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IDEAS

The Second Amendment Has Become a Threat to the First

Firearms are having a documented chilling effect on free speech.

By Diana Palmer and Timothy Zick



Getty; The Atlantic

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About the authors: Diana Palmer is a councilmember in Glens Falls, New York. Timothy Zick is a professor of law at William & Mary Law School and author of the forthcoming book Managed Dissent: The Law of Public Protest.

Many Americans fervently believe that the Second Amendment protects their right to bear arms everywhere, including at public protests. Many Americans also believe that the First Amendment protects their right to speak freely and participate in political protest. What most people do not realize is that the Second Amendment has become, in recent years, a threat to the First Amendment. People cannot freely exercise their speech rights when they fear for their lives.

This is not hyperbole. Since January 2020, millions of Americans have assembled in public places to protest police brutality, systemic racism, and coronavirus protocols, among other things. A significant number of those protesters were confronted by counterprotesters visibly bearing firearms. In some of these cases, violence erupted. According to a new study by Everytown for Gun Safety and the Armed Conflict Location & Event Data Project (ACLED), one in six armed protests that took place from January 2020 through June 2021 turned violent or destructive, and one in 62 turned deadly.

These kind of data fill a void in ongoing debates about the compatibility of free speech and firearms at protest events. For example, is the phenomenon of armed protests new? Is it frequent? The open display of firearms at public protests, including long rifles and what are sometimes called “assault-style rifles,” is a relatively new phenomenon. Although many states allow firearms in public places, until recently few Americans have openly toted firearms to political demonstrations. The Everytown/ACLED study examined thousands of protests, showing a marked uptick in protests at which people were visibly armed following the police murder of George Floyd. It found that at least 560 events involved an armed protester or counterprotester. Loose state firearms laws are part of the explanation for this phenomenon. The incidence of armed protests was three times higher in states with expansive open-carry laws, the study noted.

Such research makes much clearer the implications of open carry for public safety, public protest, and constitutional democracy. Some have argued that open carry will make protests safer. In fact, tragedies were far less frequent at protests that did not

involve firearms, the Everytown/ACLED research revealed: One in 37 turned violent or destructive, and only one in 2,963 unarmed gatherings turned fatal.

Joseph Blocher and Reva Siegel: Guns are a threat to the body politic

In short, the visible presence of firearms increases the risk of violence and death when exercising one's First Amendment rights. The increased risk of violence from open carry is enough to have a meaningful "chilling effect" on citizens' willingness to participate in political protests. Research thus far has focused on open display of firearms, but further study is needed to evaluate the public safety concerns that may still be present when protesters or counterprotesters bring concealed firearms to demonstrations. In addition, concealed carry may not have the same chilling effect; it's possible that without weapons visible, protesters will not be deterred. But at the same time, merely knowing that people might be armed could keep people away from public protests.

Diana Palmer, one of the authors of this article, conducted a study on the impact of open carry of firearms on the exercise of protest rights, and confirmed what common intuition suggests but included some surprises. The study found that participants were far less likely to attend a protest, carry a sign, vocalize their views, or bring children to protests if they knew firearms would be present.

Participants were asked about their willingness to participate in protests in two groups. In the control group, firearms were not mentioned in the questions. In the experimental group, they were. The questions did not specify whether the participants were visibly carrying firearms or not. The participants in the experimental group were much less willing to participate in expressive activities than participants in the control group to whom firearms were not mentioned.

That hesitation was present regardless of respondents' political ideology. It was experienced by gun owners and nonowners alike. Survey respondents' explanations as to

why they would refrain from participating in protests where arms are present revealed the significant chilling effects of guns at protests. Among other things, respondents indicated:

I feel like I would be antagonizing [firearms carriers] and that could lead to me being injured.

If they started shooting, I would be concerned they would target me for what I said.

I'll let the people with the guns do the talking.

Nothing is important enough to be shot over.

Some open-carry proponents insist that they bring firearms to protests to defend themselves against potential violence or to ensure that the First Amendment rights of all participants are respected. However, the Everytown/ACLED study concluded that 77 percent of armed protests during the observed-period were “driven by far-right mobilization and reactions to left-wing activism.” The study also found that 84 percent of armed protesters at Black Lives Matter protests were counterprotesters from extremist groups such as the “boogaloo boys,” the Proud Boys, and other right-wing groups. Rather than being motivated by self-defense or civil-rights concerns, the decision to carry a gun tends to follow far-right political ideology.

Garrett Epps: Guns are no mere symbol

Whatever the motives of firearms carriers might be, the clear social perception of would-be participants is that armed protests are unsafe. That finding is crucial to understanding the potentially devastating effect that bringing guns to protests can have on the exercise of First Amendment rights.

The Supreme Court will soon decide whether there is a Second Amendment right to carry firearms and other weapons in public places, a question it has yet to weigh in on. A pending case, *New York State Rifle & Pistol Association v. Bruen*, involves restrictions on

concealed-carry permits. To decide it, the Court will need to determine whether the Second Amendment applies outside the home. As the studies show, the answer has profound implications not just for public safety but also for constitutional democracy. As courts and legislatures consider gun regulations, they ought to bear in mind not just the physical dangers of armed protests but also the social harms associated with them. For many—perhaps an increasing number of—Americans, participation in armed public protests may simply not be worth the risk. Even if public protest survives, only those willing to risk their life, or who are inclined and able to carry weapons in defense of their own right to protest, may want to participate. Rather than serving as a democratizing means of expression, protest may become an armed contest and the exclusive preserve of the non-peaceable. Most concerning is that public protest as we know it may cease to exist at all. That would deprive Americans of participating in one of the greatest traditions of this country: expressing their views, engaging in public life, and advocating for democratic change.

This story is part of the project “The Battle for the Constitution,” in partnership with the National Constitution Center.

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