Defending Democracy:

Addressing the Dangers of Armed Insurrection

JANUARY 2022

EFSGV

THE EDUCATIONAL FUND
TO STOP GUN VIOLENCE

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ABOUT THE EDUCATIONAL FUND TO STOP GUN VIOLENCE

Founded in 1978, the Educational Fund to Stop Gun Violence (EFSGV) seeks to make gun violence rare and abnormal. EFSGV uses public health and equity lenses to identify and implement evidence-based policy solutions and programs to reduce gun violence in all its forms. EFSGV is the gun violence prevention movement's premier research intermediary and founder of the Consortium for Risk-Based Firearm Policy. EFSGV makes communities safer by translating research into policy; it achieves this by engaging in policy development, advocacy, community and stakeholder engagement, and technical assistance.

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EXECUTIVE SUMMARY

The growing presence of firearms in political spaces endangers public health, safety, and the functioning of democracy. Far from being an outlier, the January 6th insurrection at the United States Capitol was part of a long line of events in which individuals have sought to use political losses to justify violence or threats of violence to disrupt our government and limit civic engagement. These attacks on our nation and democratic institutions are preventable, but not without purposeful action.

This report is both an examination and a warning of the threat that armed insurrectionism poses to democracy in the United States. It also counters the reckless and false narrative that the Constitution creates rights to insurrection and the unchecked public carry of any firearm, and rejects the notion that violence has any place in our nation's politics. The report concludes with recommended policy approaches that policymakers and advocates can use to address the dangers posed by armed insurrectionism.

The First and Second Amendments Do Not Protect a Right to Armed Insurrection

- Courts have not recognized the carrying of guns to constitute speech protected under the First Amendment. Moreover, a 2021 study "concluded that the presence of firearms at a protest would chill First Amendment expression for study participants."[1] The presence of firearms at demonstrations has also been found to increase the likelihood of violence or destructive behavior nearly six-fold compared to demonstrations where firearms were not evident.[2]
- A right to take up arms against the government has not been endorsed by courts as a protection in the Second Amendment and is incompatible with our democracy. As evidenced by events like the 1995 Oklahoma City bombing and the January 6th insurrection, individuals deciding for themselves when democracy becomes "tyranny" leads to death and destruction.

Policy Recommendations

- Regulate the public carry of firearms
- Strengthen existing laws, or increase the enforcement of current laws, to prohibit paramilitary activity
- Limit guns in locations essential to political participation, such as polling places, vote counting centers, legislative buildings, and protests, to protect the essential functions of government
- Utilize Extreme Risk Protection Orders to temporarily disarm persons at high risk of violence
- Repeal or create exceptions for firearm preemption laws to give local governments the ability to create policies to address risks of insurrectionism in their jurisdictions

OVERVIEW

On January 6th, 2021, attackers breached the United States Capitol for the first time since the War of 1812.[3] For several harrowing hours, this living monument to democratic ideals was stormed, looted, and desecrated. However, the invaders this time were not foreign soldiers during a period of war but a mob of Americans bent on overturning a lawful presidential election.[4] A throng of rioters that included off-duty law enforcement, state legislators, members of extremist pseudo-militias, current and past military members, and thousands of others overwhelmed Capitol police and poured into the halls of Congress, resulting in injuries, extensive property damage, and death.[5] Outside, a noose hanging from an impromptu gallows loomed over a crowd bearing emblems of white supremacy and religious intolerance.[6] Rioters carried firearms illegally into the building,[7] while others stockpiled firearms nearby.[8] Though the rioters had the same opportunities to vote, run for office, and work with their elected officials as other Americans, they turned their political loss into an attack on the nation. The open assault on democracy and displays of hate sent ripples around the world, emboldening those who wish to see representative government destroyed.[9]

As the events of January 6th showed the world with painful clarity, the threat insurrectionism poses to democracy in the United States is not hypothetical. Insurrection is here, and the seeds have been sown for generations. The invasion of the U.S. Capitol on January 6th was foreshadowed by a long history of incidents connected by a common theme: a desire to disrupt a democratically elected government with violence. What matters most is that policymakers and advocates learn from the past, critically examine the present, and take action now to save the future.

INSURRECTIONISM IN THE UNITED STATES

For the purpose of this report, we define insurrectionism as the use of force, threat of force, or advocacy that use of force can be appropriate in response to a government policy or action "even when that policy or action has been carried out by democratically elected representatives and constrained by an independent judiciary with the power to vindicate individual rights against the state."[10] In other words, insurrectionists use violence or the threat of violence to forcibly take the power of the government into their own hands, instead of seeking policy change through the democratically elected representatives and independent judiciary available to them or accepting that, despite their efforts, such elected officials or courts shall not provide them the outcome they seek. Storming the U.S. Capitol and threatening the lives of legislators to overturn the results of a lawful presidential election is an egregious example of insurrectionism, though insurrectionist acts need not be so large and dramatic. Individuals threatening election workers if the results of an election are not to their liking is also insurrectionist activity.[11]

Insurrectionism Timeline

The United States has endured violent insurrections since its founding. Shays' Rebellion and the Whiskey Rebellion in the late 18th century both stemmed from feelings of economic hardship and resentment toward increased taxation passed by Congress, and were eventually quelled by state militia forces.[12] Decades later, President Andrew Johnson declared that the people in the states that took up arms against the U.S. in the Civil War were in "insurrection against the United States."[13] Though these insurgents may have felt they were embodying the spirit of revolution from the American Revolutionary War, there is an important distinction to be made. The American revolutionaries had no legitimate means of expressing their grievances with the British before fighting for their rights, whereas the rebels from founding era insurrections and the Civil War had democratic processes through which their interests are represented in government. Armed violence is never a resort in a democracy—first, last, or otherwise.

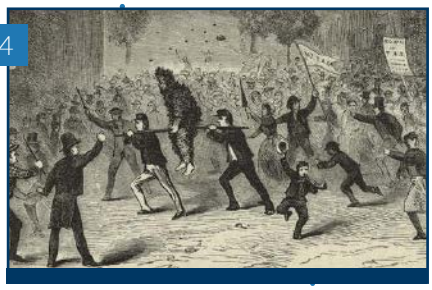
Insurrection v. Protest is largely a question of intent and method:

- Insurrectionary actions are intended to attack the lawful operation of the government using violence and intimidation, while protests use peaceful public demonstrations to show support for a cause to inspire change within a political system.
- As an example, the Black Lives Matter protests were geared toward raising awareness of racial injustice in policing to inspire cultural and policy change. The January 6th Insurrection at the U.S. Capitol was intended to depose the current government with violence and replace it with a different one. Thus, BLM is a protest movement while January 6th was an insurrection.

1786-1787

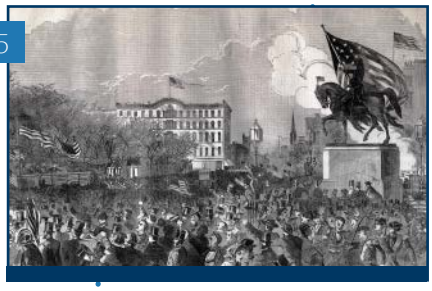
Shays' Rebellion

1791–1794



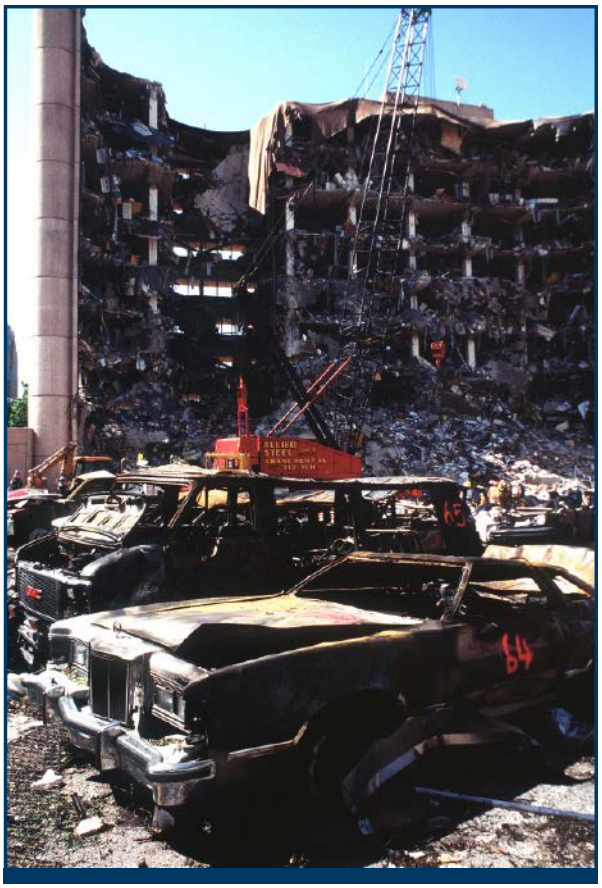
Whiskey Rebellion

1861-1865



American Civil War

The topic of modern-day insurrectionism became a focus of public discourse in 1995, after the bombing of an Oklahoma City federal building claimed 168 lives and injured hundreds more.[14] The bombers were former members of the U.S. Army who had since joined far-right, anti-government movements and committed the deadliest act of domestic terrorism in American history.[15] In a letter to his hometown newspaper, one of the bombers wrote that the bombing "was 'a legit tactic' in his war against what he considers an out-of-control federal government."[16] To some, political dissent has become closely tied to undermining democratic government as a whole.



Oklahoma City Bombing

In the decades since the Oklahoma City bombing, the open threat insurrectionism poses to democracy has been exacerbated by the expanding role of firearms in the political process. In 2014, Cliven Bundy and other armed persons and members of self-styled "militias" notoriously engaged in deadly armed standoffs with federal agents in the western United States in efforts to occupy federal land.[17] The Bundys refused to pay for their cattle to graze on federal land, believing that federal law does not apply to them, and organized with other armed groups in occupying the land.[18] In 2016, Cliven's son Ammon Bundy and a group of armed militants took over and occupied the headquarters of the Malheur National Wildlife Refuge, they claimed, in protest of the convictions of two ranchers for setting fires on federal land.[19] During ballot counting after the contentious 2020 presidential election, armed protesters surrounded vote tabulation centers in states where the vote count was close, causing election workers to fear for their safety and temporarily shut down operations in some cases.[20] Individual election workers have received threats as well. Ralph Jones, who oversaw Fulton County, Georgia's mail-in ballot operation in 2020 and who has worked in Georgia elections for over three decades, said he received death threats following the November election.[21] According to Jones, one caller "threatened to kill him by dragging his body around with a truck."[22] A woman left a voicemail for Jones's boss, Richard Barron, stating "You actually deserve to hang by your goddamn, soy boy, skinny-a** neck."[23] Another caller said they would kill Barron by firing squad.[24] Staci McElyea, an employee of the Nevada Secretary of State's Office Election Division received a call just hours after Congress certified the results of the 2020 presidential election in which the caller said "I hope you all go to jail for treason. I hope your children get molested. You're all going to f****** die."[25] These are a sample of the "102 threats of death or violence received by more than 40 election officials, workers and their relatives in eight of the most contested battleground states in the 2020 presidential contest" collected by Reuters.[26]

"You actually deserve to hang by your goddamn, soy boy, skinny-a neck"**

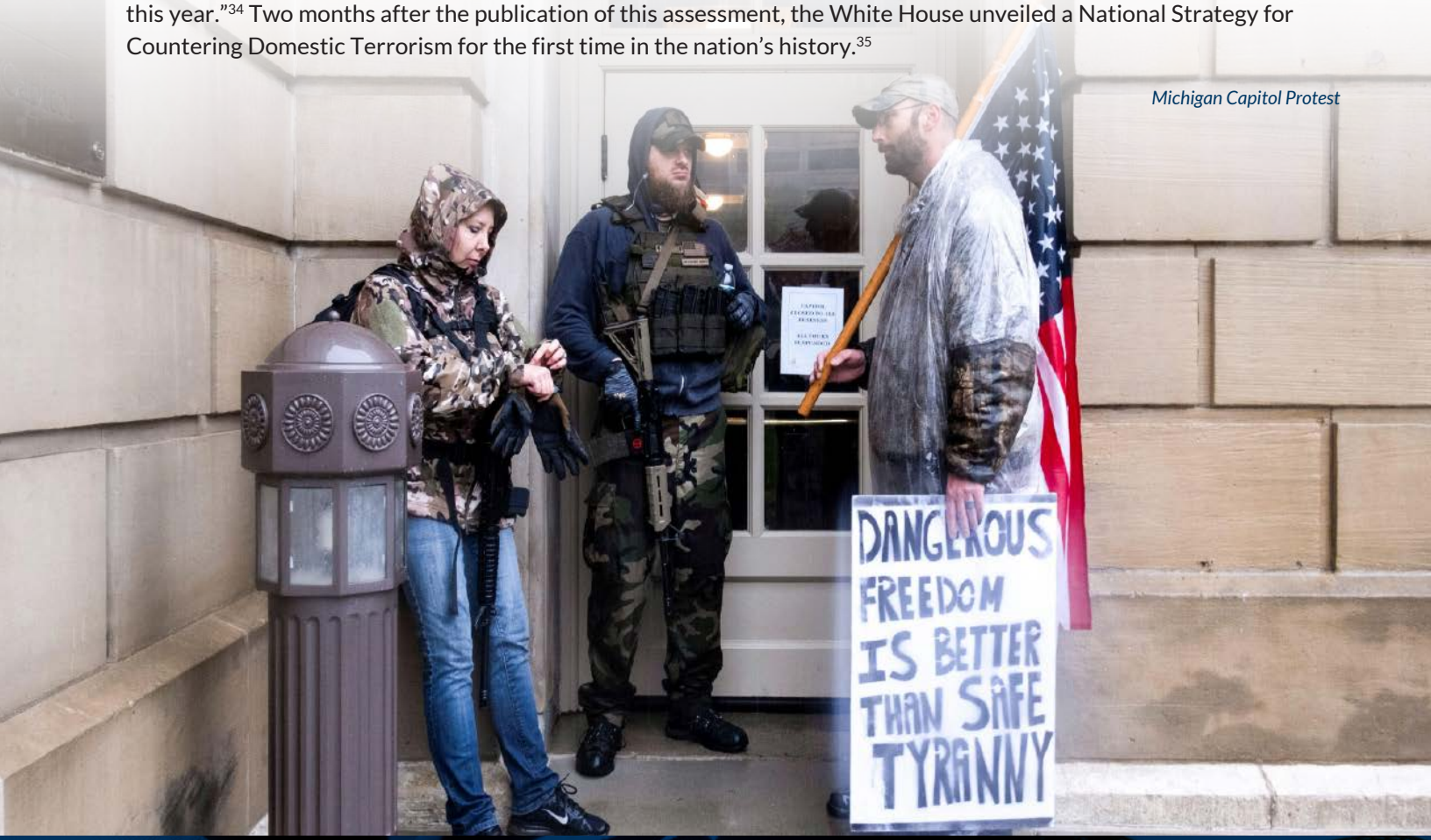
Voicemail threat left for Fulton County, Georgia Election Official during 2020 Election

In the spring of 2020, armed protesters stormed the Michigan capitol building to voice their objections over COVID-19 restrictions on multiple occasions, threatening violence against state officials.[27] Michigan State Senator Dayna Polehanki said of the protest, "It could have been just another protest. The presence of firearms was a game changer."[28] Members of a "Michigan-based self-styled 'militia' group" were arrested by the FBI in late 2020 for attempting to kidnap Michigan Governor Gretchen Whitmer.[29] One defendant allegedly advocated for the assassination of the governor, allegedly stating, "Have one person go to her house. Knock on the door and when she answers it just cap her … F*** it."[30] These events once again raise the question of whether elected officials should be prepared to risk their lives to fulfill their elected duties and whether such risks will deter individuals from seeking public office at all.

Insurrectionism is a Growing Threat

In growing numbers, insurrectionist ideologies are being advanced by extremist groups across the country. The Southern Poverty Law Center has noted a resurgence of the anti-government movement since 2008 and identified 556 active anti-government groups operating in the United States in 2020, at least 169 of which actively engage in military-style training.[31] The Center for Strategic and International Studies has also noted an increase in domestic terror incidents, finding that the year of 2020 yielded the highest single-year increase and total number of domestic terror incidents, including the insurrection on January 6th, since the Center for Strategic International Studies began tracking them in 1994.[32] In March 2021, the Office of the Director of National Intelligence, the Department of Justice, and the Department of Homeland Security released an unclassified summary of the threat assessment on domestic violent extremism, writing that "racially or ethnically motivated violent extremists (RMVEs) and militia violent extremists (MVEs) present the most lethal [domestic violence extremist] threats, with … MVEs typically targeting law enforcement and government personnel and facilities."[33] The assessment noted that "the emboldening impact of the violent breach of the US Capitol… will almost certainly spur some DVEs to try to engage in violence this year."[34] Two months after the publication of this assessment, the White House unveiled a National Strategy for Countering Domestic Terrorism for the first time in the nation's history.[35]

Michigan Capitol Protest



There is also significant overlap between armed domestic extremism, insurrectionist activity, and racial animus. The Center for Strategic and International Studies has identified that right-wing terror attacks, the predominant form of domestic terrorism in the United States over the past 27 years, were focused largely against individuals because of their race, ethnicity, or religion.[36] Large armed demonstrations like the 2017 "Unite the Right" rally in Charlottesville, Virginia, which was marked by violence and death, revolved around the premise of white supremacy.[37] The Department of Homeland Security echoed these concerns, emphasizing in its annual threat assessment the alarming rise in domestic terrorism by white supremacists who use "terrorizing tactics … [that] seek to force ideological change in the United States through violence, death, and destruction."[38] Of the anti-government groups identified by the Southern Poverty Law Center in 2020, at least 128 were identified as "white nationalist," peddling ideologies of white supremacy.[39]

Guns Allow Insurrectionists to Easily Disrupt Government, Chill Political Participation, and Increases the Likelihood that Events will be Violent

Permissive public carry laws allow people, including those committed to insurrectionist ideologies, to easily disrupt the functioning of government, chill individual participation in that government, and increase the likelihood that political events will become violent. Legal scholars have increasingly noted the growing tension between gun carrying and the exercise of political rights.[40] Duke University law professor Darrell Miller wrote in a 2009 law review article, "the presence of a gun in public has the effect of chilling or distorting the essential channels of a democracy-public deliberation and interchange. Valueless opinions enjoy an inflated currency if accompanied by threats of violence. Even if everyone is equally armed, everyone is deterred from free-flowing democratic deliberation if each person risks violence from a particularly sensitive fellow citizen who might take offense."[41] University of Miami School of Law professor Mary Anne Franks wrote, "A person in possession of a loaded gun has the capacity to inflict imminent and fatal injury which necessarily chills freedom of expression of those around them. This chilling effect, like other pernicious effects of gun use, is felt most acutely by the least powerful members of society."[42] The American Bar Association, a non-partisan voluntary bar association of lawyers and law students, acknowledged the chilling effect of the public carry of firearms in a resolution supporting prohibitions on firearms at polling places, writing "At a minimum, civilians openly carrying firearms can chill the First Amendment speech rights of counter-protesters and their right to peaceably assemble … When armed protestors storm government buildings, they risk not only violence to policymakers and government staffers, but also disruption to the legislative debate and lawmaking that are core to a functioning democracy."[43]

Unite the Right Rally, Charlottesville, Virginia

Photo by Evan Nesterak (CC BY 2.0)

New research has begun to quantify how the public carry of firearms disrupts public life and chills political participation. According to a 2021 study, within the 18-month period from January 2020 to June 2021, there were at least 560 armed demonstrations across the country, more than 100 of which occurred at legislative buildings and vote counting centers.[44] Analysis of these events revealed that the presence of firearms increased the likelihood of violence or destructive behavior nearly six-fold compared to demonstrations where firearms were not evident, suggesting that the threat of violence posed by firearms can be enough to beget actual violence.[45] Another 2021 study explored the willingness of individuals to participate in a protest at which firearms would be present. Participants in the study were surveyed in two separate groups: "a control group with no mention of firearms in the survey questions and an experimental group presented with survey questions containing the phrase 'You knew some participants would be carrying firearms.'"[46] The study determined that participants in the experimental group were much less likely "to participate in a protest or engage in expressive behaviors during a protest than participants in the control group" and "concluded that the presence of firearms at a protest would chill First Amendment expression for study participants."[47]

Diana Palmer, Fired Up or Shut Down: The Chilling Effect of Open Carry on First Amendment Expression at Public Protests

Inflamed political divisions are coinciding with increasing extremist violence and the carrying of firearms at anti-government events. New studies confirm what scholars have increasingly feared, that the public carrying of firearms at these events do indeed lead to increased violence and chilled participation in the democratic process. The rise of domestic terrorism and its impact on the functioning of our democracy highlights the need for policymakers to respond to insurrectionist threats before they devolve into violence.

Unite the Right Rally, Charlottesville, Virginia

ANTI-INSURRECTIONISM POLICY SOLUTIONS

Below is a non-exhaustive list of policy recommendations that can be implemented on the state and local levels to help mitigate the threats of armed insurrectionism across the nation. Though each of these policy solutions possesses merit in their own right, the potential for positive outcomes is likely to increase when they work in concert.

1. Placing Limitations on Public Carry

State and local governments should take action to curtail the risks posed by firearms in public. Clarifying the contours of where and when public carry can be permitted, if at all, promotes public peace and safety.

- **Prohibit or regulate the open carry of firearms in public spaces:** The open carry of firearms puts everyone nearby on notice that their life could be ended in an instant. Such a dangerous and fear-inducing activity should be prohibited beyond legitimate sport shooting and hunting activities.
- **Regulate the concealed carry of firearms:** Weak concealed carry laws are associated with an increase in violent crime. States should therefore enact rigorous permitting processes for the concealed carry of firearms.

2. Placing Limitations on Paramilitary Groups

State policymakers should either strengthen existing laws regulating paramilitary activity in their state or clarify how current laws ought to be enforced.

- **Ban militia-style activity:** MIlitary-style training, parading, and shows of force by civilian groups unaccountable to the public are a threat to democracy and public safety. Laws prohibiting these activities need to be created if they do not exist or prioritized for implementation if they do.

3. Limiting Guns in Polling Places, Legislative Buildings, and Other Places of Political Participation

State and local governments should pass laws to limit the presence of firearms, open or concealed, in locations essential to the functioning of democracy, such as polling places, vote counting centers, legislative buildings, protests, and other places of political participation. Such policies should incorporate the following considerations:

- **Time-based limitations:** These restrictions can be tailored to the days and times such buildings, surrounding spaces, and permitted events are being used for political purposes to avoid being overly broad.
- **Buffer zones:** Any limitation or restriction should also apply to the space around buildings and permitted spaces to prevent armed intimidators standing in close proximity to the grounds they are barred from. Anywhere from 40 to 100 feet could be an ample buffer zone.
- **Home exceptions:** It is also important to exempt these laws from applying to private homes that are within the designated buffer zone, so as to not create an unconstitutional ban of firearms in the home.

4. Enacting and Implementing Extreme Risk Protection Order Laws to Temporarily Disarm Persons at High Risk of Violence

The largest threat militia groups pose to public health, public safety, and democracy is vested in their ability to wield deadly weapons. However, a legal tool exists to mitigate the risk of gun violence by individuals.Extreme Risk Protection Orders (ERPOs) are court orders that can be used to temporarily prohibit the possession and purchasing of firearms by persons deemed by a court to pose a significant danger of causing injury to themselves or others.[48] State governments should pass ERPO laws in their states. ERPOs are a promising tool to prevent individuals at high risk of committing armed violence from acting on it.

To learn about Extreme Risk Protection Orders policy recommendations in greater detail, below are links to a few comprehensive resources:

- Extreme Risk Protection Orders: New Recommendations for Policy and Implementation
- Educational Fund to Stop Gun Violence Extreme Risk Law Learn Page

5. Repealing or Creating Exceptions to State Preemption Laws

Policymakers should repeal or create exceptions to preemption laws as a first step to reducing gun violence and the threats posed by armed insurrectionists. Local governments concerned about the armed disruption of democracy should create policies tailored to meet the specific needs of their jurisdictions, as opposed to being hamstrung by gaps in state law, including:

- **Place and time-based limitations:** Creating limitations on the carrying of firearms in places integral to political participation, including polling places, legislative buildings, and political demonstrations, would help local governments address concerns of political violence and intimidation specific to their jurisdictions.
- **Regulating Firearms in public:** Prohibiting or regulating open carry of firearms and regulating concealed carry of firearms is also a proactive way for local governments to reduce the risks posed by insurrectionism.

For a case study of Virginia's response to potential for armed political violence, see Appendix 1.

LEGAL ANALYSIS

The policy recommendations above rest on strong constitutional foundations. Neither the First nor the Second Amendment creates or protects a right to individual insurrection. The Second Amendment does allow for reasonable regulation of where and in what manner firearms may be carried. This section will refute the myth of the insurrectionary Second Amendment, provide a brief history of Second Amendment case law, clarify that carrying of firearms is not expressive speech protected by the First Amendment, and analyze the constitutionality of the recommendations under the Second Amendment.

The Myth of the Insurrectionary Second Amendment

The Second Amendment does not create or protect a right to individual insurrection. Scholars, policymakers, and organizations have suggested a multitude of different purposes for the ratification of the Second Amendment. The preservation of slavery through armed patrols,[49] empowering states to create their own armed militias for protection,[50] and maintaining an armed citizenry to repel foreign invasions and usurpers[51] are all offered as potential motivations for the Amendment's ratification. However, another view is that the origins of the Second Amendment were, at least in part, rooted in a distrust of standing armies,[52] and a preference for the local control of the militia forces.[53] Another theory of the purpose of the Second Amendment that has been supported by some scholars, policymakers,[54] and organizations like the National Rifle Association[55] is the Insurrectionary Theory. The Insurrectionary Theory of the Second Amendment proposes that "the possession of firearms by individuals serves as the ultimate check on the power of government … that the Second Amendment was intended to provide the means by which the people, as a last resort, could rise in armed revolt against tyrannical authorities."[56] In other words, it is the idea that the Second Amendment protects a right for individual Americans to possess and use firearms to overthrow the U.S. government if they believe it has become tyrannical. However, that interpretation has little basis in either the historical or modern application of the Constitution.

In stark contrast to the theory of an insurrectionary Second Amendment, there is evidence that the framers adamantly opposed the idea of armed uprisings against elected governments. In the aftermath of insurgencies like Shays' Rebellion and the Whiskey Rebellion, the framers of the Constitution had ample reason to distrust self-declared militias organized by entities other than the states.[57] In George Washington's address to Congress following the Whiskey Rebellion, he cautioned his colleagues that "to yield to the treasonable fury of so small a portion of the United States, would be to violate the fundamental principle of our Constitution, which enjoins that the will of the majority shall prevail."[58] As a result of the rebellions, Article I, Section 8 of the Constitution also bestowed to Congress the authority "[t]o provide for calling forth the Militia to execute the Laws of the Union, *suppress Insurrections and repel Invasions*."[59] The same section also gives Congress the power "[t]o provide for organizing, arming, and disciplining the Militia," while deferring the power to appoint officers and train militias to the states.[60] Even the idea that organized militias could effectively defend against threats of tyranny, expressed by James Madison in *Federalist* No. 46, applied only to organized state militias.[61] Madison also specified that militias would be controlled by officers appointed by the states to "[form] a barrier against the enterprises of ambition."[62] Thus, the "well-regulated Militia" of the Second Amendment applies to militias organized and controlled by states, not private persons.[63]

U.S. courts have also never recognized a right to armed insurrection in the Second Amendment. In *United States v. Miller*, one of the few significant evaluations of the Second Amendment by the U.S. Supreme Court, the justices stated that the "obvious purpose" of the Second Amendment was "to assure the continuation and render possible effectiveness of … [state militia] forces," not private militias.[64] In the earlier 1886 case *Presser v. Illinois*, the court held that allowing states the power to prohibit paramilitary organizations "is necessary to the public peace, safety, and good order" of society when upholding an Illinois state law that banned the organizing of private militias.[65] In their majority opinion, justices were frank in stating that "[w]e think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law do not infringe the right of the people to keep and bear arms."[66]

Even when the court first espoused an individual constitutional right to bear arms in self-defense over a century later in *District of Columbia v. Heller*, the majority opinion did not call into question the holding in *Presser* that the Second Amendment "does not prevent the prohibition of private paramilitary organizations."[67] Though the majority in *Heller* referred to the theory that the Second Amendment's purpose is to prevent government tyranny, the Court ultimately held that the core of the right is armed self-defense.[68] The anti-tyranny theory is also largely inconsistent with the limitations on the Second Amendment identified in *Heller* itself. For example, *Heller* identified handguns as the "quintessential self-defense weapon" yet suggests that "weapons that are most useful in military service—M–16 rifles and the like—may be banned."[69] Under both historical and contemporary legal standards, there is no recognized right for individuals to privately organize and bear arms against their country.

The Insurrectionary Second Amendment also has no practical means of application in a democratic society. The most prominent practical objection to the insurrectionary theory of the Second Amendment can be summed up in a single question: who decides when the government has become tyrannical? One individual's perception of tyranny cannot replace what millions view as democracy. As one legal scholar noted, "Tyranny, like beauty, can be in the eye of the holder. When he leapt to the stage after murdering Abraham Lincoln, John Wilkes Booth shouted: 'Sic semper tyrannis' (thus always to tyrants)."[70] Similarly, empowering individuals to take violent action against public institutions on their own accord could lead to "Hobbesian chaos," where laws become relative and the nation slips into anarchy.[71] One of the virtues of representative government is the right of the public to communally choose voices to represent their needs and interests. The Insurrectionary Second Amendment compromises that core premise of our democracy.

The Scope of the First and Second Amendments In Relation to the Public Carry of Firearms

Fundamental to the premise of insurrectionism, and the use of firearms in political discourse broadly, is the ability to carry firearms in public. Whether to actively threaten the well-being of those they disagree with or to show a general display of force, the public (and often open) carry of firearms has become more prevalent in political spaces in recent years.[72] Beyond the well-documented threats to public health and safety posed by the expansive public carry of firearms, the atmosphere of fear created by the presence of deadly weapons is disruptive to the political process. However, constitutional law is clear that neither the First nor Second Amendments prohibit limitations on how and where firearms may be carried in public spaces.

First Amendment Challenges: The Public Display of Firearms is Not Protected Speech

There is an organized effort to claim the act of displaying firearms in public is itself a form of constitutionally protected speech.[73] If the display of firearms is a recognized form of speech, the argument goes, then firearm restrictions in public places may also be "abridging the freedom of speech" protected by the First Amendment.[74] However, courts have been dubious of the notion that the display of firearms is "speech" for First Amendment purposes,[75] and have upheld limitations on speech around polling places, legislative hearings, and government buildings.[76] Similar time, place, and manner restrictions on speech can, and should, be applied to firearms at such locations.

For centuries, the Supreme Court has set precedence of what can and cannot be considered protected speech under the First Amendment. The Supreme Court has acknowledged the distinction between "pure speech" (i.e., spoken or written word) and symbolic speech (i.e., wearing a black armband in protest of the Vietnam War), which may both be protected by the First Amendment.[77] However, the Supreme Court has rejected "the view that an apparently limitless variety of conduct can be labeled as 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[78] Some individuals claim that in publicly carrying a firearm, they are expressing support for the Second Amendment. Even if that were the intent, what a gun "says" is often unclear. Just as readily as the public display of a firearm could say that the individual is "Pro-Second Amendment,"[79] it could also be saying something more nefarious like "stop speaking" or "I will or I want to harm you."[80] Any potential message the public display of a gun could convey is drowned out by its more easily understood capacity to kill. Though the Supreme Court has not had to evaluate whether displaying a firearm would be protected speech, lower courts have found such conduct is not protected under the First Amendment.[81] Even if courts did find that the public carry of guns was protected speech under the First Amendment, the Constitution allows for "reasonable restrictions on the time, place, or manner of protected speech[.]"[82]

For more in-depth First Amendment discussion, see Appendix 2.

Second Amendment Law: From the Founding to *McDonald*

For hundreds of years, the Second Amendment was primarily recognized to protect the rights of states to organize and maintain militia forces.[83] The Supreme Court dramatically changed the scope of Second Amendment law in the landmark 21st century cases *District of Columbia v. Heller* and *McDonald v. City of Chicago*.[84] In *Heller*, the Supreme Court held for the first time that the Second Amendment protected an individual right to possess a firearm in the home for self-defense.[85] The Court cautioned, however, that "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[86] The Court further emphasized that"nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[87] According to the Court this list of "presumptively lawful regulatory measures" was not "exhaustive."[88]

Two years later, in *McDonald*, the Court held that the Second Amendment applies to the states via the 14th Amendment[89] and noted that the applicability of the Second Amendment to the states "limits (but by no means eliminates) [a state or local government's] ability to devise solutions to social problems that suit local needs and values."[90] The Court also repeated its assurances in *Heller* regarding the validity of "longstanding regulatory measures."[91] Like all constitutional rights, the Second Amendment has limitations to prevent it from depriving life and liberty from Americans in other respects. After *Heller* and *McDonald*, lower courts have generally found that laws and regulations that are (a) historically longstanding or (b) sufficiently related to furthering an important government interest are permissible under the Second Amendment.[92]

For more in-depth discussion of the analytical framework of Second Amendment cases, see Appendix 3.

Pending Litigation

The Supreme Court of the United States granted review in a Second Amendment case called *New York State Rifle & Pistol Association v. Bruen* and is expected to issue an opinion in mid-2022. The Court may require Second Amendment cases to be evaluated using a different test utilizing different criteria.

See Appendix 3 for more information about *New York State Rifle & Pistol Association v. Bruen*

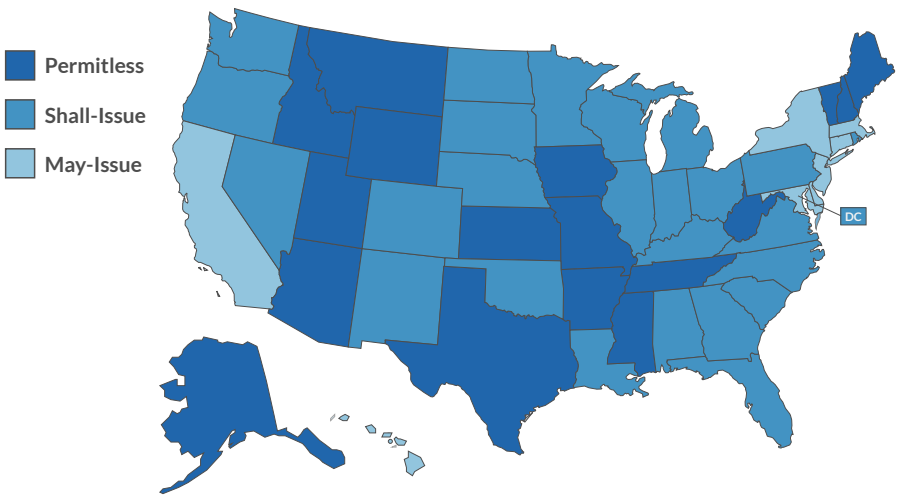
Regulations on Public Carry

The number of permitless concealed carry states has dramatically increased in recent decades, with almost half of states currently allowing permitless concealed carry and a majority of states allowing permitless open carry of firearms.[93] The number of states allowing permitless concealed carry has grown from one to 21 since the 1980s.[94] A 2019 analysis found that enactment of certain weak concealed carry permitting laws were associated with an increase in violent crime.[95] In regards to open carry, only four states and the District of Columbia generally limit the open carry of handguns,[96] and six states and the District of Columbia do the same for long guns, subject to certain exceptions.[97] States that allow open carry are at least five times more likely to have firearms present in public demonstrations than states that do not.[98] Beyond the public health and safety implications of lax open carry laws, experts have observed how "expanding gun rights beyond the home and into the public sphere presents questions concerning valued liberties and activities of *other* law-abiding citizens."[99]

Since the *Heller* decision, almost every federal appellate court has decided legal challenges to open and concealed carry laws,[100] with the majority recognizing the broad discretion of state and local governments to regulate firearms in public spaces.[101] After examining the history of regulation of concealed firearms in the United States and under English law, the 9th and 10th Circuits determined that the Second Amendment does not apply to the concealed public carry of firearms at all.[102] The 9th Circuit upheld Hawaii's regulations on open carry after conducting the most in-depth historical review of public carry regulations to date in *Young v. Hawaii*.[103] The 9th Circuit's analysis began by reviewing the English right to bear arms, noting that regulations on "going armed within the realm without … special licen[s]e" have dated back to the 13th century in England.[104] It cites the famous Statute of Northampton enacted by Parliament in 1328, which "prohibited all people ('great [or] small') from going armed in places people were likely to gather."[105] During the colonial period of American history during the late 1600s, New Jersey, Massachusetts, and New Hampshire led the way in placing limitations on public firearm possession, modeling laws after or wholly adopting the Statute of Northampton.[106] Other states followed in the coming centuries.[107] The 9th Circuit concluded ""[l]aws restricting conduct that can be traced back to the founding era and are historically understood to fall outside of the Second Amendment's scope may be upheld without further analysis."[108]

With the exception of the extensive historical analysis of the 9th Circuit in *Young v. Hawaii*,[109] courts have generally assumed the law in question implicates a Second Amendment right and moved on to determine if the law is substantially related to an important government interest.[110] However, the majority of courts have found a substantial governmental interest in promoting public safety and preventing crime with reasonable public carry restrictions.[111] Even after striking down an Illinois law that was notability restrictive on carrying usable firearms outside the home, the 7th Circuit in *Moore v. Madigan* gave the state legislature 180 days to "craft a new gun law that will impose reasonable limitations, consistent with the public safety and the Second Amendment as interpreted in this opinion, on the carrying of guns in public."[112] Policymakers can, and should, utilize their power to regulate guns in public spaces, especially when political rights fundamental to our democracy are at stake.

State Concealed Carry Permit Laws (as of 2021)



Limitations on Paramilitary Groups

From their marches at Charlottesville to their assaults on state capitol buildings after the 2020 presidential election, heavily armed paramilitary groups across the country have increased their disruptive interventions in everyday affairs.[113] However, the Constitution and our nation's laws reflect a long history of justified mistrust in private armed groups that are not accountable to the will of the people.[114] States have the authority to limit paramilitary activity within their borders and the preexisting legal foundations to prevent organized insurrectionist efforts.

All 50 states have some legal limitations on paramilitary groups, though the depth and enforcement of these laws vary. Forty-eight state constitutions possess a "subordination clause," which requires militaries to obey a "civil power," such as a governor.[115] Subordination clauses establish a clear legislative intent that any armed forces operate at the behest of the state, not private parties or interests. Twenty-nine states outlaw the organization of private militias without state government approval,[116] typically by prohibiting specific military-like conduct, such as "parading" or "drilling" in public with firearms.[117] Texas used its law against unauthorized private militias in the 1980s to prevent military-like demonstrations by the Ku Klux Klan that were designed to terrorize communities of color.[118] Similarly, 25 states prohibit paramilitary activity intended to prompt civil disorder,[119] such as teaching or demonstrating how to create or use firearms or explosives with the intent to sow discord. It is also illegal in at least 17 states to present oneself as a peace or military officer if not actually employed as such.[120] These laws align with the Supreme Court's long-held position "that the right to keep and bear arms [is] not violated by a law that forbade 'bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law.'"[121] In total, paramilitary laws prohibit individuals or groups of people creating their own militaristic presence to confuse and disrupt the functioning of society.

Despite the existence of these aforementioned laws, many militia groups operate with impunity across the country. Georgia, Oregon, Texas, Washington, and other states have seen a rise in open militia activity at protests related to racial justice, the 2020 elections, and COVID lockdowns, yet this militia activity draws less attention from law enforcement than left-leaning protests, like those supported by Black Lives Matter, the NAACP and Abolish ICE.[122] Ties between some members of law enforcement and extremist militia groups have raised alarms among advocacy communities.[123] A law's effectiveness ultimately comes down to its application. Education of law enforcement, courts, elected officials, and the public is required to ensure these protections against unsanctioned militia activity can achieve their intended purpose.

Limiting Guns in Polling Places, Legislative Buildings, and Other Places of Political Participation

The surest way to protect against armed intimidation at political places is to prohibit firearms from being present in the first place. It can be exceptionally difficult to discern when the pointing or display of firearms rises to the level of intentional intimidation.[124] The presence of firearms at polling places, regardless of whether they are meant to intimidate, may discourage people from voting.[125] Though many states and the federal government[126] have different voter intimidation and firearm brandishing laws, these provide "neither clear rules of conduct to inform people what they are allowed to do, nor clear rules of decision to instruct police and prosecutors what to permit and when to intervene."[127] A clear prohibition on firearm possession in places of political participation would send a plain message to voters that they can participate in democracy without fearing for their safety and will make enforcing these laws easier for law enforcement and the courts.

Several states have already implemented place-based firearms limitations in political spaces, though more work is needed. For instance, only 11 states and the District of Columbia prohibit or limit the possession of firearms within a certain distance of polling places on election days. Arizona, California, D.C., Florida, Georgia, Louisiana, Texas, and Virginia prohibit guns broadly,[128] while Mississippi, Missouri, Nebraska, and South Carolina prohibit concealed carry only.[129] Nearly all states prohibit firearms in schools and government buildings to some degree.[130]

Place-based limitations on firearm possession are backed by legal precedent. *Heller* identified "laws forbidding the carrying of firearms in *sensitive places* such as schools and government buildings'' as being "presumptively lawful" under the Second Amendment.[131] However, the Court did not provide guidance to lower courts on how to determine whether other locations may be considered "sensitive places" where firearms may be prohibited. What locations can be designated as a "sensitive place" beyond "schools and government buildings" varies on a state-by-state basis.[132] A strong argument can be made that regulations of firearms in legislative buildings and at polling places are presumptively lawful because they are sensitive places. Legislative buildings are, by definition, government buildings. Polling places are often located in government buildings and schools. Polling places that are located elsewhere may still be considered "sensitive places" due to the activity that occurs there, which is essential for the functioning of democratic government.

For a more in-depth discussion of sensitive places, see Appendix 4.

Alternatively, regulations of firearms in legislative buildings and at polling places should be upheld under the test adopted by lower courts after *Heller* and *McDonald*.[133] The country has a robust history of regulating firearms in legislative buildings, at polling places, and for the purpose of protecting elections.[134] Legislative buildings, polling places, and other government buildings are public structures used for the purpose of facilitating elections and the political engagement vital to our democracy, well outside the "core" of the Second Amendment relating to personal and home defense. Finally, the government has an important interest in protecting public safety in legislative buildings and at polling places, as well as protecting the integrity of our democracy. Such regulations are sufficiently related to those interests.

Extreme Risk Protection Orders

A legal tool already exists in several states to address individuals posing demonstrable risk to themselves or others with firearms, known as "extreme risk" laws.[135] Extreme Risk Protection Orders (ERPOs) are court orders that can be used to temporarily prohibit the possession and purchasing of firearms by persons deemed by a court to pose a significant danger of causing injury to themselves or others.[136] Extreme risk laws balance public health and safety interests with robust due process protections to save lives while also respecting constitutional rights.[137]

ERPOs have a wide field of application to prevent homicides[138] and suicides,[139] and have the potential to quell domestic terror as well. Many of the rioters arrested after the January 6th insurrection at the U.S. Capitol had histories of violent and concerning behavior that could, at least temporarily, have prevented them from possessing firearms.[140] Anti-government self-styled militia groups, such as the Oath Keepers,[141] the Boogaloo movement,[142] and others,[143] also have histories of violent and intimidating actions and rhetoric, both as organizations and among their individual members. ERPOs have already been issued by courts to temporarily remove firearms from members of these armed anti-government groups based on threats and conduct.[144] Few courts have considered Second Amendment challenges to ERPO laws, and those that have been presented with such cases have upheld them.[145]

Preemption Laws

In many states, local efforts to respond to the threats posed by insurrectionism are stifled by strict preemption laws, which are enacted by state legislatures to prevent local governments from adopting gun violence prevention laws more robust than relevant state law.[146] Preemption laws have been used by state legislatures to limit local decision-making on issues ranging from expanding paid sick leave[147] to anti-discrimination laws,[148] and have ballooned in use over the past three decades to implicate a "wide array of policy areas.[149] To date, 45 states limit local control over firearms regulations[150], a stark increase from only seven states in 1979,[151] with at least 11 states having "absolute preemption" with no exceptions.[152] Some states have adopted what a few scholars have coined "punitive preemption" or "hyper-preemption" where "localities with potentially preempted laws not only face the prospect that those rules will be invalidated, but also risk inviting civil liability, financial sanctions, removal from office, or criminal penalties."[153] Preemption laws have been so effective at stymieing gun violence prevention efforts on the local level that they have been considered by legal scholars to be "a more important determinant of gun regulation than the Second Amendment itself."[154]

Allowing local control of firearms laws can save lives. Colorado lawmakers repealed the state's entire firearm preemption statute in 2021, but only after a mass shooter used an assault-style weapon to kill 10 bystanders days after a court struck down the city of Boulder's assault weapons ban as violative of the preemption statute.[155] Tragedies do not need to occur before meaningful change can be implemented, especially when they are foreseeable and preventable. Absolute preemption completely prevents local governments from taking action to protect their communities. Allowing local governments to enact local laws or regulations does not by itself run afoul of the Second Amendment and should be permitted.

SUMMARY OF RECOMMENDATIONS

Quelling insurrectionism and protecting the integrity of our nation's democratic institutions cannot be a passive process. The rising prevalence and activity of armed insurrectionist movements is a clear sign that state legislatures must take decisive action to protect the safety and civil rights of voters and the integrity of our democratic institutions at large. Though the most effective remedies for each state and locality may look different depending on jurisdictional differences, the following are general recommendations that policymakers and advocates can follow to push back against insurrectionism where they live:

- **Regulate the public carry of firearms**
- **Strengthen existing laws, or increase the enforcement of current laws, to prohibit paramilitary activity**
- **Limit guns in locations essential to political participation, such as polling places, vote counting centers, legislative buildings, and protests, to protect the essential functions of government**
- **Utilize Extreme Risk Protection Orders to temporarily disarm persons at high risk of violence**
- **Repeal or create exceptions for firearm preemption laws to give local governments the ability to create policies to address risks of insurrectionism in their jurisdictions**

CONCLUSION

The rising prevalence of armed insurrectionism jeopardizes the integrity of our democracy, but remedies are within reach. Armed violence is never a resort in a democracy—first, last, or otherwise. Policymakers and advocates should advance equitable legal measures to limit the presence and usage of firearms in political spaces to ensure that the will of the majority, as opposed to a violent minority, guides the future direction of our country.

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APPENDIX 1:

Case Study: The Virginia Blueprint to Protect Against Armed Political Violence

Virginia has taken significant steps in recent years to comprehensively prevent armed political violence. During a 2020 special legislative session, the legislature passed a bill that amended the commonwealth's firearm preemption law to give local governments the ability to regulate firearms in government buildings, permitted public events, and any location being used for a government purpose.[156] A number of city governments in Virginia, including those in Alexandria, Newport News, and Richmond, have already adopted some or all of these firearm preemption exceptions.[157] In 2021, Virginia passed laws to prohibit the carrying of firearms in Capitol Square and government buildings, and the possession of firearms near polling places, board of election meeting locations, or vote counting locations while they are in use.[158] Virginia also has its own ERPO law, called Substantial Risk Orders, that was first implemented earlier in 2020.[159]

The efforts of the Virginia legislature to pass laws to prevent armed intimidation during the democratic process were bolstered by the collaboration of other state offices. Ahead of the 2020 presidential election, Virginia's Office of the Attorney General released both a memo outlining protections against voter intimidation under state and federal law and guidance for poll watchers and a short training video for law enforcement and election officials.[160] In 2021, Virginia's attorney general also issued an official opinion instructing county election boards how the new firearm prohibition at polling sites operates in practice.[161] He clarified that "firearms are prohibited at central absentee voter precincts, voter satellite offices, and offices of general registrars where they are the designated locations of early voting in the locality, in the same way firearms are prohibited at polling places when the polls are open on Election Day" and that "the prohibitions … do not apply to the entire building that houses the polling place, but rather to the 40-foot boundary around the discrete portion of that building that is used as the polling place."[162] By passing laws to protect the right to vote without fear of armed intimidation and educating the public and other relevant stakeholders on how these laws work, Virginia is creating a holistic blueprint to protect against armed political violence that other states can follow.

APPENDIX 2:

First Amendment Analysis: Gun Are Not Protected Speech

For centuries, the Supreme Court has developed case law regarding what is and is not considered protected speech under the First Amendment. The Supreme Court has acknowledged the distinction between "pure speech" and symbolic speech for First Amendment purposes, noting how "[s]ymbolism is a primitive but effective way of communicating ideas."[163] However, the Supreme Court has also rejected "the view that an apparently limitless variety of conduct can be labeled as 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[164] Conduct that is "sufficiently imbued with elements of communication [may] fall within the scope of the First and Fourteenth Amendments"[165] if certain criteria are met.[166] More specifically, the Supreme Court has held that conduct is only considered "symbolic speech," and therefore eligible for First Amendment protections, when (i) there is an "intent to convey a particularized message," and (ii) the surrounding circumstances give rise to a great "likelihood … that the message would be understood by those who viewed it."[167] The Supreme Court has further noted that when an additional explanation is needed for an audience to understand the intended message behind conduct, this "is strong evidence that the conduct at issue … is *not* so inherently expressive that it warrants protection."[168]

The public carry of firearms on its own does not convey a particularized message that would be understood by a person viewing them. In practice, the display of firearms in public is dangerous at worst and concerningly ambiguous at best. Especially in states where the permitless open carry of firearms is legal, it can be unclear whether someone is committing a crime when they display firearms in or around sensitive places like legislatures, polling places, and permitted events.[169] Just as readily as the public display of a firearm could say that the individual is "Pro-Second Amendment,"[170] it could also be saying something more nefarious like "stop speaking" or "I will or I want to harm you."[171] If protesters gather with rifles outside of a state legislature before a committee hearing, are they intending to threaten policymakers into voting a certain way? If someone clearly in favor of one political candidate shows up at a polling site with a visible firearm, are they intending to coerce others to vote for their candidate or leave? The lack of clarity surrounding the public display of guns brandishing endangers political rights and the proper functioning of democracy.

Though the Supreme Court has not had to evaluate whether the message behind displaying a firearm would be understood by others, lower courts have not found such conduct to be protected speech. The 9th Circuit stated 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."[172] Michigan courts have espoused a similar view, holding that attempts to communicate messages by openly carrying firearms did not qualify as protected speech because worried members of the public did not perceive the firearm owners "as open carry activists demonstrating their First … Amendment rights," but rather "were simply alarmed and concerned for their safety and that of their community."[173] A Connecticut court evaluating a case in which an individual was openly carrying a firearm, while wearing a right to bear arms t-shirt, wrote that reasonable officers could disagree whether carrying the gun conveyed a message in support of the Second Amendment or was simply carrying for other purposes.[174] In doing so, the court found that the gun carrier's conduct was not protected by the First Amendment.[175] A court in Ohio also rejected that the open carry of firearms amounted to protected symbolic speech, observing that the defendant "[having] to explain the message he intended to convey undermines the argument that observers would likely understand the message."[176] These court findings emphasize that the right to free speech cannot be confused with a right to terrorize others and threaten public safety.

Even in the unlikely event that a court holds that the public display of firearms constitutes speech, there is another legal approach that allows for regulation under the First Amendment. Though public spaces are afforded the greatest First Amendment protections, speech can still be governed in these areas.[177] More specifically, the Supreme Court has held that "[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech."[178] Such restrictions must: (1) be content neutral, (2) be narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication of the information."[179]

The author of one law review article proposes three distinct interests that regulations on firearms at public protests would serve: (1) "preventing violence and crime during protests[,]" (2) "preventing situations from arising in which violence is a likely outcome[,]"and (3) "protecting citizens from the fear of violence itself."[180] These interests are applicable in other contexts in which individuals wish to express themselves and such regulations would apply regardless of the content of the speech. Individuals also have numerous other, arguably more effective, methods of communication if the open display of firearms is prohibited at public protests.

The Supreme Court has also held that symbolic conduct can be regulated if it was intended to intimidate or threaten in what is referred to as the "true threats" doctrine. The Supreme Court first stated that true threats constituted a category of unprotected speech in the per curiam opinion in *Watts v. United States*.[181] As Seton Hall Law School professor Jessica Miles and numerous other commentators have noted, Watts did not clearly define what constitutes a "true threat."[182] The Supreme Court has, to date, failed to provide clear guidance in evaluating true threats.[183] In the absence of guidance from the Supreme Court, lower courts have analyzed true threats by making two distinct inquiries: (1) are the words in question objectively threatening such that the speech may fail to warrant constitutional protection; and (2) did the speaker of the words have "necessary intent to utter or publish a true threat pursuant to the relevant statute, or pursuant to the First Amendment if the Amendment requires a higher mens rea than the statute."[184] The first inquiry is often referred to as the objective test because the courts have "adopted the viewpoint of either a reasonable speaker, reasonable recipient/listener, or just a generic reasonable person to assess whether the words at issue may constitute a true threat."[185] The objective test considers the words spoken as well as a "variety of contextual factors to determine if a statement qualifies as a true threat."[186] Regarding the second inquiry, a majority of circuit courts have determined that the Constitution only requires that the speaker intend to communicate particular words that the court finds are objectively threatening, not that the speaker intended to threaten or intimidate the listener.[187] It is worth noting that "the speaker need not actually intend to carry out the threat" for speech to be a "true threat," but rather the speaker makes an intentional statement that creates a fear that violence can or will occur.[188] Given how inherently threatening the display of firearms can be, the true threats doctrine is a legal theory worthy of further exploration in the context of insurrectionism.[189]

Despite increasing rhetoric tying the public carry of firearms to the First Amendment, it is highly unlikely for courts to extend First Amendment protection to such conduct. Even if courts were to find the public carry of firearms constitutes speech under the First Amendment, other doctrines such as time, place, and manner restrictions and "true threats" would allow for the regulation of firearms. As William & Mary Law School Professor Timothy Zick writes, "proponents of open carry looking to the First Amendment for protection are likely to come away mostly disappointed."[190]

APPENDIX 3:

Analytical Framework for Evaluating Second Amendment Claims

The Supreme Court in *Heller* and *McDonald* recognized for the first time an individual right to possess a handgun in the home for self defense and applied that right against the states.[191] However, the Supreme Court failed to clarify how lower courts should determine the constitutionality of laws and regulations under the Second Amendment. In the absence of clear guidance from the Supreme Court, the lower courts have created a two-step framework to analyze Second Amendment inquiries.[192] To date, every federal circuit has applied some variation of this test.[193] The two-step framework asks the following questions:

1. Does the regulation on firearm possession and usage burden conduct protected by the Second Amendment?

2. If the answer to question 1 is yes, what level of scrutiny applies?[194]

To determine whether the regulation burdens conduct protected by the Second Amendment, courts look to history.[195] History, in this context, refers to whether the law or similar laws could be considered "longstanding" in the United States.[196] To determine the level of scrutiny, many courts' choice is informed by (a) how close the law comes to the core of the Second Amendment right, and (b) the severity of the law's burden on the right.[197] Courts apply intermediate scrutiny "if a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right."[198] To pass intermediate scrutiny, the government must show that the challenged law is "substantially related to an important government objective."[199] A majority of courts have applied intermediate scrutiny in Second Amendment cases and upheld gun violence prevention laws.[200] If a challenged law does implicate a core Second Amendment right, then the court requires that a law be narrowly tailored to achieve a compelling government interest under the higher strict scrutiny standard.[201] In light of *Heller*, the majority of courts have held the core right of the Second Amendment to be the right to possess firearms in the home for self defense.[202]

It is worth noting that the two-step framework may change in the near future. At the time of this writing, the Supreme Court has heard oral arguments for *New York State Rifle and Pistol Association, Inc. v. Bruen* and is in the process of drafting the opinion.[203] The case involves a challenge to New York's law governing licenses to carry firearms in public and provides an opportunity for the Supreme Court to either confirm the two-step framework, to establish a different test for Second Amendment claims, or to remain silent on the standard. In a dissent in *Heller v. DC*, a case before the U.S. Court of Appeals for the District of Columbia Circuit, then-judge Brett Kavanaugh advocated for a test based solely on the Second Amendment's text, history, and tradition.[204] In a dissent in *Kanter v. Barr*, a case before the 7th Circuit Court of Appeals, then-judge Amy Coney Barrett espoused a "dangerousness" standard, stating how "legislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are dangerous."[205] It is unclear whether the Supreme Court will adopt a test that focuses primarily on text, history, and tradition, adopt a test based on dangerousness, formally establish the current two-step framework used by the lower courts, create a new test altogether, or decline to establish a clear test once again. Regardless of whether courts analyze the history of gun laws with or without the consideration of present-day governmental interests, the ability of governments to regulate the public carry of firearms is longstanding.

APPENDIX 4:
Sensitive Places

Regulations on firearm usage and possession in particular places may be constitutional based on the nature of the location alone. The Supreme Court in *Heller* identified "laws forbidding the carrying of firearms in *sensitive places* such as schools and government buildings" as being "presumptively lawful" under the Second Amendment.[206] However, the Court did not provide guidance to lower courts on how to determine whether other locations may be considered "sensitive places" where firearms may be prohibited.

The scope of what constitutes a "sensitive place" for Second Amendment purposes has been explored in depth by few courts across the country. In Georgia, a district court considered "sensitive places" to potentially include "places of worship, government buildings, court houses, and polling places."[207] In its discussion, the Georgia court speculated that "[a] place, such as a school, might be considered sensitive because of the people found there. Other places, such as government buildings, might be considered sensitive because of the activities that take place there. A reasonable argument can be made that places of worship are also sensitive places because of the activities that occur there."[208] Given the failure of the Supreme Court in *Heller* to provide clarity in determining what constitutes a "sensitive place," the Georgia court decided that the safer approach was to apply the two-step framework and upheld the prohibition on firearms in houses of worship under intermediate scrutiny.[209]

Several courts have invoked "sensitive places" to uphold regulations on firearms on university property.[210] The Virginia Supreme Court, for example, has held that "university property in academic buildings, administrative office buildings, student residence buildings, dining facilities, or while attending sporting, entertainment, or educational events" are all considered "sensitive places."[211] The Virginia Supreme Court noted that George Mason University (GMU) is a school and its buildings are owned by the government, which both indicate that the university is a "sensitive place."[212] The Court also wrote that "GMU has 30,000 students enrolled ranging from age 16 to senior citizens, and that over 350 members of the incoming freshman class would be under the age of 18. Also approximately 50,000 elementary and high school students attend summer camps at GMU and approximately 130 children attend the child study center preschool there. All of these individuals use GMU's buildings and attend events on campus[,]" suggesting that places where large numbers of people belonging to vulnerable populations are factors to be considered when designating locations as sensitive places.[213]

Other courts have expanded "sensitive places" beyond the "schools and government buildings" listed in *Heller*.[214] A federal court in Washington state helped uphold a policy where guns could not be brought inside identified city-run park facilities where children and youth were likely to be present, reasoning that "a city-owned park where children and youth recreate is a 'sensitive' place where it is permissible to ban possession of firearms."[215] Another federal court in Georgia found land used by the Army Corps of Engineers to be a "sensitive place," going beyond government buildings to encompass government property as well.[216] In reaching their judgment, the authoring judge opined how "the Court cannot fathom that the framers of the Constitution would have recognized a civilian's right to carry firearms on property owned and operated by the United States Military, especially when such property contained infrastructure products central to our national security and well being."[217] U.S. Postal Service parking lots have also been found to be sensitive places by multiple courts.[218]

Though the Supreme Court and lower courts have upheld regulations on "sensitive places" without clearly articulating what makes a certain location sensitive, protecting locations where vulnerable populations congregate and locations essential to the security and functioning of government arise as compelling factors in reaching that determination. A strong argument can be made that regulations of firearms in legislative buildings and at polling places are presumptively lawful because they are sensitive places. Legislative buildings are, by definition, government buildings. Polling places are often located in government buildings and schools. Polling places that are located elsewhere may still be considered "sensitive places" due to the activity that occurs there, which is essential for the functioning of democratic government.

ENDNOTES

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[6] *See* Deena Zaru, *The symbols of hate and far-right extremism on display in pro-Trump Capitol siege*, ABC news (Jan. 14, 2021), https://abcnews.go.com/US/symbols-hate-extremism-display-pro-trump-capitol-siege/story?id=75177671 (last visited Sep. 1, 2021), recounting the display of Nazi slogans, White power signs, confederate flags, and more.

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[10] Joshua Horwitz & Casey Anderson, *Guns, Democracy, and the Insurrectionist Idea* (2009).

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[35] White House National Security Council, *National Strategy for Countering Domestic Terrorism* (Jun. 15 2021); Office of the Director of National Intelligence, *Unclassified Summary of Assessment on Domestic Violent Extremism* (Mar. 17, 2021), https://www.dni.gov/files/ODNI/documents/assessments/UnclassSummaryofDVEAssessment-17MAR21.pdf (last visited Dec. 12, 2021). The federal government classifies "domestic terrorism" as "activities that involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; appear to be intended to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily within the territorial jurisdiction of the United States." 18 U.S.C.A. § 2331(5).

[36] Seth Jones & Catrina Doxsee, *The Escalating Terrorism Problem in the United States* (Jun. 17, 2020), Center for Strategic and International Studies, https://www.csis.org/analysis/escalating-terrorism-problem-united-states (last visited Jul. 20, 2021).

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[40] *See* e.g. Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 Tex. L. Rev. 49, 95 (2012) ("[I]nsurrection short-circuits political debate in order to impose on the polity the insurrectionists' justification for violence. Even keeping arms to enable insurrection would undermine debate by fostering a climate of mistrust and fear."); Katlyn E. DeBoer, *Clash of the First and Second Amendments: Proposed Regulation of Armed Protests*, 45 Hastings Const. L.Q. 333, 355 (2018) ("The United States has a very high prevalence of gun violence, engendering very reasonable fear in those viewing armed protests; there is an abundance of people in America willing to escalate to shooting during a dispute, which may then chill opposition against armed protesters out of fear of prompting the pull of a trigger."); Joseph Blocher, Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 116 Nw. U. L. Rev. 139, 188–89 (2021) ("In various contexts, the threat of gun violence undoubtedly chills the exercise of rights, depriving Americans of the security to speak, protest, learn, shop, pray, and vote."); Diana Palmer and Timothy Zick, *The Second Amendment Has Become a Threat to the First*, (Oct. 27, 2021) The Atlantic, https://www.theatlantic.com/ideas/archive/2021/10/second-amendment-first-amendment/620488/ (last visited Nov. 10, 2021) ("The increased risk of violence from open carry is enough to have a meaningful "chilling effect" on citizens' willingness to participate in political protests."); Franks, Mary Anne. The Cult of the Constitution. Stanford University Press, 2020.

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[49] Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998).

[50] Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487 (2004).

[51] Robert Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. Am. History 599, 600 (1982).

[52] *See generally*, Richard Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802*, 3-9 (1975) and Richard Kohn, *The Constitution and National Security: The Intent of the Framers, in The United States Military Under the Constitution of the United States 1789-1989*, 61 (Richard H. Kohn ed., 1991), noting how colonial Americans distrusted professional militaries, given their experience with the standing armies of the British. *See also* Dunlap n. 43 at 646-649.

[53] Paul Finkelman, *A Well Regulated Militia: The Second Amendment in Historical Perspective, in* The Second Amendment in Law and History, 144-145 (Carl Bogus ed., 2000).

[54] Andrew Solender, *Gaetz tells supporters second amendment is for 'Armed rebellion against the government'* (May 28, 2021), Forbes, https://www.forbes.com/sites/andrewsolender/2021/05/28/gaetz-tells-supporters-2nd-amendment-is-for-armed-rebellion-against-the-government/?sh=29ba2123196f (last visited Jul. 28, 2021).

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[56] Charles J. Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 Tenn. Law Rev. 643, 645 (1995).

[57] Connor, *supra* note 12.

[58] George Washington, President of the United States, Sixth Annual Message to Congress (Nov. 19, 1794).

[59] U.S. CONST. art. I, sec. 8, cl. 15 (emphasis added).

[60] U.S. CONST. art. I, sec. 8, cl. 16; *see also* U.S. CONST. art. III, sec. 3, cl. 1, defining "Treason against the United States" as "only in levying War against them," which is effectively what an armed insurrection is.

[61] *The Federalist* No. 46, at 321 (James Madison).

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[64] *United States v. Miller*, 307 U.S. 174, 178 (1939).

[65] *Presser v. Illinois*, 116 U.S. 252, 268 (1886).

[66] *Id.* at 267.

[67] *District of Columbia v. Heller*, 554 U.S. 570, 598-600, 635 (2008).

[68] *Id* at 630.

[69] *Id* at 627-629.

[70] Carl T. Bogus, *Heller and Insurrectionism*, 59 Syracuse L. Rev. 253, 265 (2008).

[71] Christopher J. Peters, *What Are Constitutional Rights for? The Case of the Second Amendment*, 68 Okla. L. Rev. 433, 475 (2016).

[72] *See* ACLED & Everytown for Gun Safety, *supra* note 44.

[73] *See* Dahlia Lithwick & Christian Turner, *It's Not My Gun. It's "Free Speech." The Alarming Rise of "Open Carry" Demonstrations*, Slate Magazine (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 (last visited Sep 14, 2021); Tyler Yzaguirre, *Why Gun Owners Should Use the First Amendment to Protect Open Carry*, TheHill (Aug. 8, 2017), https://thehill.com/blogs/pundits-blog/civil-rights/345675-why-gun-owners-should-use-the-first-amendment-to-protect-open (last visited Sep. 14, 2021); *see also* Appendix 2.

[74] U.S.C.A. Const.Amends. 1.

[75] *Chesney v. City of Jackson*, 171 F. Supp. 3d 605, 616-19 (E.D. Mich. 2016); *see also Baker v. Schwarb*, 40 F. Supp. 3d 881, 894-95 (E.D. Mich. 2014).

[76] *See Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846 (1992), *Galena v. Leone*, 638 F.3d 186 (3d Cir. 2011), and *Helms v. Zubaty*, 495 F.3d 252 (6th Cir. 2007), respectively.

[77] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943). *See generally*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

[78] *United States v. O'Brien*, 391 U.S 367, 376 (1968).

[79] Kendall Burchard, *Your 'Little Friend' Doesn't Say 'Hello': Putting the First Amendment Before the Second in Public Protests*, 104 Va. L. Rev. Online 30, 35 (2018).

[80] *Id* at 36-38.

[81] *See, Nordyke v. King*, 319 F.3d 1185, 1190 (9th Cir. 2003); *Burgess v. Wallingford*, 2013 WL 4494481, at *9 (D.Conn. May 15, 2013); *Baker v. Schwarb*, 40 F. Supp. 3d 881, 894-95 (E.D. Mich. 2014); *Northrup v. City of Toledo Police Div.*, 58 F. Supp. 3d 842, 848 (N.D. Ohio 2014), affirmed in part, reversed in part and remanded sub nom. *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128 (6th Cir. 2015); *Deffert v. Moe*, 111 F. Supp. 3d 797 (W.D. Mich. 2015); *Chesney v. City of Jackson*, 171 F. Supp. 3d 605, 616-19 (E.D. Mich. 2016).

[82] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), *quoting Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 293 (1984).

[83] *See Miller*, 307 U.S. at 178.

[84] *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

[85] *Heller*, 554 U.S. at 635.

[86] *Id* at 626.

[87] *Id* at 626-627.

[88] *Id* at 627 n.26.

[89] *McDonald*, 561 U.S. at 750.

[90] *Id* at 785.

[91] *Id* at 786.

[92] *See*, Eric Ruben, Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 Duke L.J. 1433, 1496 (2018).

[93] *See Concealed Carry*, Giffords Law Center (Sep. 14, 2021), https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/concealed-carry/ (last visited Oct. 24, 2021) and *Open Carry*, Giffords Law Center (Sep. 7, 2021), https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/open-carry/ (last visited Oct. 24, 2021).

[94] Alyson Youngblood & Greg Fauerbach, *State Firearm Law Navigator*, RAND Corporation (Sep. 17, 2020), https://www.rand.org/research/gun-policy/law-navigator.html#carrying-a-concealed-weapon (last visited Oct. 24, 2021).

[95] John J. Donohue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis*, 16 J. Empirical Legal Stud. 198, 200 (2019). *See also*, Coalition to Stop Gun Violence, *Guns in Public: A Threat to Safety and Democracy* (Oct. 2020), https://3p2eii11tkyo44umh7qu2zpd-wpengine.netdna-ssl.com/wp-content/uploads/2020/10/WestEnd_CSGV_PublicCarry_Final-web-rev.pdf.

[96] *See* Cal. Penal Code §§ 26350, 25850; D.C. Code § 22-4504.01; Fla. Stat. Ann. § 790.053(1); 720 Ill. Comp. Stat. 5/24-1(a)(10); N.Y. Penal Law § 265.01(1).

[97] *See* Cal. Penal Code § 26400(a); D.C. Code § 22-4504.01; Fla. Stat. Ann. § 790.053(1); 720 Ill. Comp. Stat. 5/24-1(a)(10); Mass. Gen. Laws ch. 140, §§ 129C, 131; Minn. Stat. § 624.7181, subd. 2, Minn. Stat. § 624.7181, subd. 1(b)(3); N.J. Rev. Stat. § 2C:39-5(c).

[98] *See* ACLED & Everytown for Gun Safety, *supra* note 44.

[99] Joseph Blocher & Reva Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 116 Nw. U. L. Rev. 1, 3 (2021).

[100] Note that "open carry" refers to the visible display of firearms in public and "concealed carry" to the possession of firearms in public that are hidden on the carrier's person.

[101] *See Gould v. Morgan*, 907 F.3d 569 (1st Cir. 2018); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2nd Cir. 2012); *Drake v. Filko*, 724 F.3d 426 (3rd Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021).

[102] *See Peruta v. Cty. of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc), cert. denied, 137 S.Ct. 1995 (mem.), and *Peterson v. Martinez*, 707 F.3d 1197, 1201 (10th Cir. 2013).

[103] *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021).

[104] *Id* at 786.

[105] *Id* at 788.

[106] *Id* at 794.

[107] *Id* at 794-813.

[108] *Silvester v. Harris*, 843 F.3d 816, 812 (9th Cir. 2016).

[109] *Young*, 992 F.3d at 784-85. At the time of writing this report, *Young v. Hawaii* is currently pending cert before SCOTUS.

[110] *See Gould*, 907 F.3d at 670–72; *Woollard*, 712 F.3d at 876; *Wrenn*, 864 F.3d 650, 659–61 (D.C. Cir. 2017); *Drake*, 724 F.3d at 432–35; *Moore v. Madigan*, 702 F.3d 933, 936–37 (7th Cir. 2021); *Kachalsky*, 701 F.3d at 90–96.

[111] *Id.*

[112] *Moore*, 702 F.3d at 942.

[113] *Supra* notes 10-39 and accompanying text.

[114] *Supra* notes 49-71 and accompanying text.

[115] Georgetown Law, *Prohibiting Private Armies at Public Rallies: A Catalog of Relevant State Constitutional and Statutory Provisions*, Georgetown Law Institute for Constitutional Advocacy and Protection, 3d ed., 8 (Sep. 2020).

[116] *Id.* at 9.

[117] *Id; see e.g.*, N.Y. Mil. Law § 240 (McKinney)("No body of men other than the organized militia and the armed forces of the United States except such independent military organizations as were on the twenty-third day of April, eighteen eighty-three and now are in existence and such other organizations as may be formed under the provisions of this chapter, shall associate themselves together as a military company or other unit or parade in public with firearms in any city or town of this state.").

[118] *See Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198 (S.D. Tex. 1982).

[119] Georgetown Law at 10.

[120] *Id.* at 11.

[121] *Heller*, 554 U.S. at 620, quoting *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886).

[122] *See* Lois Beckett, *US police three times as likely to use force against Leftwing protesters, data finds*, The Guardian (Jan. 14, 2021), https://www.theguardian.com/us-news/2021/jan/13/us-police-use-of-force-protests-black-lives-matter-far-right (last visited Aug. 23, 2021), and Katie Shepherd, *Portland Police Stand by as Proud Boys and Far-Right Militias Flash Guns and Brawl with Antifa Counterprotesters*, The Washington Post (Aug. 22, 2020), https://www.washingtonpost.com/nation/2020/08/22/portland-police-far-right-protest/ (last visited Aug 23, 2021).

[123] *See* Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, Brennan Center for Justice (Aug. 27, 2020), https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law (last visited Aug. 23, 2021); *see also* Jones & Doxsee, *supra* note 36.

[124] Joseph Blocher, Samuel W. Buell, Jacob D. Charles, Darrell A.H. Miller, *Pointing Guns*, 99 Tex. L. Rev. 1173, 1175 (2021).

[125] Ashley Collman, *Armed groups say they will show up to polling sites on Election Day, and experts are afraid it will intimidate voters*, Business Insider (Oct. 12, 2020), https://www.businessinsider.com/armed-groups-planning-to-monitor-polling-sites-on-election-day-2020-10 (last visited Dec. 16, 2021).

[126] For example, Section 11 of the Voting Rights Act makes it unlawful to either successfully or attempt to "intimidate, threaten, or coerce" someone from "voting or attempting to vote" or "for urging or aiding any person to vote or attempt to vote." 52 U.S.C. § 10307(b). However, the intimidation must be "intended to deter individuals from exercising their voting rights." *Nat'l Coal. on Black Civic Participation v. Wohl*, 512 F. Supp. 3d 500, 509 (S.D.N.Y. 2021).

[127] Blocher et. al, *supra* note 124 at 1182.

[128] *See* Ariz. Rev. Stat. Ann. § 13-3102 (A)(11); Cal. Elec. Code § 18544(a); D.C. Code Ann. § 7-2509.07(a)(5); Fla. Stat. Ann. § 790.06(12)(a)(6); Ga. Code Ann. § 16-11-127(b)(7); La. Stat. Ann. § 18:1461.7(C)(3); La. Stat. Ann. § 40:1379.(N)(4); Tex. Penal Code Ann. § 46.03(a)(2); Va. Code Ann. § 24.2-604(A)(iv).

[129] *See* Miss. Code. Ann. § 45-9-101 (13); Mo. Ann. Stat. § 571.215(1)(2); Neb. Rev. Stat. Ann. § 69-2441(1)(a); S.C. Code Ann. § 23-31-215(M)(3).

[130] *See Guns in Public: Location Restrictions*, Giffords Law Center (Sep. 24, 2021), https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/location-restrictions/ (last visited Dec. 3, 2021) and *Guns in Public: Guns in Schools*, Giffords Law Center (Dec. 2, 2021), https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/guns-in-schools/#state (last visited Dec. 3, 2021).

[131] *Heller*, 554 U.S. at 626 (emphasis added).

[132] *Heller*, 554 U.S. at 626.

[133] *See* Appendix 3.

[134] David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 Charleston L. Rev. 205 (2018). *See also* discussion *supra* 18.

[135] Currently, 19 states and the District of Columbia have ratified Extreme Risk laws.

[136] The specific language varies by state, with ex parte orders having the additional criteria of the risk being immediate or in the near future. *See* Educational Fund to Stop Gun Violence, *Extreme Risk Laws* (Jun. 2021), https://efsgv.org/learn/policies/extreme-risk-laws/ for more information on the extreme risk laws of each state.

[137] *See* Educational Fund to Stop Gun Violence, *ERPOs and Due Process* (Feb. 2021), https://efsgv.org/wp-content/uploads/ERPO-and-Due-Process-Factsheet.pdf.

[138] *See* Garen J. Wintemute et al., *Extreme Risk Protection Orders Intended to Prevent Mass Shootings*, 171 Annals of Internal Medicine 655 (2019), finding that California's extreme risk law may have prevented mass shootings by being issued against persons demonstrating clear intent to commit them.

[139] *See* Aaron J. Kivisto & Peter Lee Phalen, *Effects of Risk-Based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981–2015*, 69 Psychiatric Services 855–862 (2018), finding that Connecticut's and Indiana's extreme risk laws led to a 13.7% and 7.5% decrease in firearm suicides, respectively; and Jeffrey Swanson et al., *Criminal Justice and Suicide Outcomes with Indiana's Risk-Based Gun Seizure Law*, The Journal of the American Academy of Psychiatry and the Law (2019), finding that about one suicide was prevented for every 10 firearms removed through Indiana's extreme risk law.

[140] Dinah Pulver et al., *Capitol riot arrests: See who's been charged across the U.S.*, USA Today (Aug. 20, 2021), https://www.usatoday.com/storytelling/capitol-riot-mob-arrests/ (last visited Aug. 23, 2021).

[141] *See* Eric McQueen, Examining extremism: The Oath Keepers, Center for Strategic and International Studies (Jun. 17, 2021), https://www.csis.org/blogs/examining-extremism/examining-extremism-oath-keepers (last visited Aug. 23, 2021), detailing the origins, ideologies, and high profile incidents involving the Oath Keepers.

[142] *See* Jared Thompson, *Examining extremism: The Boogaloo Movement*, Center for Strategic and International Studies (Jun. 30, 2021), https://www.csis.org/blogs/examining-extremism/examining-extremism-boogaloo-movement (last visited Aug. 23, 2021), detailing the origins, ideologies, and high profile incidents involving participants in the Boogaloo Movement.

[143] *See* Catrina Doxsee, Examining Extremism: The Militia Movement, Center for Strategic and International Studies (Aug. 12, 2021), https://www.csis.org/blogs/examining-extremism/examining-extremism-militia-movement (last visited Aug. 23, 2021).

[144] A.C. Thompson, Lila Hassan, & Karim Haji, *The Boogaloo Bois Have Guns, Criminal Records and Military Training. Now They Want to Overthrow the Government.*, ProPublica (Feb. 1, 2021), https://www.propublica.org/article/boogaloo-bois-military-training?utm_medium=social&utm_source=twitter (last visited Dec. 13, 2021).

[145] *Redington v. State*, 992 N.E.2d 823, 833 (Ind. Ct. App. 2013); *Hope v. State*, 163 Conn. App. 36, 43, 133 A.3d 519, 525 (2016).

[146] *See Cipollone v. Liggett Group. Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992).

[147] *Preemption Watch*, Grassroots Change, https://grassrootschange.net/preemption-watch/#/category/paid-sick-days (last visited Aug. 17, 2021).

[148] National League Of Cities, *City Rights In An Era Of Preemption: A State-by State Analysis* 3, 10 (2017).

[149] *See* Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1166 (2018).

[150] Simon, Rachel, *State Preemption of Local Gun Regulations* (March 15, 2020). Cardozo Law Review, Vol. 43, 2022, Available at SSRN: https://ssrn.com/abstract=3623529 or http://dx.doi.org/10.2139/ssrn.3623529.

[151] Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 Fordham Law Rev. 681–714 (2004).

[152] *See* N.M. Const. art. II, § 6; Ark. Code Ann. § 14-54-1411; Ind. Code § 35-47-11.1-2; Iowa Code Ann. § 724.28; Ky. Rev. Stat. Ann. § 65.870; Mich. Comp. Laws § 123.1102; Or. Rev. Stat. § 166.170; 11 R.I. Gen Laws § 11-47-58; S.D. Codified Laws §§ 7-18A-36, 8-5-13, 9-19-20; Utah Code Ann. § 76-10-500; Vt. Stat. Ann. tit. 24, § 2295.

[153] Simon, *supra* note 150 at 5.

[154] Joseph Blocher, *The Biggest Legal Obstacle to Gun Regulation: State Preemption Laws, Not the Second Amendment*, 111 American Journal of Public Health 1192-1193 (2021).

[155] Zusha Elinson, *Colorado lets Cities set their own gun laws, and Boulder plans to move quickly*, The Wall Street Journal (Jun. 19, 2021), https://www.wsj.com/articles/colorado-lets-cities-set-their-own-gun-laws-and-boulder-plans-to-move-quickly-11624121655 (last visited Aug. 17, 2021).

[156] *See* 2020 VA SB 35; Va. Code Ann. § 15.2-915(E).

[157] Alexandria, Virginia City Code § 2-3-5; Newport News, Virginia City Code § 43-3; Richmond, Virginia City Code § 19-334.1; *see also* Graham Moomaw, *Virginia's Gun Control Debate Shifts to Newly Empowered Localities*, Virginia Mercury (Aug. 10, 2020), https://www.virginiamercury.com/2020/08/10/virginias-gun-control-debate-shifts-to-newly-empowered-localities/ (last visited Aug. 18, 2021).

[158] *See* 2021 VA HB 2295 and 2021 VA HB 2081, respectively; Va. Code Ann. §§ 18.2-283.2, 24.2-604, 24.2-671, and 24.2-802.1.

[159] *See* VA Code Ann. §§ 19.2-152.13 - 19.2-152.17 (enacted by 2020 VA HB 674 and 2020 VA SB 240).

[160] Virginia Office of the Attorney General, *Attorney General Herring Reiterates Protections Against Voter Intimidation and Outlines Guidance for Poll Watchers*, Attorney General of Virginia (Sep. 30, 2020), https://www.oag.state.va.us/media-center/news-releases/1840-september-30-2020-herring-reiterates-protections-against-voter-intimidation-and-outlines-guidance-for-poll-watchers (last visited Aug. 18, 2021); Virginia Office of the Attorney General, *Attorney General Herring Release Training Video on Voter Intimidation Protections Ahead of Election*, Attorney General of Virginia (Oct. 29, 2020), https://www.oag.state.va.us/media-center/news-releases/1869-october-29-2020-herring-releases-training-video-on-voter-intimidation-protections-ahead-of-election (last visited Dec. 8, 2021).

[161] Virginia Office of the Attorney General, *New Opinion From Attorney General Herring Says Firearms Prohibited at Early Voting Locations* (Sep. 1, 2021), https://www.oag.state.va.us/media-center/news-releases/2139-september-1-2021-new-opinion-from-attorney-general-herring-says-firearms-prohibited-at-early-voting-locations (last visited Sep. 15, 2021).

[162] 21-040 Va. Op. Atty. Gen. https://www.oag.state.va.us/files/Opinions/2021/21-040-Wurzer-Issued.pdf.

[163] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943).

[164] *United States v. O'Brien*, 391 U.S 367, 376 (1968).

[165] The Privileges or Immunities Clause of the Fourteenth Amendment requires states and localities to respect the civil rights of citizens in accordance with the Constitution, including free speech; U.S.C.A. Const. Amends. 14, sec 1.

[166] *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

[167] *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

[168] Timothy Zick, *Arming Public Protests*, 104 Iowa L. Rev. 223, 245 (2018) (quoting *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66, 126 S. Ct. 1297, 1311, 164 L. Ed. 2d 156 (2006)) (emphasis added).

[169] *See generally* Joseph Blocher et al., *Pointing Guns*, 99 Tex. L. Rev. 1173, 1188 (2021), noting that "[w]hile criminal law in many American jurisdictions is reasonably clear that pointing a firearm at a person during a confrontation in public can be a crime (at least at the misdemeanor level), it is extremely opaque—indeed, even intentionally noncommittal—about when such conduct will be a crime."

[170] Kendall Burchard, *Your 'Little Friend' Doesn't Say 'Hello': Putting the First Amendment Before the Second in Public Protests*, 104 Va. L. Rev. Online 30, 35 (2018).

[171] *Id* at 36-38.

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

[173] *Baker v. Schwarb*, 40 F. Supp. 3d 881, 894-95 (E.D. Mich. 2014); *see also Chesney v. City of Jackson*, 171 F. Supp. 3d 605, 616-19 (E.D. Mich. 2016) and *Deffert v. Moe*, 111 F. Supp. 3d 797 (W.D. Mich. 2015).

[174] *Burgess v. Wallingford*, 2013 WL 4494481, at *9 (D.Conn. May 15, 2013).

[175] *Id.*

[176] *Northrup v. City of Toledo Police Div.*, 58 F. Supp. 3d 842, 848 (N.D. Ohio 2014), affirmed in part, reversed in part and remanded sub nom. *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128 (6th Cir. 2015).

[177] *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009).

[178] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), *quoting Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 293 (1984).

[179] *Id.*

[180] Katlyn E. DeBoer, *Clash of the First and Second Amendments: Proposed Regulation of Armed Protests*, 45 Hastings Const. L.Q. 333, 351-352 (2018).

[181] Jessica Miles, *Straight Outta SCOTUS: Domestic Violence, True Threats, and Free Speech*, 74 U. Miami L. Rev. 711, 723 (2020).

[182] *Id.*

[183] *See Virginia v. Black*, 538 U.S. 343 (2003) (plurality opinion); *Elonis v. United States*,135 S. Ct. 2001 (2015).

[184] Miles, *supra* note 181 at 725-727.

[185] *Id* at 725-726.

[186] *Id* at 727.

[187] *Id.*

[188] *Black*. at 359-60; *see also R.A.V. v. City of St. Paul*, 505 U.S. 337, 388 (1992).

[189] However, it is worth noting there is uncertainty over how subjective intent can present challenges to a true threats analysis, which could complicate its application; *see Elonis v. United States*, 575 U.S. 723, 746 (2015).

[190] Zick, *supra* note 13 at 229.

[191] *Heller*, 554 U.S. at 635; *McDonald*, 561 U.S. at 750.

[192] *See* Brief for Second Amendment Law Professors as Amicus Curiae, *New York State Rifle & Pistol Ass'n, Inc. v. City of New York, New York*, 833 F.3d 45 (2nd Cir. 2018), vacated and remanded, 140 S.Ct. 1525 (2020), outlining the two-step test, its history, and its application by the courts.

[193] *See Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018); *United States v. Jimenez*, 895 F.3d 228, 232 (2d Cir. 2018); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Chester*, 628 F.3d 673, 680-83 (4th Cir. 2010); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185 (5th Cir. 2012); *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 685-86 (6th Cir. 2016) (en banc); *Kanter v. Barr*, 919 F.3d 437, 441-42 (7th Cir. 2019); *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs*, 788 F.3d 1318, 1322 (11th Cir. 2015); *Medina v. Whitaker*, 913 F.3d 152, 156 (D.C. Cir. 2019).

[194] *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010). *See also N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 254 n.49 (2d Cir. 2015); *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194–96 (5th Cir. 2012); *GeorgiaCarry.org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012).

[195] *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012).

[196] *See Heller v. D.C.*, 670 F.3d 1244, 1253 (D.C. Cir. 2011).

[197] *Id* at 195.

[198] *Torres*, 911 F.3d at 1262.

[199] *See United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011) and *Heller v. D.C.*, 670 F.3d 1244, 1258 (D.C. Cir. 2011).

[200] Eric Ruben, Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 Duke L.J. 1433, 1496 (2018).

[201] *Heller v. D.C.*, 670 F.3d 1244, 1256 (D.C. Cir. 2011)(quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340, 130 S. Ct. 876, 898, 175 L. Ed. 2d 753 (2010)).

[202] *See Chovan*, 735 F.3d at 1133, quoting *Heller*, 554 U.S. at 635, noting that "[t]he Heller Court suggested that the core of the Second Amendment right is to allow 'law-abiding, responsible citizens to use arms in defense of hearth and home.'"

[203] *See New York State Rifle & Pistol Ass'n, Inc. v. Corlett*, 141 S. Ct. 2566 (2021).

[204] *Heller v. D.C.*, 670 F.3d 1244, 1285 (D.C. Cir. 2011)(Kavanaugh, J., dissenting). *See also*, Brief of Second Amendment Law Professors as Amici Curiae Supporting Neither Party pg. 16-25, *New York State Rifle & Pistol Association, Inc. et al., v. Bruen*, (No. 20-843) 2021 WL 3144391 (U.S.)(Discussing some of the practical limitations of a test that relies exclusively on text, history, and tradition to resolve Second Amendment cases).

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

[206] *Heller*, 554 U.S. at 626 (emphasis added).

[207] *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F.Supp.2d 1306, 1318 (M.D. Ga. 2011), *aff'd*, 687 F.3d 1244 (11th Cir. 2012), *cert. denied* 687 F.3d 1244 (2013).

[208] *Id* at 1319.

[209] *Id.*

[210] *See Fla. Carry, Inc. v. Univ. of Fla.*, 180 So. 3d 137, 147 (Fla. Dist. Ct. App. 2015) and *Wade v. Univ. of Michigan*, 320 Mich. App. 1, 905 N.W.2d 439 (2017), appeal granted, 506 Mich. 951, 950 N.W.2d 55 (2020).

[211] *DiGiacinto*, 704 S.E.2d at 367-68.

[212] *Id* at 370.

[213] *Id.*

[214] *Heller*, 554 U.S. at 626.

[215] *Warden v. Nickels*, 697 F. Supp. 2d 1221 (W.D. Wash. 2010).

[216] *GeorgiaCarry.org, Inc. v. U.S. Army Corps of Engineers*, 212 F. Supp. 3d 1348 (N.D. Ga. 2016), *cf., Morris v. U.S. Army Corps of Engineers*, 60 F. Supp. 3d 1120 (D. Idaho 2014)(Rejecting the Corps' argument that outdoor recreational land constituted a "sensitive place" and striking down regulations on the possession and carrying of firearms on property administered by the Corps.).

[217] *GeorgiaCarry.org, Inc. v. U.S. Army Corps of Engineers*, 212 F. Supp. 3d at 1361-62.

[218] *See, Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1124-25 (10th Cir. 2015) and *United States v. Dorosan*, 350 F. App'x 874, 875-76 (5th Cir. 2009).