-control measures on First Amendment grounds. Five of the nine cases involve First Amendment challenges to police stops conducted in response to emergency calls from alarmed bystanders who encountered public gun bearers.[79] The other gun-control measures challenged are diverse:

- Virginia Governor Ralph Northam's Executive Order declaring that "no weapons, including firearms, may be carried or possessed on any land, real property, or improvements" within the Capitol area.[80]
- A local ordinance that provided that, "Every person who brings onto or possesses on county property a firearm, loaded or unloaded, or ammunition for a firearm is guilty of a misdemeanor."[81]
  A state statute that prohibits "intentionally and knowingly display-[ing] a deadly weapon, namely a firearm, in a public place and in a manner calculated to alarm."[82]
- A community college policy prohibiting the wearing of empty holsters on campus.[83]

The core of the issue raised by these challenges is a matter of First Amendment coverage—that is, whether bearing arms constitutes "speech" for First Amendment purposes. Put another way, the issue is whether gun-control laws regulating the public carry of guns raise a First Amendment question at all. In all nine challenges, plaintiffs alleged that carrying guns—and in one case, wearing an empty holster—constitutes expressive conduct, intended to convey pro–Second Amendment and open carry messages.[84] To date, courts have uniformly rejected these challenges on grounds that

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[75] *See* Baker. v. Schwarb, 40 F. Supp. 3d 881, 881 (E.D. Mich. 2014) (discussing a sidewalk by a public park and hospital); Deffert v. Moe, 111 F. Supp. 3d 797, 801 (W.D. Mich. 2015); Northrup v. City of Toledo Police Div., 58 F. Supp. 3d 842, 848 (N.D. Ohio 2014).

[76] *Nordyke*, 319 F.3d at 1187–88.

[77] *See* Chesney v. City of Jackson, 171 F. Supp. 3d 605, 610 (E.D. Mich. 2016); *Ex Parte* Poe, 491 S.W.3d 348, 351–52 (Tex. App. 2016).

[78] Burgess v. Wallingford, No. 11-cv-1129, 2013 WL 4494481 (D. Conn. 2013).

[79] *See Chesney*, 171 F. Supp. 3d at 611; *Baker*, 40 F. Supp. 3d at 884–85; *Northrup*, 58 F. Supp. 3d at 845; *Burgess*, 2013 WL 4494481, at *1–2; *Deffert*, 111 F. Supp. 3d at 801–02.

[80] *Declaration of a State of Emergency Due to Potential Civil Unrest at the Virginia State Capitol*, COMMONWEALTH VA. OFF. GOVERNOR (Jan. 15, 2020), https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-49-Declaration-of-a-State-Of-Emergency-Due-to-Potential-Civil-Unrest-at-the-Virginia-State-Capitol.pdf [https://perma.cc/3TPN-TU9F].

[81] *Nordyke*, 319 F.3d at 1188.

[82] Ex parte *Poe*, 491 S.W.3d at 350.

[83] *See generally* Smith v. Tarrant Cnty. College Dist., 694 F. Supp. 2d 610 (N.D. Tex. 2010).

[84] *See supra* notes 74–83.

gun ownership and carry do not constitute expressive conduct for First Amendment purposes, and therefore do not warrant First Amendment scrutiny.[85] In eight of the nine cases, the court refused to extend First Amendment coverage to arms-bearing.[86]

In *Spence v. Washington*, the Supreme Court tried to offer a general formula for whether conduct deserved First Amendment coverage. The test asks whether the conduct in question "was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."[87] The Court held that conduct is entitled to First Amendment coverage where (1) there is an "intent to convey a particularized message," and (2) the surrounding circumstances give rise to a great "likelihood . . . that the message would be understood by those who viewed it."[88]

Six courts have rejected First Amendment challenges to gun control laws on grounds that they fail to satisfy the *Spence* test.[89] Put together, courts have held that First Amendment challenges to public-carry restrictions fail *both* prongs of the *Spence* test: open gun carriers lack the requisite intention to convey a particularized message, and even if they did, bystanders are unlikely to understand the intended message. The first prong is concerned with the intentions of the *speaker*—in this case the gun carrier. In *Nordyke v. King*, for instance, the Ninth Circuit maintained that "[t]ypically a person possessing a gun has no intent to convey a particular message, nor is any particular message likely to be understood by those who view it."[90] A federal district court in Ohio rejected a First Amendment challenge to a police stop in *Northrup v. City of Toledo Police Division* on the same grounds: "[T]he surrounding circumstances . . . offer no support to Northrup's intended message. As he notes, he simply was walking on a public sidewalk in his neighborhood with his wife, daughter, grandchild, and dog."[91] Faced with a similar set of facts, a Connecticut federal district court in *Burgess v. Wallingford* agreed: "Carrying a weapon alone is generally not associated with expression. . . . [R]easonable officers could disagree regarding whether his shirt established a great likelihood that others would interpret his weapon as a particularized message regarding the Second Amendment rather than, for example, a weapon carried for protection."[92]

The second prong is concerned with the reaction of the *listener*—in this case, bystanders.[93] Courts have consistently held that the likely reaction of audiences faced with someone carrying a firearm in public is "alarm[] and concern[] for their safety and that of their community."[94] All of the challenged police stops were

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[85] *See, e.g.*, *Chesney*, 171 F. Supp. 3d at 622.
[86] *See supra* notes 74–83; *Smith*, 694 F. Supp. 2d at 610.
[87] Spence v. Washington, 418 U.S. 405, 409 (1974).
[88] *Id.* at 410–11.
[89] *See, e.g.*, *Chesney*, 171 F. Supp. 3d at 616–18.
[90] Nordyke v. King, 319 F.3d 1185, 1190 (9th Cir. 2003).
[91] Northrup v. City of Toledo Police Div., 58 F. Supp. 3d 842, 848 (N.D. Ohio 2014).
[92] Burgess v. Wallingford, No. 11-cv-1129, 2013 WL 4494481, *at 9 (D. Conn. 2013).
[93] *Spence*, 418 U.S. at 409–11.
[94] *Chesney*, 171 F. Supp. 3d at 618; *see also* Deffert v. Moe, 111 F. Supp. 3d 797, 814

instigated because of the alarmed reactions of bystanders—and courts often take note of this fact when analyzing prong two of the *Spence* test. In *Baker v. Schwarb*, a federal district court in Michigan rejected a First Amendment challenge to a police stop, explaining that "[b]ased upon the numerous emergency calls the City of Sterling Heights received from concerned citizens, it seems clear that these random observers did not apprehend that Plaintiffs were engaged in any [expressive activity]."[95] In *Chesney v. City of Jackson*, the Michigan federal district court pointed to the "lack[] [of] evidence that anyone . . . actually perceived the message that Plaintiff purportedly sought to convey" to reject plaintiff's challenge.[96] There, plaintiff had been detained by police after entering a Michigan Secretary of State branch office in a shopping mall armed with a loaded pistol.[97]

B. The Persistence of First Amendment Public Carry Challenges

If courts have uniformly rejected these challenges, then what are the stakes of this inquiry? Two comments on this point: First, existing precedent, by relying on the *Spence* test as the standard of First Amendment coverage and confining holdings to the facts, has deliberately left the door open for future successful First Amendment challenges to gun control measures. Most notably, in a passage oft-cited by plaintiffs and never overruled, the Ninth Circuit in *Nordyke* maintained that "a gun protestor burning a gun may be engaged in expressive conduct. So might a gun supporter waving a gun at an anti-gun control rally. Flag waving and flag burning are both protected expressive conduct."[98] Citing *Nordyk*e, the district court in *Burgess* noted that "[g]un possession may, in some contexts, meet [the *Spence*] test and invoke First Amendment analysis."[99]

Or consider the Texas Court of Appeals' decision in *Ex Parte Poe*. There, plaintiff argued that a Texas brandishing law violated the First Amendment, asserting that "the act of displaying a firearm is conduct protected by the First Amendment."[100] Rejecting his challenge, the court of appeals merely asserted that the state law regulates "the conduct of displaying a firearm in a public place in a manner calculated to alarm"[101]—not speech. The court concluded its opinion by noting that "although there clearly are constitutional rights to bear arms and to express oneself freely, there is no constitutionally protected right to display a firearm in a public place *in*

(W.D. Mich. 2015); Baker v. Schwarb, 40 F. Supp. 3d 881, 895 (E.D. Mich. 2014); *Northrup*, 58 F. Supp. 3d at 846–48; *Burgess*, 2013 WL 4494481, at *7–9.

[95] *Baker*, 40 F. Supp. 3d at 895.

[96] *Chesney*, 171 F. Supp. 3d at 618.

[97] *Id.* at 610–11.

[98] Nordyke v. King, 319 F.3d 1185, 1190 (9th Cir. 2003).

[99] *Burgess*, 2013 WL 4494481, at *7.

[100] *Ex Parte* Poe, 491 S.W.3d 348, 351 (Tex. App. 2016).

[101] *Id.* at 354.

a manner that is calculated to alarm,"[102] seemingly implying that if Poe's public arms bearing had not constituted brandishing, he would have enjoyed First Amendment protection. Indeed, in a concurring opinion, Justice Leanne Johnson emphasized that while the provision "appears to regulate conduct rather than speech, the display of a weapon could, in some instances, be connected to the exercise of free speech. Expressive conduct may, in some instances, run afoul of the First Amendment, and some statutes that prohibit such conduct may indeed be facially unconstitutional."[103]

Some courts have suggested that passing the *Spence* test and extending First Amendment protection to guns is as easy as drawing a slogan onto the gun itself or wearing a different T-shirt. The *Nordyke* court noted that "[w]here the symbols on the gun (not the gun itself) convey a political message, the gun likely represents a form of political speech itself."[104] Holding that plaintiffs failed to meet prong two of the *Spence* test, a Michigan federal district court in *Deffert v. Moe* pointed to the fact that plaintiff

> was neither chanting nor reciting slogans . . . nor was he carrying any banner, sign, flag or poster advocating the right to bear arms or open carry. His outerwear did not contain a slogan or statement advocating the right to bear arms . . . and his t-shirt, while arguably exhibiting such a slogan, was admittedly covered up.[105]

Indeed, if we take the *Spence* test for granted, it isn't obvious that bearing arms should be categorically excluded from First Amendment coverage. *Concealed* public carry would clearly be excluded from coverage because a concealed weapon is unlikely to convey a message to any nearby audiences. But *open* carry—especially open carry at explicitly gun rights–related political demonstrations like Lobby Day—is another story. When protestors wandered the streets of Richmond with guns strapped across their chest, they very plausibly satisfied the *Spence* test. As the Gun Owners of America put it, "[i]t is difficult to imagine a more clear example of an event where carrying firearms is intended to convey an unambiguous political message."[106] Indeed, it is hard to deny that a protestor who brings their gun to Lobby Day intends to convey their opposition to pending gun control legislation in the Virginia legislature. And similarly hard to deny that audiences—whether arms

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[102] *Id.* at 355 (emphasis in original).

[103] *Id.* at 357 (Johnson, J., concurring).

[104] *Nordyke*, 319 F.3d at 1190.

[105] Deffert v. Moe, 111 F. Supp. 3d 797, 814 (W.D. Mich. 2015).

[106] Complaint at 7–8, Gun Owners of America, Inc. v. Northam, No. CL20-279-4 (Va. Cir. Ct. Jan. 16, 2020). Timothy Zick has echoed this point: "The clearest case in terms of coverage for *open carry* involves a situation in which individuals openly carry firearms *at a public rally for Second Amendment rights*." ZICK, DYNAMIC FREE SPEECH CLAUSE, *supra* note 17, at 220.

bearing protestors, state legislators, or mere bystanders caught in the scene—are likely to understand the pro-gun rights message being conveyed (notwithstanding reactions of fear and intimidation).

Or consider the facts of *Burgess*. There, the district court rejected the First Amendment challenge of a man who was disarmed by police after walking into a pool hall wearing a loaded handgun visible on his hip.[107] Rejecting the challenge, the court maintained that "[c]arrying a weapon alone is generally not associated with expression."[108] But even if carrying a weapon alone is *generally* not associated with any particular message, a more context-specific inquiry is warranted. Notably, the man wasn't carrying a weapon alone as the court claimed; he was also wearing a shirt expressing support for the Second Amendment and carrying pro-gun rights brochures.[109] It is true that audiences reacted with concern—that openly bearing arms in the pool hall created an atmosphere of fear that prevented patrons from enjoying their night.[110] But what does that have to do with the *Spence* test? The alarm that firearms in public may incite can certainly interfere with the clear conveyance of a particularized message. But they need not. Pool hall patrons can be scared and still comprehend the pro-gun rights views of the carrier.

The problem here isn't the courts' judgements that open carry might, under the right circumstances, satisfy the *Spence* test, but rather courts' overwhelming reliance on the *Spence* test itself. As I argue in the next Section, the *Spence* test is a doctrinally and theoretically unworkable test for First Amendment coverage. Transforming the open carry of firearms into constitutionally protected speech can't be as easy as wearing a different shirt, shouting a slogan, or putting an NRA sticker on an AR-15 rifle.

Second, even as courts reject these challenges, the idea that bearing arms is protected by the First Amendment has continued to gain traction in the public imagination. The plaintiff in *Baker*, who was stopped by police after walking down the street carrying a rifle and handgun, complained to the officer after being detained, "I'm not breaking any laws, I'm just exercising my First Amendment rights or my Second Amendment rights."[111] In *Ex Parte Poe*, a number of non-profit guns-rights organizations filed affidavits attesting to the expressive nature of open carry.[112] Terry Holcomb, the Executive Director of Texas Carry, Inc., argued that "[t]he sole purpose of openly carrying rifles and shotguns is to express our belief that people should be allowed to openly carry handguns. We are attempting to educate the public not alarm them."[113] Christopher Grisham, the president of Open Carry Texas, maintained that openly carrying long arms is,

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[107] *See generally* Burgess v. Wallingford, No. 11-cv-1129, 2013 WL 4494481 (D. Conn. 2013).

[108] *Id.* at *9.

[109] *Id.* at *1.

[110] *Id.*

[111] Baker. v. Schwarb, 40 F. Supp. 3d 881, 886 (E.D. Mich. 2014).

[112] *Ex Parte* Poe, 491 S.W.3d 348, 351 (Tex. App. 2016).

[113] *Id.*

> immensely important as a [First] Amendment issue as it draws attention and encourages dialogue on our efforts. No single method of speech has been more successful for us than the open display of firearms in a peaceful and respectful manner than carrying these long arms. Signs and flags only draw attention to the protestor, not the cause.[114]

And in an op-ed, Tyler Yzaguirre, the president of the Second Amendment Institute, urged "gun owners" to "use the First Amendment to protect open carry" exactly because "[t]he First Amendment has historically been much more difficult to limit than the Second."[115]

As guns in public spaces and protests become commonplace, we can expect not only unceasing First Amendment challenges to gun control measures, but also the growing prevalence of First Amendment claims asserted in the public by advocates and gun owners to justify open carry—and the forging of new constitutional meanings and social norms. By presenting a new framework for rejecting these claims, this Article speaks to interlocutors inside and outside our courts. Put simply, the Article explains at length why the First Amendment should not be construed liberally to protect the open carry of firearms. It maps a doctrinal path that judges should take to reject these challenges. And it provides a conceptual language for bystanders to reassert and reclaim their rights to public safety and participation from open carriers trying to weaponize the First Amendment.

C. A Value-Sensitive Approach to First Amendment Coverage

The first step is to abandon the *Spence* test as a standard for First Amendment coverage. As Robert Post has argued, "[t]he test cannot plausibly be said to express a sufficient condition for bringing 'the First Amendment into play.'"[116] To illustrate the problem, Post invokes criminal laws prohibiting the defacement of public property. Regardless of whether a defendant spray-painted an unintelligible mess or an explicit message conveying a particularized message like "I support the Second Amendment," that defendant would be unable to mount a First Amendment defense; even though the defendant's activity could satisfy the *Spence* test, "no court in the country would consider the case as raising a First Amendment question."[117] And

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[114] *Id.*

[115] Tyler Yzaguirre, *Why Gun Owners Should Use the First Amendment to Protect Open Carry*, THE HILL (Aug. 8, 2017, 9:21 AM EDT), https://thehill.com/blogs/pundits-blog/civil-rights/345675-why-gun-owners-should-use-the-first-amendment-to-protect-open [https://perma.cc/L4WW-Q2DK].

[116] Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1252 (1995).

[117] *Id.*

there are countless other expressive activities which satisfy the *Spence* test, but would never present a First Amendment issue—contractual language, medical malpractice, commercial fraud, and workplace harassment to name only a few.

On the other hand, courts have not hesitated to recognize plenty of media and conduct which *do not* straightforwardly satisfy the *Spence* test, but nevertheless enjoy First Amendment coverage, such as paintings, music, wearing an armband, parades, flag burning, and flag waving. In lights of these anomalies, the Court has even acknowledged that "a narrow, succinctly articulable message is not a condition of constitutional protection."[118] And this is generally the approach that litigants in First Amendment gun control challenges take. They present gun carrying as a form of symbolic speech, indistinguishable from waving or burning flags at political rallies.[119]

The central problem with the *Spence* test—and with any coverage test that aims to track "expressive conduct"—is its insensitivity to underlying First Amendment values and the social contexts in which those values are manifest. The *Spence* test "does not state a *sufficient* condition for bringing the First Amendment into play because social contexts can sometimes render individual acts of communication into events without First Amendment value."[120] If the underlying normative basis of the First Amendment is democratic self-governance, then the scope of First Amendment coverage is defined by reference to those activities that fall within the domain of public discourse. As Justice Stephen Breyer, faced with a coverage question, explained:

> [The Court] can, and normally do[es], simply ask whether, or how, a challenged statute, rule, or regulation affects an interest that the First Amendment protects. If, for example, a challenged government regulation negatively affects the processes through which political discourse or public opinion is formed or expressed (interests close to the First Amendment's protective core), courts normally scrutinize that regulation with great care.[121]

Whether a particular speech-act falls in the domain of public discourse—and implicates the formation of public opinion—is a context-specific sociological inquiry into the public meaning of social practices and conventions. Questions of First

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[118] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).

[119] *See, e.g.*, Yzaguirre, *supra* note 115 ("Open carrying a firearm is an action; it is symbolic speech because it is a public statement. As history has shown us, actions and public statements, are protected by the First Amendment under symbolic speech. Examples of this include students in Des Moines wearing armbands to protest the Vietnam War, waving flags that may be seen as offensive and even flag burning.").

[120] Post, *Recuperating First Amendment Doctrine*, *supra* note 116, at 1255.

[121] Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1152 (2017) (Breyer, J., concurring).

Amendment coverage force judges to "chart[] and classify[] the social world in order best to serve the constitutional value of democratic self-determination."[122]

D. Charting the Social Practice of Open Carry

1. Guns and Media for the Communication of Ideas

So not all expressive activities (with particularized messages) deserve First Amendment coverage. Instead, the First Amendment protects expressive messaging conveyed via "media for the communication of ideas."[123] Media for the communication of ideas are the "organs of public opinion"[124]—they facilitate public discourse by bringing together a speaker and an audience into a "dialogic and independent" relationship.[125] Think of newspapers, books, movies, art, or music.[126] These are media through which the participants are self-consciously engaged in deliberation and debate about current events and matters of public concern.

First Amendment values, then, are not attached to amorphous speech-acts, but instead are manifest in particular social contexts that transform speech-acts into constitutionally significant expression. There is no ready answer to the question, "are guns as such speech?" A gun on display at a Walmart is very different from a gun on display in a contemporary art exhibit. In a Walmart, the gun is a mere commodity with no First Amendment value—laws regulating the sale of firearms would likely never be subject to First Amendment scrutiny.[127] But now imagine a law that banned the display of firearms at museum exhibitions.[128] Such a law clearly

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[122] Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 17 (2000).

[123] *See* Post, *Recuperating First Amendment Doctrine*, *supra* note 116, at 1276.

[124] Mutual Film Corp. v. Indust. Comm., 236 U.S. 230, 243–45 (1915).

[125] Post, *Recuperating First Amendment Doctrine*, *supra* note 116, at 1254.

[126] *See* Joseph Burstyn, Inc., v. Wilson, 343 U.S. 495, 501 (1952) (granting First Amendment protection to motion pictures because they "are a significant medium for the communication of ideas").

[127] For a discussion of the First Amendment value (or lack thereof) of commodities, see Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86 (2020).

[128] There are, in fact, art exhibitions that feature guns. Consider the 2014 art exhibition titled "Guns in the Hands of Artists," displaying the work of over thirty artists who used decommissioned guns collected through a gun buyback program in New Orleans "as the raw materials in their art . . . to express a thought, make a statement, open a discussion and stimulate thinking about guns in our culture." *Guns in the Hands of Artists*, JONATHAN FERRARA GALLERY, http://www.jonathanferraragallery.com/exhibitions/guns-in-the-hands-of-artists [https://perma.cc/RVH4-Y5S3] (last visited Apr. 26, 2022). *See also* Francis X. Clines, *The N.R.A. Says, Go Ahead, Make My Fantasy*, N.Y. TIMES (Apr. 24, 2017), https://www.nytimes.com/2017/04/24/opinion/the-nra-says-go-ahead-make-my-fantasy.html?smid=tw-share

restricts public discourse by regulating a medium for the communication of ideas—namely, the medium of the museum exhibit. Placed in a modern art museum, guns can be transformed from commodities with no First Amendment value into works of art that trigger First Amendment protection.

We might start by asking, then, whether carrying guns in a public fora transforms them from commodities into media. Another way of phrasing the question is to ask whether laws that regulate the open carry of firearms restrict the processes of self-governance and the formation of public opinion. Guns in public are a far cry from the traditional forms of media that society associates with the formation of public opinion—books, movies, and the like. Guns are not the means through which we engage in public debate about current events. They are not organs of idea exchange. There is no doubt that the contents of public opinion and the constitutional meanings attached to the Second Amendment are influenced by the ways guns are regulated; but that does not imply that the regulation of guns is itself a First Amendment problem. First Amendment scrutiny is reserved for the regulation of media through which the public carries on public deliberation.[129] It is clear that an AR-15 strapped across someone's back is not such a medium.

Far from a medium for the communication of ideas, courts have, for the most part, coalesced around the understanding that the open carry of firearms represents a public threat and source of intimidation. This surely reflects a prevailing public understanding of the meaning of open carry. In *Baker v. Schwarb*, the Michigan federal district court rejected the First Amendment claims of two men who had been briefly detained by police officers after receiving "a flood of 911 calls from concerned citizens" reporting men "carrying impressive looking rifles and handguns in full view."[130] Plaintiffs argued that their First Amendment rights "were infringed by the officers when their walk was interrupted and they were detained for promoting open carry."[131] Dismissing their challenge, the federal court began its holding with this description of open-carry practices:

[https://perma.cc/X6YD-MSXY] (describing the National Rifle Association's National Firearms Museum, including an exhibit displaying guns from film); Annie Dell'Aria, *Loaded Objects: Addressing Gun Violence Through Art in the Gallery and Beyond*, 6 PALGRAVE COMMC'NS 1 (2020) (surveying works of art related to gun violence to "outline moments where contemporary art intersects with the issue of gun violence in ways that prompt dialogue and connect the material presence and political issue of guns to other structures of violence."); *Mexican Artist Creates Gun Orchestra*, PHAIDON, https://www.phaidon.com/agenda/art/articles/2013/february/26/mexican-artist-creates-gun-orchestra/ [https://perma.cc/8LTF-VMHH] (last visited Apr. 26, 2022) (describing a collection of work by Mexican artist Pedro Reyes who transformed guns and rifles into musical instruments); *The Art of London Firearms*, MET MUSEUM, https://www.metmuseum.org/exhibitions/listings/2019/london-firearms [https://perma.cc/9VCF-HVHB] (last visited Apr. 26, 2022) (describing an exhibition of British firearms).

[129] *See* Post & Rothman, *supra* note 127.

[130] Baker. v. Schwarb, 40 F. Supp. 3d 881, 881 (E.D. Mich. 2014).

[131] *Id.* at 894.

> Out on the forested frontier, it was commonplace—and never worrisome—to see buckskin-wearing men setting off toting their flintlocks and hunting knives, fixin' to bring home vittles for the family. But, in the contemporary reality of a settled, peaceful suburban environment, where most of the hunting is done between aisle three and the frozen food section, the sight of commandos with AK-47s marching along the highway predictably grabs the attention of citizens and law enforcement alike.[132]

Here, the court engaged directly in sociological interpretation of open carry as a social practice and charts the social world in such a way as to leave no room for guns as a medium for the exchange of ideas. Contrasting "the contemporary reality" with the Wild West, the court classifies guns in public as anomalous, unusual, and dangerous.

On this interpretation, open carry is a far cry from the domain of democratic public discourse. And this view of our social reality is undoubtably commonplace. As one commentator put it: "The right to bear arms in political debate . . . is not the right to persuade; it is the right to terrorize. It is not the right to participate in civil society; it is the power to threaten to disrupt, even to destroy it."[133] Consider the fact that businesses are increasingly asking customers to leave their guns at home to provide "associates and customers with a safe place to work and shop."[134] These measures, one public health expert noted, "begin[] to make guns seem less socially acceptable."[135]

Implicit in these understandings of guns in public is the idea that guns are not themselves media for the communications of ideas. Rather than facilitating the formation of public opinions, guns in public more often evoke reactions of fear.[136] Notice how this First Amendment coverage argument differs from a mechanical application of the *Spence* test. Guns in public can be understood as posing a threat while also satisfying the *Spence* test so long as the gun-carrier means to express a particularized message that audiences are likely to understand.[137] But satisfying the *Spence* test does not transform guns into a media for the communication of ideas. These sociological accounts of open carry illustrate that gun-carriers and bystanders,

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[132] *Id.* at 884.

[133] Garrett Epps, *Guns Are No Mere Symbol*, THE ATLANTIC (Jan. 21, 2020), https://www.theatlantic.com/ideas/archive/2020/01/guns-are-no-mere-symbol/605239/ [https://perma.cc/ZGM9-D8ZD].

[134] Dalvin Brown, Kelly Tyko & Janna Herron, *Publix, Aldi, CVS, Walgreens and Other Businesses Want Shoppers to Leave Guns at Home*, USA TODAY (Sep. 5, 2019), https://www.usatoday.com/story/money/2019/09/05/open-carry-these-stores-restaurants-want-you-not-bring-guns/2208651001/ [https://perma.cc/2FHB-KY72] (internal quotation omitted).

[135] Michael Corkery, *Retailers Walk Thin Lines by Asking, Not Telling, Shoppers Not to Carry Guns*, N.Y. TIMES (Sept. 9, 2019), https://www.nytimes.com/2019/09/09/business/walmart-guns-open-carry.html [https://perma.cc/TP4Q-24N5] (internal quotation omitted).

[136] Zick, *Arming Public Protests*, *supra* note 17, at 225.

[137] *Supra* Section II.B.

more often than not, do not stand in the "dialogic and independent" relationships constitutive of media for the communication of ideas.[138] Carrying a gun on the street, in a pool hall or in a mall does not transform a space into a forum for the self-conscious deliberation of public issues.

2. Guns at Protests

Of course, the determination of whether a particular speech-act constitutes public discourse depends on the context in which the act takes place. As the Ninth Circuit explained in *Nordyke*, "the correct question is whether gun possession is speech, not whether a gun is speech. Someone has to do something with a symbol before it can be speech."[139] And critical to Gun Owners of America's argument was the fact that the "symbolic act of bearing arms" took place at Virginia Lobby Day. Even if guns are not media for the communication of ideas, expressive public gatherings like protests, demonstrations, and parades definitely are. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, for instance, the Supreme Court acknowledged that "marches" and "expressive parades" are "mediums of expression" entitled to First Amendment protection.[140] In so ruling, the Supreme Court acknowledged for the first time the "tension between a focus on media for the communication of ideas" on the one hand and "*Spence*'s focus on the communication of particular messages" on the other.[141] Breaking from *Spence*, the *Hurley* Court conceded that "a narrow, succinctly articulable message is not a condition of constitutional protection" and that the First Amendment protects such speech-acts as "wearing an armband to protest a war, displaying a red flag, and even '[m]arching, walking or parading' in uniforms displaying the swastika."[142] Crucially, acts as simple as waving a flag, once introduced into the context of expressive marches, are transformed into constitutionally significant speech-acts.

Guns at protests, then, present a more complicated case. And as Second Amendment commentators have observed, armed protests are an increasingly common phenomenon. As early as 2013, Dahlia Lithwick and Christian Turner described "[t]he alarming rise of 'open-carry' demonstrations," writing that "[w]hether or not open-carry counterdemonstrations are a good thing, they are assuredly a thing."[143] They observed that pro-gun rights demonstrators "strap on weapons and parade around to prove that parading around with weapons is constitutional and that they

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[138] *Supra* Section II.B.

[139] Nordyke v. King, 319 F.3d 1185, 1189 (9th Cir. 2003).

[140] 515 U.S. 557, 569 (1995).

[141] Post, *Recuperating First Amendment Doctrine*, *supra* note 116, at 1253 n.16.

[142] *Hurley*, 515 U.S. at 569 (internal citations omitted).

[143] Dahlia Lithwick & Christian Turner, *It's Not My Gun. It's "Free Speech."*, SLATE (Nov. 12, 2013), https://slate.com/news-and-politics/2013/11/open-carry-demonstrations-is-carrying-a-gun-to-a-protest-protected-by-the-first-amendment.html [https://perma.cc/52RY-64MT].

have a First Amendment right to say so."[144] Since 2013, armed protesters have marched through Charlottesville, Virginia and stormed the Capitol Building in Michigan.[145] This year alone, the Giffords Law Center has recorded over forty significant cases of armed protests.[146] Only seven states, plus the District of Columbia, ban the open carry of firearms at public demonstrations.[147]

The fact that political demonstrations are media protected by the First Amendment does not itself guarantee that guns carried at demonstrations are constitutionally protected forms of public discourse. This is because speech within media for the communication of ideas is *presumptively* public discourse.[148] And as James Weinstein put it, "[a]lthough this presumption is a strong one, it is rebuttable."[149] Consider two examples: obscenity and commercial speech. Although obscenity is conventionally broadcast via traditional media for the communication of ideas (e.g., movies, television, webpages), it remains a category of unprotected speech.[150] Similarly, although commercial speech is often transmitted via television and newspaper advertisements, the Court has always been careful to distinguish it from the public discourse which constitutes the core of First Amendment protection.[151]

Determining whether the public discourse presumption has been defeated requires an appraisal of the First Amendment values and state interests at stake. In the case of obscenity and commercial speech, the Court determined that the speech-acts are insufficiently related to the value of democratic self-governance to deserve full First Amendment protection—they are so far from the kinds of speech by which we govern ourselves that even situating them within traditional media for the communication of ideas does not warrant constitutional protection.[152]

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[144] *Id.*

[145] Robyn Thomas, *Armed Protestors Inspire Fear, Chill Free Speech*, GIFFORDS L. CTR. (Aug. 31, 2020), https://giffords.org/lawcenter/report/armed-protesters-inspire-fear-chill-free-speech/ [https://perma.cc/AZJ6-KM7T] (keeping a running list of notable armed protests in 2020); Zick, *Arming Public Protests*, *supra* note 17, at 224.

[146] Thomas, *supra* note 145.

[147] Alex Yablon, *The 36 States Where Local Officials Can't Ban Guns at Protests*, THE TRACE (Sept. 11, 2017), https://www.thetrace.org/2017/09/35-states-local-officials-cant-ban-guns-protests/ [https://perma.cc/28SG-8UHR].

[148] Post & Rothman, *supra* note 127, at 137 ("Speech within such media is presumptively public discourse.").

[149] James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 496 n.35 (2011).

[150] *See* Paris Adult Theatre I v. Slaton, 413 US. 49, 69 (1973) (upholding the banning of legally obscene films as consistent with the First Amendment); Reno v. ACLU, 521 U.S. 844, 868 (1997) (maintaining that obscenity is unprotected even when expressed via the "democratic forums of the Internet").

[151] *See generally* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976); Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

[152] Weinstein, *supra* note 149, at 493–94.

So too for guns at protests, the presumption of public discourse is defeated. Indeed, the case is even more compelling for denying guns at protests the status of public discourse. Because, whereas obscenity and commercial speech are merely unrelated to the value of participatory democracy, open carry actively contravenes it. And importantly, their introduction into a medium for the communication of ideas (i.e., protests) can actually *amplify* their undemocratic effect. As a growing number of Second Amendment scholars have observed, First Amendment values are threatened by open carry at protests and public events; guns at protests can incite fear and intimidation, provoke and antagonize, quell dissent, halt deliberation, and chill speech.[153] These effects suggest that bringing guns to a protest actually changes the constitutional nature of the protest itself by nullifying the protest's status as a medium for the communication of ideas. In other words, although public protests are conventionally organs of public opinion, armed protests are not.

III. THE NORMATIVE STAKES OF COVERAGE

A. Divergent Social Realities

Pointing to prevailing accounts that describe guns in public as abnormal and threatening, I have argued that guns are not media for the communication of ideas. But it would be naive to deny the fact that for at least a significant number of Americans, guns *are* expressive symbols. For these Americans, the preceding argument is likely unpersuasive because it fails to capture their lived social reality.[154] These Americans manifestly do not view open carry as threatening, and instead as

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[153] *See, e.g.*, Darrell A. H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1308–10 (2009).

[154] Dan Kahan has long argued that making progress in the gun-control debate requires recognizing that these debates are *cultural*, not merely empirical; they are about divergent social meanings. *See generally* Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291 (2003); *see also* Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569, 571 (2006) ("Indeed, the meanings that guns and gun control express are sufficient to justify most individuals' positions on gun control independently of their beliefs about guns and safety. It follows that the only meaningful gun control debate is one that explicitly addresses whether and how the underlying cultural visions at stake should be embodied in American law."); Dan M. Kahan, *The Gun Control Debate: A Culture-Theory Manifesto*, 60 WASH. & LEE L. REV. 3, 4 (2003) (arguing that empirical econometric studies "cannot resolve the American gun debate" because "this body of work ignores what that debate is really about: culture"); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 451–62 (1999) (viewing the discourse between proponents and opponents of gun control as permeated by "each side's illiberal ambition to proclaim its cultural and moral ascendancy through the law").

"a fundamental American freedom and an act of citizenship."[155] As one pro-gun commentator put it, "[y]ou feel a sense of burning conviction that you, your family, and your community are safer and freer because you own and carry a gun."[156] A growing body of sociological literature confronts this fact head on, aiming to map out frequently overlooked narrations of gun rights.[157] On this view, gun ownership and carry are constitutive of the broader social world of "gun culture," and are identarian markers of being a part of the in-group.[158]

For many gun-rights advocates, responding to guns in public with fear and viewing them as threats is a totally unintelligible reaction. So unintelligible that this fear has been pathologized in some gun-rights circles and dubbed "hoplophobia".[159] These circles define hoplophobia as an "[i]rrational, morbid fear of guns" that "[m]ay cause sweating, faintness, discomfort, . . . nondescript fears, more, at [the] mere thought of guns."[160] Proponents of "hoplophobia" naturalize the bearing of arms,

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[155] Jill Lepore, *Battleground America*, NEW YORKER (Apr. 16, 2020), https://www.newyorker.com/magazine/2012/04/23/battleground-america [https://perma.cc/YZE3-UQR9]. Jennifer Carlson, for instance, has argued that gun carry fosters a "citizen protector ethic," "whereby firearms—and the willingness to use them to defend innocent life—come to represent an *affirmation of life*." Jennifer Carlson, *Why So Many American Men Want to Be the "Good Guy With a Gun"*, VOX (Mar. 24, 2018 7:43 AM EST), https://www.vox.com/the-big-idea/2018/3/23/17156084/carry-gun-laws-parkland-culture-good-guy-gun-male-identity [https://perma.cc/S4BM-H8BH]; *see generally* JENNIFER CARLSON, CITIZEN-PROTECTORS: THE EVERYDAY POLITICS OF GUNS IN AN AGE OF DECLINE 1 (2015).

[156] David French, *What Critics Don't Understand About Gun Culture*, THE ATLANTIC (Feb. 27, 2018), https://www.theatlantic.com/politics/archive/2018/02/gun-culture/554351/ [https://perma.cc/Z78K-JFVE].

[157] For recent sociological discussions of the cultural meanings attached to gun ownership and carry, see Jonathan M. Metzl, *What Guns Mean: The Symbolic Lives of Firearms*, 6 PALGRAVE COMMC'NS 1 (2020); F. Carson Mencken & Paul Froese, *Gun Culture in Action*, 66 SOC. PROBLEMS 3 (2019); Mugambi Jouet, *Guns, Identity, and Nationhood*, 5 PALGRAVE COMMC'NS 1 (2019); David Yamane, *The Sociology of U.S. Gun Culture*, 11 SOC. COMPASS (2017).

[158] Jouet, *supra* note 157, at 5. As Mugambi Jouet explained,

> The symbolic dimensions of the right to bear arms in America are glaring. After all, the odds that anyone will fire a gun against a criminal are slim. The odds that anyone will fire a gun in an insurrection against the government are slimmer. . . . A fierce rhetorical defense of the right to bear arms or the choice to arm oneself to the teeth are largely symbolic acts. They reflect strong views about what guns mean based on an underlying set of beliefs.

Id. at 4.

[159] Alan Korwin, *Hoplophobia: A Modern Scourge*, GUNLAWS, https://www.gunlaws.com/GunPhobia.htm [https://perma.cc/8ACQ-NUMR] (last visited Apr. 26, 2022).

[160] *Id.*; *see also* John Cylc, *Fearing Guns Is a Refusal to Take Responsibility For Your Safety*, THE FEDERALIST (Mar. 3, 2017), https://thefederalist.com/2017/03/03/afraid-guns-refusal-take-responsibility-safety/ [https://perma.cc/NJ5L-K6US] ("There is a fear that the media doesn't seem to recognize. It isn't Islamaphobia. It isn't homophobia. It isn't xenophobia.

claiming that the use of guns for self-defense "is based on man's 'fight' instinct."[161] In turn, they believe that those that fear guns—so-called "hoplophobes"—"deserve pity, and should seek treatment."[162] The concept of "hoplophobia" might seem like the kind of thing that gets relegated to the dark corners of the interweb. But it recently made its way into a federal appeals court opinion. In a case involving a ban on interstate gun sales, Fifth Circuit Judge James Ho wrote: "Law-abiding Americans should not be conflated with dangerous criminals. Constitutional rights must not give way to hoplophobia."[163]

First Amendment challenges to open carry restrictions raise difficult questions about how judges should go about making judgments about First Amendment coverage when social norms are so dramatically divergent. In these cases, judges are faced with two diametrically opposed conceptions of social reality. Who gets to decide whether the activity in question is speech? The listener? The speaker? On my account, neither the listener nor the speaker gets to unilaterally decide whether a particular speech-act deserves First Amendment coverage. Media for the communication of ideas assume an independent and self-consciously dialogic relationship between listener and speaker. But even still, what happens when there exist some social settings and communities wherein guns are conscious instruments of deliberation from the perspective of both speakers and listeners, and some communities in which guns are nothing but threats?

As our social realities diverge, courts must confront the normative question underlying these controversies—namely, what kind of a world *should* we inhabit? As Amanda Shanor has argued, courts refuse to extend First Amendment coverage "when there is a common norm about the social effect of the activity or when the court decides *there should be such a norm*."[164] First Amendment doctrine both reflects prevailing social norms and entrenches them in our constitutional law. The relevant First Amendment question that judges must confront is not merely whether open carry *is* a form of public discourse, but also whether it *ought* to be. In my view, the refusal of judges to extend First Amendment coverage to open carry is best understood as a judgment about the *normative stakes* at hand—even if that is never made explicit in their decisions.

Journalists love to discuss those because they primarily generate negativity towards conservatives and Republicans. I am talking about an irrational fear of an inanimate object. It is an item that will neither move on its own, nor explode or damage anything by itself. I am talking about firearms. This irrational fear is called hoplophobia.").

[161] Cylc, *supra* note 160.

[162] Korwin, *supra* note 159.

[163] Mance v. Sessions, 880 F.3d 390, 405 (5th Cir. 2018) (Ho, J., dissenting in denial of rehearing en banc).

[164] Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 346 (2018) (emphasis added).

B. The Stakes of Future Challenges

Our discussion about the values implicated by guns at protests is one example of the normative conversations that judges and litigators should be having. But the stakes of First Amendment challenges to open carry are enormous and span beyond guns at protests. Extending First Amendment coverage to open carry implicates all of the long-standing and commonplace regulations on the bearing of firearms outside the home by making them vulnerable to as-applied First Amendment scrutiny: general bans on the open carry of firearms, prohibitions on guns at demonstrations on public property, laws prohibiting groups of people from "marching" in public with firearms, anti-paramilitary laws prohibiting individuals from assembling to train with firearms, generally applicable criminal laws prohibiting the use of guns to threaten members of the public, laws prohibiting the brandishing of firearms, laws prohibiting the pointing of guns, and laws criminalizing the use of a firearm to cause fear.[165]

All of these laws protect a state's interests in public safety. But they also implicate a host of other social values. Reva Siegel and Joseph Blocher have articulated the normative stakes of open-carry regulation: "In enacting gun laws, the government acts for a majority of citizens who believe that not only their families' physical safety, but their communities' fundamental freedoms—to travel, to speak, to learn, to pray, and to vote without fear or intimidation—are at stake."[166] In other words, laws regulating guns in public protect a vast array of interests beyond the preservation of life; they foster the social conditions necessary for free and equal participation in the demos. They preserve the public channels of self-governance. These are the values that courts must consider—and take seriously—before extending coverage to open gun carry.

The analysis that judges should undertake must be context- and value-sensitive. The question is not merely whether guns are good or bad, but rather how First Amendment values—and indeed, other constitutional values—are implicated by regulating guns in *particular* ways in *particular* social settings. Laws that regulate the manner of arms bearing seem to have a negligible effect on the carrier's ability to express pro-gun views in public. Laws that regulate concealed carry, for instance, do not implicate First Amendment values at all because hidden weapons are void of public meaning. Similarly, laws that prohibit the carrying of loaded firearms have no bearing on communication and advocacy. Finally, consider laws that regulate the brandishing and

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[165] *See generally* Eric Tirschwell & Alla Lefkowitz, *Prohibiting Guns at Public Demonstrations: Debunking First and Second Amendment Myths After Charlottesville*, 65 UCLA L. REV. DISC. 172 (2018); ROBERT J. SPITZER, GUNS ACROSS AMERICA 1 (2015). For a survey of state and federal laws regulating violence at public events and spaces, see *Protests and Public Safety: A Guide for Cities & Citizens*, INST. FOR CONST. ADVOC. & PROT. (2020), https://constitutionalprotestguide.org/ICAP-Protest_and_Public_Safety-Toolkit-072720.pdf [https://perma.cc/CLP2-LT24].

[166] Joseph Blocher & Reva Siegel, *Why Regulate Guns?*, 48 J.L. MED. & ETHICS 11, 15 (2020).

pointing of firearms in ways likely to provoke fear and intimidation. It is hard to imagine why pointing a firearm at someone would be essential to getting a point across, but much easier to see how that kind of threatening conduct can chill speech.

Laws that regulate guns in particular *places* also implicate constitutional values in different ways. As I have argued, laws that regulate guns at protests actively advance First Amendment values by preserving the participatory and democratic potential of public gatherings. Think also of laws that restrict guns in "sensitive places" like schools, shopping centers, or polling places. These laws preserve a sense of public safety that is a prerequisite to the free exercise of our constitutional liberties.

The result is not a categorical prohibition on the extension of First Amendment coverage to bearing arms. We can imagine settings where firearms do operate as organs of public opinion and facilitate public discourse (e.g., at an NRA convention or gun shows[167]). Instead, the relevant point is that the sociological approach makes it much harder to claim First Amendment coverage for open carry than the *Spence* test because it forces judges to consider whether and how guns in public implicate First Amendment values in different social settings.

C. The Costs of Coverage

A critic may ask: why not simply extend First Amendment coverage, but deny protection? In other words, if the state interests served by these regulations are so great, courts can easily decide that they satisfy First Amendment scrutiny. This approach may be especially attractive given the growing body of scholarship arguing that the open carry of firearms at protests directly conflicts with First Amendment values by creating an atmosphere of fear which chills speech and deliberation.[168] Putting aside the fact that it is not obvious that these regulations would survive heightened First Amendment scrutiny, this approach is misguided because it wrongly assumes that extending First Amendment coverage is cost-free as long as laws survive judicial scrutiny.

Judicial intervention—especially the review of commonplace and pervasive legislation—is itself quite expensive. First, constitutionalizing large swaths of social life risks upsetting the delicate balance between judicial review and democratic self-governance. Extending the risk of judicial invalidation to commonplace public safety measures upsets ordinary processes of legislative enactment. Second, judicial intrusion into these pervasive regulations implicates Mark Tushnet's "too much work" principle.[169] Tushnet has argued that "[d]octrines that require ordinary judges

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[167] Sarah Jane Blithe & Jennifer L. Lanterman, *Camouflaged Collectives: Managing Stigma and Identity at Gun Events*, 11 STUD. SOC. JUST. 113, 113 (2017) (analyzing "the organization of gun collectives, places where gun owners and gun culture are accessible, to begin to understand how 'gun culture' and 'gun owner identities' unfold").

[168] *See, e.g.*, Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 95 (2012); Miller, *supra* note 153, at 1308–10.

[169] Mark Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of*

do too much work to reach obvious results ought to be avoided because too often ordinary judges will make mistakes . . . as they try to implement the complex doctrines step by step."[170] In other words, there are error costs associated with lower court judges having to work through the quagmire of First Amendment protection doctrine to uphold commonplace gun control laws. And finally, overextension of First Amendment coverage risks losing sight of core First Amendment values and diluting the protection of public deliberation. As Post put it, "[t]o key heightened First Amendment scrutiny to the expressive properties of human action is thus to risk stretching the First Amendment to encompass everything, which means that it will protect nothing. And that could deeply demoralize and endanger our precious First Amendment rights."[171]

In the realm of gun control, the absence of First Amendment coverage reflects respect for our basic societal interests in public safety and order more generally—and deference to legislative bodies in crafting and enforcing laws to safeguard those interests. First Amendment expansionism implicates these interests by inserting an additional (and seriously cumbersome) constitutional hurdle before legislative actors exercise ordinary police powers. First Amendment challenges to open carry exemplify why judges *must* be sensitive to the normative and institutional consequences of extending coverage. Sociological judgments about whether certain activity constitutes public discourse do not merely describe the social reality one inhabits—they also actively play a role in shaping it.[172]

In other words, judges must ask themselves not only whether we currently do carry on national debates through open gun carry, but also whether we ought to. Courts have so far been wise to answer in the negative. Courts should continue to deny coverage to the possession of guns—not only because guns are not organs of public opinion, but also because doing so preserves the social norms that exclude guns from the public forum. These norms—encoded in commonplace gun control laws—serve important constitutional values and interests.

IV. EXPANDING THE FRAME ON GUN RIGHTS

A. A Weaponized First Amendment Outside the Courts

So far, we have focused primarily on how judges ought to resolve claims asserted in courts about First Amendment protection for gun carry. But the upshot of

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Speech—An Essay on Meta-Doctrine in Constitutional Law, 25 WM. & MARY BILL RTS. J. 1073, 1076 (2016).

[170] *Id.*

[171] *See* Robert Post, *An Analysis of DOJ's Brief in Masterpiece Cakeshop*, TAKE CARE BLOG (Oct. 18, 2017), https://takecareblog.com/blog/an-analysis-of-doj-s-brief-in-masterpiece-cakeshop [https://perma.cc/TY8Z-4FAA].

[172] *See* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 95 (1984) ("The discourse of law—its categories, arguments, reasoning modes, rhetorical tropes, and procedural rituals—fits into a complex of discursive practices that together structure how people perceive and that therefore act to reproduce or to try to change people's social reality.").

our discussion extends beyond the courthouse doors. Even as they fail in court, these First Amendment challenges levied against open-carry laws illuminate the divisive social contestation over the practice of bearing firearms in public and evolving public understandings of constitutional rights.

Crucially, these challenges illustrate the extent to which pro-gun rights movements transcend the jurisprudential boundaries of the Second Amendment. The pro-gun rights social movements that have driven contemporary Second Amendment doctrine and public understandings are acutely aware of the mutability of constitutional meanings.[173] As has been well-documented, decades of social-movement mobilization and conflict helped forge popular beliefs about the right to bear arms and the Second Amendment's original meaning that made the Supreme Court's eventual decision in *Heller* possible.[174]

But the story of the public's understanding of guns rights did not end with *Heller*. The *Heller* decision left unresolved questions about the status of the right to bear arms in different pockets of life outside the home. We are now in the midst of a new generation of guns rights claims—of which First Amendment claims are merely one among many—that extend beyond the Second Amendment protections prescribed by the *Heller* Court. As Jacob Charles put it, a focus on Second Amendment claims

> ignore[s] the vast and expansive non–Second Amendment right to keep and bear arms. If observers want to assess the strength of gun rights in the United States today, they cannot confine the inquiry to the formal constitutional guarantee and how state and federal courts apply doctrine under that provision.[175]

On Charles's account, non–Second Amendment gun-rights claims exist in many constitutional forms—in First Amendment and Fourth Amendment claims, for example.[176] Indeed, this Article's discussion of legal claims alleging First Amendment

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[173] *See generally* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008).

[174] *Id.*; *see also* Reva B. Siegel, Heller *& Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1402 (2009) ("[W]hatever its vices, *Heller* does not impose the decisions of the dead on the living. The decision arises out of a quite contemporary and still persisting dispute about the nature and scope of our constitutional freedoms—as any politically aware reader of the decision understands.").

[175] Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. 581, 630–31 (2022); *see also id.* at 640 ("What Americans have the right to do with guns today flows less from the text or judicial interpretation of the Second Amendment than from the wide-ranging set of entitlements codified in federal, state, and local statutes and regulations. This set of statutory gun rights is often rhetorically justified in the language of constitutional rights, but it differs profoundly from the protections the Constitution provides.").

[176] *See, e.g.*, Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1133 (6th Cir. 2015)

coverage of public carry is far from exhaustive of what we might call "First Amendment Firearm Law" more generally. A growing body of lawsuits and commentary has begun to address a wide array of gun control–related controversies that implicate First Amendment rights. These controversies include whether the First Amendment bars the government from prohibiting or regulating dissemination the online distribution of 3D firearms code;[177] whether it bars schools from banning depictions of firearms on student clothing,[178] and whether it bars local and state governments from cutting off ties with government contractors and vendors associated with the NRA.[179]

But as Charles points out, non–Second Amendment gun-rights claims also exist, in large part, in statutory form. That is, the right to bear arms enjoys protection not only in the Constitution, but in federal and state laws that guarantee gun rights in "public, private, educational, governmental, commercial" settings among others.[180] These statutory protections give life to the right to bear arms in our small-c constitutional order.[181]

The debate about First Amendment protection of armed gatherings, Charles observes, "illustrates the ways that the trend in robust statutory rights to carry in public interacts with and influences constitutional doctrine. Debates about the expressive act of gun carrying are now relevant in ways they would not have been in a world without extensive statutory gun rights."[182] And, as an addendum, nor would these

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("While open-carry laws may put police officers (and some motorcyclists) in awkward situations from time to time, the Ohio legislature has decided its citizens may be entrusted with firearms on public streets. The Toledo Police Department has no authority to disregard this decision—not to mention the protections of the Fourth Amendment—by detaining every 'gunman' who lawfully possesses a firearm." (citation omitted)).

[177] *See, e.g.*, Barton Lee, *Where Gutenberg Meets Guns: The Liberator, 3D-Printed Weapons, and the First Amendment*, 92 N.C. L. REV. 1393 (2013); Anthony M. Masero, *I Came, ITAR, I Conquered: The International Traffic in Arms Regulations, 3D-Printed Firearms, and the First Amendment*, 55 B.C.L. REV. 1291 (2014); Josh Blackman, *The 1st Amendment, 2nd Amendment, and 3D Printed Guns*, 81 TENN. L. REV. 479 (2013).

[178] *See* Schoenecker v. Koopman, 349 F. Supp. 3d 745 (E.D. Wis. 2008); N.J. *ex rel.* Jacob v. Sonnabend, No. 20-C-227 (E.D. Wis. May 3, 2021); Jake Charles, *Litigation Highlight: Guns & Speech*, DUKE CTR. FIREARMS L. (May 7, 2021), https://firearmslaw.duke.edu/2021/05/litigation-highlight-guns-speech/ [https://perma.cc/2K3W-LV3K].

[179] *See* David Cole, *New York State Can't Be Allowed to Stifle the NRA's Political Speech*, ACLU (Aug. 24, 2018), https://www.aclu.org/blog/free-speech/new-york-state-cant-be-allowed-stifle-nras-political-speech; Jacob Sullum, *Lawsuit Argues that San Francisco's Anti-NRA Resolution Violates the First Amendment*, REASON (Sept. 10, 2019 1:30 PM), https://reason.com/2019/09/10/lawsuit-argues-that-san-franciscos-anti-nra-resolution-violates-the-first-amendment/ [https://perma.cc/ULZ3-25JF].

[180] Charles, *supra* note 175, at 56.

[181] *Id.* For an account of small-c constitutionalism, see Richard A. Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1082 (2013).

[182] Charles, *supra* note 175, at 63.

debates be relevant in a world without an increasingly deregulatory public and judicial understanding of First Amendment protection. As this Article has aimed to show, it is this unique convergence of trends in judicial and nonjudicial understandings of *both* the First and Second Amendments that has given rise to an interest in gun carry as a free speech right.

Once we consider these First Amendment challenges to gun control measures and look beyond their lack of judicial success, we can begin to see how popular beliefs about the right to bear arms are gradually evolving to incorporate First Amendment values.

Consider a recent example: Weeks before the 2020 general election, Michigan Secretary of State Jocelyn Benson banned the open carry of firearms at polling locations, clerk's offices, and absentee voter counting boards on Election Day.[183] Benson argued that the Election Day gun ban was necessary to prevent voter intimidation and facilitate the free exercise of the fundamental right to vote.[184] In response, Tom Lambert, the president of the pro-gun rights organization Michigan Open Carry, argued that Benson's directive violated the First Amendment because guns at polling places constituted core political speech: "I think she's crazy if she thinks this is going to hold up in court. . . . It's clearly an affront to otherwise protected political speech, and as the Supreme Court has held numerous times, political speech is at the core of the First Amendment."[185]

Lambert never formally raised a First Amendment challenge in court. Instead, Lambert and Michigan Open Carry became named plaintiffs in a lawsuit challenging Benson's directive solely on grounds that it violated Michigan's Administrative Procedure Act.[186] Yet, even without formally advancing a First Amendment challenge to the temporary gun ban, the complaint spoke in the technical language of First Amendment jurisprudence, suggesting that a gun ban at polling locations constitutes unconstitutional "viewpoint" discrimination:

> Plaintiffs in this case include individuals and firearm rights organizations that represent many thousands of members who

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[183] Dave Boucher, *Michigan to Ban Open Carry of Guns at Polling Places, Other Spots on Election Day*, DETROIT FREE PRESS (Oct. 6, 2020), https://www.usatoday.com/story/news/politics/elections/2020/10/16/michigan-ban-open-carry-guns-polls-jocelyn-benson-says/3687022001/ [https://perma.cc/77KJ-GN9T].

[184] Beth LeBlanc, *Gun Groups Sue to Stop Secretary of State Benson's Open Carry Ban at Polling Places*, DETROIT NEWS (Oct. 23, 2020), https://www.detroitnews.com/story/news/local/michigan/2020/10/23/open-carry-ban-gun-groups-lawsuit-sos-benson/5997584002/ [https://perma.cc/K9TH-SVA3].

[185] Rick Pluta, *Benson Says Open Carry of Guns Will Be Banned at Polling Places*, MICH. RADIO (Oct. 16, 2020), https://www.michiganradio.org/post/benson-says-open-carry-guns-will-be-banned-polling-places [https://perma.cc/X38J-KQDG].

[186] Complaint for Declaratory and Emergency Injunctive Relief, Lambert v. Benson, No. 20-000208-MM (Mich. Ct. Cl. 2020).

> choose to openly carry firearms into polling places on Election Day as a means of pronouncing their viewpoint on the Second Amendment. . . . [I]t is . . . common practice for open carrier to vote and affix an 'I Voted' sticker on their holster at the polling place. The open carrier then takes a picture of their stickered holstered pistol and posts the pictures on social media as a form of political expression and viewpoint-based speech.[187]

It is worth pointing out that a First Amendment viewpoint-discrimination challenge against Michigan's temporary gun ban at polling locations was unlikely to succeed. Viewpoint discrimination is an "egregious form of content discrimination" in which the government regulates speech based on "the specific motivating ideology or the opinion or perspective of the speaker."[188] Far from censoring a specific viewpoint, Michigan's ban on guns at polling places was a content neutral and generally applicable law.

Lambert's asserted viewpoint-discrimination claim masks an alternative potential First Amendment problem. Given the political significance of carrying guns at polling locations, Lambert may have been questioning Secretary Benson's motives. Established First Amendment case law is concerned with both the *content* and *motive* of government regulation. Even if a statute does not regulate a recognized medium for the communication of ideas, First Amendment scrutiny may still be triggered if the statute was enacted for impermissible purposes—or as Justice Scalia put it, "Where the government prohibits conduct precisely because of its communicative attributes, we hold the regulation unconstitutional."[189]

Here, then, we might interpret Lambert's comments as suggesting that the purpose of Secretary Benson's directive was to silence voters' views about the Second Amendment—an inappropriate purpose that would trigger First Amendment scrutiny. But in this case, there is no reason to believe that the temporary gun ban was enacted with the purpose of silencing gun-rights advocacy. Still, Lambert's asserted claims are important because they are suggestive of the forms that First Amendment challenges to gun regulation may take in future controversies.

Crucially, by looking beyond the frame of formal First Amendment challenges to gun control measures in courts, it is possible to begin to understand the political and rhetorical significance of these claims for the public's understanding of carrying guns as a social practice. These First Amendment claims seek not only judicial recognition, but public recognition that would transform guns into an ordinary part of democratic deliberation and public-opinion formation. That is, beyond forging new

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[187] *Id.* at 6.

[188] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[189] Barnes v. Glen Theatre, Inc., 501 U.S. 560, 577 (1991) (Scalia, J., concurring) (emphasis omitted); *see also* Post, *Recuperating First Amendment Doctrine*, *supra* note 116, at 1255 (explaining how bad purposes can trigger First Amendment scrutiny).

jurisprudential understandings of the First and Second Amendments, the gun-rights movement actively attempts to construct new social norms and realities in which guns are symbols, not weapons.

One commentator, reacting to a string of armed protests against Michigan pandemic-related stay-at-home orders, observed that

> [a]ccepting the open display of firearms at rallies means we must also admit this confirms *a significant cultural shift* that collides with norms and current laws. The protesters that stormed the statehouse in Michigan were within their right to carry guns inside the state Capitol under open-carry laws. But their actions were far outside of the comfort zone for many people who work in that building and who dedicate their lives to finding civil solutions to disagreements.[190]

As gun rights advocates continue to carry guns to protests, shopping malls, Walmarts, and Starbucks, it becomes increasingly clear that their aim is precisely to *transform* our comfort zones to accept public firearms—and, in turn, transform guns into every-day organs of public opinion. As these social realities change, gun rights advocates will likely find support from more than just the Second Amendment. The day when waving guns at protests becomes as ubiquitous as waving flags is the day open carry may enjoy First Amendment coverage. And when that day comes, the First Amendment will truly have been weaponized.

B. Reclaiming the Values of Democratic Participation and Self-Governance

Part III called for judges to invoke the normative stakes of gun control to reject these First Amendment challenges. But perhaps more important are nonjudicial actors' efforts to reclaim and protect public spaces from those who seek to transform guns into ordinary fixtures of our political discourse. Public understandings of constitutional values—and their relationship to gun rights—can themselves change the legal landscape of gun regulation. Advocates for gun control measures should flip the script on these First Amendment claims and forcefully articulate the ways that guns in public spaces threaten the free and equal exercise of constitutional rights to free, assembly, and political participation more broadly. Advocates should emphasize that gun control measures are designed to do more than preserve our physical safety—they are preservative of the basic channels of democratic deliberation and self-governance.

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[190] Michele L. Norris, *We Cannot Allow the Normalization of Firearms at Protests to Continue*, WASH. POST (May 6, 2020 5:23 PM EST), https://www.washingtonpost.com/opinions/firearms-at-protests-have-become-normalized-that-isnt-okay/2020/05/06/19b9354e-8fc9-11ea-a0bc-4e9ad4866d21_story.html [https://perma.cc/GXA2-23C7] (emphasis added).

Recent events have brought these claims to the fore. The violent takeover of the U.S. Capitol on January 6 and a string of armed riots at state capitol buildings in recent months are gross indicators of the havoc that armed mobilization can wreak on our most basic institutions of democratic governance.[191] Reflecting on the Capitol riots, Blocher and Siegel have pointed out that "[w]eapons caught in this cycle no longer threaten individual lives only, if they ever did. Gun regulation becomes a defense of the body politic."[192]

This insight—that gun regulation can be preservative of the democratic processes that underlie the First Amendment (and our constitutional order more generally)—has motivated a series of new proposals to regulate guns in state capitol buildings. Six days after the Capitol riots, the Michigan Capitol Commission unanimously banned the open carry of firearms in the Michigan State Capitol Building.[193] The proposal emerged after, months earlier, armed protestors swarmed the Michigan Senate gallery during legislative proceedings about COVID19-related restrictions. Calling for gun restrictions in the Capitol, Michigan State Rep. Sarah Anthony urged the Commission to "safeguard Michiganders' constitutionally protected rights to speak, assemble and petition the government and protect legislators, staff and the general public from armed intimidation."[194]

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[191] For a visual account of the storming of the U.S. Capitol, see Hank Gilman, *War on Democracy: The Capitol Riot, in Pictures*, NEWSWEEK (Jan. 14, 2021), https://www.newsweek.com/2021/01/22/war-democracy-capitol-riot-pictures-1561392.html [https://perma.cc/3Z9E-H43X]. *See also* Cassidy McDonald, *Handguns, Crowbars, Tasers and Tomahawk Axes: Dozens of Capitol Rioters Wielded "Deadly or Dangerous" Weapons, Prosecutors Say*, CBS NEWS (May 27, 2021), https://www.cbsnews.com/news/capitol-riot-weapons-deadly-dangerous/ [https://perma.cc/U799-KSDH] (reporting that at least three rioters are facing federal firearm charges in connection with the January 6th attack).

In the days following the Capitol riots, the American Civil Liberties Union (ACLU) publicly rejected claims that the First Amendment protects armed demonstration. Louise Melling & David Cole, *What Does the ACLU Say About the Right to March While Armed?*, ACLU (Jan. 15, 2021), https://www.aclu.org/news/free-speech/what-does-the-aclu-say-about-the-right-to-march-while-armed [https://perma.cc/7UCE-FAEL] ("[W]hat happened at the Capitol on Jan. 6 was not a protest, but a violent insurrection that left five dead and many more injured and endangered. Violence, true threats, and incitement have no place in the exchange of ideas and are not protected by the First Amendment. . . . Our right to speech is about words, not weapons.").

[192] Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under* Heller, 115 NW. U. L. REV. 139, 146 (2021); *see also* John Feinblatt, *With Armed Protests Planned After D.C. Attack, Ban Open Carry of Guns at State Capitols*, USA TODAY (Jan. 15, 2021), https://www.usatoday.com/story/opinion/2021/01/15/ban-guns-state-capitols-intimidation-not-free-speech-column/4158330001/ [https://perma.cc/6U8K-MNHT] ("America's political conversation should not be held at the barrel of a gun. We should be able to talk to each other without fearing for our lives.").

[193] Adam Brewster, *Michigan State Capitol Bans Open Carry of Firearms Inside Building*, CBS NEWS (Jan. 12, 2021), https://www.cbsnews.com/news/michigan-state-capitol-firearm-open-carry-ban/ [https://perma.cc/QGN7-RJ9B].

[194] Samantha May, *Michigan House Democrats Push to Prohibit Guns at the Capitol After*

In February, the Washington State Senate voted to approve a bill banning the open carry of firearms on State Capitol grounds and at public demonstrations. Legislative debate over the measure made heavy reference to the underlying constitutional values at stake.[195] The prime sponsor of the bill, Democratic state Senator Patty Kuderer argued that there is no "practical purpose for carrying a deadly weapon at public demonstrations or here at the Capitol" other than "to intimidate people who are exercising their First Amendment Rights."[196] Republican state Senator Keith Wagoner responded that "I find this bill, and I think my constituents find this bill, rather intimidating[.] . . . It restricts their rights directly, a right to open carry, and secondarily a right of freedom of expression."[197] *Both sides*, then, claimed fidelity to the First Amendment.

These state legislators model a path forward. The point is that proponents of gun control measures should not cede constitutional ground to gun-rights advocates in the court of public opinion. Gun control laws should not be understood primarily as *restrictions* on constitutional rights, but rather as *protective* of our constitutional rights to freedom of speech—and necessary for the ordinary operation of our basic channels of democratic government. In other words, these state laws restricting guns on Capitol grounds and at public demonstrations are statutory guarantors of our First Amendment rights. They are not merely constitutionally permissible, but constitutionally prescribed.

CONCLUSION

Background conditions of extreme political polarization have been ever present in our discussion of First Amendment claims for and against gun rights. As suggested, these First Amendment challenges highlight two divergent social realities and experiences of guns in public spaces. On one account, guns are symbols of cultural and political identity—they are experienced as ordinary and educative fixtures

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Protests, WWMT (May 8, 2020), https://wwmt.com/news/state/michigan-house-democrats-push-to-prohibit-guns-at-the-capitol-after-protests [https://perma.cc/2VJG-6NWE].

[195] *See* Joseph O'Sullivan, *Washington Senate Approves Ban of Open Carry of Guns at Protests Statewide*, SEATTLE TIMES (Feb. 25, 2021), https://www.seattletimes.com/seattle-news/politics/washington-senate-approves-ban-of-open-carry-of-guns-at-protests-statewide [https://perma.cc/P8VK-SEZS] ("Much of Thursday's debate focused on the tension between the First Amendment's right to free speech and assembly and the Second Amendment's right to bear arms. 'We know that neither the First nor the Second Amendment is absolute, we know that there have been restrictions, reasonable restrictions placed on each of them,' said Sen. Patty Kuderer, D-Bellevue and sponsor of the bill. 'This is just another one.'").

[196] Austin Jenkins, *Washington Senate Votes to Ban Open Carry of Firearms at Capitol and at Demonstrations*, KUOW: NPR (Feb. 25, 2021, 6:28 PM), https://www.kuow.org/stories/washington-senate-votes-to-ban-open-carry-of-firearms-at-capitol-and-at-demonstrations [https://perma.cc/XSC9-WHKU].

[197] *Id.*

of political demonstration and deliberation. And on the other account, guns are life-threatening weapons—they are experienced as terrifying, unusual, and speech-chilling.

These disagreements cannot be resolved via argument about which view of guns bearing is a more accurate or representative account of the world we live in. Rather, divergent accounts of public carry should be contested in reference to the constitutional values at stake. These disagreements should be understood as disagreements about the kind of world we *want* to inhabit, and the kind of constitutional democracy we *want* to embrace. Is it a constitutional democracy in which guns are commonplace at protests? In statehouses? As public and judicial understandings of the right to bear arms and the right to free speech grow more expansive and move toward deregulation, it is incumbent on proponents of gun control to articulate a competing ideal of constitutional democracy that safeguards Americans' ability to freely and safely participate in the project of self-governance—and the instrumental role that gun laws play in preserving that ideal.