

# Clash of the First and Second Amendments: Proposed Regulation of Armed Protests

by KATLYN E. DEBOER\*

## Introduction

A man with a bandana over his face and a long AR-15 rifle in hand gathered with approximately a dozen other people outside of the Islamic Center of Irving, Texas, to protest the “Islamization of America” on November 21, 2015.<sup>1</sup> Next to him, another man dressed in black held his tactical shotgun close and mocked Arabic music as afternoon prayers finished in the Islamic Center.<sup>2</sup> The weapons, he stated, were “mostly for self-protection,” but the protesters “do want to show force.”<sup>3</sup> The police were present, but they were powerless to stop the unsettling display of firearms.<sup>4</sup> What the protesters were doing was completely legal under Texas law.<sup>5</sup>

An even more stunning display shook the nation on August 12, 2017. The small college town of Charlottesville, Virginia, was flooded with terror and declared a state of emergency when a “Unite The Right” rally facilitated the clash between hundreds of white supremacists protesting the removal of

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\* Law clerk to the Honorable John E. Jones III of the Middle District of Pennsylvania; J.D., 2016, Chicago-Kent College of Law, Illinois Institute of Technology; B.A. in Journalism & Mass Communication and B.A. in Ethics & Public Policy, The University of Iowa, 2013. I am grateful to Professor Steven J. Heyman for his invaluable guidance, input, and encouragement in the completion of this Article. I would also like to thank the editors and staff of *Hastings Constitutional Law Quarterly* for their wise input and hard work in shepherding this Article to publication.

1. Avi Selk, *Armed Protesters Gather Outside of Islamic Center of Irving*, DALLAS MORNING NEWS (Nov. 21, 2015), <http://thescoopblog.dallasnews.com/2015/11/armed-protesters-set-up-outside-islamic-center-of-irving.html/>.

2. *Id.*

3. *Id.*

4. *Id.*

5. TEX. PENAL CODE § 46.02 (2017) (prohibiting open carry of firearms, but silent on long guns).

a Confederate statue and counter-protesters speaking out against racism.<sup>6</sup> “It’s an open-carry state, so our members will be armed,” Ku Klux Klan member James Moore warned the media prior to the incident.<sup>7</sup> Amidst the protesters and counter-protesters appeared a citizen militia: thirty-six men dressed in full camouflage, outfitted for combat in tactical vests, and toting semiautomatic rifles and pistols.<sup>8</sup> Firearms were on full display as racial slurs and pejorative insults were chanted and hurled from one side to the other.<sup>9</sup> Short of declaring a state of emergency and attempting to disperse the crowd, the police were powerless; each person was able to tout their weapon in the open carry state of Virginia and exercise their freedom to spew hateful speech while doing so.<sup>10</sup>

Are these the kind of actions that the First and Second Amendments were intended to protect? Are we prepared to recognize an unfettered freedom to make spectacles of force and intimidation with weapons while exercising the established right to free speech? This Article argues that it is constitutionally permissible to enact legislation prohibiting the display of firearms during protests and that states which allow open carry of firearms should pursue such regulations. While the First Amendment would undoubtedly cover the message and words of the protest itself, this Article contends that the act of displaying a firearm does not constitute speech within the realm of constitutional protection. Even if the display of a firearm was considered a form of symbolic speech, government regulation at the national, state or local level would easily satisfy the requirements of the First Amendment. This Article also argues that the Second Amendment would not preclude regulation or prohibition of armed protests because it does not take away from the core right of self-defense, and even if it does, the minimal impact on the right to self-defense would be substantially outweighed by a governmental interest in public safety.

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6. Joe Ruiz & Doreen McCallister, *Events Surrounding White Nationalist Rally in Virginia Turn Fatal*, NPR (Aug. 12, 2017), <http://www.npr.org/sections/thetwo-way/2017/08/12/542982015/home-to-university-of-virginia-prepares-for-violence-at-white-nationalist-rally>.

7. Joe Heim, *KKK Marchers Say They Will Be Armed Saturday at Charlottesville Rally*, WASH. POST (July 7, 2017), [https://www.washingtonpost.com/local/kkk-marchers-say-they-will-be-armed-saturday-at-charlottesville-rally/2017/07/07/eba102b4-6270-11e7-8adc-fea80e32bf47\\_story.html](https://www.washingtonpost.com/local/kkk-marchers-say-they-will-be-armed-saturday-at-charlottesville-rally/2017/07/07/eba102b4-6270-11e7-8adc-fea80e32bf47_story.html).

8. Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), [https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline; Paul Duggan, \*Militiamen Came to Charlottesville as Neutral First Amendment Protectors, Commander Says\*, WASH. POST \(Aug. 13, 2017\), \[https://www.washingtonpost.com/local/trafficandcommuting/militiamen-came-to-charlottesville-as-neutral-first-amendment-protectors-commander-says/2017/08/13/d3928794-8055-11e7-ab27-1a21a8e006ab\\\_story.html\]\(https://www.washingtonpost.com/local/trafficandcommuting/militiamen-came-to-charlottesville-as-neutral-first-amendment-protectors-commander-says/2017/08/13/d3928794-8055-11e7-ab27-1a21a8e006ab\_story.html\).](https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline; Paul Duggan, <i>Militiamen Came to Charlottesville as Neutral First Amendment Protectors, Commander Says</i>, WASH. POST (Aug. 13, 2017), https://www.washingtonpost.com/local/trafficandcommuting/militiamen-came-to-charlottesville-as-neutral-first-amendment-protectors-commander-says/2017/08/13/d3928794-8055-11e7-ab27-1a21a8e006ab_story.html)

9. Heim, *supra* note 8.

10. Heim, *supra* note 8.

Part I briefly discusses the history and current state of armed protests. Part II offers a proposed armed protest regulation, which serves as the basis of the constitutional analysis that follows. Part III analyzes the regulation of armed protests under the First Amendment. Part III-A argues that the display of a firearm during a protest should not be regarded as symbolic speech. Part III-B argues that, even if it were to be considered symbolic speech, the government could easily enact a nonneutral regulation under *Virginia v. Black* aimed at preventing armed protests where the protesters intend to communicate a message of fear and intimidation. Part III-C demonstrates that a neutral regulation of armed protests, without reference to any specific communicative value, would pass constitutional muster under the *O'Brien* test. Part III-D shows that a regulation of armed protests could also be understood as a constitutionally permissible regulation of the time, place, and manner of symbolic conduct. Part III-E then takes a step back from the doctrinal applications to consider whether the regulation of armed protests is consistent with the different general theories of the First Amendment.

Part IV discusses the regulation of armed protests through the lens of the Second Amendment. Part IV-A offers a brief overview of current Second Amendment jurisprudence to provide a two-step framework to analyze the regulation of armed protests. Part IV-B delves into the first step and argues that a right to open carry during protests does not fall within the traditional scope of the Second Amendment. Part IV-C moves on to the second step of the analysis and argues that, even if armed protests fall within the scope of the Second Amendment, regulation is reasonable because it does not cut off an individual's right to self-defense. Finally, Part V offers a brief conclusion and a call to action for state legislatures to enact armed protest regulation.

## I. Armed Protests: Then and Now

American history is undoubtedly founded on the use of citizen militias to rebel against the British and a long history of public carriage of firearms for self-defense followed.<sup>11</sup> In the 1800s, slave owners carried weapons publicly purportedly to protect themselves from slaves and to use violence as a means to oppress them.<sup>12</sup> As the years progressed, however, the need for citizen militias all but vanished and slave owners were disenfranchised. The modern practice of coming together as an armed group in order to show

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11. ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 113 (W.W. Norton, 2011).

12. Saul Cornell & Eric M. Ruben, *The Slave-State Origins of Modern Gun Rights*, ATLANTIC (Sept. 30, 2015), <http://www.theatlantic.com/politics/archive/2015/09/the-origins-of-public-carry-jurisprudence-in-the-slave-south/407809/>.

force or to bring an issue into the public eye is a far cry from these historic practices of open carry. The ideology behind the modern use of open carry as a means to send a message can be largely traced to the Black Panthers of the 1960s.<sup>13</sup>

The Black Panthers Party for Self-Defense was formed in 1966 in response to the black community's growing frustration with the failed promises of the civil rights movement.<sup>14</sup> Harnessing the teachings of Malcolm X, the Black Panthers were civil rights activists dedicated to showing force through the display of guns.<sup>15</sup> Every member was expected to know how to use a firearm and the official uniform of the party included the display of such a firearm.<sup>16</sup> "While they weren't the first civil rights activists to have guns, the Panthers took it to the extreme. They carried their guns in public, openly displaying them for everyone—especially the police—to see."<sup>17</sup> The Panthers used guns as a way to have their voices heard; the police were forced to listen and take them seriously when they had weapons in hand.<sup>18</sup> While the Panthers were prepared to retaliate in self-defense if needed, the guns were mainly for show.<sup>19</sup> "[T]he guns were primarily to garner the group media attention. The Panthers didn't plan to take hostages or to start a shootout. This was a political protest."<sup>20</sup>

Resolute advocates of the right to keep and bear arms can trace their roots to this Black Panther movement.<sup>21</sup> Their ideology sparked the modern gun rights movement in America.<sup>22</sup> While modern armed protesters do not share the same original goal of the Black Panthers—to garner attention for an oppressed racial minority that was otherwise overlooked—modern armed protesters do seem to hold the same beliefs as the Black Panthers did with respect to their firearms; the Irving protesters stated that the guns were both meant to "show force" and for self-protection.<sup>23</sup> Armed protesters use their firearms as a way to garner media attention and to force their audience to hear their message, while expressing preparedness to defend their rights.

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13. WINKLER, *supra* note 11, at 231.

14. WINKLER, *supra* note 11, at 231.

15. WINKLER, *supra* note 11, at 234.

16. WINKLER, *supra* note 11, at 234.

17. WINKLER, *supra* note 11, at 235.

18. WINKLER, *supra* note 11, at 236.

19. WINKLER, *supra* note 11, at 236.

20. WINKLER, *supra* note 11, at 236.

21. WINKLER, *supra* note 11, at 231.

22. WINKLER, *supra* note 11, at 230.

23. Selk, *supra* note 1.

Armed protests are increasingly common in modern society. In February 2016, armed protesters demonstrated in Texas against the U.S. policy of accepting Syrian refugees.<sup>24</sup> In April 2016, two separate groups of armed protesters gathered in Dallas, Texas, to demonstrate anti-Islam ideology as well as to promote the Black Lives Matter movement.<sup>25</sup> The same month, in Georgia, armed protesters gathered at the Capitol to demonstrate anti-Islam beliefs.<sup>26</sup> In July 2016, during the Republican National Convention in Cleveland, Ohio, anti-Donald Trump protesters walked through Public Square carrying rifles while an armed citizen militia stood guard.<sup>27</sup> In October 2016, protesters flashed firearms outside of Hilary Clinton's campaign office in Virginia.<sup>28</sup> In December 2016, the Black Panthers marched through Sherman Park in Milwaukee, Wisconsin, toting rifles to protest the "genocide" of African Americans by law enforcement.<sup>29</sup> In February 2017, a group of Donald Trump supporters gathered in downtown Atlanta armed with semiautomatic weapons.<sup>30</sup> In April 2017, white nationalists descended upon Pikeville, Kentucky, carrying a banner that read "Diversity = White Genocide" with pistols on their hips and a fellow protester armed with a shotgun at their side.<sup>31</sup>

While armed protests are hardly a new phenomenon, the August 12, 2017, "Unite The Right" rally in Charlottesville received considerable media attention and brought the spotlight to the growing problem of armed protests;

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24. Sarah Mervosh, *Gun-wielding Protesters Want Irving Mosque to 'Say No to Syrian Refugees'*, DALLAS NEWS (Feb. 2016), <https://www.dallasnews.com/news/news/2016/02/20/gun-wielding-protesters-want-irving-mosque-to-say-no-to-syrian-refugees>.

25. Sarah Mervosh, *Armed Clash Over Black Mosque Triggers Anger in South Dallas*, DALLAS NEWS (Apr. 2 2016), <https://www.dallasnews.com/news/news/2016/04/02/tense-anti-mosque-protest-draws-armed-demonstrators-in-south-dallas>.

26. Lisa Hagen, *Two Men Hold Armed Protest Against Muslims at Georgia Capitol*, WABE (Apr. 19, 2016), <http://news.wabe.org/post/two-men-hold-armed-protest-against-muslims-ga-capitol>.

27. Tracy Connor et al., *RNC in Cleveland: Scuffle Escalates Tensions but Calm Maintained*, NBC NEWS (July 19, 2016), <https://www.nbcnews.com/storyline/2016-conventions/rnc-cleveland-protesters-get-face-arizona-sheriff-joe-arpaio-n612421>.

28. Emily Tate, *Armed Trump Supporters Protest in Front of Democrat's Campaign Office*, HUFF. POST (Oct. 14, 2016), [http://www.huffingtonpost.com/entry/armed-donald-trump-supporters\\_us\\_580120b7e4b0e8c198a7f139](http://www.huffingtonpost.com/entry/armed-donald-trump-supporters_us_580120b7e4b0e8c198a7f139).

29. Sheila Swift, *Black Panthers Hold 'Human Rights Tribunal' in Sherman Park*, WISN (Dec. 19, 2016), <http://www.wisn.com/article/black-panthers-hold-human-rights-tribunal-in-sherman-park/8518242>.

30. *Trump Supporters Rally Downtown with Firearms*, WSB-TV ATLANTA (Feb. 19, 2017), <http://www.wsbtv.com/news/local/atlanta/pro-trump-supporters-stand-in-downtown-with-semi-automatic-firearms/495372347>.

31. Bill Estep, *Hardly Peaceful, but No Violence as White Nationalists, Protesters, Yell in Pikeville*, LEXINGTON HERALD LEADER (Apr. 29, 2017), <http://www.kentucky.com/news/state/article147594424.html>.

Charlottesville illustrated just how helpless courts and police are in preventing armed protests in open carry states.<sup>32</sup> Jason Kessler, on behalf of the “Unite The Right” rally, received a permit from the City of Charlottesville on June 13, 2017, to conduct a demonstration on August 12, 2017, in Emancipation Park to protest the renaming of the park and the removal of a statue of Robert E. Lee.<sup>33</sup> On August 7, 2017, the City notified Kessler that it was revoking and modifying the permit to require the rally to take place in McIntire Park, more than a mile away.<sup>34</sup> At the same time, the City took no action to revoke or otherwise modify the permits granted to counterprotesters.<sup>35</sup> Kessler filed an action in federal court under 42 U.S.C. § 1983, asserting that the City’s decision to revoke and modify his permit violated his First Amendment right to freedom of speech.<sup>36</sup> Judge Glen E. Conrad of the Western District of Virginia agreed with Kessler and preliminarily enjoined the City from revoking the permit, holding that “Kessler has shown that he will likely prove that the decision to revoke his permit was based on the content of his speech.”<sup>37</sup>

The City had warned the court that rally participants intended to carry firearms and cautioned that the “risks associated with the presence of firearms would be exacerbated by holding a Rally with a large number of participants in the relatively confined area of Emancipation Park.”<sup>38</sup> Finding that Kessler had a likelihood of success in demonstrating that the City’s decision was based on the content of the “Unite The Right” speech, however, the court was confined by First Amendment doctrine to grant a preliminary injunction. As an open carry state, the court did not have any power to prohibit protesters and counterprotesters from going to Emancipation Park

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32. Throughout this Article, “open carry” refers to the practice of carrying firearms in plain view in public. An “open carry state” refers to a state that has not enacted any restrictions on its residents’ ability to carry a firearm openly in public. *Open Carry*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/open-carry/> (Nov. 26, 2017).

33. *Kessler v. City of Charlottesville*, No. 3:17CV00056, 2017 WL 3474071, at \*1 (W.D. Va., Aug. 11, 2017).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at \*2.

38. Defendants’ Brief in Opposition to Plaintiff’s Motion for a Preliminary Injunction or Temporary Restraining Order at 3, *Kessler v. City of Charlottesville*, (W.D. Va., Aug. 11, 2017) (No. 3:17-cv-56, 2017 WL 3474071.).

with weapons on full display, and indeed did not even address the issue in its opinion.<sup>39</sup>

Law enforcement was similarly constrained by Virginia's allowance of open carry. Following the turmoil at the rally, complaints abound that police officers looked on idly and "turned the streets of the city over to groups of militiamen armed with assault rifles."<sup>40</sup> In response, Virginia Governor Terry McAuliffe defended the actions of law enforcement, noting that "80% of the people here had semiautomatic weapons" and the militia members "had better equipment than our State Police had."<sup>41</sup> In an open carry state like Virginia, law enforcement is left with few options to diffuse heated protests.<sup>42</sup> The *New York Times* reported on the precarious situation that law enforcement finds itself amidst armed protests:

John Eterno, a former training instructor with the New York Police Department who now teaches at Molloy College, said the presence of weapons combined with the unexpectedly large crowds in Charlottesville might have thrown off that city's planning. When people have the right to carry firearms, the police must balance caution with respect, he said. Officers can do little more than check the person's demeanor for signs of aggression and monitor whether the firearm is properly holstered.<sup>43</sup>

To be sure, nobody was shot or otherwise injured by a firearm in Charlottesville.<sup>44</sup> A man was arrested following video footage of him discharging his firearm and firing a shot toward the ground,<sup>45</sup> but there were no reports of any attempted shootings. There were, however, dozens of injuries from violent encounters between the protesters and

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39. *Kessler v. City of Charlottesville, Virginia*, No. 3:17-CV-00056, 2017 WL 3474071, \*1 (W.D. Va., Aug. 11, 2017).

40. A.C. Thompson, *Police Stood by as Mayhem Mounted in Charlottesville*, PROPUBLICA: DOCUMENTING HATE (Aug. 12, 2017), <https://www.propublica.org/article/police-stood-by-as-mayhem-mounted-in-charlottesville>.

41. Harrison Jacobs, *VA Governor Defends Charlottesville Response: Militia Members Had 'Better' Guns than Police*, BUSINESS INSIDER (Aug. 13, 2017), <http://www.businessinsider.com/virginia-gov-mcauliffe-defends-charlottesville-police-better-semiautomatic-guns-white-nationalists-2017-8>.

42. Timothy Williams et al., *Police Brace for More White Nationalist Rallies, but Have Few Options*, N.Y. TIMES (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/us/white-nationalist-rallies-police.html>.

43. *Id.*

44. Jacobs, *supra* note 41.

45. Allison Wrabel, *Man Arrested in Firing of Gun at Unite the Right Rally*, DAILY PROGRESS (Aug. 26, 2017), [http://www.dailyprogress.com/news/crime/man-arrested-in-firing-of-gun-at-unite-the-right/article\\_0e58fb14-8aa2-11e7-afa0-0f303b68602b.html](http://www.dailyprogress.com/news/crime/man-arrested-in-firing-of-gun-at-unite-the-right/article_0e58fb14-8aa2-11e7-afa0-0f303b68602b.html).

counterprotesters.<sup>46</sup> The chaos culminated with the death of thirty-two-year-old Heather Heyer when a terrorist sped his vehicle into the crowd, bulldozing through a throng of counterprotesters, killing Heyer.<sup>47</sup>

Following the mayhem in Charlottesville, many have either suggested or specifically called for the very thing that this Article proposes—regulation of armed protests.<sup>48</sup> Even the American Civil Liberties Union has taken the unprecedented step of declaring that it will no longer fight for the First Amendment rights of those who intend to open carry during a protest demonstration.<sup>49</sup> This Article provides a proposed regulation of armed protest and argues that such regulation is entirely consistent with First and Second Amendment doctrines. This Article urges states that permit open carry of firearms to enact regulation of armed protests in order to stop the intimidation and fear that armed protests engender, as well as the threat of violence and chilling of opposing viewpoints that inevitably ensue from it. The immense harm that results from open carry protests is staggering in light of the relatively small burden that would result from requiring said protesters to simply conceal carry their weapons, or leave their assault rifles at home. The traditional use of citizen militias to demand freedom has been replaced by irresponsible and intimidating displays of firearms as a way of demanding attention, and it is time for state legislatures to take remedial action.

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46. Phil McCausland et al., *Charlottesville Rally Turns Deadly: One Killed After Car Strikes Crowd*, NBC NEWS (Aug. 13, 2017), <https://www.nbcnews.com/news/us-news/charlottesville-rally-turns-deadly-one-killed-after-car-strikes-crowd-n792116>.

47. Mark Berman, *Was the Charlottesville Car Attack Domestic Terrorism, a Hate Crime or Both*, WASH. POST (Aug. 14, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/08/14/was-the-charlottesville-car-attack-domestic-terrorism-a-hate-crime-or-both>.

48. See, e.g., Connor McLean, *You Don't Need a Gun to Peacefully Protest*, SLATE (Aug. 24, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/08/prohibit\\_open\\_carry\\_in\\_registered\\_protest\\_zones.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/08/prohibit_open_carry_in_registered_protest_zones.html); Dahlia Lithwick & Mark Joseph Stern, *The Guns Won*, SLATE (Aug. 14, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/08/the\\_first\\_and\\_second\\_amendments\\_clashed\\_in\\_charlottesville\\_the\\_guns\\_won.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/08/the_first_and_second_amendments_clashed_in_charlottesville_the_guns_won.html); John Feinblatt, *Ban the Open Carry of Firearms*, N.Y. TIMES (Aug. 17, 2017), <https://mobile.nytimes.com/2017/08/17/opinion/open-carry-charlottesville.html>; David Frum, *The Chilling Effects of Openly Displayed Firearms*, ATLANTIC (Aug. 16, 2017), <https://www.theatlantic.com/politics/archive/2017/08/open-carry-laws-mean-charlottesvillcould-have-been-graver/537087/>.

49. Joe Palazzolo, *ACLU Will No Longer Defend Hate Groups Protesting with Firearms*, WALL ST. J. (Aug. 17, 2017), <https://www.wsj.com/articles/aclu-changes-policy-on-defending-hate-groups-protesting-with-firearms-1503010167>.



## II. Proposed Regulation

PROHIBITION OF ARMED PROTESTS: IT IS UNLAWFUL TO PARADE, STAND, OR MOVE IN PROCESSION TO BRING INTO PUBLIC NOTICE A PARTY, ORGANIZATION, MOVEMENT, OR IDEOLOGY WHILE OPENLY DISPLAYING A FIREARM.

This definition of a protest is adapted from Title 40, Section 6135 of the United States Code, a statute that prohibits parades, assemblages, and displays of flags in the Supreme Court building and grounds.

## III. The First Amendment

The first crucial step in determining whether the First Amendment would foreclose regulation of armed protests is to determine whether the open carry of firearms constitutes “speech” at all.<sup>50</sup> It may be a foreign concept to some that displaying a firearm could even potentially bring about First Amendment issues, but the U.S. Supreme Court has made abundantly clear that some conduct is so expressive that it can be considered speech for purposes of the Constitution.<sup>51</sup> After all, the Supreme Court has held that contributing money to a political campaign is considered speech.<sup>52</sup> Indeed, circulating the internet in August 2017 was an opinion piece by Tyler Yzaguirre, cofounder and president of the Second Amendment Institute, titled “Why Gun Owners Should Use the First Amendment to Protect Open Carry.”<sup>53</sup> The opinion piece offers scant legal analysis and conclusively declares open carry as symbolic speech because “[p]eople want to bring attention to the fact that they have the right to bear arms and that they can legally and safely exercise that right.”<sup>54</sup> Part III-A delves deeper into this superficial conclusion and discusses whether it can be fairly concluded that open carry during a protest is expressive conduct and equivalent to speech for First Amendment purposes.

Determining the expressive nature of the conduct is only the first step in the First Amendment analysis. If displaying a weapon during protest is found to be symbolic speech, then the next focus is on the nature of the regulation itself. If the regulation were to ban firearms specifically displayed

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50. U.S. CONST. amend. I.

51. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *United States v. O’Brien*, 391 U.S. 367 (1968).

52. *Buckley v. Valeo*, 424 U.S. 1, 48 (1976); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

53. Tyler Yzaguirre, *Why Gun Owners Should Use the First Amendment to Protect Open Carry*, THE HILL (Aug. 8, 2017), <http://thehill.com/blogs/pundits-blog/civil-rights/345675-why-gun-owners-should-use-the-first-amendment-to-protect-open>.

54. *Id.*

to instill fear and intimidation in onlookers, *Virginia v. Black* would provide the appropriate test and guidance for legislators, as further explained in Part III-B.<sup>55</sup> Conversely, if the regulation were to ban firearms at protests generally, as my proposed regulation does, then the proper analytical framework is the test from *United States v. O'Brien*, discussed and applied in Part III-C.<sup>56</sup> Part III-D illustrates how a regulation of armed protests could also be permissible as a reasonable regulation of the time, place, and manner of symbolic speech. Finally, this Article takes a step back from the doctrinal precedents to analyze whether the result that case law points us toward is consistent with our understanding of the First Amendment generally. To that end, Part III-D discusses some of the main theories of the First Amendment and how those fit within the regulation of armed protests.

### A. Armed Protests Are Not a Form of Symbolic Speech

In literal terms, the First Amendment protects the “freedom of speech,”<sup>57</sup> but the Supreme Court has long interpreted that protection to encompass acts, gestures, and conduct that communicate symbolically.<sup>58</sup> In 1943, the Supreme Court stated that “[s]ymbolism is a primitive but effective way of communicating ideas.”<sup>59</sup> Some Justices have distinguished “pure speech,”<sup>60</sup> which receives the fullest First Amendment protection, and “speech plus,”<sup>61</sup> or symbolic speech, which may not receive the utmost protection when combined with certain actions.<sup>62</sup> In *United States v. O'Brien*, the Supreme Court cautioned against “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea,”<sup>63</sup> but has made clear that conduct may be “sufficiently imbued with elements of

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55. *Virginia v. Black*, 538 U.S. 343, 362 (2003).

56. *O'Brien*, 391 U.S. at 376.

57. U.S. CONST. amend. I.

58. *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

59. *Id.*

60. *See Cox v. Louisiana*, 379 U.S. 536, 555 (1965) (distinguishing between “patrolling, marching, and picketing on streets and highways” and “those who communicate ideas by pure speech.”); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (wearing arm bands was closely related to “pure speech”).

61. *See Thomas v. Collins*, 323 U.S. 516, 540 (1945) (“[T]he collection of funds or securing subscriptions,” the Court said “would be free speech plus conduct.”).

62. James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1, 2 (2008).

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

communication to fall within the scope of the First and Fourteenth Amendments.”<sup>64</sup>

To determine whether conduct can be classified as symbolic speech for First Amendment purposes, the Court has looked to whether “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.”<sup>65</sup> Further, the Court looks to the context of the conduct and the purpose of the object, if an object is involved in the conduct.<sup>66</sup> In consideration of these factors, the Court has recognized as symbolic speech the wearing of armbands to protest American military involvement in Vietnam,<sup>67</sup> a sit-in to protest segregation,<sup>68</sup> the burning of crosses,<sup>69</sup> and many other forms of conduct.

To begin our inquiry, we must think about what armed protesters would be intending to convey when displaying their firearms and what an audience would understand as the message. As one author noted, “[g]iven the political backdrop and rhetoric surrounding the gun control issue, in practice, openly bearing guns can have a very different meaning to those who are carrying the guns and any audience exposed to those guns.”<sup>70</sup> Let us continue for now by analyzing armed protests geared towards general issues, not those having to do with gun or weapon control. The protesters of the mosque in Irving stated that they wanted to “show force,”<sup>71</sup> but showing force can mean many different things and certainly those protesters do not speak for all armed protesters in the nation. This Article will explore several possible messages that an armed protester may intend to communicate through open carry.

Initially, the protesters may simply have the weapons for self-protection. It would be difficult to argue that this constitutes symbolic speech; using a weapon simply for its purpose of self-defense surely does not convey a particularized message. This would remove the analysis from the realm of the First Amendment and bring it under consideration of the Second Amendment, as discussed in Part IV. Second, and relatedly, the protesters could be showcasing their weapons to “show force” in a defensive

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64. *Spence v. Washington*, 418 U.S. 405, 409 (1974).

65. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974); *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

66. *Johnson*, 491 U.S. at 405.

67. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969).

68. *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966).

69. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

70. Daniel Horwitz, *Open Carry: Open-Conversation or Open-Threat*, 15 FIRST AMEND. L. REV. 96, 107 (2016).

71. Selk, *supra* note 1.

manner. Perhaps the potential message is simply, “I have my firearm ready” and the protesters intend to show the world that they are prepared to defend themselves. Again, this seems to be the general use of a weapon and not communicating anything other than the weapon’s inherent function to support self-defense.

Third, the protesters could be “showing force” in the sense that they are letting the audience know that they are present, serious, and are willing to use force offensively. The issue with that is whether “showing force” or seriousness is enough to constitute First Amendment expression. The Court in *Spence v. Washington* looked to whether there was “intent to convey a particularized message.”<sup>72</sup> A general intention to show force does not seem to fit the bill of a particularized message. In fact, it does not seem like there is an actual “message” of any kind. There is not the same political, religious, or race based ideology like those expressed in many of the leading symbolic speech cases.<sup>73</sup> Instead, it seems that the lethal nature of the weapon itself conveys the “show of force” or the intimidation that the armed protesters seek. The act of openly carrying the firearm does not add any particularized message; it is the firearm itself, and the understanding of the firearm as a dangerous weapon, that communicates the “force.”

The Supreme Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* made clear that a “narrow, succinctly articulable message is not a condition of constitutional protection.”<sup>74</sup> Nevertheless, an open carry message of “showing force” does not seem to fit within *Hurley*’s formulation of symbolic conduct.<sup>75</sup> In *Hurley*, the Court recognized that a parade, where people are marching to make “some sort of collective point, not just to each other but to bystanders along the way,” constitutes First Amendment expression.<sup>76</sup> The Court referenced the “inherent expressiveness of marching to make a point.”<sup>77</sup> In both of these articulations, the Court pointed to the fact that marchers in a parade are marching *in order to* demonstrate a message. The Court acknowledged the reality that “[i]f there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any

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72. *Spence*, 418 U.S. at 409 (emphasis added).

73. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 505 (1969); *Brown*, 383 U.S. at 141–42; *R.A.V.*, 505 U.S. at 388.

74. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995).

75. *Id.*

76. *Id.* at 568.

77. *Id.*

message beyond the fact of the march itself.”<sup>78</sup> The “speech,” therefore, comes from the conveyed intention to send a message coupled with the action of marching. It is clear to the audience when a group parades down a street that they are intending to send a message. Guns are different. While the armed protesters may intend to send a message in some way to their audience through the open carry of the weapon, that intention is not easily communicated to or perceived by the audience because, unlike marching in a parade, guns have a very practical and non-communicative use. There is no way to effectively divorce the use of the gun as an instrumentality of violence and self-defense from any intended use of it as a symbol.

Firearms already carry the inherent symbolic value of “showing force,” such that the display of them does not add any additional communicative message. “[A]ny time an individual openly displays a gun, intentional or not, the message is clear: that individual now has the power to kill.”<sup>79</sup> Precedent indicates that symbolic conduct does not come within First Amendment protection simply because an object has some symbolic value, as opposed to an intention of the speaker to use the symbol to communicate a particular message. Cases involving flags are useful to understand symbolic speech in this regard. The Court has found that attaching a peace sign to the flag,<sup>80</sup> refusing to salute the flag,<sup>81</sup> and displaying a red flag<sup>82</sup> may all come within First Amendment protection. The Court recognized that “[t]he very purpose of a national flag is to serve as a symbol of our country.”<sup>83</sup> However, even with the immense symbolism built into the flag itself, the Court made explicit that not “any action taken with respect to our flag is expressive.”<sup>84</sup> Instead, the context must be considered.<sup>85</sup> It is therefore only when a person is using the flag as an instrument of communication that it has potential to become symbolic speech for purposes of the First Amendment. Through manipulating the flag, refusing to salute to it, or hanging it outside of a home, the person is using the symbolism of the flag in order to convey a particular message. The focus is on the intent to communicate a message and the audience’s perception of that intent.<sup>86</sup>

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78. *Hurley*, 515 U.S. at 569.

79. Horwitz, *supra* note 70, at 157.

80. *Spence v. Washington*, 418 U.S. 405, 409–10 (1974).

81. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

82. *Stromberg v. California*, 283 U.S. 359, 368–69 (1931).

83. *Texas v. Johnson*, 491 U.S. 397, 405 (1989).

84. *Id.*

85. *Id.*

86. *Spence v. Washington*, 418 U.S. 405, 409 (1974).

Just like a flag is a symbol to represent the country, a gun has become a symbol of violence, intimidation, and force, simply through the nature of what it is. Unlike a flag or march, however, guns have a very practical and non-communicative purpose. Guns are used for self-defense or for committing violence, and do not necessarily communicate a message when they are used in that way. Carrying, holstering, or using a firearm is all within the general and contemplated use of a weapon. The weapon itself conveys the violence, intimidation, and force, not really the conduct of the person. The distinction that brings open carry into the realm of the First Amendment must come from when a person is using a gun as an instrumentality of communication rather than simply as a gun itself. Yet, the problem with using a weapon as an instrumentality of communication is that there is no way to dissociate the normal use of a weapon from any symbolic use. Considering the prevalence of gun violence and resulting deaths in America,<sup>87</sup> those witnessing protesters openly carrying their weapons are likely to see the gun as a means for violence rather than an instrumentality of communication. As *Spence* expressly stated, and *Hurley* implicitly ratified, the expressive nature of an action is dependent on the likelihood that the audience would understand the message communicated by the action.<sup>88</sup>

The protesters could also be conveying their belief that they are “freedom loving Americans” who are serious about defending and fighting for their rights. While this seems to encompass the general notions of force and seriousness discussed by the other possibilities, it does add a “message” of sorts by indicating they will defend what they believe in. This message, however, only comes across because of the surrounding circumstances of the protest. Using the weapon as a way to show that the protester is serious about the message and defending their rights exists only because they are already protesting another issue. The actual message, therefore, comes from the protest itself as opposed to the open carry of the weapon. The open carry of the weapon is only used to add emphasis to that message, and meets the same problems of having a noncommunicative effect on the audience as the previous potential messages discussed.

Perhaps the most convincing argument that open carry during a protest constitutes speech comes from the narrow circumstance of protests concerning gun regulations. Picture, for example, a group protesting legislation that narrows individual gun rights, or state legislation that bans

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87. The Law Center to Prevent Gun Violence states that 117,000 Americans are shot every year. *Statistics*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <http://lawcenter.giffords.org/facts/statistics/> (Sept. 24, 2017).

88. *Spence*, 418 U.S. at 410–11; *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 568 (1995).

open carry of weapons. Brandishing guns adds power to the message that they are communicating in a very specific way. They are enacting the alternate legal norm in order to change the norm itself. The protesters are saying “this is what we want” and showing it to their audience. Many open carry activists characterize this message as educating the public on gun control law and policy.<sup>89</sup> C. J. Grisham of Open Carry Texas led an armed protest to greet then-President Barack Obama in Austin, Texas, in March 2016.<sup>90</sup> Speaking about his brandished firearms, Grisham explained that “[t]he point is to engage with the public, explain to them that you know it’s not the guns people need to be afraid of, it’s the person, and to show the lighter side and the friendlier side of gun owners.”<sup>91</sup> In the context of an armed protest specifically regarding gun regulation, a court is more likely to find that both a particularized message is conveyed and that an audience would recognize that message.<sup>92</sup> This is a very narrow and rare situation to concede that the open carry during a protest would constitute speech.

When open carry activists try to couple their educational communication with protests on unrelated matters, however, it becomes much harder for the audience to recognize that message.<sup>93</sup> One law review article noted that “[e]ven when the open-carrier’s purpose is to educate the public on the legality of open-carry, courts often reject First Amendment claims based on the likelihood that those who viewed it would understand the message.”<sup>94</sup> As applied to the armed protests that are occurring in modern day America, such as those aimed at Islamic Centers to preach anti-Islam beliefs and those aimed at the overreach of government, the open carry of weapons would not constitute speech under the First Amendment.

However, even if a court disagrees and finds that the open carry of weapons during protests constitutes expression under the First Amendment, the government’s ability to regulate it under precedent such as *Virginia v. Black*, *United States v. O’Brien*, or *Clark v. Community for Creative Non-Violence* would not be affected. As discussed below, the government has a substantial interest in protecting its citizens from the fear and intimidation

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89. *The Elephant in the Room*, OPEN CARRY TEXAS, <https://opencarrytexas.wordpress.com/2013/09/15/the-elephant-in-the-room/> (Apr. 1, 2016) (“We’ve just proven the only thing we ‘knowingly’ and ‘intentionally’ do is educate.”).

90. Mike DeBonis, *Open-Carry Gun Protesters Greet President Obama in Texas*, WASH. POST (Mar. 11, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/03/11/open-carry-gun-protesters-will-greet-obama-in-texas/?utm\\_term=.4dff023a8ac8](https://www.washingtonpost.com/news/post-politics/wp/2016/03/11/open-carry-gun-protesters-will-greet-obama-in-texas/?utm_term=.4dff023a8ac8).

91. *Id.*

92. *Id.*

93. Horwitz, *supra* note 70 (citing *Burgess v. Wallingford*, No. 11-CV-1129, 2013 U.S. Dist. LEXIS 69755, at \*3–4 (D. Conn. May 15, 2013)).

94. Horwitz, *supra* note 70.

that armed protests create, and that interest will justify regulations of armed protests under the First Amendment despite any communicative value.

**B. *Virginia v. Black* Supports the Prohibition of Armed Protests Where the Intent is to Intimidate**

The strongest and most harmful message that armed protesters could intend would be a message of specific fear and intimidation in displaying their weapons. A significant reason why legislation in this area is so vital is because of the fear that these protests engender: Protesters may lawfully express their anger and contempt toward a group of people or an ideology, but it becomes a very real threat of violence when those messages are coupled with firearms on display. At a certain point there must be a balance between the freedom of expression and the right of a person to be free from the fear of violence. Recall that one of the specific purposes that the armed protesters brought weapons to their protest of the Islamic Center in Irving was to “show force.”<sup>95</sup>

That is where the doctrine of true threats comes in. “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,” and those threats are not afforded First Amendment protection.<sup>96</sup> The important part to remember about true threats is that “the speaker need not actually intend to carry out the threat.”<sup>97</sup> Instead, the doctrine “protect[s] individuals from the fear of violence” and “from the disruption that fear engenders,” along with the possibility of the violence actually taking place.<sup>98</sup> The Supreme Court made clear in *Virginia v. Black* that the government can regulate symbolic conduct that is done with the intent to express a message of fear and intimidation.<sup>99</sup>

The law at issue in *Virginia v. Black* criminalized the burning of a cross “with the intent of intimidating any person or group of persons.”<sup>100</sup> The Supreme Court recognized that the statute clearly criminalized a form of symbolic speech; Justice O’Connor devoted an entire section of the opinion to the historic implications of cross burnings by the Ku Klux Klan.<sup>101</sup> The plain language of the statute itself criminalized cross burning *because of* the message of intimidation that comes with it, not for any governmental interest

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95. Selk, *supra* note 1.

96. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

97. *Id.* at 359–60.

98. *R.A.V. v. City of St. Paul*, 505 U.S. 337, 388 (1992).

99. *Black*, 538 U.S. at 343.

100. *Id.* at 348.

101. *Id.* at 361, 352–58.



in preserving crosses or other nonspeech elements of the act.<sup>102</sup> The statute thus fell outside the bounds of *United States v. O'Brien*, discussed below, which allows some suppression of symbolic speech where the government has an interest in regulating the nonspeech elements.<sup>103</sup> Yet, the Supreme Court found that this section of the statute was constitutional and did not violate the First Amendment<sup>104</sup> because the statute only criminalized behavior that fell within the “true threats” doctrine.<sup>105</sup> Further, in contrast to the cross-burning statute at issue in *R.A.V. v. City of St. Paul*, this statute was viewpoint neutral.<sup>106</sup> It did not specify the reason why the person was intending to intimidate through cross burning, and thus did not favor one viewpoint over another in its enactment.<sup>107</sup>

*Virginia v. Black* provides a framework that legislators should consider when enacting armed protest regulations. By simply substituting “armed protests” with “cross burning” we have a regulation that is permissible under the First Amendment. The regulation would prevent protesters from displaying their firearms in a way that intentionally puts others in fear for their safety, while allowing for circumstances where the firearm is present for other reasons. It would be a more flexible statute than a blanket prohibition on firearms during protests and therefore protect any innocent behavior by open carry protesters. By criminalizing the *intent* to intimidate through the display of a firearm during a protest, the regulation cuts to the heart of the harm of armed protests in general by stopping people from using their weapons to intimidate and add force to their protest.

There are significant drawbacks to legislation enacted under *Virginia v. Black*, however. First, such legislation probably will not encompass the vast majority of armed protesters. Even the Irving protesters stated that they “don’t want people to think [they are] out to kill people or shoot people.”<sup>108</sup> Also, it is currently unclear in jurisprudence whether there needs to be a subjective intent to cause others to believe that a threat is credible under the “true threat” doctrine.<sup>109</sup> While a regulation that bans true threats in the form of armed protests would be useful, it may not actually encompass the

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102. *Black*, 538 U.S. at 348.

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

104. *Black*, 538 U.S. at 363 (another provision of the statute stated that cross burning was prima facie evidence of intent to intimidate, *id.* at 348, but the Court found that provision rendered the statute invalid).

105. *Id.* at 363.

106. *R.A.V. v. City of St. Paul*, 505 U.S. 337, 388 (1992).

107. *Black*, 538 U.S. at 363.

108. Selk, *supra* note 1.

109. *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015).

situations where onlookers would have a reasonable fear for safety, but the protesters did not intend for the onlookers to feel that way. For example, it may not encompass the Irving protest at the Islamic Center even if the Islamic Center attendees reasonably believed that the protesters were there to cause physical harm to them.<sup>110</sup> It seems that this would leave out a large majority of armed protests that harm the public. Second, it could be very hard to prove that an armed protester violated a statute enacted under *Virginia v. Black*. The statute in *Black* banned cross burnings—something inextricably tied to a history of violence against the black community and rallies by the Ku Klux Klan.<sup>111</sup> Because of that history, it would be easier to show that somebody had the subjective intent to place their audience in fear of harm when they burned a cross. Guns, however, lack that specific viewpoint symbolism. Carrying a gun can have a nonthreatening purpose, such as self-defense and self-protection, as well as a threatening purpose to intimidate others. That dual purpose would probably make convictions under a true threat-styled regulation particularly difficult to sustain because the government would have to prove, beyond a reasonable doubt, that a person had the subjective intent of placing others in fear.

A statute created under *Virginia v. Black* would leave a wide array of other armed protests still permissible. So long as the protesters were communicating a message other than a threat, or not intending to communicate at all, the conduct would fall outside of the bounds of the regulation. Thankfully, the Supreme Court has carved out a way for the government to regulate speech based on the conduct, rather than any message it may be communicating, in *United States v. O'Brien*.

### **C. *United States v. O'Brien* Allows for Prohibition of Armed Protests Because of the Nonspeech Component of Open Carry**

Even if the act of openly carrying a firearm during a protest constitutes symbolic speech under the First Amendment, the government can prohibit that speech because of its nonspeech component. The Supreme Court's decision in *United States v. O'Brien* gives legislators a blueprint for how to craft a constitutionally permissible regulation of displaying weapons during protests: First, ensure that there is a nonspeech element that the government would have a substantial interest in regulating; and second, write the prohibition so as to be neutral about the speech elements.<sup>112</sup>

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110. *Elonis*, 135 S. Ct. at 2016; see Selk, *supra* note 1.

111. *Black*, 538 U.S. at 361.

112. *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968).

The statute at issue in *O'Brien* criminalized the willful destruction of Selective Service registration cards.<sup>113</sup> David O'Brien and three others stood on the steps of the South Boston Courthouse and burned their draft cards in front of a crowd.<sup>114</sup> O'Brien made clear in his arguments to the jury that he burned his draft card "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider [his] position."<sup>115</sup> The Court rejected his "view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," and further stated that the case could be resolved in the government's favor "even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment."<sup>116</sup> In upholding the statute, the Court made clear that when "'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."<sup>117</sup>

The Court defined three elements that must be present to justify governmental regulation of conduct that intertwines speech and nonspeech elements: (1) the regulation must further an important or substantial governmental interest; (2) the governmental interest must be "unrelated to the suppression of free expression; and (3) "the incidental restriction on alleged First Amendment freedoms" must be "no greater than is essential to the furtherance of" the governmental interest.<sup>118</sup> Considering each element in turn, regulation of the use or display of firearms during protests would not run afoul of the First Amendment despite any communicative effect of open carry.

Beginning with the first factor, there are three distinct, but related, interests that the government can point to in order to justify the regulation of armed protests, whether it be a regulation at the national, state, or local level. First, the government clearly has a substantial interest in preventing violence and crime during protests. The Court in *O'Brien* recognized the vague language of a "substantial interest," and has characterized that type of interest as "substantial; subordinating; paramount; cogent; strong" and

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113. *O'Brien*, 391 U.S. at 369.

114. *Id.*

115. *Id.* at 370.

116. *Id.* at 376.

117. *Id.*

118. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

“important.”<sup>119</sup> This type of “substantial” government interest has been associated with intermediate scrutiny—the vernacular now widely used to describe the type of scrutiny applied in an *O’Brien* analysis—while “compelling” interests are reserved for strict scrutiny cases. The Supreme Court has recognized the very general governmental interest in preventing crime as “compelling.”<sup>120</sup> Certainly an even more specific exercise of that interest in the form of preventing crime at protests is not only substantial, but compelling as well, satisfying the first *O’Brien* element.

Second, and related, the government has an interest in preventing potential violence by precluding situations from occurring where there is a high probability that violence will ensue. This interest is substantial for all the same reasons that the interest in preventing actual violence is substantial—the interests follow one another. By preventing situations from arising in which violence is a likely outcome, the government is also exercising its compelling interest in preventing violence among its citizens. An interesting question raised is if the government would still have a substantial interest in regulating the use of fake or unloaded guns during a protest, but that variable would not change the inquiry. If a firearm has the appearance of a real weapon, its use during a protest will still engender fear and intimidation in the audience. It can cause others to reasonably fear for their safety, incite preemptive self-defense from onlookers or law enforcement, or provoke violent altercations.

Lastly, the government has a substantial interest in protecting citizens from the fear of violence itself. The government has successfully criminalized the formulation of threats towards others,<sup>121</sup> which shows that there is a legitimate and substantial interest in preventing people from instilling fear of bodily harm in another individual. Armed protests have that effect, regardless of whether the guns actually have the capability of inflicting bodily harm. The Supreme Court has made clear that an “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”<sup>122</sup> However, the government does have a substantial interest when the action is “likely to produce a clear and present danger of a serious substantive evil that rises far above public

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119. *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968).

120. *United States v. Salerno*, 481 U.S. 739, 750 (1987).

121. *Watts v. United States*, 394 U.S. 705, 707 (1969) (upholding a statute criminalizing threats against the President because the “Nation undoubtedly has a valid, even an overwhelming interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence”); *see also* 18 U.S.C. § 875 (criminalizing communication of threats).

122. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 505, 508 (1969).

inconvenience, annoyance, or unrest.”<sup>123</sup> The open carry of weapons during a protest surely passes that test. It instills fear and intimidation in the audience, it may provoke preemptive self-defense from the citizens or the police, and it creates a situation in which the police must monitor the protest for fear that violence could break out at any moment. Indeed, this precarious police response is what happened in Charlottesville.<sup>124</sup>

The second prong of *O’Brien* is easily satisfied as well. All that *O’Brien* requires is that the governmental interest at play is “unrelated to the suppression of free expression.”<sup>125</sup> In *O’Brien*, that interest was the preservation of issued draft certificates to buttress Congress’ power to raise and support armies.<sup>126</sup> Although people could destroy their draft cards as a form of expression, the Court found that the governmental interest at issue had nothing to do with the suppression of that communication.<sup>127</sup> Contrast that, for example, with *Stromberg v. California* where the Court struck down a regulation that prohibited the use of flags, banners, and the like to convey an expression against organized government.<sup>128</sup> If the interest is “aimed at suppressing communication it [can] not be sustained as a regulation of noncommunicative conduct.”<sup>129</sup>

In the case of armed protests, the government can assert a fully recognizable interest in preventing violence and crime that is completely separate from whatever communicative effect the display of a firearm during a protest may have. John Ely’s examination of draft card burning in *O’Brien* is helpful to understand how my proposed prohibition on armed protests is even more fitting as a non-speech prohibition than the prohibition on draft card burning that the Supreme Court upheld.<sup>130</sup> Ely explains, “[b]urning a draft card to express opposition to the draft is an undifferentiated whole, 100% action and 100% expression. It involves no conduct that is not at the same time communication, and no communication that does not result from conduct.”<sup>131</sup> Yet the Supreme Court still upheld the governmental interest in regulating the nonspeech element.<sup>132</sup> While burning a draft card is an

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123. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

124. *Williams et al.*, *supra* note 42.

125. *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

126. *Id.*

127. *Id.* at 382.

128. *Stromberg v. California*, 283 U.S. 359, 368 (1931).

129. *O’Brien*, 391 U.S. at 382.

130. John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975).

131. *Id.* at 1495.

132. *O’Brien*. 391 U.S. at 377.

undifferentiated whole, where communication and action cannot be separated, armed protests cannot be said to be the same. The action of publicly burning a draft card serves no other purpose; the action and the communication are melded together. The action of openly carrying, on the other hand, can be for self-protection, which does not encompass communication, or the communication can simply be the message of the protest, which does not come from the act of carrying a weapon. The nonspeech element of physically displaying a weapon is easily separated from any potential communication; the government can express an interest in regulating the conduct, while leaving the avenues of communication untouched.

To analyze the third prong of the *O'Brien* analysis, we need to look back to the proposed regulation above, which prohibits the display of firearms while bringing into public notice a party, movement, or ideology. *O'Brien* requires that the regulation only impinge on First Amendment rights as much as necessary to further the governmental interest.<sup>133</sup> There would be no way to effectively eliminate the public threat of violence and crime from open carry protests without prohibiting them altogether. The only expression that would be suppressed through a regulation such as this would be the communication that comes from displaying the firearm itself: the statute would not, and obviously *could not*, prohibit the protest altogether, just the public display of firearms during the event. This is an “incidental restriction” on First Amendment freedoms if there ever was one.<sup>134</sup> Consider the protesters of the Islamic Center in Irving: they would not have to stop their protest—they would just have to either leave their guns at home, or bring a smaller firearm that is suitable for concealed carry if their state allows it. The result would be a greater sense of safety, as well as a substantially reduced risk of firearm violence, preemptive self-defense, and police interaction during the protest—exactly what the governmental interest was aimed at.

From a First Amendment standpoint, it is clear that the government may absolutely enact legislation to prevent armed protests. Their regulation can easily be neutral in regards to any communicative effect that the open carry of firearms may have, and instead focus on the prevention of violence. There is, however, some drawback to a regulation made under *United States v. O'Brien*: what about those rare circumstances where open carry during a protest *is* vital to the protest itself? Consider a protest against gun regulations where law-abiding citizens wish to showcase their rights to carry a firearm

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133. *O'Brien*. 391 U.S. at 377.

134. *Id.*

in a peaceful way. A regulation like the one proposed would prohibit the abovementioned protest as well. The reality of an *O'Brien* regulation is that it naturally will regulate some forms of expression that society may deem valuable; in *O'Brien* itself, the law restricted a political protest that would normally be found at the heart of the First Amendment.<sup>135</sup>

However, the harms of armed protests are substantial enough to justify the incidental restriction upon speech where open carry would be vital to the message. Suppressing that very limited area of communication is a small cost to pay for regulating a form of protest that instills fear and intimidation in the listener. It is important to note that in some ways, armed protesters chill speech even more than a regulation upon armed protests would.<sup>136</sup> Those in the presence of armed protesters may be too intimidated to stand up and offer an opposing viewpoint for fear of retaliation and opposition. Rather than inspire a worthwhile debate on the issues, armed protesters likely encourage others to keep their thoughts to themselves and walk away before anything escalates or, alternatively, to fight. Professor Shaundra K. Lewis has argued that in the context of guns on school campuses, “[f]irearms may discourage students from expressing unpopular political perspectives,” a result that is strongly inconsistent with the high value placed upon political speech.<sup>137</sup> The Supreme Court explicitly directed that “political speech must prevail against laws that would suppress it, whether by design or inadvertence.”<sup>138</sup> Post-Charlottesville, David Frum wrote that “the presence of large quantities of lethal guns had in fact effectively *silenced* the many people who’d assembled to peacefully express their opposition to racism.”<sup>139</sup>

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. Geographical and racial communities that experience higher volumes of gun violence may be suppressed even more because of that reality. This suppression of opposition is unacceptable. The government should take hold of the opportunity that *United States v. O'Brien* provides and enact reasonable legislation to prohibit armed protests.

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135. *O'Brien*, 391 U.S. at 376–77.

136. Frum, *supra* note 48.

137. Shaundra K. Lewis, *Crossfire on Compulsory Campus Carry Laws: When the First and Second Amendments Collide*, 102 IOWA L. REV. 2109, 2128 (2017).

138. *Citizens United v. Fed. Elections Comm’n*, 558 U.S. 310, 329 (2010).

139. Lithwick & Stern, *supra* note 48.

#### D. An Armed Protest Prohibition Would Be a Valid Time, Place, and Manner Restriction of Speech

Assuming *arguendo* that armed protests constitute symbolic speech, a prohibition could be easily recognized as a constitutional regulation on the time, place, and manner of expression. The Supreme Court has established that “[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.”<sup>140</sup> These types of restrictions have been upheld in enjoining protesters from camping on National Park property,<sup>141</sup> stopping citizens from posting signs on public property,<sup>142</sup> prohibiting religious members from disseminating written materials in certain public places,<sup>143</sup> and restricting many other forms of expression. Time, place, or manner restrictions are analyzed very similarly to restrictions under *United States v. O’Brien*; the Supreme Court has recognized that there is “little, if any” difference between the two analyses.<sup>144</sup> Regulations made pursuant to both the instruction of *O’Brien* and through a time, place, or manner restriction do not aim to suppress the message itself, but the *mechanism* for conveying that message. So long as the government is regulating something other than the content of the message itself, and has a substantial reason for doing so, the First Amendment will not be offended.<sup>145</sup> The Supreme Court has noted that “restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”<sup>146</sup>

The first two requirements of a permissible time, place, or manner regulation are effectively identical to those discussed in the *O’Brien* section, and the reasons why regulation of armed protests would meet those requirements remain the same. It is clear that the government could easily show a substantial governmental interest and that the interest does not concern communication. The last requirement of a reasonable time, place, or manner regulation requires that the restriction does not foreclose all channels of communication for those affected by the regulation.<sup>147</sup> Again,

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140. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

141. *Id.* at 289.

142. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984).

143. *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640, 655 (1981).

144. *Clark*, 468 U.S. at 298.

145. *Id.* at 293.

146. *Id.* at 288.

147. *Id.*



this is very easily met. Armed protesters have available to them a variety of methods of communication. All that would be taken away from the protest would be the weaponry; the protesters would still be free to communicate the same message they intend to communicate with their firearms through other verbal, written, or symbolic means, so long as it did not include open carry.

Whether it is couched as a *United States v. O'Brien* restriction that meets intermediate scrutiny or as a reasonable time, place, or manner restriction of expression, it is clear that the government can enact regulations of armed protests that will be constitutionally permissible under the First Amendment. The nature of the restrictions would be to prohibit such conduct due to the fear and intimidation armed protests engender in their audiences, as well as the violence that may ensue, not because of whatever message it may communicate. As such, there would be no successful First Amendment attack on the legislation, leaving the government free to pursue regulation. Armed protests are becoming more and more popular, and erase any possibility of worthwhile debate between competing viewpoints; instead, they spark chaos, anger, and violence, and suppress opposing perspectives. Legislatures should follow the guidance of *O'Brien* and the doctrine of time, place, and manner restrictions, and pass laws that regulate armed protests or eliminate open carry protests altogether.

### **E. Armed Protest Regulation Fits Within the Theoretical Understandings of the First Amendment**

First Amendment legal doctrine would not bar legislation of armed protests, but it is important to step away from precedent and discuss whether this result comports with our theories of the First Amendment and its purposes altogether. Three of the main theories that justify the First Amendment include the search for truth, democratic self-governance, and self-fulfillment. I will discuss each approach and whether the regulation of armed protests would offend those traditional notions of the freedom of expression.

The theory that free speech promotes truth by fostering a “marketplace of ideas” has traditionally been thought to derive from John Milton’s *Areopagitica*<sup>148</sup> and from John Stuart Mill’s *On Liberty*.<sup>149</sup> Mill emphasized the importance of allowing all thoughts and ideas to have a space in the political and social process—“it is only by the collision of adverse opinions

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148. Richard M. Thomas, *Milton and Mass Culture: Toward a Postmodernist Theory of Tolerance*, 62 U. COLO. L. REV. 525, 531–32, 532 nn.19-20 (1991).

149. JOHN STUART MILL, *ON LIBERTY* 75–118 (Penguin Books 1974) (1859).

that the remainder of the truth has any chance of being supplied.”<sup>150</sup> Justice Holmes tapped into these ideas in his dissent in *Abrams v. United States*, stating that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>151</sup> The basic idea of this First Amendment theory is that ideas must be subjected to the scrutiny of other ideas in the marketplace in order to result in the ultimate truth. As one author summarized, “the basic proposition of this ‘marketplace of ideas’ notion is that the key to the success of our political system is an informed public, and the notion of free speech directly facilitates this goal.”<sup>152</sup>

Regulation of armed protests would almost certainly not offend any notions of the truth-finding purpose of the First Amendment. Carrying or brandishing a weapon does not offer any message that could contribute to a debate on political, societal, or social issues. Instead, weapons are carried to show force and intimidation, or to shore up a separate issue that the protest is about. Carrying a weapon does not inject any new ideology into the marketplace of ideas that others can respond and react to. Quite the contrary, openly carrying a firearm serves to quiet any disagreement or challenge to the ideology that the protester is attempting to put forth in the protest as a whole. Guns instill fear and chill speech that could challenge the ideas of the protester, and, according to philosophers like Milton, eventually bring about the truth through the crucible of the public discourse.

At least one scholar might disagree that Justice Holmes would not be offended by regulation of armed protests from a First Amendment standpoint.<sup>153</sup> Steven Heyman argues that Justice Holmes viewed the First Amendment as a struggle between different social groups that can only be resolved by force.<sup>154</sup> Heyman points to Justice Holmes’ understanding of the social world as “no different” from the “Darwinian forces of natural selection” because “it too is governed by forces.”<sup>155</sup> Holmes believes that the truth of an idea comes from the amount of power that it has; the amount of force that it has in directing the social order.<sup>156</sup> Heyman does not address specifically whether he believes Holmes would sanction the use of armed protests or something similar to create the force behind an idea in the

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150. MILL, *supra* note 149, at 116.

151. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

152. Michael A. Henderson, *Today’s Symbolic Speech Dilemma: Flag Desecration and the Proposed Constitutional Amendment*, 41 S.D. L. REV. 533, 539 (1996).

153. See Steven Heyman, *The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence*, 19 WM. & MARY BILL RTS. J. 661 (2011).

154. *Id.* at 692.

155. *Id.*

156. *Id.*

marketplace of ideas, and I would argue that Holmes would not. Heyman points out how often Holmes used words like “force” and “power.” However, Holmes did not understand those to mean physical force or power.<sup>157</sup> To Holmes, power and force came from the social majority agreeing with you. As Heyman points out, Holmes believed “the most far-reaching form of power” that human beings can aspire to “is the command of ideas.”<sup>158</sup> Holmes believed that the power behind an idea comes from its ability to be accepted as truth in the marketplace.<sup>159</sup> That is the force and power that Holmes referred to—intellectual power and the force that an idea receives through being accepted as the truth. Because brandishing a weapon does not inject any intellect or ideology into an idea, I think that Justice Holmes would not regard it as something protected through his marketplace of ideas ideology.

Somewhat related is the theory that the First Amendment serves to protect speech that is necessary for democratic self-governance. Philosopher and free speech advocate Alexander Meiklejohn proposed that democratic self-government would survive only when the people are equipped with all of the relevant information and opinions necessary to make wise decisions in the democracy.<sup>160</sup> This theory is premised on the idea that the system of free expression serves “an important deliberative feature, in which new information and perspectives influence social judgments about possible courses of action. Through exposure to such information and perspectives, both collective and individual decisions can be shaped and improved.”<sup>161</sup> “In Meiklejohn’s view, the ultimate purpose of the First Amendment is the guard against ‘the mutilation’ of ‘the thinking process of the community,’ not to protect the rights of persons to self-expression.”<sup>162</sup>

Similar to the search for truth theory of the First Amendment, the democratic self-governance view also depends on the value of the message put forth; it is the value that the speech lends to political and social decision making that the First Amendment protects.<sup>163</sup> This theory of the First

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157. Heyman, *supra* note 153.

158. Heyman, *supra* note 153; OLIVER WENDELL HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167, 201 (1920).

159. Heyman, *supra* note 153.

160. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25–26 (1948).

161. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 19 (1993).

162. ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 270 (Harv. Press 1995); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 15 (1960).

163. SUNSTEIN, *supra* note 161.

Amendment would not be offended by a restriction of armed protest for the same reason as the previous theory: There is no real message being suppressed. A ban on armed protests would not suppress any political or social ideology, and even if the open carry offered a message, it could be communicated through the protest itself. Constitutional scholar Cass Sunstein points out that an essential premise of the democratic self-governance theory of free speech is that “there must be public exposure to an appropriate diversity of views.”<sup>164</sup> Armed protests frustrate that premise by chilling opposing views through fear and intimidation.

In contrast to the previous two theories, those that understand the First Amendment as a protection of self-fulfillment focus on the individual rather than the communal value of the expression.<sup>165</sup> Some of the leading theorists in this realm are C. Edwin Baker, Thomas Emerson, and Martin Redish. This theory of the First Amendment can take many names—self-fulfillment, individual self-realization, the liberty theory—but the general idea is essentially the same: The justification for protecting the freedom of expression is that it fosters individual self-realization and self-determination.<sup>166</sup> Emerson stated, “[t]he proper end of man is the realization of his character and potentialities as a human being. For the achievement of this self-realization the mind must be free,” and thus free from suppression of belief and expression.<sup>167</sup> Because this theory focuses on the individual, it has the highest potential for rejecting restrictions on an individual’s right to open carry during a protest. However, each theorist has contemplated how the freedom of expression is to be interpreted when it is in conflict with other rights, and armed protest regulation fits agreeably within those contours.

To start, Baker argues that the freedom of speech does not apply “if the speaker *coerces* the other or *physically interferes* with the other’s rights.”<sup>168</sup> Baker uses both “coerce” and “threaten” when talking about types of speech that are subject to legal restrictions.<sup>169</sup> He ultimately defines two of the main types of coercive speech as either speech “involved in an actual or attempted taking or physical injury to another’s person or property” or “designed to disrespect and distort the integrity of another’s

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164. SUNSTEIN, *supra* note 161, at 21.

165. C. Edwin Baker, *The Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978).

166. Baker, *supra* note 165; MARTIN REDISH, FREEDOM OF EXPRESSION 5 (1984); THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970).

167. EMERSON, *supra* note 166.

168. Baker, *supra* note 165, at 998.

169. Baker, *supra* note 165, at 1002.

mental processes.”<sup>170</sup> The governmental interest in restricting armed protests fits well with Baker’s definitions and rationales for allowing prohibitions on coercive speech. The state would enact legislation in order to prevent physical injury or the threat of physical injury. It would keep armed protesters from forcing their ideology onto their audiences through the perceived threat of violence and intimidation. Baker places utmost respect in an individual’s right to think and believe as he will, and to have that mental process respected by others in society.<sup>171</sup> Armed protesters disrespect the autonomy of their audiences by using weapons to intimidate those in opposition into silence and acquiescence to the armed protesters’ beliefs.

Emerson’s formulation of individual self-realization would approve of armed protest regulation as well. Emerson argues that there is a fundamental distinction between expression and action, and only action can be regulated under the proper understanding of the First Amendment.<sup>172</sup> Recognizing that “[t]o some extent expression and action are always mingled,” Emerson instructs that the proper way to analyze whether symbolic conduct can be regulated is “to determine which element is predominant in the conduct under consideration.”<sup>173</sup> With armed protests, the action of carrying the gun far outweighs any expression that comes with it. Emerson points out that the conduct “must, of course, be intended as a communication and capable of being understood by others as such.”<sup>174</sup> Even if the armed protesters did intend to send a message to the audience through the exercise of their open carry, the audience is unlikely to perceive any message other than the intimidation and threat of violence that inherently comes with the act of carrying a weapon. Because the governmental interest is aimed at preventing violence and fear that comes from the act of openly displaying a firearm, not from the communicative value it may hold, Emerson’s formulation of the First Amendment would not be offended by armed protest regulation.

Redish might be harder to convince than Baker and Emerson that armed protest regulation fits within the self-fulfillment theory of the First Amendment. Redish advocates that all government restrictions on expression, regardless of their content neutrality and regardless of being aimed only at the “action” component of symbolic speech, must meet strict

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170. Baker, *supra* note 165, at 1002.

171. Baker, *supra* note 165, at 1002.

172. EMERSON, *supra* note 166, at 80.

173. EMERSON, *supra* note 166, at 80.

174. EMERSON, *supra* note 166, at 81.

scrutiny to pass constitutional muster.<sup>175</sup> He recognizes *O'Brien's* demand that the government purport to further a substantial interest that is wholly separate from its effect on speech, and adds another requirement that the interest be compelling.<sup>176</sup> While strict scrutiny is always a difficult burden for the government to meet, the government's interest in preventing violence that can ensue from armed protests can qualify as compelling; in fact, the Supreme Court has recognized the general interest of preventing violence as compelling already.<sup>177</sup> Further, Redish argues that the correlation between the speaker's alternate means of expression and the governmental interest is important and operates as a sliding scale.<sup>178</sup> Armed protesters have ample means to communicate any message they wish during the protest at large, so long as they do so without openly carrying weapons. Regulation leaves open full opportunity for the speaker to communicate the armed protesters' message, and regulation furthers a government interest in preventing violence. Because of these realities, even Redish may be left unoffended by the regulation of armed protests from the individual self-realization viewpoint.

Regulation of armed protests would not suppress expression that contributes any valuable ideas to the public discourse. It may interfere with certain individuals' rights to express themselves in a particular way through the open carry during a protest, but the harms that the open carry inflict on the audience of the protest justify the restriction. The doctrinal strictures of the First Amendment and the theoretical understandings of its purpose both support a call to state legislatures to enact reasonable regulation to prohibit open carry during protest demonstrations.

#### IV. The Second Amendment

Advocates of armed protests will certainly turn toward the Second Amendment in search for protection from government regulation, but they will find no safe harbor in the right to keep and bear arms. This section argues that the Second Amendment would not limit the government from enacting regulations on the open carry of firearms during protests. Part IV-A will offer a brief overview of the current state of Second Amendment jurisprudence, outlining the two-step analysis that courts undertake when considering a regulation on the right to bear arms. Part IV-B then jumps into the first step of that analysis and argues that the right to open carry during

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175. REDISH, *supra* note 166, at 118.

176. REDISH, *supra* note 166, at 118.

177. *United States v. Salerno*, 481 U.S. 739, 750 (1987).

178. REDISH, *supra* note 166, at 118.

protests is not a traditional right within the scope of the Second Amendment. Part IV-C will argue that, even if the right to armed protest falls within the historical understanding of the Second Amendment, restrictions upon it would be reasonable because it does not significantly interfere with a right to self-defense and is justified by substantial governmental interests.

As a threshold matter, it is important to note that this Article presupposes that a state allows for open carry of firearms. Whether or not a state could permissibly restrict an individual's right to open carry in public altogether is the topic for another paper; indeed, that very topic has attracted a lot of scholarship.<sup>179</sup> For purposes of this analysis, however, we must assume we are in one of the thirty-one states that allow for open carry of firearms without a license, or the fifteen states that allow it with a license or permit.<sup>180</sup> The issue here is whether a restriction specifically upon the open carry in public during a protest would present Second Amendment problems.

#### **A. Current Second Amendment Jurisprudence Offers a Two-Step Inquiry into the Constitutionality of Firearm Regulations**

The Supreme Court ended a nearly seventy-year period of silence on the Second Amendment when it decided *District of Columbia v. Heller* in 2008, and marked a significant shift in the way the right to bear arms is understood.<sup>181</sup> In contrast with previous precedent holding that the Second Amendment existed for military and militia weapon use,<sup>182</sup> in *Heller*, the Court recognized an individual right to carry weapons.<sup>183</sup> Writing for the majority, Justice Scalia stated that the amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation”<sup>184</sup> and that “the inherent right of self-defense” rests at the core of the Second Amendment.<sup>185</sup> Justice Scalia further stated that the home is “where the need for defense of self, family, and property is most acute”<sup>186</sup> and that the Second

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179. See, e.g., James Bishop, *Hidden or on the Hip: The Right(s) to Carry After Heller*, 97 CORNELL L. REV. 907 (2012); Jonathan Meltzer, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486 (2014).

180. *Open Carry*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/open-carry/> (Sept. 24, 2017). The laws are different for long guns, which are commonly associated with hunting.

181. *District of Columbia v. Heller*, 554 U.S. 570 (2008). Prior to *Heller*, the last Second Amendment case the Court decided was *United States v. Miller*, 307 U.S. 174 (1939).

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

183. *Heller*, 554 U.S. at 592.

184. *Id.*

185. *Id.* at 628.

186. *Id.*

Amendment “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>187</sup> In coming to these conclusions, the Court relied heavily on the historical background and original understanding of the Second Amendment.<sup>188</sup> It found that “the inherent right of self-defense has been central to the Second Amendment right” and placed great importance on the right to defend your person and your home.<sup>189</sup>

Relying on *Heller*, the Court struck down a ban on handguns in *McDonald v. City of Chicago* two years later and made explicit that the Second Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment.<sup>190</sup> The Court reaffirmed in *McDonald* that “[s]elf-defense is a basic right . . . deeply rooted in this Nation’s history and tradition.”<sup>191</sup> The Court again looked to history and the original understanding of the Second Amendment and found that self-defense was “the *central component* of the Second Amendment.”<sup>192</sup> Both *Heller* and *McDonald* make it clear that the cornerstone of the Second Amendment is the right of “defense of self, family, and property,” which is “most acute” in the home.<sup>193</sup> Unfortunately for lower courts interpreting that right, however, the Supreme Court offered no guidance on how to interpret it outside of the home.<sup>194</sup> Because the statutes at issue in both cases imposed outright bans on the use and possession of firearms, the Court did not have the opportunity to speak to how regulations of the use and possession of weapons would be constitutional.<sup>195</sup> Lower courts have been left to struggle with the ambiguity of *Heller* and *McDonald* in determining whether the government can regulate the individual right to bear arms in public and to what extent regulations will be tolerated.<sup>196</sup>

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187. *Heller*, 554 U.S. at 635.

188. *Id.* at 600–19.

189. *Id.* at 628.

190. *McDonald v. City of Chi.*, 561 U.S. 742, 767 (2010).

191. *Id.* at 768–69.

192. *Id.* at 767.

193. *Heller*, 554 U.S. at 628.

194. *See McDonald*, 561 U.S. at 859 (Stevens, J., dissenting) (“Neither submission requires the Court to express an opinion on whether the Fourteenth Amendment places any limit on the power of States to regulate possession, use, or carriage of firearms outside the home.”).

195. *See id.* at 750 (describing the city ordinances that place restrictions on handguns generally without reference to whether the guns are used in the home); *see also Heller*, 554 U.S. 574 (“The District of Columbia generally prohibits the possession of handguns.”).

196. *See, e.g., Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 88 (2d Cir. 2012) (“*Heller* provides no categorical answer to this case. And in many ways, it raises more questions than it answers.”).



In interpreting *Heller* and *McDonald*'s limited instruction, many courts have employed a two-step analysis when considering whether a government regulation on the right to bear arms would offend the Second Amendment.<sup>197</sup> The Fourth Circuit articulated this test particularly well:

The first question is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid. If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny.<sup>198</sup>

Because every circuit that has heard a Second Amendment claim since *Heller* has employed this two-step analysis in determining the validity of regulations on firearm use or possession, I will use it in determining whether my proposed regulation of armed protests would be upheld in light of the Second Amendment's protection of the right to keep and bear arms.

### **B. Step One: The Right to Open Carry During Protest is Not Within the Scope of the Second Amendment**

This two-step analytical framework starts with an inquiry into whether the regulation is restricting activity subject to Second Amendment protection at all.<sup>199</sup> The Seventh Circuit recognized in *Ezell v. City of Chicago* that "*Heller* suggests that some federal gun laws will survive Second Amendment challenge because they regulate activity falling outside the terms of the right as publicly understood when the Bill of Rights was ratified."<sup>200</sup> "To determine whether a law impinges on the Second

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197. See *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 254 (2nd Cir. 2015); *Bonidy v. U.S. Postal Service*, 790 F.3d 1121, 1132 (10th Cir. 2015); *GeorgiaCarry.org v. U.S. Army Corps of Eng'rs*, 788 F.3d 1318, 1322 (11th Cir. 2015); *Woollard v. Gallagher*, 712 F.3d 865, 875 (4th Cir. 2013); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *NRA v. ATF*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chi.*, 651 F.3d 684, 703–04 (7th Cir. 2011); *United States v. Marzzarella*, 614 F.3d 85, 89 (3rd Cir. 2010).

198. *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (citations and internal quotation marks omitted).

199. *Id.* at 680 ("Under this approach, the first question is whether § 922(g)(9) burdens or regulates conduct that comes within the scope of the Second Amendment.").

200. *Ezell*, 651 F.3d at 702.

Amendment right, we look to whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee.”<sup>201</sup>

The Supreme Court cautioned in *Heller* that the right to keep and bear arms has never been understood to be an unfettered or unlimited right.<sup>202</sup> “Gun safety regulation was commonplace in the American colonies from their earliest days.”<sup>203</sup> History reveals that during the founding, a variety of gun safety regulations were in place, such as those that regulated the storage of gun powder, kept track of who owned guns in the community, restricted certain groups from purchasing a firearm, and, most importantly, prohibited the use of firearms on certain occasions and in certain places.<sup>204</sup> There is nothing in the historical records which suggest that the open carry of firearms during a protest as a means of showing force or garnering attention for an ideology was common practice or understood to be within the Second Amendment’s protection. Instead, what history does reveal is a revolutionary era replete with gun regulations that concerned the manner in which the public dealt with their firearms.<sup>205</sup> “[T]he founders understood that gun rights had to be balanced with public safety needs.”<sup>206</sup> “The right to bear arms in the colonial era was not a libertarian license to do whatever a person wanted with a gun. When public safety demanded that gun owners do something, the government was recognized to have the authority to make them do it.”<sup>207</sup>

The historical inquiry into understanding the Second Amendment at the time of ratification reveals that the founding fathers even supported selective disarmament when it was in the interest of public safety.<sup>208</sup> The founders were in support of a practice that would completely eradicate the right to own a firearm for an entire group of people, such as felons or the mentally ill.<sup>209</sup> A regulation on armed protests that would only prohibit the open carry of a firearm while an individual is engaging in protest is certainly much less invasive. History shows that the founders were more than willing to restrict the individual’s public right to carry a weapon when there were safety

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201. *NRA*, 700 F.3d at 194.

202. *Heller*, 554 U.S. at 626.

203. WINKLER, *supra* note 11, at 115.

204. WINKLER, *supra* note 11, at 113–18; Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 502 (2004).

205. WINKLER, *supra* note 11, at 114.

206. WINKLER, *supra* note 11, at 114.

207. WINKLER, *supra* note 11, at 115.

208. WINKLER, *supra* note 11, at 115–16.

209. WINKLER, *supra* note 11, at 115–16.

concerns,<sup>210</sup> which suggests that the open carry of a firearm during a protest is not something that would fall within the scope of the Second Amendment.

*Heller* made clear that the Second Amendment is concerned with the core right of self-defense.<sup>211</sup> The proposed regulation of armed protests does not eradicate an individual's right to self-defense; it only prohibits the open carry of firearms during a protest. It leaves open the option to carry a concealed firearm if legally permitted to do so, or to exercise the right to open carry in all other situations. Indeed, the Supreme Court's focus on the right to protect your home and its statement that self-defense rights are "most acute" in the home might suggest that Second Amendment protections are significantly lessened when assembled in public.<sup>212</sup> However, recognizing that most armed protesters will argue that their open carry is used for self-defense purposes, I will follow the lead of the circuit courts and proceed to step two of the Second Amendment framework.

### C. Step Two: Armed Protest Regulation Would Pass Judicial Scrutiny

Even if the right to open carry during a protest fits within the original scope of Second Amendment protection, the government could still pass constitutional scrutiny in its regulation. Several courts have even found it prudent to forgo the first step of the inquiry altogether, choosing to "avoid guesswork"<sup>213</sup> on the scope of Second Amendment protections and whether they apply outside of the home. Those courts instead assume that the first step is met and proceed with either upholding or striking down regulations under the second step of the framework.<sup>214</sup> Following this practice, we can move forward on the assumption that the right to open carry during a protest is within the scope of the Second Amendment and still find that the government would be permitted to regulate it.

The level of scrutiny that is appropriate depends on the regulation itself.<sup>215</sup> This part of the Second Amendment analysis relies heavily on First Amendment doctrine.<sup>216</sup> Just like in the First Amendment context, "[l]aws

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210. See Carlton F.W. Larson, *Four Exceptions In Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1374–1378 (2009).

211. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

212. *Id.*

213. *United States v. Mahin*, 668 F.3d 119, 124 (4th Cir. 2012).

214. See, e.g., *Woollard v. Gallagher*, 712 F.3d 865, 875 (4th Cir. 2013); *NRA v. ATF*, 700 F.3d 185, 204 (5th Cir. 2012); *Mahin*, 668 F.3d at 123.

215. *NRA*, 700 F.3d at 205.

216. Several courts have adapted First Amendment doctrine to the Second Amendment. See, e.g., *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010); *United States v. Marzarella*, 614 F.3d 85, 89 (3rd Cir. 2010).

which regulate only the ‘*manner* in which persons may exercise their Second Amendment rights’ are less burdensome than those which bar firearm possession completely.”<sup>217</sup> To determine the appropriate level of scrutiny, courts look to “(1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law’s burden on the right.”<sup>218</sup> If the law at issue “burdens the core of the Second Amendment guarantee,” like the right of law-abiding citizens to use firearms in defense of their home and hearth, then the law must pass strict scrutiny to be constitutional.<sup>219</sup> A less severe law would be easier to justify, and the appropriate standard of scrutiny would be “intermediate,” which “requires the government to show a reasonable fit between the law and an important government objective.”<sup>220</sup> Using *Heller* as guidance, several courts have held that strict scrutiny applies to regulations that limit the core right of self-defense in the home, whereas regulations of firearm use and possession outside of the home only have to pass intermediate scrutiny.<sup>221</sup> Under that framework, armed protest regulation would only have to pass intermediate scrutiny and could easily do so for the same reasons discussed with regard to the First Amendment.<sup>222</sup>

Even under a less categorical approach, however, intermediate scrutiny appears to be the proper standard because armed protest regulation would not impose severe limitations on a person’s right to possess and use a firearm for self-defense. Instead, armed protest regulation is more akin to a time, place, and manner restriction on the right to open carry. All fifty states allow for the concealed carry of firearms, either with a permit or without one.<sup>223</sup> Protesters would have the opportunity to carry with them a concealed weapon during protests for self-defense purposes, if they are licensed to do so in that state. As discussed earlier with the First Amendment, time, place, or manner restrictions that leave open alternative avenues to express a right trigger only intermediate scrutiny.<sup>224</sup> A regulation of armed protests similarly does not foreclose the right to open carry within that state in general: rather, it places a reasonable limitation on the time and place of that right to prevent the exercise of open carry during a protest. The District of

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217. *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 961 (9th Cir. 2014).

218. *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (internal quotations omitted).

219. *Jackson*, 746 F.3d at 961.

220. *Id.*

221. *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96 (2nd Cir. 2012).

222. *Id.* at 473–74.

223. *Conceal Carry Permit Reciprocity Maps*, USA CARRY, [http://www.usacarry.com/concealed\\_carry\\_permit\\_reciprocity\\_maps.html](http://www.usacarry.com/concealed_carry_permit_reciprocity_maps.html).

224. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Columbia's restriction in *Heller*, which banned handgun possession in the home, represents the type of regulation which would be classified as severe and requiring strict scrutiny.<sup>225</sup> While that, too, illustrated a regulation on the place where a person could exercise their Second Amendment rights, it did so in the home, coming within the very core of the Second Amendment.<sup>226</sup> A regulation of armed protests, conversely, would not come close to that level of infringement. It leaves open ample alternative avenues to express the right to open carry both in private and in public. Because armed protests are properly categorized as a regulation on the time, place, and manner of the right to open carry, intermediate scrutiny is more appropriate, even considering the slight interference upon the way that one exercises their right to self-defense.<sup>227</sup>

Moving forward to apply that level of scrutiny, the government could pass constitutional muster under an intermediate scrutiny analysis of armed protest regulation. "Even though all of [firearm limitation] laws interfere with the ability of people to defend themselves against attack, they are nevertheless legitimate because the government has sound reasons to impose them."<sup>228</sup> As discussed previously, the government would have a substantial interest in regulating the open carry of firearms during protests to promote the safety and the general welfare of the public. The open carry of firearms, coupled with the promotion of a certain ideology during protests, could ignite fights and violence. It engenders fear in those that the protest is aimed toward and creates tension between law enforcement and the protesters. The government has a substantial interest in protecting the public from the fear, intimidation, and increased risk of violence that armed protests create. A regulation that prohibits the open carry of firearms during protests is a reasonable way to protect that government interest. It leaves open the possibility of concealed carry during a protest and open carry when a person is not protesting, while sufficiently protecting the public from the harms that a group of angry protesters brandishing rifles creates.

The Second Amendment would not prevent the government from enacting regulations that prohibit the open carry of firearms during a protest. Indeed, because this right does not cut to the core of the Second Amendment's guarantee of self-defense of your person and your home, it does not fall within the scope of the Second Amendment. Even if it did fall within that core class of protection, the regulation is not a severe imposition

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

226. *Heller*, 554 U.S. at 628–629.

227. *See Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 961 (9th Cir. 2014).

228. Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1572 (2009).

on the right of self-defense. It is a reasonable regulation of the time, place, or manner of open carry, created to meet a substantial governmental interest in safety.

## V. Call to Action

The armed protest problem calls out to be rectified by state legislature. Millions of people across the nation received a front row seat to the terror that armed protests engender when the media showed pictures and video footage of armed militiamen in Charlottesville, Virginia, amidst throngs of neo-Nazis, white supremacists, and enraged counterprotesters. The flaunting of semiautomatic weapons during a protest adds nothing to the debate on the topic of the demonstration, and instead incites angry, fearful, or intimidated reactions by those present. Law enforcement is forced to stand at the sidelines hoping to predict if and when a shootout is about to take place, handicapped by the lack of open carry regulation from doing anything to disarm the unsettling and provocative display.

Armed protest regulation fits squarely within the allowances of the First and Second Amendments. In light of the doctrinal and social justifications supporting the prohibition of open carry during protest demonstrations, I urge lawmakers to take action to remediate this rising trend of incendiary bravado and pursue statutory constraints. Regulation at the federal level would be the ideal resolution because it would provide one general standard to be enforced across the country; however, I caution lawmakers at the state and local levels against waiting for action from Congress and implore them to take charge of this issue and pass legislation. The swift eradication of armed protests should be within the agenda of all state and local legislative bodies.

I invite lawmakers to use my proposed regulation as a starting point in pursuit of legal reform. This Article provides assurances that the proposed regulation would withstand First and Second Amendment scrutiny. As this Article demonstrates, the proposed regulation would be permissible under the First Amendment even despite any communicative value attached to open carry; it would only serve to prevent the nonspeech element of armed protests, and thus is clearly acceptable pursuant to *United States v. O'Brien*. Lawmakers can feel further certainty knowing that this regulation fits precisely within the long-held exception for regulations on the time, place, and manner of speech.

Some may be resistant to the prohibition of armed protests because of its potential Second Amendment concerns, but as established, the proposed regulation does not offend the core guarantees of the right to keep and bear arms. Those who wish to exercise those rights to their fullest extent may still

do so in other contexts; the proposed regulation carves out a narrow circumstance where open carry would be prohibited. Protesters would still be able to pursue concealed carry rights where applicable, or could open carry in other circumstances. Thus, while a prohibition on armed protests may seem like a more direct attack on a person's right to keep and bear arms, it really only brings about incidental infringements on Second Amendment rights.

Charlottesville highlighted the ugly reality of armed protests and its growing popularity in America. Allowing firearm legislation to remain at the *status quo* means just waiting for another Charlottesville to happen. Instead of watching from the sidelines out of fear of running afoul of the First and Second Amendments, I implore legislators to dig deeper and appreciate that armed protest regulation is in fact constitutional and would provide immense benefits to society.

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