



Defending Democracy

**ADDRESSING THE DANGERS
OF ARMED INSURRECTION**

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JOHNS HOPKINS
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**Center for
Gun Violence Solutions**

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About This Report

About the Johns Hopkins Center for Gun Violence Solutions

The Johns Hopkins Center for Gun Violence Solutions combines the expertise of respected gun violence researchers with the skills of experienced gun violence prevention advocates. We use a public health approach to conduct rigorous scientific research to identify a range of innovative solutions to gun violence. Using the best available science, our Center works toward expanding evidence-based advocacy and policy-making efforts grounded in principles of equity. This combination of expertise creates a unique opportunity to turn public health research into action that reduces deaths and injuries from gun violence.

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I Executive Summary

The growing presence of firearms in political spaces in the United States 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 taking 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 false narrative that the Constitution creates rights to insurrection and the unchecked public carry of firearms, and rejects the notion that violence has any place in our nation's politics. The report concludes with recommended policy and practice solutions that policymakers and advocates can use to address the dangers of armed insurrectionism.

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

- Courts have not recognized the open carry of guns as speech protected under the First Amendment. If anything, the presence of guns at venues where political speech occurs, such as legislative buildings and demonstrations, imperils the exercise of First Amendment rights.
- A right to take up arms against the government has not been recognized by courts as a protection within 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” jeopardizes lives and the foundational civil liberties of free speech and fair elections necessary for democratic governance.

Policy and Practice Recommendations

- Regulate the public carry of firearms
- Strengthen existing laws, or increase the enforcement of current laws, to prohibit paramilitary activity
- Prohibit the civilian possession of firearms in locations essential to political participation, such as polling places, legislative buildings, and protests to protect the core functions of government
- Enact and implement Extreme Risk Protection Order laws to temporarily disarm people who pose a 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
- Break the insurrectionist permission structure by openly denouncing violence





II Overview

On January 6th, 2021, attackers breached the United States Capitol for the first time since the War of 1812.¹ For several harrowing hours, this living monument to democratic ideals was overrun, 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.² A throng of rioters that included off-duty law enforcement, state legislators, members of extremist unlawful-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.³ Outside, a noose hanging from an impromptu gallows loomed over a crowd bearing emblems of white supremacy and religious intolerance.⁴ Rioters carried firearms illegally into the building,⁵ while others stockpiled firearms nearby.⁶ Though the 2020 election was deemed “the most secure in American history” by U.S. election officials after extensive recounting and audit measures,⁷ over 60 court cases challenging the election results were defeated or dismissed,⁸ and claims of voting fraud or irregularities had been soundly debunked,⁹ the rioters acted outside the peaceful avenues available to them by turning 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.¹⁰

Washington, D.C. - January 6, 2021:
Rioters overrun the U.S. Capitol
Building to stop the certification of
Joe Biden's Electoral College victory
by Congress. (lev radin/Shutterstock)

The January 6th insurrection has since been decried in courtrooms and Congress.¹¹ Over 1,000 people have been charged for their involvement with the Capitol siege, many of whom have already plead guilty or been found guilty after trial.¹² Yet, the riot is only the most notorious of a growing number of incidents that evidence a rise in public willingness to entertain violence as a legitimate political tool.

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.

III Insurrectionism in the United States

For the purpose of this report, we define insurrectionism as the use of force, threat of force, or advocating for use of force as an appropriate 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.”¹³ 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.



Phoenix, Arizona - November 7, 2020: A reporter interviews an armed demonstrator protesting the results of the 2020 election outside Arizona's Capitol building. (Rebekah Zemansky/Shutterstock)

“If you want to get to President Trump, you’re going to have to go through me, and you’re going to have to go through 75 million Americans just like me. And I’m going to tell you, most of us are card-carrying members of the NRA. That’s not a threat – that’s a public service announcement”¹⁴

- Kari Lake, Arizona Gubernatorial candidate, calling for armed resistance to ongoing criminal investigations of former President Donald Trump

1. Insurrectionism Timeline

The United States has endured violent insurrections since its founding. Shay's 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.¹⁵ 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."¹⁶ Though these insurgents may have felt they were embodying the spirit of revolution from the American Revolutionary War, there are important distinctions to be made. The American revolutionaries had no legitimate means of expressing their grievances with the British before fighting for their rights. Participants in founding era rebellions and supporters of the Confederacy in the Civil War had democratic processes at their disposal through which their interests were represented in government. Armed violence is never a resort in a democracy—first, last, or otherwise.

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.¹⁷ 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.¹⁸ 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."¹⁹ To some, political dissent has become closely tied to undermining democratic government as a whole.

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 sphere. In 2014, Cliven Bundy led armed persons and members of self-styled "militias" in deadly armed standoffs with federal agents in the western United States in efforts to remain on occupied federal land.²⁰ The Bundys refused to pay for their cattle to graze on government land, believing that federal law does not apply to them, and organized with other armed groups to remain on the land.²¹ 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.²² Armed takeovers of state capitol buildings in Idaho, Michigan, and Oregon to protest 2020 COVID measures foreshadowed the storming of the U.S. Capitol months before January 6th.²³ 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.²⁴ "Armed vigilantes" later raised national alarm by patrolling ballot drop-off boxes in Arizona during the 2022 midterm elections, exemplifying a growing willingness to use weapons to disrupt democratic processes.²⁵



1786–1787
Shays' Rebellion



1791–1794
Whiskey Rebellion

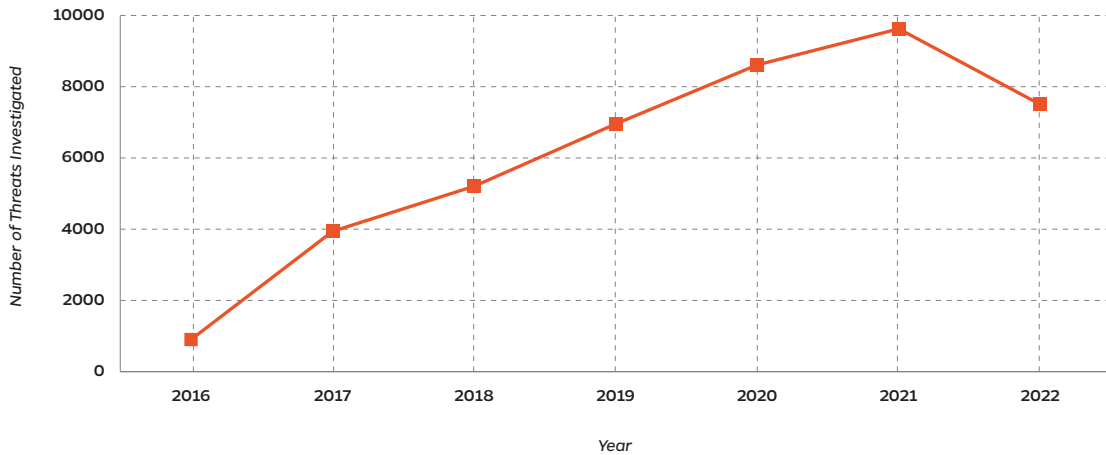


1861–1865
American Civil War

Individual election workers have received threats as well. Ralph Jones, who oversaw Fulton County, Georgia’s, mail-in ballot operation in 2020 and had worked in Georgia elections for over three decades, said that he received death threats following the November 2020 elections.²⁶ According to Jones, one caller “threatened to kill him by dragging his body around with a truck.”²⁷ A woman left a voicemail for Jones’s boss, stating, “You actually deserve to hang by your goddamn, soy boy, skinny-a** neck.”²⁸ Another caller said they would kill Fulton County’s election director by firing squad.²⁹ 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.”³⁰ These are samples 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.³¹

Threats against government officials and election workers have spiked to historic highs. In 2021, Capitol Police investigated over 10 times more threats to members of Congress than they had in 2016.³² A Republican nominee for a New Mexico House seat who failed to win the election allegedly executed a plan to shoot up the homes of his political rivals.³³ California lawmakers were forced to halt the 2023 legislative session for a day after a man made credible threats against the Capitol and fired multiple bullets while driving his car.³⁴ A January 6th defendant was arrested near former President Obama’s D.C. home in June 2023 after parking near it in a van with two guns and 400 rounds of ammunition, posting on a messaging app the day before that “We got these losers surrounded!” and “See you in hell, Podesta’s and Obama’s!”³⁵

Threats Against Members of Congress Investigated by Capitol Police (2016–2022)³⁶



Unprecedented numbers of election workers have left their jobs in fear of their safety due to increasing threats and harassment. Some states had almost a 20–30% turnover rate of their local election officials within the last year.³⁷ According to a 2022 survey, one in five election workers say they may quit election work before 2024 and nearly one in three know someone who left their roles out of fears for their safety, increased threats, or intimidation.³⁸ More recent data suggests that almost half of election workers fear for the safety of their colleagues in 2023.³⁹ Additional analysis from January 2020 to September 2022 found that threats of gun violence or death against local officials were twice as likely as any other form of threat.⁴⁰ These events raise the question of whether civil servants, regardless of how public-facing their roles may be, should be prepared to risk their lives to uphold the functions of our democracy. This is a decision that no one should be forced to make.

2. Insurrectionism Is a Growing Threat Often Overlapping With White Supremacy

In growing numbers, insurrectionist ideologies are being advanced by extremist groups across the country. The Center for Strategic and International Studies has noted an increase in domestic terror incidents, finding that 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 1994.⁴¹ The Southern Poverty Law Center has also noted a resurgence of the anti-government movement since 2008 and identified 702 anti-government groups and 523 hate groups actively operating in the United States in 2022.⁴² Still, the threats posed by hate and anti-government violence in the United States cannot be entirely quantified in the number of operating groups at any given point in time. The brazenness and impact of their actions define the true dangers they pose, especially amid shifts in public willingness to engage in political violence.

Whether it is directly related or not, the rise of hate and anti-government group activity has coincided with an increasing willingness of Americans to engage in political violence. Preliminary results from a nationally representative study found in 2022 that roughly one in five American adults believe “in general” that political violence was at least somewhat justified.⁴³ A substantial minority of survey respondents believed “force or violence” was at least somewhat justified to achieve a wide array of political objectives, including 24.8% “to stop an election from being stolen,” 7.3% “to stop people who do not share my beliefs from voting,” 24.2% “to preserve an American way of life based on Western European traditions,” and 18.8% “to oppose the government when it does not share my beliefs.”⁴⁴ “Force or violence” was defined in the survey as “physical force strong enough that it could cause pain or injury to a person.”⁴⁵



Half (50.1%) of those surveyed agreed at least somewhat that “in the next few years, there will be civil war in the United States.”

Half (50.1%) of those surveyed agreed at least somewhat that “in the next few years, there will be civil war in the United States.”⁴⁶ About 2% of respondents in the same study who thought violence was at least somewhat justified to achieve a wide array of political objectives reported being “very or completely willing” to kill someone to “advance an important political objective.”⁴⁷ That figure equates to roughly 5 million Americans willing to settle a political dispute by killing the opposition.⁴⁸ Another study found that around 20% of Americans think it is appropriate to bring a firearm to political protests and that about half of gun owners, as compared to a quarter of non-gun owners, believe that “government is so powerful that people need arms to protect themselves from it.”⁴⁹

The volatile combination of firearms and an increasing willingness to engage in political violence create real threats to public health and safety. For example, mass shootings inspired by the white supremacist “Great Replacement Theory” at the Tree of Life Synagogue in Pittsburgh, Walmart in El Paso, and supermarket in Buffalo have been among the deadliest the country has ever seen.⁵⁰ In addition to religious and racial discrimination, anti-LGBT+ attacks, threats, and demonstrations spiked in 2022 to over three times the number of events in 2021.⁵¹

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 (DVE)] threats, with ... MVEs typically targeting law enforcement and government personnel and facilities.”⁵² 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.”⁵³ 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.⁵⁴ From the attack on former House Speaker Nancy Pelosi’s husband in his home to plots by neo-Nazis to disable the power grids of large cities across the country, these concerns have been substantiated over time.⁵⁵



Charlottesville, Virginia - August 12, 2017: White nationalists and counter-protesters clash during a rally that turned violent, resulting in the death of one and multiple injuries. (Kim Kelley-Wagner/Shutterstock)

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.⁵⁶ 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.⁵⁷ 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.”⁵⁸ Many of the anti-government groups identified by the Southern Poverty Law Center in 2022 were identified as “white nationalist,” peddling ideologies of white supremacy.⁵⁹

3. 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.⁶⁰ 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.”⁶¹ 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, noting “[a]t a minimum, civilians openly carrying firearms can chill the First Amendment speech rights of counter-protesters and their right to peaceably assemble ... When armed protesters 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.”⁶² In a similar tone, University of Miami School of Law professor Mary Anne Franks observed that “[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.”⁶³

Research has begun to quantify how the public carry of firearms disrupts public life and chills political participation. According to a 2022 study, there were at least 610 armed demonstrations across the country between January 2020 and November 2021, more than 100 of which occurred at legislative buildings and vote counting centers.⁶⁴ Analysis of these events revealed that the presence of firearms increased the likelihood of violence or destructive behavior by 6.5 times compared to demonstrations where firearms were not evident.⁶⁵ 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.’”⁶⁶ 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.”⁶⁷

Inflamed political divisions are coinciding with increasing firearms carrying to dangerous effect. New studies confirm what experts increasingly feared—the public carrying of firearms at political events increases violence and chills participation in the democratic process. These conclusions highlight a clear need for policymakers to respond to insurrectionist threats before further damage is inflicted on our communities and democracy.

IV Insurrectionism, Guns, and the Constitution

The policy and practice recommendations below 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 lay a foundation for our solution analyses by refuting the myth of the insurrectionary Second Amendment, providing a brief history of Second Amendment case law, and clarifying that carrying of firearms is not expressive speech protected by the First Amendment.



1. 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,⁶⁸ empowering states to create their own armed militias for protection,⁶⁹ maintaining an armed citizenry to repel foreign invasions and usurpers,⁷⁰ a distrust of standing armies,⁷¹ and a preference for the local control of the militia forces⁷² are all offered as potential motivations for the Amendment's ratification. The theory of the Second Amendment's purpose at issue here, touted by some scholars, policymakers,⁷³ and organizations like the National Rifle Association,⁷⁴ 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."⁷⁵ 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, the Insurrectionary Theory of the Second Amendment has little basis in actual Constitutional history, nor in the administration of a democratic government.

Example Invocations of an Insurrectionary Second Amendment

When asked in a congressional hearing if he agreed with the point of view that people needed firepower to protect themselves from the government, Wayne LaPierre of the NRA responded:

“Senator, I think without any doubt, if you look at why our Founding Fathers put it there, they had lived under the tyranny of King George and they wanted to make sure that these free people in this new country would never be subjugated again and have to live under tyranny[.]”⁷⁶

During the 2016 presidential election, then-candidate Donald Trump insinuated that armed violence is the only way to stop Hillary Clinton from nominating judges if elected president:

“... By the way, and if [Hillary Clinton] gets to pick her judges, nothing you can do, folks. Although the Second Amendment people, maybe there is ...”⁷⁷

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 Shay’s 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.⁷⁸ 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.”⁷⁹ After the rebellions, Article I, Section 8 of the Constitution 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.”⁸⁰ 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.⁸¹ 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.⁸² Madison also specified that militias would be controlled by officers appointed by the states to “form a barrier against the enterprises of ambition.”⁸³ Thus, the “well-regulated Militia” of the Second Amendment applies to militias organized and controlled by states, not private persons.⁸⁴

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 ... [Militia] forces” that were trained by the states.⁸⁵ In an 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.⁸⁶ In their majority opinion, justices were frank in stating “[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.”⁸⁷

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.”⁸⁸ The majority in *Heller* ultimately held that the core of the right is armed self-defense, without relying on anti-tyranny reasoning.⁸⁹ 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.”⁹⁰ 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 application in a democratic society. The most practical objection to the Insurrectionary Theory of the Second Amendment can be summarized 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).”⁹¹ 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.⁹² 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.



Fibonacci Blue from Minnesota, USA, CC BY 2.0 via Wikimedia Commons

2. 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.⁹³ Beyond the well-documented threats to public health and safety posed by the expansive public carry of firearms,⁹⁴ the atmosphere of fear created by the presence of deadly weapons is disruptive to the political process.⁹⁵ 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.

A. 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.⁹⁶ 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.⁹⁷ However, courts have been dubious of the idea that the display of firearms is “speech” for First Amendment purposes,⁹⁸ and have upheld limitations on speech around polling places, legislative hearings, and government buildings.⁹⁹ 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



Carson City, Nevada - July 4, 2020: Armed counter-protesters wave Trump and American flags across the street from a Black Lives Matter protest. (Trevor Bexon/Shutterstock)

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.¹⁰⁰ 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.”¹⁰¹ Some individuals claim that in publicly carrying a firearm, they are expressing support for the Second Amendment.¹⁰² 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,”¹⁰³ it could also be saying something more nefarious like “stop speaking” or “I will or I want to harm you.”¹⁰⁴ 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.¹⁰⁵ Even if courts did find that the public carry of guns was protected speech under the First Amendment, the law allows for “reasonable restrictions on the time, place, or manner of protected speech[.]”¹⁰⁶



For a more in-depth First Amendment discussion, see Appendix 1.

B. Second Amendment Law: From the Founding to Bruen

For hundreds of years, the Second Amendment was primarily recognized to protect the rights of states to organize and maintain militia forces.¹⁰⁷ The Supreme Court dramatically changed the scope of Second Amendment law in the landmark 21st-century cases *District of Columbia v. Heller*, *McDonald v. City of Chicago*, and *New York State Rifle and Pistol Association, Inc. v. Bruen*.¹⁰⁸ 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.¹⁰⁹ 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.”¹¹⁰ 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.”¹¹¹ According to the Court, this list of “presumptively lawful regulatory measures ... [did] not purport to be exhaustive.”¹¹²

Two years later, in *McDonald*, the Court held that the Second Amendment applies to the states via the 14th Amendment¹¹³ 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.”¹¹⁴ The Court also repeated its assurances in *Heller* regarding the validity of “longstanding regulatory measures.”¹¹⁵ 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.¹¹⁶

However, all stability in Second Amendment jurisprudence was upended in the 2022 case *NYSRPA v. Bruen*. In *Bruen*, the Court expanded the Second Amendment’s right to armed self defense to outside the home.¹¹⁷ More consequential, however, was the Court’s rejection of the post-*Heller* framework developed by the lower courts. The Court notably removed the need for lower courts to consider whether a law is sufficiently related to furthering an important government interest, calling it “one step too many.”¹¹⁸ Instead, it required the government to prove that “modern firearms regulations are consistent with the Second Amendment’s text and historical understanding.”¹¹⁹

The Post-*Bruen* Two-Step Second Amendment Test



- 1 The court must determine whether the plain text of the Second Amendment covers the conduct regulated by the law.

If the answer at step 1 is “no,” then the analysis stops here and the law does not violate the Second Amendment. If the answer is “yes,” then the court moves on to step 2.

- 2 The government must show that the modern law is sufficiently analogous to historical firearms laws.

If the answer at step 2 is “no,” then the law violates the Second Amendment and must be changed. If the answer is “yes,” then the regulation does not violate the Second Amendment and may be upheld.

The implications of prohibiting the consideration of modern day interests in Second Amendment cases are staggering. Instead of governments devising contemporary solutions to gun violence issues faced by their constituencies today, they must prioritize comparisons to what the Founders chose to regulate hundreds of years ago. This arbitrary limitation has facilitated subjective analyses and unconscionable questions, such as whether the Founders’ silence on issues such as domestic violence limit policymakers to the racially and sexually discriminatory values of early America.¹²⁰

Still, even with the challenges posed by the *Bruen* test, there are important policy and practice solutions to meaningfully address risks of armed political violence that survive legal scrutiny. We anticipate these to include the solutions below.

V Anti-Insurrectionism Policy and Practice Solutions

Below is a non-exhaustive list of policy and practice 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 solutions possess merit in their own right, the potential for positive outcomes is likely to increase when they work in concert.

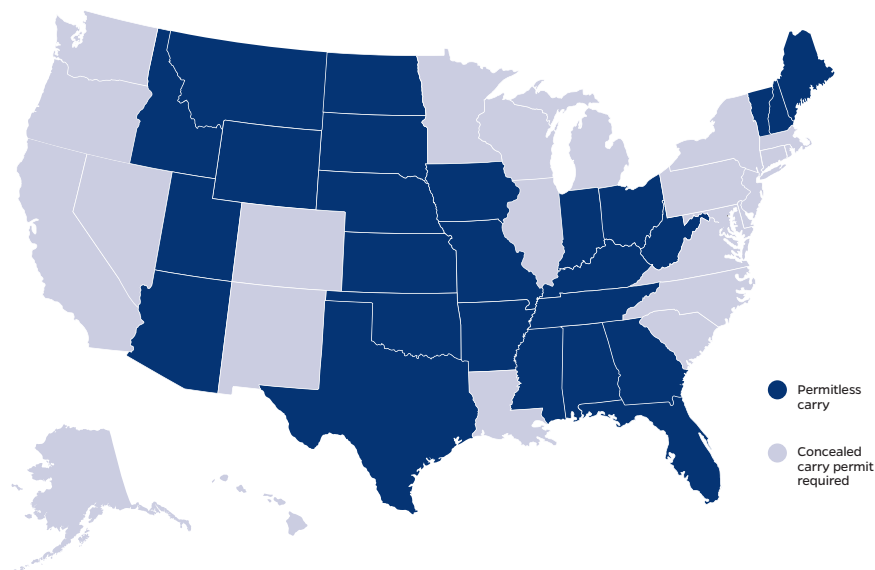
1 Regulate the Public Carry of Firearms



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 is 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 except for 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.

The number of permitless concealed carry states has dramatically increased in recent decades, with over half of states currently allowing permitless concealed and open carry of firearms.¹²¹ The number of states allowing permitless concealed carry has grown since the 1980s from one to 27.¹²² Such drastic shifts in policy have consequences. A 2019 analysis found that enactment of certain weak concealed carry permitting laws was associated with an increase in violent crime.¹²³ Research also suggests that “right to carry” concealed handgun regimes, which includes laws that require the state to issue a permit or allow for the carrying of firearms without a permit, are related to statistically significant increases in violent firearm crime, reductions in police effectiveness, and increases of gun theft.¹²⁴





Carson City, Nevada - January 6, 2021: Armed protesters gathered outside the Nevada State Legislature in opposition to the certification of Joe Biden's Electoral College victory by Congress. (Trevor Bexon/Shutterstock)

In regard to open carry, only four states and D.C. generally limit the open carry of handguns,¹²⁵ and six states and D.C. do the same for long guns, subject to certain exceptions.¹²⁶ States that allow open carry are at least five times more likely to have firearms present in public demonstrations than states that do not.¹²⁷ Beyond the public health and safety implications of lax public 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.”¹²⁸

Before *Bruen*, almost every federal appellate court had decided legal challenges to open and concealed carry laws,¹²⁹ with the majority recognizing the broad discretion of state and local governments to regulate firearms in public spaces.¹³⁰ As the limits of regulating firearms in public continue to be litigated after *Bruen*, the Court made clear that at least some firearm permitting regulations are permissible. The majority explained in a footnote that “... nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States’ ‘shall-issue’ licensing regimes, under which a general desire for self-defense is sufficient to obtain a [permit].”¹³¹ Justice Kavanaugh also clarified in his concurrence that “the Court’s decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense” or “impact existing [shall-issue] licensing regimes.”¹³²

2 Strengthen Existing Laws, or Increase the Enforcement of Current Laws, to Prohibit Paramilitary Activity



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.

From the Unite the Right march at Charlottesville to the assaults on state capitol buildings after the 2020 presidential election, armed paramilitary groups across the country have increased their disruptive interventions in everyday affairs.¹³³ However, the Constitution and our nation’s laws reflect a long history of justified mistrust in armed groups that are not accountable to democratically elected governments.¹³⁴ 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.¹³⁵ 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,¹³⁶ typically by prohibiting specific military-like conduct, such as “parading” or “drilling” in public with firearms.¹³⁷ 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.¹³⁸ Similarly, 25 states prohibit paramilitary activity intended to prompt civil disorder,¹³⁹ 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 peace or military officers if not actually employed as such.¹⁴⁰ These laws align with the Supreme Court’s long-held precedent “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.’”¹⁴¹ In total, paramilitary laws prohibit individuals or groups of people creating their own militaristic presence to confuse and disrupt the functioning of society.



Madison, Wisconsin - April 24, 2020: Armed demonstrators protesting Wisconsin’s stay at home orders during the initial spread of COVID-19. (Aaron of L.A. Photography/ Shutterstock)

Despite the existence of these aforementioned laws, many militia groups operate with impunity across the country. Georgia, Oregon, Texas, Washington, and other states have experienced a rise in open militia activity at protests related to racial justice, the 2020 elections, and COVID lockdowns, yet this militia activity drew less attention from law enforcement than Black Lives Matter protesters during the same time period.¹⁴² Ties between some members of law enforcement and extremist militia groups have raised alarms among advocacy communities.¹⁴³ Some experts have criticized existing paramilitary laws for being unclear and difficult to enforce, inspiring state legislators in Vermont, New Mexico, and Oregon to introduce new legislation clarifying these laws in 2023.¹⁴⁴ 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.

3 Prohibit the Civilian Possession of Firearms in Locations Essential to Political Participation, Such as Polling Places, Legislative Buildings, and Protests to Protect the Core Functions of Government



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, 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.

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 display of firearms alone rises to the level of intentional intimidation.¹⁴⁵ The presence of firearms at polling places, regardless of whether they are meant to intimidate, may discourage people from participating in democracy.¹⁴⁶ Though many states and the federal government¹⁴⁷ 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.”¹⁴⁸ An explicit 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.



Lansing, Michigan - January 17, 2021: Armed protesters denying the results of the 2020 election on the lawn of the Michigan Capitol building. (Lester Graham/Shutterstock)

Several states have already implemented place-based firearms limitations in political spaces, though more work is needed. At the time of writing this report, 16 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., Delaware, Florida, Georgia, Louisiana, Maryland, New Jersey, New York, Texas, and Virginia prohibit guns broadly,¹⁴⁹ while Mississippi, Missouri, Nebraska, and South Carolina prohibit concealed carry only.¹⁵⁰ Colorado, where a significant majority of the public votes by mail, is the only state to prohibit only open carry around polling locations and voting drop boxes.¹⁵¹ Nearly all states prohibit firearms in schools and government buildings to some degree.¹⁵²

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.¹⁵³ *Bruen* reaffirmed the constitutional validity of sensitive place prohibitions on firearm possession, explicitly listing “legislative assemblies, polling places, and courthouses” as non-exhaustive examples of places where firearms could be constitutionally restricted.¹⁵⁴ The exact boundaries of what can and cannot be considered a sensitive place beyond the examples listed in *Heller* and *Bruen* are unclear. Location restrictions are currently being litigated in lower courts.¹⁵⁵

4 Enact and Implement Extreme Risk Protection Order Laws to Temporarily Disarm People Who Pose a 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 already exists in almost half the states and the District of Columbia to address individuals posing demonstrable risk of violence with firearms before it occurs.¹⁵⁶ 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.¹⁵⁷ Extreme risk laws balance public health and safety interests with robust due process protections to save lives while abiding by constitutional rights.¹⁵⁸ State governments should pass and implement ERPO laws.

ERPOs are a promising tool to prevent individuals at high risk of committing armed violence from acting on it. ERPOs have a wide field of application to prevent homicides¹⁵⁹ and suicides,¹⁶⁰ 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 behavior and concerning behavior that could, at least temporarily, have prevented them from possessing firearms.¹⁶¹ Self-styled militia groups with anti-government sentiment, such as the Oath Keepers,¹⁶² the Boogaloo movement,¹⁶³ and others,¹⁶⁴ also have histories of violent and intimidating behavior, both as organizations and among their individual members. ERPOs have already been issued by courts to temporarily remove firearms from members of some armed groups based on threats and conduct.¹⁶⁵ Few courts have considered Second Amendment challenges to ERPO laws, and the majority that have been presented with such cases have upheld them.¹⁶⁶

Washington state used its ERPO law to temporarily disarm a man who made repeated, targeted threats against Governor Inslee’s life online. He stated that “Governor Inslee and his staff are criminals. I will kill them all now ... I am cleaning my guns and sharpening my knives,” and called for a “civil war.”

– ERPO petition August 2022

Joe Mabel/Wikimedia Commons



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

- [Extreme Risk Protection Orders: New Recommendations for Policy and Implementation](#)
- [Bloomberg American Health Initiative Implement ERPO website](#)

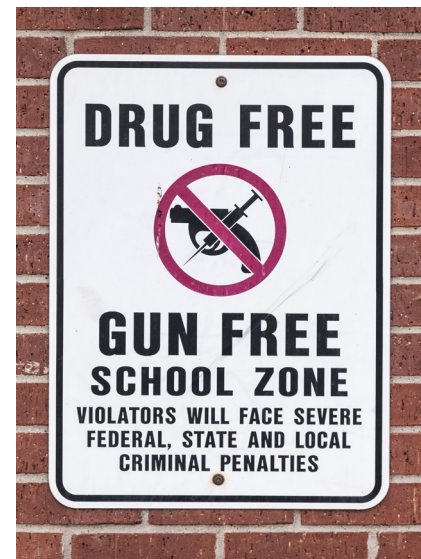
5 Give Local Governments the Ability to Create Policies to Address Risks of Insurrectionism in Their Jurisdictions



State policymakers should repeal or create exceptions to state 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 be able to 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.

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 policies more robust than relevant state law.¹⁶⁷ Preemption laws have been used by state legislatures to limit local decision-making on issues ranging from expanding paid sick leave to anti-discrimination laws,¹⁶⁸ and have ballooned in use over the past three decades to implicate a “wide array of policy areas.”¹⁶⁹ To date, 45 states limit local control over firearms regulations¹⁷⁰, a stark increase from only seven states in 1979,¹⁷¹ with at least 11 states having “absolute preemption” with no exceptions.¹⁷² Some states have adopted what a few scholars have coined as “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.”¹⁷³ 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.”¹⁷⁴



Drug Free and Gun Free School Zone sign in Dallas, Texas. (Philip Lange/Shutterstock)

Permitting 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.¹⁷⁵ Tragedies do not need to occur before meaningful change can be implemented, especially when they are foreseeable and preventable. Repealing or reducing the scope of firearm preemption laws allow local governments to serve the people they represent by addressing a critical public health need.

6 Break the Insurrectionist Permission Structure by Openly Denouncing Violence



Political leaders and other public figures should actively denounce violence. Just like public figures can encourage people to support violence by endorsing it, research suggests they also have the potential to decrease the violent attitudes of their supporters by denouncing violence. Leaders must recognize the power of their voice and use it for the public good.

It is well understood in sociological research that violent rhetoric can translate into actual violence. An international study of hate speech in politics has found that speech by political figures that disparages minority groups increases the likelihood of domestic terrorism in that country.¹⁷⁶ The United States is no outlier in this trend. For example, researchers identified then-President Trump's posts on Twitter about Islam-related topics predicted increases in xenophobic tweets by his followers, news programming attention paid to Muslims, and hate crimes on the days following the publication of his posts.¹⁷⁷ Another study on Trump's 2016 presidential campaign found that "prejudiced elite speech" emboldens prejudiced listeners to both express and act on their prejudices, especially when the prejudiced speech is "tacitly condoned by other elites."¹⁷⁸

Encouragingly, evidence also suggests that leaders have the same power to quell violent attitudes as they do to incite them. Research on partisanship and political violence from Lilliana Mason and Nathan Kalmoe has found that explicit messages from political leaders denouncing violence significantly reduce Americans' support for violence.¹⁷⁹ These findings were more pronounced for people who identified strongly with the political party that the message originated from.¹⁸⁰ In a similar vein, research has also found that viewing opponents as less violent lessens partisan support for violence by reducing their fears for their safety.¹⁸¹ Though gun policy is an essential element for reducing the risk of political violence and intimidation, political leaders speaking out against violence can have its own disarming effect.

Some political leaders are leading by example when they denounce violence:

"[W]e must – with one overwhelming, unified voice – speak as a country and say there is no place – no place – for voter intimidation or political violence in America, whether it's directed at Democrats or Republicans. No place, period. No place ever."

- President Joe Biden¹⁸²

"The leaders must tone it down, leaders from the top and leaders of all stripes. Parents, bosses, reporters, columnists, professors, union chiefs, everyone. The consequence of the crescendo of anger leads to a very bad place. No sane person can want that."

- Senator Mitt Romney¹⁸³



For a case study of Virginia's response to potential armed political violence, see Appendix 2.

VI 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, often combined with racial animus, is a clear sign that legislatures must take decisive action to protect the safety and civil liberties 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**
- **Prohibit the civilian possession of firearms in locations essential to political participation, such as polling places, legislative buildings, and protests, to protect the core functions of government**
- **Enact and implement Extreme Risk Protection Order laws to temporarily disarm people who pose a 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**
- **Break the insurrectionist permission structure by openly denouncing violence**

VII Conclusion

The rising prevalence of armed insurrectionism jeopardizes the integrity of our democracy, but remedies are within reach. Armed political 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.

APPENDIX 1

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.”¹⁸⁴ 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.”¹⁸⁵ Conduct that is “sufficiently imbued with elements of communication [may] fall within the scope of the First and Fourteenth Amendments”¹⁸⁶ if certain criteria are met.¹⁸⁷ 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.”¹⁸⁸ 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.”¹⁸⁹

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 legislative buildings, polling places, and permitted events.¹⁹⁰ 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 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.”¹⁹¹ 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.”¹⁹² 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 if the individual was simply carrying for other purposes.¹⁹³ In doing so, the court found that the gun carrier’s conduct was not protected by the First Amendment.¹⁹⁴ 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.”¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷ 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.”¹⁹⁸

Regulating firearms at public protests would serve significant governmental interests, including: (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.”¹⁹⁹ Such restrictions do not discriminate based on speech content and are narrowly tailored in scope. 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*.²⁰⁰ As Seton Hall Law School professor Jessica Miles and numerous other commentators have noted, *Watts* failed to provide a clear definition of a “true threat.”²⁰¹ The Supreme Court did not meaningfully expand upon their definition of true threats until the 2023 case of *Counterman v. Colorado*.²⁰² The majority in *Counterman* ruled that “[t]he State must show that the defendant consciously disregarded a substantial risk that [their] communications would be viewed as threatening violence” to consider their speech a true threat without First Amendment protections.²⁰³ It is important to note that though the Supreme Court in *Counterman* determined that the First Amendment requires proof that a defendant had some subjective understanding of the threatening nature of their communication, it does not require proof that the defendant intended to carry out the threat.²⁰⁴ 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.

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.”²⁰⁵

APPENDIX 2

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. First, the legislature passed an ERPO law, called Substantial Risk Orders, in 2020.²⁰⁶ 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.²⁰⁷ A number of city governments in Virginia, including those in Alexandria, Newport News, and Richmond, have adopted some or all of these firearm preemption exceptions.²⁰⁸ Later 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.²⁰⁹

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.²¹⁰ In 2021, then-Virginia Attorney General Mark Herring also issued an official opinion instructing county election boards how the new firearm prohibition at polling sites operates in practice.²¹¹ 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."²¹² 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.

Endnotes

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137 *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.”).

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

139 Georgetown Law, *supra* n. 135 at 10.

140 *Id.* at 11.

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

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148 Blocher et al., *supra* n. 145 at 1182.

149 See Ariz. Rev. Stat. Ann. § 13-3102 (A)(11); Cal. Elec. Code § 18544(a); D.C. Code Ann. § 7-2509.07(a)(5); Del. Code Ann. tit. 11, § 1457A; 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); Md. Code Ann., Crim. Law § 4-203; N.J.S.A. 2C:58-4.6; N.Y. Penal Law § 265.01-e(2); Tex. Penal Code Ann. § 46.03(a)(2); Va. Code Ann. § 24.2-604(A)(iv).

150 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).

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153 *Heller*, 554 U.S. at 626 (emphasis added).

154 *Bruen*, 142 S.Ct. at 2133.

155 See *Frey v. Nigrelli*, No. 21 CV 05334 (NSR), 2023 WL 2473375 (S.D.N.Y. Mar. 13, 2023); *Miller v. Smith*, No. 22-1482, 2023 WL 334788 (7th Cir. Jan. 20, 2023); *United States v. Tallion*, No. CR 8:22-PO-01758-AAQ, 2022 WL 17619254 (D. Md. Dec. 13, 2022); *Antonyuk v. Hochul*, No. 122CV0986GTSFCH, 2022 WL 5239895 (N.D.N.Y. Oct. 6, 2022).

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158 See Johns Hopkins Center for Gun Violence Solutions (2023). *ERPOs and Due Process*. Johns Hopkins Bloomberg School of Public Health. <https://publichealth.jhu.edu/sites/default/files/2023-04/erpo-due-process-march-2023-final.pdf>.

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

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187 *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

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

189 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).

190 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.”

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

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