

2018

Arming Public Protests

Timothy Zick

William & Mary Law School, tzick@wm.edu

Repository Citation

Zick, Timothy, "Arming Public Protests" (2018). *Faculty Publications*. 1951.
<https://scholarship.law.wm.edu/facpubs/1951>

Arming Public Protests

Timothy Zick*

ABSTRACT: Public protests have become armed events, with protesters and counter-protesters openly carrying firearms—generally pursuant to state law. Many view the presence of firearms at protest events as wholly incompatible with the exercise of First Amendment free speech and assembly rights. Although the Supreme Court has yet to decide whether there is a Second Amendment right to openly carry firearms in public, all but a small handful of states in the United States provide some legal protection for open carry. Taking the law as it currently stands, this Article provides a comprehensive assessment of the options available to officials who seek to regulate open carry at public protests. It considers a number of measures, from bans on open carry during protest events, to measures aimed at armed private militias, to more limited restrictions on the place or manner of open carry. The Article assesses these and other regulatory alternatives from the perspective of both the First Amendment and the Second Amendment. It generally rejects First Amendment arguments for protecting, or limiting, open carry at public protests. The Article also concludes that some measures restricting open carry at protest events would likely satisfy current interpretations of the Second Amendment. Finally, using longstanding experience with public First Amendment rights as a rough guide, the Article considers the primary factors that will likely influence the nature and scope of the public Second Amendment.

I.	INTRODUCTION.....	224
II.	THE PUBLIC FIRST AND SECOND AMENDMENTS.....	230
	A. PUBLIC SPEECH AND ASSEMBLY.....	230
	B. PUBLIC KEEPING AND BEARING OF ARMS.....	233
	C. THE COMPATIBILITY QUESTION.....	236
III.	ARMING THE FIRST AMENDMENT.....	241
	A. A FIRST AMENDMENT RIGHT TO OPEN CARRY AT PROTESTS?.....	241

* Mills E. Godwin, Jr. Professor of Law, William & Mary Law School. Special thanks to Joseph Blocher for his insights concerning the Second Amendment issues addressed in the Article. Thanks also to Paul Hellyer for excellent research assistance.

B.	<i>UNCOVERED ARMS SPEECH</i>	245
C.	<i>MANNER AND PLACE REGULATIONS</i>	246
D.	<i>EXPRESSIVE ASSOCIATION AND “PEACEABLE” ASSEMBLIES</i>	250
E.	<i>EXPRESSIVE CHILL AS A GROUND FOR LIMITING OPEN CARRY</i>	252
IV.	DISARMING PUBLIC PROTESTS.....	253
A.	<i>EXISTING FIREARMS OFFENSES</i>	254
B.	<i>BANNING ARMED PRIVATE MILITIAS AND OTHER ARMED ASSEMBLIES</i>	254
C.	<i>GOING ARMED TO THE TERROR OF THE PEOPLE</i>	257
D.	<i>PLACE AND TIME/EVENT REGULATIONS</i>	260
E.	<i>MANNER REGULATIONS</i>	264
F.	<i>ARMS-SPECIFIC RESTRICTIONS</i>	265
V.	THE FUTURE PUBLIC SECOND AMENDMENT.....	267
A.	<i>GENERAL LESSONS FROM THE PUBLIC FIRST AMENDMENT</i>	268
B.	<i>EXERCISING AND POLICING OPEN CARRY</i>	274
C.	<i>BALANCING EXPRESSIVE AND OPEN CARRY RIGHTS</i>	278
D.	<i>JUSTIFYING OPEN CARRY</i>	280
E.	<i>LOOKING FORWARD</i>	282
VI.	CONCLUSION.....	284

I. INTRODUCTION

In the United States, public protests, demonstrations, rallies, and marches have become armed events.¹ Participants are openly carrying firearms, in most cases pursuant to state laws protecting this activity.² During the Summer of 2017, referred to by some as “the Summer of Hate,”³ participants at a “Unite the Right” rally in Charlottesville Virginia, openly carried long rifles and side arms.⁴ In one instance, a firearm was discharged

1. See Katlyn E. DeBoer, *Clash of the First and Second Amendments: Proposed Regulation of Armed Protests*, 45 HASTINGS CONST. L. Q. 333, 337–40 (2018) (describing several recent examples of armed protests). I will refer to “protests” generally, as a shorthand for other types of events including demonstrations, marches, and rallies.

2. As used in this Article, “open carry” refers to the practice of carrying firearms in plain view in public spaces.

3. See, e.g., Tim Morris, ‘Summer of Hate’ Should be the End of the Alt-Right Movement: Opinion, TIMES-PICAYUNE (Aug. 15, 2017), https://www.nola.com/opinions/index.ssf/2017/08/summer_of_hate_should_be_the_e.html.

4. See Siva Vaidhyanathan, *Why the Nazis Came to Charlottesville*, N.Y. TIMES (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/opinion/why-the-nazis-came-to-charlottesville.html> (discussing presence of militia groups at Charlottesville rally).

near a crowd of protesters but no one was injured as a result.⁵ At the protest, the day's sole fatality occurred as a result of a possible vehicular homicide.⁶ Nevertheless, the open and visible presence of firearms during such a large and contentious public protest alarmed many participants, concerned public officials, and may even have deterred law enforcement officers from confronting certain protesters.⁷

Despite having many opportunities to do so, the Supreme Court has yet to decide whether there is a Second Amendment right to keep and bear arms in public.⁸ In *District of Columbia v. Heller*, the Court held that an individual has a Second Amendment right to possess a firearms in the home for the purpose of self-defense.⁹ The Court has also held that the individual right to keep and bear arms applies against states and localities.¹⁰ The states have not waited for a Supreme Court pronouncement on public carry rights. Nearly every state now authorizes some form of a right to openly carry firearms in at least some public places.¹¹ In fact, only three states ban open carry outright.¹² A few states ban the open carry of handguns, but not long guns (rifles and shotguns), while a few states ban the open carry of long guns, but not handguns.¹³ Several states require a license to open carry and many impose other restrictions on the practice, such as limiting open carry in specified places or during certain hours of the day.¹⁴

5. Frances Robles, *As White Nationalist in Charlottesville Fired, Police 'Never Moved,'* N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/us/charlottesville-protest-police.html> (discussing police reaction to armed protesters).

6. Jonah Engel Bromwich & Alan Blinder, *What We Know About James Alex Fields, Driver Charged in Charlottesville Killing,* N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/james-alex-fields-charlottesville-driver.html>. Two police officers were also killed, when their surveillance helicopter crashed. Matthew Haag, *Death of 2 State Troopers Adds Another Layer of Tragedy in Charlottesville,* N.Y. TIMES (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/us/virginia-police-helicopter-crash.html>.

7. See Joe Heim, *Charlottesville Response to White Supremacist Rally is Sharply Criticized in Report,* WASH. POST (Dec. 1, 2017), https://www.washingtonpost.com/local/charlottesville-response-to-white-supremacist-rally-sharply-criticized-in-new-report/2017/12/01/9c59feg8-d6a3-11e7-a986-d0a9770d9a3e_story.html (noting criticism that police did not respond to armed protesters); see also Robles, *supra* note 5.

8. See, e.g., Adam Liptak, *Supreme Court Turns Down Case on Carrying Guns in Public,* N.Y. TIMES (Jun. 26, 2017), <https://www.nytimes.com/2017/06/26/us/politics/supreme-court-guns-public-california.html>.

9. *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008).

10. *McDonald v. City of Chi.*, 561 U.S. 742, 766 (2010).

11. For a 50-state survey of current laws relating to the open and concealed carrying of firearms, see *Open Carry: State by State*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <http://lawcenter.giffords.org/gun-laws/state-law/50-state-summaries/open-carry-state-by-state> (last updated Nov. 16, 2017).

12. See *id.* (California, Florida, and Illinois).

13. See *id.*

14. *Id.*

These legislative trends, along with an open carry movement that urges its members to display firearms in public places, lie at the center of the phenomenon of arming public protests.¹⁵ Commentators have voiced concerns that public protest will be chilled or even eliminated as a result of the open presence of firearms at events.¹⁶ Constitutional scholars have argued that exercising First Amendment rights of speech and assembly is both physically and theoretically incompatible with open carry at protest events.¹⁷ Shortly after the Charlottesville rally, the American Civil Liberties Union (“ACLU”) adopted a policy stating that it would no longer defend certain groups that demonstrate while openly carrying firearms.¹⁸ Critics of open carry at public protests share a common concern that the presence of firearms will transform public protests into threatening, intimidating, and violent events.¹⁹

Responding to these concerns, state and local officials have begun to consider their options in terms of regulating open carry at protests. Some have proposed restrictions on the size of protests near Civil War monuments and other public places where armed protests have occurred.²⁰ Others have turned to 19th-century laws prohibiting the open carrying of firearms “to the terror of the public.”²¹ These are merely opening salvos in what promises to

15. See Ian Urbina, *Locked, Loaded, and Ready to Caffeinate*, N.Y. TIMES (Mar. 7, 2010), <https://www.nytimes.com/2010/03/08/us/o8guns.html> (discussing the open carry movement).

16. See, e.g., John Feinblatt, *Ban the Open Carry of Firearms*, N.Y. TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/opinion/open-carry-charlottesville.html> (arguing for a ban on open carry at public protests and in public places); 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-charlottesville-could-have-been-graver/537087> (“Within metropolitan areas, there is no reason—zero—that a weapon should ever be carried openly. The purpose is always to intimidate—to frighten others away from their lawful rights, not only free speech and lawful assembly, but voting as well.”).

17. See Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 95 (2012) (“Even keeping arms to enable insurrection would undermine debate by fostering a climate of mistrust and fear.”); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1309–10 (2009) (“[T]he presence of a gun in public has the effect of chilling or distorting the essential channels of a democracy—public deliberation and interchange.”).

18. Joe Palazzolo, *ACLU Will No Longer Defend Hate Groups Protesting With Firearms*, WALL ST. J. (Aug. 17, 2017, 6:54 PM), <https://www.wsj.com/articles/aclu-changes-policy-on-defending-hate-groups-protesting-with-firearms-1503010167>.

19. See *McDonald v. City of Chi.*, 561 U.S. 742, 891 (2010) (Stevens, J., dissenting) (“Your interest in keeping and bearing a certain firearm may diminish *my* interest in being and feeling safe from armed violence.”).

20. See, e.g., Matthew Haag, *Virginia Restricts Protests at Lee Monument in Richmond After Clashes*, N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/us/robert-e-lee-monument-richmond-virginia.html> (discussing restrictions proposed in Richmond, Virginia).

21. See Dahlia Lithwick & Olivia Li, *Can You Bring a Gun to a Protest?*, SLATE (Oct. 17, 2017, 10:45 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/10/protests_might_be_on_place_you_can_t_carry_guns.html (discussing state enforcement of the offense of “going armed to the terror of the public”).

be a long-term debate about the presence of firearms at public protests. Assuming the political will exists and no state constitutional provision stands in the way, states can alter their open carry laws to address the problem of public protests. Indeed, as discussed in Part IV some states have already done so.²² However, in many cases, fashioning a local response to the arming of public protests will be complicated by limits on local governmental autonomy.²³ Still, even in the many states where open carry is protected, officials have options.

Unfortunately, officials have little guidance with which to navigate a course of action with regard to the arming of public protests. No reported judicial decisions have specifically addressed the intersection between First Amendment and Second Amendment rights at public protests. Only a few scholars have addressed the matter, and they have either proposed broad one-size solutions or narrow one-off proposals.²⁴

This Article offers the first comprehensive assessment of the alternatives available to state and local officials to respond to armed protests. One of the Article's primary goals is to assist lawmakers, courts, and law enforcement officials in working through the constitutional implications of their various options. The Article does not address whether there is, or ought to be, a constitutional right to keep and bear arms in public places.²⁵ Rather, it takes the law as it currently stands, with nearly all states allowing some form of open carry and most allowing this practice at public protests. A central question is whether officials can regulate open carry at public protests in ways that satisfy both First Amendment and Second Amendment standards.

The arming of public protests also raises some more general concerns. One issue is whether we can actually reconcile or harmonize expression and

22. See *infra* Part IV (discussing state and local laws concerning open carry).

23. For example, a locality may be banned from imposing restrictions on open carry owing to preemptive and controlling state laws. Thus, authorities in Charlottesville, Virginia, are not able to impose restrictions on open carry owing to Virginia's permissive open carry laws. See Va. Code Ann. § 18.2-287.4 (2012 & Supp. 2018). Many states are governed by the so-called "Dillon rule," which places limits on local governmental authority where the state legislature has addressed an issue like right to carry. See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1122-23 (2007). For a discussion of how this rule affected Charlottesville's response to the Unite the Right rally in that city, see generally Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58 (2018).

24. See DeBoer, *supra* note 1, at 341-42 (proposing a law banning open carry of firearms at public protests); David M. Shapiro, *Guns, Speech, Charlottesville: The Semiotics of Semiautomatics*, 106 GEO. L.J. ONLINE 1 (2017) (proposing "open-carry zones" as a means of regulating open carry at public protests).

25. The right to *concealed* public carry, which the Supreme Court has strongly suggested may not be covered by the Second Amendment and which does not raise the core expressive concerns raised by open carry of firearms at public protests, is not addressed in detail in this Article. See *District of Columbia v. Heller*, 554 U.S. 570, 626 ("[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."); see also *Peterson v. Martinez*, 707 F.3d 1197, 1201 (10th Cir. 2013) (upholding ban on concealed carry of handguns).

firearms at public protests, assuming both rights are likely to be exercised together. That depends, to a large extent, on the options available to state and local authorities. From an even broader perspective, the Article considers the likely future of the public Second Amendment—the recognition and exercise of public open carry rights. It does so by using the long experience we have with our public First Amendment in order to highlight the factors and influences that are likely to shape the public Second Amendment.

Part II summarizes the scope and exercise of First Amendment and Second Amendment rights in public places. There is robust and well-developed First Amendment jurisprudence concerning rights relating to public protests and public expression more generally.²⁶ The Supreme Court recognized an individual right to bear arms only a decade ago.²⁷ As noted, it has not yet addressed the scope of Second Amendment rights outside the home. First Amendment doctrines and justifications relating to public expression are also far more developed than their Second Amendment counterparts,²⁸ which are still under construction. In sum, relative to the public Second Amendment, the public First Amendment is well-defined and deeply theorized. Part II closes by introducing, but not resolving, the compatibility issue—i.e., whether we can have both expression and firearms at public protests. Compatibility will ultimately depend on whether First Amendment and Second Amendment rights can be reconciled in this and other public contexts. This in turn depends on the regulatory options available to officials and broader concerns about the exercise and policing of open carry at public protests. These issues will be addressed in the remaining parts of the Article.

Part III examines the intersection between expression and open carry from the perspective of First Amendment rights and interests. It first considers whether there is a *First Amendment* right to carry firearms at public protests. Recognition of such a right could spell trouble for state bans on open carry. I conclude that in very narrow circumstances, the act of carrying a firearm, as well as the act of assembling with others for that purpose, might be an act of expression protected by the First Amendment.²⁹ However, even assuming this is the case, the First Amendment provides a relatively thin form of protection for open carry in public places. Unlawful communications conveyed with firearms—threats and intimidation, for example—are not covered by the Free

26. See generally TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES (2009) (discussing and critiquing First Amendment doctrines governing public expression).

27. See *Heller*, 554 U.S. at 635 (recognizing a right to keep and bear arms in the home for self-defense).

28. See generally ZICK, *supra* note 26 (comparing the development of the First and Second Amendments).

29. See *infra* Sections III.A & III.D (discussing the right to bear firearms in association with the Freedom of Expression and the Freedom of Assembly).

Speech Clause.³⁰ Further, even if open carry is expressive, content-neutral permit requirements and time, place, and manner regulations can restrict it in certain respects. Ultimately, the First Amendment may protect only the right to carry an *unloaded* firearm. Thus, proponents of open carry looking to the First Amendment for protection are likely to come away mostly disappointed. Part III also examines whether the First Amendment might be relied upon by other protest participants as a basis for *limiting* open carry rights. This claim would largely be based on the argument that the presence of firearms “chills” the expressive activities of protest participants.³¹ However, the short answer to this argument is that this sort of First Amendment harm is not generally cognizable—even when inflicted by government officials.³² It would not provide a basis for limiting open carry by private individuals.

Part IV next considers, primarily from the perspective of the Second Amendment and state laws granting open carry rights, a menu of options for regulating the arming of public protests. Authorities have six primary options: (1) enforce existing criminal laws relating to firearms; (2) ban the presence of unauthorized private militias at public protests; (3) enforce longstanding state law prohibitions on “going armed to the terror,” which generally treat public carry as an act of public intimidation; (4) impose place and time/event restrictions on open carry; (5) restrict the manner of open carry; and (6) limit the types of “arms” that can be openly carried at protests. Part IV concludes that many, although not all, of these regulations would satisfy current Second Amendment standards. The options provide a basic framework for thinking about future state laws regulating armed protests, as well as current measures that can be taken—even in states that allow open carry—to limit the arming of public protests. These measures may help to reconcile expression and open carry at public protests, even if they will not eliminate all tensions between them.

Part V examines some broader lessons—in particular for the public exercise of Second Amendment rights, which are highlighted by the phenomenon of armed protests. Although expression and firearms obviously raise distinctive concerns, our long history with the public dimension of First Amendment rights suggests a possible path forward with regard to the public exercise of Second Amendment rights. Much like firearms today, freedom of speech and assembly were once considered threats to public order and safety.³³ The transformation of public expression from presumptive threat to preferred right was the product of decades of experimentation with

30. See *infra* Section III.B.

31. See, e.g., Miller, *supra* note 17, at 1309–10 (discussing chilling effect of firearms at public protests).

32. See *Laird v. Tatum*, 408 U.S. 1, 13–16 (1972) (holding that subjective chill arising from alleged governmental surveillance of protest activities is not a cognizable injury).

33. See Timothy Zick, *Managing Dissent*, 95 WASH. U. L. REV. 1423, 1433–37 (2018) (discussing early free speech and assembly cases treating even political speech as a “clear and present danger”).

regulations, doctrines, and theories. The public Second Amendment has a robust head start, particularly in terms of legislative support. However, it has yet to be tested, shaped, and justified in the same manner as our public First Amendment. Like the public First Amendment, the future of the public Second Amendment will not depend only or perhaps even primarily on state laws and court decisions. It will also depend on how the public right to keep and bear arms is exercised, policed, balanced against other concerns, and justified—including at public protests—in the years to come. Only once these things occur will we know for certain whether a public Second Amendment is compatible with a pre-existing public First Amendment.

II. THE PUBLIC FIRST AND SECOND AMENDMENTS

With regard to both the First Amendment and Second Amendment, the spheres in which these rights are exercised can be divided into private and public. Freedom of expression and the right to keep and bear arms can both be exercised within the home and outside it.³⁴ This Article focuses on the public exercise of First Amendment and Second Amendment rights. It begins with a summary of the current public First Amendment and public Second Amendment. It then introduces, but does not resolve, a central concern relating to the intersection between public expression and open carry—that the two are inherently incompatible.

A. PUBLIC SPEECH AND ASSEMBLY

The definition and scope of public expressive rights are by now relatively clear. The courts have extensive experience addressing the public protection of freedom of speech, assembly, petition, and press rights, pursuant to a jurisprudence that has been developed over the course of many decades.³⁵

Public protests take many different forms. Speakers engage in everything from large-scale assemblies and demonstrations, to smaller-scale expressive gatherings, to face-to-face pamphleteering. Public speakers use the written and spoken word. They also communicate through music, art, and performance.³⁶ Symbolic or expressive acts have long been part of the American public expressive tradition.³⁷ Our First Amendment has been interpreted to cover conduct with an expressive element. Thus, when the speaker intends to convey a particularized message, and there is a great

34. See generally Miller, *supra* note 17 (discussing private and public aspects of freedom of speech and the right to keep and bear arms).

35. See generally ZICK, *supra* note 26 (discussing the development of First Amendment doctrines).

36. See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (upholding sound restrictions at a park bandshell).

37. See generally Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057 (2009) (discussing early forms of symbolic conduct).

likelihood that the audience will understand that message, the Free Speech Clause applies.³⁸

Symbolic conduct also takes a wide variety of forms—including parading, flag burning, overnight camping, die-ins, and even stages of nudity. The government can enforce content-neutral regulations of symbolic conduct, if those regulations are narrowly tailored to serve significant public interests.³⁹ However, as is the case with other forms of expression, the government cannot generally target the expressive element of symbolic conduct unless it has a compelling interest in doing so and its regulation is necessary to serve that interest.⁴⁰

Under current doctrine, speakers have relatively robust access rights, for purposes of the exercise of First Amendment rights, to “traditional” public forums such as public streets, parks, and sidewalks.⁴¹ In those places which the Court has described as open to expressive activities “time out of mind,” government is generally prohibited from denying access or regulating speech based on its subject matter or viewpoint.⁴² However, the government can impose content-neutral restrictions on the time, place, and manner of expression so long as those restrictions suppress no more speech than is necessary to serve its significant interests.⁴³ Those interests range from public order and safety, to privacy and repose, to aesthetics.⁴⁴ The same basic rules apply in “designated” public forums, which are properties the government has intentionally opened to expressive activities.⁴⁵ In other public properties—i.e., those that are neither traditional public forums nor designated public forums—government can impose reasonable restrictions on speech so long as they are neutral with regard to viewpoint.⁴⁶

38. See *Texas v. Johnson*, 491 U.S. 397, 417–18 (1989) (concluding that public burning of U.S. flag at a political protest was expressive); *Spence v. Washington*, 418 U.S. 405, 410 (1974) (holding that conduct is expressive if the speaker intends to convey a message and an audience is likely to understand it).

39. See *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968) (announcing an intermediate scrutiny standard for laws that incidentally burden speech and expressive conduct).

40. See *Johnson*, 491 U.S. at 411–12 (invalidating state law criminalizing flag burning).

41. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (summarizing modern public forum doctrine).

42. *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939); see *Perry*, 460 U.S. at 45 (describing places “which by long tradition or by government fiat have been devoted to assembly and debate”).

43. *Perry*, 460 U.S. at 60.

44. See *Frisby v. Schultz*, 487 U.S. 474, 486 (1988) (upholding restriction on “targeted picketing” outside residence of abortion provider); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 289 (1984) (upholding prohibition on overnight camping in national parks owing to concerns about damage to park lands); *Cox v. Louisiana*, 379 U.S. 536, 545 (1965) (invalidating conviction of leader of civil rights group seeking to protest racial segregation).

45. See *Perry*, 460 U.S. at 45–46.

46. *Id.*

Although protection for public expressive rights is robust, it is not without limits. There are Free Speech Clause coverage limits, all of which apply to public expression. Speakers cannot incite others to violence or unlawful acts where violence or unlawful activity is imminent and likely to occur.⁴⁷ Nor can they communicate threats, distribute obscene materials, or utter words that are likely to provoke an imminent brawl.⁴⁸ However, these are relatively narrow coverage exceptions. Thus, the First Amendment generally protects communications that are crude, offensive, and derogatory.⁴⁹ Public protests, demonstrations, and rallies often include boisterous, profane, and distasteful communications. Assemblies of protesters and counter-protesters may shout at one another, hurl insults, and engage in contentious debates.

Governments can of course regulate unlawful and violent assemblies of individuals. Moreover, the First Amendment standards and principles applicable to public expression grant government wide latitude to displace, limit, and burden public expression and assembly.⁵⁰ As managers of public properties, including public parks and streets, governments can impose limits on public expression that render its actual exercise quite difficult.

Thus, as mentioned, officials can impose limits on the time, place, and manner of expression and expressive events.⁵¹ Under this authority, governments have enacted detailed permit schemes and imposed limits on the duration and manner of protests. This authority has been used to restrict speakers to “free speech zones”—designated places in which speech and assembly are permitted.⁵² Notwithstanding their significant impact on public speech and assembly, so long as they satisfy the relatively lenient time, place, and manner standard, free speech zones and similar restrictions are often permissible.

In general, officials can pursue a variety of content-neutral interests in ways that make it very difficult for speakers to distribute information, convey ideas, assemble in numbers, and reach intended audiences. This authority is considered necessary to impose basic rules of order on public events such as

47. See *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (invalidating application of Ohio criminal syndicalism law where speech was not intended or likely to incite imminent lawless action).

48. See *Miller v. California*, 413 U.S. 15, 23 (1973) (holding that obscenity is not covered by the Free Speech Clause); *Watts v. United States*, 394 U.S. 705, 707–08 (1969) (holding that “true threats” are not covered by the Free Speech Clause); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (announcing that “fighting words” are not covered under the First Amendment).

49. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–96 (1992) (invalidating St. Paul ordinance prohibiting certain fighting words); *Cohen v. California*, 403 U.S. 15, 16, 25 (1971) (invalidating conviction for disturbing the peace based on jacket bearing the words “Fuck the Draft”).

50. See generally ZICK, *supra* note 26 (discussing First Amendment doctrines relating to place or location).

51. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–47 (1988).

52. See generally Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006) (discussing use of free speech zones and other spatial restrictions on public expression).

protests and demonstrations. However, it can also be used to impose managerial control over dissenting speakers and groups that rely on a degree of disruption to communicate their messages.

The reasons for recognizing these robust First Amendment protections to speech, assembly, press, and petition rights in public places are also well-understood. All of the principal justifications for protecting expressive rights—advancing self-government, facilitating the search for truth, and respecting individual autonomy⁵³—apply to communications at public protests and demonstrations. In sum, public protests, demonstrations, symbolic acts, and other public expression are a critical part of the American expressive tradition.

B. PUBLIC KEEPING AND BEARING OF ARMS

Compared to established public First Amendment tradition, the constitutional framework governing the public exercise of Second Amendment rights is in its infancy. The Supreme Court recognized an individual right to keep and bear arms in 2008, in *District of Columbia v. Heller*.⁵⁴ *Heller* recognized an individual right to bear arms in the home, for self-defense.

The Court emphasized that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.”⁵⁵ Thus, it does not protect “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁵⁶ In a passage that has received a lot of attention, the Court discussed some longstanding limits:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, *or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings*, or laws imposing conditions and qualifications on the commercial sale of arms.⁵⁷

Aside from the reference to “sensitive places” such as schools and government buildings in the above passage, the Court has not yet addressed the scope of Second Amendment rights in public places. However, there are

53. See *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting) (using marketplace of ideas metaphor to explain freedom of speech). See generally C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989) (discussing autonomy values associated with free speech); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (2004) (discussing the importance of free speech to self-government).

54. *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008).

55. *Id.* at 626.

56. *Id.*

57. *Id.* at 626–27 (emphasis added).

some indications that it may recognize at least a limited right to keep and bear arms openly in public. Justice Scalia's opinion for the Court in *Heller* concluded that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."⁵⁸ The Court also observed that "the inherent right of self-defense" rests at the core of the Second Amendment.⁵⁹ Although the Court noted that the need for self-defense was "most acute" in the home, it did not expressly limit the scope of the Second Amendment to that place.⁶⁰

The scope of the term "Arms" in the Second Amendment is also the subject of ongoing judicial and academic debate. *Heller* states that the term covers "Arms" that were "'in common use at the time' for lawful purposes like self-defense."⁶¹ Whether that includes various types of assault rifles, or other weapons from knives to nunchucks, will be worked out over time. Under the Court's standard, it at least appears to be the case that individuals cannot carry hand grenades, sawed-off shotguns, or weapons of war to a public protest.⁶² However, which weapons are covered by the Second Amendment, and what standard of judicial review is to be used to adjudicate limits on specific "Arms," remain open questions.

One possibility for resolving at least some questions of public scope, as suggested above, is to look generally to the First Amendment for guidance. *Heller* relied heavily on analogies between the First Amendment and Second Amendment. The Court invoked the First Amendment in three respects, each of which might have some bearing on defining the public dimension of Second Amendment rights.

First, the Court sought to burnish the Second Amendment's historical pedigree by comparing it to the First Amendment's. Both provisions, the Court asserted, codified pre-existing rights and both were the product of a long dormancy followed by renewed judicial engagement.⁶³ This comparison served to place the Second Amendment in the same orbit as the more established First Amendment, in terms of its historical roots and road to rediscovery.

Second, the Court invoked the Free Speech Clause analogy in addressing the Second Amendment's scope. For example, it noted that just as the Free

58. *Id.* at 592.

59. *Id.* at 628.

60. *Id.*; see also *McDonald v. City of Chi.*, 561 U.S. 742, 767 (explaining that "individual self-defense is 'the central component' of the Second Amendment right" without any indication that the right is limited to the home).

61. *Heller*, 554 U.S. at 624 (citation omitted).

62. See *id.* at 626–27; see also *id.* at 625 ("[United States v. Miller said] only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right.").

63. *Id.* at 592, 625–26.

Speech Clause's protection extends to modern forms of communication (such as speech on the Internet), so too must the Second Amendment's scope extend beyond the types of arms available at the founding.⁶⁴ At the same time, also concerning the matter of scope, the Court observed⁶⁵ that the Second Amendment, like the First Amendment, does not protect *all* exercises of the right in question.⁶⁵ Thus, just as there are some limits on free speech coverage, there must also be limits on the coverage and exercise of the right to bear arms.

Finally, in terms of methodology, the Court rejected calls for an interest-balancing approach to Second Amendment rights—i.e., a weighing of the individual's right to keep and bear arms against the state's interests in regulating such activities. Once again, the majority opinion invoked the Free Speech Clause example: "The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different."⁶⁶ In addition, the Court expressly rejected any form of "rationality" review for Second Amendment regulations, arguing that this form of low-level review has not been applied in the free speech context.⁶⁷ These observations may have some bearing on how courts assess future restrictions on the public exercise of Second Amendment rights.

Lower courts have had roughly a decade to examine the scope of public rights to keep and bear arms. Some have concluded that the Second Amendment applies in public places and have invalidated outright bans on public carry.⁶⁸ Other courts have held that the Second Amendment does *not* include a right to carry firearms in public.⁶⁹ Some have noted that the question remains open.⁷⁰ The Supreme Court has declined several

64. *Id.* at 582.

65. *Id.* at 595.

66. *Id.* at 635.

67. *Id.* at 628 n.27.

68. *See, e.g.,* *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1178–79 (9th Cir. 2014); *Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2012) (concluding that the right to self-defense extends beyond the home).

69. *See, e.g., In re Pantano*, 60 A.3d 507, 514 (N.J. Super Ct. App. Div. 2013); *Richards v. Cty. of Yolo*, 821 F. Supp. 2d 1169, 1174–75 (E.D. Cal. 2011), *rev'd sub nom. Richards v. Prieto*, 560 F. App'x 681 (9th Cir. 2014), *rev'd en banc sub nom., Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016). *See generally* Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225 (2008) (arguing that *Heller* supports adoption of a private/public distinction concerning Second Amendment rights).

70. *See, e.g., Drake v. Filko*, 724 F.3d 426, 430 (3d Cir. 2013) ("It remains unsettled whether the individual right to bear arms for the purpose of self-defense extends beyond the home."); *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.").

opportunities to address whether the Second Amendment protects some form of public carry.⁷¹

The federal appeals courts have started to develop standards of review regarding regulations that burden open and other forms of public carry. Taking their primary cues from *Heller*, some courts have expressly relied on the First Amendment's general framework for speech regulations when reviewing firearms regulations.⁷² One court concluded that "a lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside the home."⁷³ Under the borrowed free speech framework, regulations of what might be considered non-core exercises of the Second Amendment—i.e., those that do not affect the right to keep and bear arms in the home for self-defense—are subject to an "intermediate scrutiny" standard under which governments must demonstrate a reasonable fit between the law and some important governmental objective.⁷⁴ As some commentators had predicted, the logical progression and likely consequence of borrowing a First Amendment framework to define public and other Second Amendment rights is a form of judicial interest balancing.⁷⁵

In stark contrast to our understanding of First Amendment expressive rights, the scope of the right to exercise Second Amendment rights in public is far less developed and thus far less certain. Whether there is a constitutional right to exercise Second Amendment rights in public places is itself unclear. So too is the precise scope of the conduct the Second Amendment protects in public settings. The doctrines, principles, and theories relating to the public exercise of Second Amendment rights are the subject of current debate in and beyond the courts.⁷⁶ In contrast to First Amendment rights, there is much we do not yet know about when, where, and how Second Amendment rights can be exercised in public venues or at public events.

C. THE COMPATIBILITY QUESTION

The arming of public protests has brought the public dimensions of the First Amendment and Second Amendment together. Expression and open

71. See Liptak, *supra* note 8 (observing that the Supreme Court has denied certiorari in several public carry cases).

72. See, e.g., *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010).

73. *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011).

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

75. See Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 381–83 (2009) (explaining the distinction between categoricalism and balancing approaches and how this might affect interpretation of the Second Amendment); Mark Tushnet, *Heller and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 421–22 (2009) (explaining that some balancing in Second Amendment doctrine is inevitable).

76. Joseph Blocher & Darrell A.H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 HARV. J. LEGIS. 279, 293–300 (2016) (discussing a range of possible Second Amendment justifications, including self-defense, autonomy, and protection against governmental tyranny).

carry are now exercised in the same public places. As individuals have begun to more regularly exercise open carry and other Second Amendment rights in the same places where they protest and assemble, some have raised the question whether First Amendment and Second Amendment rights are *inherently* incompatible at public protests, demonstrations, and rallies.

Commentators, including some constitutional scholars, argue that in the case of public protests, there is an inherent conflict between the exercise of First Amendment and Second Amendment rights. Professor Darrell Miller argues that the right to keep and bear arms, like the right to view obscenity, ought to be interpreted as “home-bound.”⁷⁷ According to Miller, part of the justification for treating Second Amendment rights as “home-bound” is that in public contexts, the government has “a monopoly on legitimate violence.”⁷⁸ Further, Miller argues, the public display of firearms “must be tempered by other constitutional values, including the preservation and maintenance of the social compact and democratic norms.”⁷⁹

Directly addressing the compatibility concern, Miller argues that “the presence of a gun in public has the effect of chilling or distorting the essential channels of a democracy—public deliberation and interchange.”⁸⁰ He writes: “Valueless opinions enjoy an inflated currency if accompanied by threats of violence. Even if everyone is equally armed, everyone is deterred from free-flowing democratic deliberation if each person risks violence from a particularly sensitive fellow citizen who might take offense.”⁸¹ A “home-bound” interpretation of the Second Amendment is justified, Miller argues, in part because “[a] right to freely brandish firearms frustrates one of the very purposes of a constitution, which is ‘to make politics possible.’”⁸²

Other scholars have similarly argued that the First Amendment and Second Amendment are democratically incompatible in the context of public protests. Focusing specifically on the claim that public carry rights are necessary to resist government, Professor Greg Magarian claims that “[e]ven keeping arms to enable insurrection would undermine debate by fostering a climate of mistrust and fear.”⁸³ Magarian puts it this way: “[I]nsurrection short-circuits political debate.”⁸⁴ According to this view, in our democracy the First Amendment provides the chosen and legitimate vehicle for political revolution.⁸⁵ Allowing individuals to openly carry firearms at public protests

77. See generally Miller, *supra* note 17 (arguing for a “home-bound” Second Amendment).

78. *Id.* at 1308.

79. *Id.*

80. *Id.* at 1309–10.

81. *Id.* at 1310 (footnote omitted).

82. *Id.* (quoting Jack M. Balkin, *Constitutional Hardball and Constitutional Crises*, 26 QUINNIPIAC L. REV. 579, 592 (2008)).

83. Magarian, *supra* note 17, at 95.

84. *Id.*

85. See *id.* at 95–96.

is repugnant to the premise of peaceful self-government and democratic change that the First Amendment supports.

The incompatibility argument thus rests on two basic premises. The first is that the mere presence of firearms at public protests is a form of intimidation that chills public debate by threatening violent suppression of protest. The second premise is that openly carrying a firearm conflicts with the democratic values served by freedoms of speech, assembly, and petition at public protests.⁸⁶ In essence, the claim is that allowing open carry at public protests elevates armed conflict over peaceful democratic discourse. This substitutes the brandishing of arms for counter-speech, which is the First Amendment's preferred response to protest and dissent.⁸⁷ For Miller and Magarian, in the particular context of public protests, Second Amendment rights are outweighed by First Amendment rights and concerns.⁸⁸

There is a certain common sense and rational appeal to the notion that the presence of armed protesters or counter-protesters will indeed chill the exercise of First Amendment speech and assembly rights. At the least, the presence of firearms adds an element of potential danger to what are often rowdy and contentious public events. Events like the Charlottesville "Unite the Right" Rally suggest that the premises of the incompatibility position are not without some merit.

By the same token, it may not be fair to test the incompatibility argument with reference to the most combustible and violent protests. When one thinks about the range of protest events that occur across the U.S., whether expression and firearms are inherently incompatible with one another becomes a closer question. At the very least, the argument that we cannot have both First Amendment and Second Amendment rights at protests is subject to rebuttal.

In many places in the U.S., public protests have actually been armed for some time.⁸⁹ In some open carry jurisdictions, the mere presence of firearms has not suppressed public protests.⁹⁰ Of course, that does not mean public expression has never been chilled at all by the presence of firearms. To understand the actual effect of open carry on public expression, we would

86. See *id.* at 58.

87. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[T]he fitting remedy for evil counsels is good ones."), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (2012).

88. This sort of rights balancing is not uncommon. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001) (holding that privacy interest in the context of private conversation must give way to public interest in dissemination of information of public concern); *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion) (balancing free speech and voting rights and upholding limits on political campaign speech near polling places).

89. Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 102-03 (2009).

90. See *id.* (claiming that New Hampshire, Vermont, and Washington, which have long imposed few restrictions on carrying guns, enjoy the same level of robust political discourse as more restrictive states like Hawaii, Maryland, and New York).

need to empirically examine the psychological and physical impacts of public carry on public protest participants and participation.

At this point, we do not have that kind of data. We have only anecdotal observations and accounts. I can count my own among them. In September 2017, I attended a permitted rally near the Robert E. Lee monument in Richmond, Virginia. A white nationalist group planned the rally to garner support for retaining the statue, which some had proposed be removed. As it happened, counter-protesters far outnumbered the dozen or so white nationalists who attended. Some in the crowd were openly carrying firearms. Here is what I witnessed:



The conversation depicted went on for at least thirty minutes, and was at all times peaceful but spirited. It drew a crowd of curious onlookers.

Recall that the question presented is one of *inherent* incompatibility. The fact that open carry creates some tensions or concerns that may chill or inhibit public expression does not itself demonstrate *inherent* incompatibility. My single example does not demonstrate the absolute compatibility of free speech and firearms. However, it defeats the claim that these two things can never co-exist at public protests.

Some scholars have also pushed back against the claim that the mere presence of firearms chills public expression. Indeed, Professor Eugene Volokh argues that public carry might actually *facilitate* the exercise of First

Amendment rights at public protests.⁹¹ Professor Volokh argues that the right to keep and bear arms at public protests might “support public interchange, by assuring minority speakers that they can protect themselves against violent suppression.”⁹² Rather than view open carry as fatally undermining public discourse, Volokh suggests that it may level the playing field and encourage the communication of dissident and minority viewpoints.⁹³ Some of the armed militia groups that participated in the Charlottesville event sounded a similar note, claiming that they were present in order to ensure that all participants’ First Amendment rights were respected.⁹⁴

As noted earlier, most state legislatures and many courts have implicitly concluded that First Amendment and Second Amendment rights are not inherently in conflict with one another at public events.⁹⁵ Laws protecting open carry, including in public places, are politically popular. They suggest a political determination, indeed one bordering on broad consensus, that expression and firearms are not wholly incompatible at public events like protests. As we will see, not all states have adopted this view.⁹⁶ And indeed, some states that protect open carry impose limits on it that are clearly aimed at reducing the tensions and potential harms that might occur when protests become armed. But these are best interpreted as efforts to reconcile or harmonize expression and open carry at protests, rather than determinations that Second Amendment rights are outweighed by First Amendment rights.

The Supreme Court seems likely to weigh in on the compatibility question, at least indirectly, when it finally addresses the Second Amendment’s public dimension. Depending on what it concludes, the Court will have some impact on the future of the public Second Amendment. In the meantime, as will be discussed in Parts III and IV, jurisdictions will seek to reduce the tensions that occur when expression and firearms occupy the same public venues. Moreover, as I explain in Part V, several additional factors will likely affect the compatibility debate as we move forward. These include how open carry is exercised, regulated, and policed. Ultimately, how the public, officials, and courts view the compatibility question may depend on how many “Charlottesvilles,” or worse, we experience.

91. *Id.* at 102.

92. *Id.* (emphasis omitted).

93. *Id.*

94. See 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.

95. See, e.g., *Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2012) (concluding that the Second Amendment right to self-defense extends beyond the home).

96. See *infra* Part IV (discussing various state and local open carry regulations).

III. ARMING THE FIRST AMENDMENT

Individuals are exercising First Amendment and Second Amendment rights at public protests. Assuming for the moment that these rights are not inherently incompatible, what rights does the First Amendment confer on arms-carriers at public protests? What restrictions apply to armed expression and assemblies that openly carry firearms for expressive purposes? Finally, can the First Amendment be invoked to *limit* open carry rights at public protests, owing to the potential chilling effect of firearms on political and other expression?

A. A FIRST AMENDMENT RIGHT TO OPEN CARRY AT PROTESTS?

One aspect of the relationship between First Amendment and Second Amendment rights at public protests relates the possible expressiveness of open carry. If open carry is expressive, then the First Amendment may limit the extent to which authorities can restrict or ban the activity at public protests. Is there a *First Amendment* right to carry firearms at a public protest? If so, what is the scope of this right?

In some circumstances, the keeping and bearing of arms might be sufficiently expressive to constitute covered “speech” under the First Amendment’s Free Speech Clause.⁹⁷ Symbolic acts—i.e., those intended to convey messages that audiences, in particular contexts, are likely to understand—are covered by the Free Speech Clause.⁹⁸ For example, the Supreme Court has held that burning a flag at a political protest qualifies as sufficiently expressive to warrant Free Speech Clause coverage.⁹⁹ With respect to symbolic acts, context matters—particularly in terms of the requirement that an audience be likely to comprehend what a person seeks to communicate through acts or conduct.

The easiest case in terms of coverage involves individuals openly carrying firearms at a public protest or rally *advocating in favor of Second Amendment open carry rights*.¹⁰⁰ Assume that the jurisdiction currently prohibits open carry and allows only the concealed carry of firearms in public places. In the narrow context of a protest that is about or concerning Second Amendment rights, open carry may be considered part of the expressive element of the

97. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

98. See *Spence v. Washington*, 418 U.S. 405, 409–10 (1974) (holding that conduct can be expressive where a speaker intends to convey a message and an audience is likely to understand it); *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (setting forth standard of review for content-neutral regulations of symbolic speech).

99. See *Texas v. Johnson*, 491 U.S. 397, 400, 404–05, 420 (1989) (invalidating state law conviction for “desecrati[ng]” the U.S. flag).

100. See *Nordyke v. King*, 319 F.3d 1185, 1190 (9th Cir. 2003) (observing that “a gun supporter waving a gun at an anti-gun control rally” may be engaged in expressive conduct); *Burgess v. Wallingford*, No. 11-cv-1129, 2013 WL 4494481, at *9 (D. Conn. May 15, 2013) (“Gun possession may, in some contexts, . . . invoke First Amendment analysis.”).

demonstration or protest.¹⁰¹ It would constitute what I have described elsewhere as a form of “rights speech”—a communication about or concerning the recognition, scope, or exercise of a constitutional right.¹⁰²

A protester who openly and publicly bore arms at such a rally would likely have a valid claim that restricting the open carry of firearms at least implicates the Free Speech Clause. Assuming the open carry restriction is not based on the content of what open carry seeks to communicate but instead on content-neutral safety or other reasons, the free speech right to carry would be reviewed under a standard that requires government to demonstrate important regulatory interests and that its restriction is narrowly tailored to those interests.¹⁰³

The government would likely argue that disarming individuals during a public protest—in particular prohibiting them from openly carrying firearms—is narrowly tailored to further an important interest in public safety and crime prevention. It might also argue that disarming protesters in this manner will facilitate the effective exercise of free speech and assembly rights. In sum, the government would argue that the presence of firearms at public protests creates an inherent risk of violence, intimidation, or both.

Some commentators treat the invocation of such interests as sufficient *on their face* to justify *any* restriction on open carry under the Free Speech Clause.¹⁰⁴ To the contrary, I think it is a close question whether an armed protester might prevail under the governing standard.¹⁰⁵

While it is true that courts generally defer to stated governmental interests in public order, safety, and the like, courts sometimes require more specific showings to uphold limits on expression.¹⁰⁶ For example, the Ninth Circuit invalidated a city ordinance banning the carrying of all poles and sticks during public protests.¹⁰⁷ The court concluded that the city bore the burden of demonstrating that its interests were real—i.e., that there was some tangible evidence that the ban was necessary to serve its interests in public safety.¹⁰⁸

101. See DeBoer, *supra* note 1, at 346–47 (concluding that open carry at a rally for Second Amendment rights would be expressive); Shapiro, *supra* note 24, at 2 (arguing that open carry at the Charlottesville rally was expressive).

102. See generally Timothy Zick, *Rights Speech*, 48 U.C. DAVIS L. REV. 1 (2014) (identifying a category of political speech that relates to the recognition, scope, or exercise of constitutional rights).

103. *O'Brien*, 391 U.S. at 376–77.

104. E.g., DeBoer, *supra* note 1, at 355; Shapiro, *supra* note 24, at 5.

105. See generally DeBoer, *supra* note 1 (concluding that safety and crime prevention justifications are sufficient to merit a ban on open carry at public protests); Shapiro, *supra* note 24 (same).

106. See, e.g., *McCullen v. Coakley*, 134 S. Ct. 2518, 2535–36 (2014) (invalidating abortion clinic buffer zones on the ground that the state had not demonstrated they were narrowly tailored to serve its interests relating to ensuring access).

107. See *Edwards v. City of Coeur d’Alene*, 262 F.3d 856, 864–65 (9th Cir. 2001) (concluding that ban on all sign supports was not narrowly tailored to serve city’s interest in public safety).

108. *Id.* at 863.

Further, courts treating a class of armed speakers as presumptively dangerous are flirting with content discrimination. Add to these concerns the fact that there is another (at least potential) constitutional right at issue. This may heighten judicial review of government claims that the mere presence of firearms is an adequate basis for curtailing free speech. Armed protesters could plausibly argue that the mere *prospect* of violence from open carry is too speculative to be treated as sufficiently “important” to outweigh their expressive rights in public forums like public streets and parks. They could rely, again, on the established free speech principle that subjective fear of violence, without more, is not a valid justification for limiting or prohibiting speech.¹⁰⁹ As explained earlier, the mere prospect of expressive chill might not be deemed sufficient to justify an outright ban on open carry at a Second Amendment protest.¹¹⁰

Of course, it is possible that a court might view the prospect of violence as more than merely speculative. Although it has happened only rarely, firearms have indeed been discharged at some public protests.¹¹¹ A locality might thus be able to make a more concrete showing of danger or harm—either by proving that there have been public shootings at protests in that specific locality, or perhaps pointing to similar experiences elsewhere.¹¹² Notwithstanding the Second Amendment implications, First Amendment scrutiny of content-neutral time, place, and manner restrictions might just be flexible enough to permit officials to rely on this sort of evidence. But courts faithfully applying a narrow tailoring requirement should require more than abstract invocations of public safety or crime prevention before allowing officials to restrict expression in public forums.

109. See, e.g., *Cohen v. California*, 403 U.S. 15, 23 (1971) (“The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves.”); *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 508 (1969) (“But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”).

110. One commentator has reached the opposite conclusion. See DeBoer, *supra* note 1, at 350–57 (arguing that prohibition on open carry during public protests would satisfy Free Speech Clause standards). The author’s argument is based on the premise that government can justify a prohibition on open carry at public protests by pointing generally to crime-prevention and safety interests. *Id.* For the reasons stated, it is not clear whether these abstract invocations of safety and crime prevention would be sufficient to justify an open carry ban in the context being considered.

111. See Robles, *supra* note 5 (reporting on arrest of man who discharged handgun at Charlottesville rally).

112. Cf. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (suggesting that local officials could rely on evidence of “secondary effects” from adult theaters in defending regulations of such establishments).

Whether an open carry restriction is adequately tailored will depend to some extent on the scope of the restriction. Assuming a court credits the government's invocation of important interests, a ban on public carry during the duration of a public protest could be upheld as necessary to further those interests. Then again, some courts might balk at this sort of medium ban and require that the government at least consider a more limited restriction. More limited regulations might further the government's interests in safety and crime-prevention just as effectively. For example, the government could limit the protest or demonstration route in ways that reduce the potential for violent interactions. Or it could condition the permit on armed protesters not having any record of criminal or other violent behavior. Thus, again, it is not a certainty that the government would be able to defend an outright ban on the open carry of firearms at a political protest about gun rights or gun control.

Thus far, I have concluded that in the context of a public protest about the right to keep and bear arms, claimants might prevail on their claim that firearms display is a form of covered and protected speech. Outside that narrow context, however, the prospects for Free Speech Clause coverage dim rather significantly.

To be sure, gun rights proponents might argue that keeping and bearing arms at *any* public protest—indeed, in any public setting—is an expressive act. They might argue that they intend to communicate a willingness to defend themselves against private or governmental force. Or they might argue an intent to communicate the importance of an armed citizenry to defend against an overreaching government. Finally, they might insist that a firearm, like a national flag, is “pregnant with expressive content”—a cultural symbol of rugged individualism, frontier values, and self-defense.¹¹³

The act of marching in a demonstration is itself a form of covered speech, as are the placards, banners, and songs marchers use to communicate their message.¹¹⁴ Further, as the Supreme Court has said with regard to a public parade, “a narrow, succinctly articulable message is not a condition of constitutional protection.”¹¹⁵ So the demonstration itself is clearly a form of covered speech. However, not *everything* one does in the protest context is automatically swept in as expressive. For instance, the act of carrying a stick, a pole, a rock, a container of mace, or any other weapon at a public protest does not have any inherently expressive element. These acts seem no more inherently expressive than other public acts, such as driving a car or recycling a plastic container. One might be expressing the virtues of driving or

113. *Texas v. Johnson*, 491 U.S. 397, 405 (1989) (“Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in ‘America.’”); DeBoer, *supra* note 1, at 343–48 (examining variety of messages open carry might communicate).

114. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (discussing the expressiveness of a parade).

115. *Id.*

recycling, but any speech element is decidedly marginal and is in any event not *likely* to be understood by an audience.¹¹⁶

As the Supreme Court has said, conduct does not qualify as “‘speech’ *whenever* the person engaging in the conduct intends thereby to express an idea.”¹¹⁷ It has also said that where some explanatory speech is necessary to enable the audience to understand the intended message, this “is strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants protection.”¹¹⁸ This principle may apply to most instances of open carry, which likely require some form of explanation in order to convey a message that would be understandable to public audiences.¹¹⁹

Thus, it seems unlikely that courts would conclude that the mere act of visibly carrying a firearm at any public protest or demonstration constitutes an expressive act in a great majority of circumstances.¹²⁰ Without something more in the way of context, it is not clear what, if anything, a firearm expresses. However, even if courts were to consider open carry to be an expressive act in the specific context I describe, or more generally, it would be subject to several limitations. As discussed below, one of those limitations might be that First Amendment rights are adequately preserved by a regulation that allows for the open carrying of only *unloaded* firearms.¹²¹

B. UNCOVERED ARMS SPEECH

Even if there is some *expressive* right to openly carry firearms at certain public protests, the First Amendment limits certain arms-facilitated expression. Thus, there is no First Amendment right to threaten others by brandishing firearms in a manner that places an individual in fear of

116. See *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47, 60 (2006) (rejecting claim that requiring law schools to send emails and provide other forms of equal access for military employers violated rights of expressive conduct).

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

118. *Forum for Acad. & Institutional Rights*, 547 U.S. at 66.

119. See *Nordyke v. King*, 319 F.3d 1185, 1190 (9th Cir. 2003) (“Typically a person possessing a gun has no intent to convey a particular message, nor is any particular message likely to be understood by those who view it.”); see also Kendall Burchard, *Your ‘Little Friend’ Doesn’t Say ‘Hello’: Putting the First Amendment Before the Second in Public Protests*, 104 VA. L. REV. ONLINE 30, 44 (2018) (“Guns don’t speak. Although they may command attention and fear, the objects themselves are not inherently expressive.”); Luke Morgan, Note, *Leave Your Guns at Home: The Constitutionality of a Prohibition on Carrying Firearms at Political Demonstrations*, 68 DUKE L.J. 175, 183–99 (2018) (concluding that the act of carrying a weapon is not “speech”); Eric Tirschwell & Alla Lefkowitz, *Prohibiting Guns at Public Demonstrations: Debunking First and Second Amendment Myths After Charlottesville*, 65 UCLA L. REV. DISCOURSE 172, 188 (2018) (concluding that open carry is not expressive).

120. See, e.g., *Northrup v. City of Toledo Police Div.*, 58 F. Supp. 3d 842, 848 (N.D. Ohio 2014), *rev’d on other grounds*, 785 F.3d 1128 (6th Cir. 2015) (rejecting argument that defendant, who was carrying a firearm in a holster when arrested, was engaged in expressive conduct); *Baker v. Schwarb*, 40 F. Supp. 3d 881, 895 (E.D. Mich. 2014) (observing that audience did not appear to understand the message armed defendant was seeking to convey).

121. See *infra* Section III.C.

imminent bodily injury or death.¹²² Waving a firearm in another's face, or otherwise menacing a protest participant with an object of deadly force, cannot be defended as an exercise of the right to freedom of speech. Even if there is a Second Amendment right to openly carry firearms in public, the First Amendment does not cover exercises of that right that are intended to place persons in fear of bodily injury or death. Although the mere carrying of firearms is not sufficient to establish an intent to intimidate, an armed group of neo-Nazis brandishing arms and chanting neo-Nazi slogans at a public rally may qualify as an uncovered threat under First Amendment.¹²³

Nor can arms-carriers use words that incite others to engage in these sorts of actions, at least where the speaker intends that imminent lawless activity occur and there is a likelihood that it will imminently occur.¹²⁴ Thus, law enforcement officers would have the power to arrest any armed protester who communicates to fellow arms-bearers that they should use their weapons to inflict immediate harm on those present or threaten others with imminent death or bodily injury.

These and other forms of menacing-by-firearm would not be covered by the First Amendment. Although it might be difficult to enforce limits on threatening and inciting exercises of open carry in the context of a public protest, the First Amendment poses no obstacle to law enforcement's arrest of arms-bearers for breach of peace, public disorder, or unlawful assembly where they engage in unlawful brandishing or other conduct.

C. MANNER AND PLACE REGULATIONS

In addition, even if it is a form of expression, the act of openly carrying firearms would be subject to ordinary content-neutral time, place, and manner regulations.¹²⁵ There are several regulatory options to consider. One is to generally ban persons from participating in a protest while wearing masks or otherwise concealing their identities. Another is to restrict expressive arms-bearers to "open-carry zones" or other designated areas during a public protest.¹²⁶ Perhaps most significantly, in light of the safety concerns that have

122. See *Virginia v. Black*, 538 U.S. 343, 360 (2003) ("Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."); *Watts v. United States*, 394 U.S. 705, 708 (1969) (holding that "true threats" are not covered by the Free Speech Clause).

123. See *Black*, 538 U.S. at 360 (defining uncovered intimidation); see also Michael Dorf, *Constitutional Arithmetic Post-Charlottesville: Sometimes One Plus One Equals Zero*, DORF ON LAW (Aug. 21, 2017), <http://www.dorfonlaw.org/2017/08/constitutional-arithmetic-post.html>.

124. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (defining uncovered incitement as speech that advocates unlawful action that is both imminent and likely to occur).

125. See *Ward v. Rock Against Racism*, 491 U.S. 781, 790–91 (1989) (explaining that content-neutral regulation of time, place, or manner of speech is subject to intermediate scrutiny).

126. See Shapiro, *supra* note 24, at 4–6 (proposing "open-carry zones").

been cited, a ban on the open carrying of *loaded* firearms at public protests might survive First Amendment scrutiny.

Insofar as armed protesters raise safety and law enforcement concerns, a flat ban on appearing at a public event while wearing a mask would diminish such concerns to a degree. Although it would not prevent open carry itself, a masking ban would make violations of firearm and other laws easier to enforce. It might also reduce the apprehension of protest participants, who may view masked gunmen as more threatening than the ordinary armed protester.

In order to preserve First Amendment rights, officials would need to carefully draft a masking ban such that it did not target political protests or arms-bearers. A content-neutral law or ordinance, one that is not designed to be selectively enforced against only arms-bearing protesters, would stand some chance of surviving First Amendment scrutiny.¹²⁷ The safest course would be to enact a very narrow ban on wearing masks, such as a ban on concealing one's identity during the commission of a crime. Of course, that sort of ban would not unmask all potentially violent protesters. However, it would provide a basis for law enforcement to intervene where circumstances suggest criminal activity is afoot.

Officials might also try to separate open carriers from other protesters by adopting "open-carry zones." These zones would be specific places at a protest or along a parade route where open carry would be permitted.¹²⁸ On its face, this kind of place regulation seems like it would be reasonably effective in terms of reducing the potential for violence at public protests while preserving the free speech rights of open carriers.

Zoning is a very common regulatory tactic at public protests. Speakers are frequently confined to specific areas or spaces during public protests and demonstrations.¹²⁹ Under First Amendment doctrine, a content-neutral open-carry zone would have to be narrowly tailored to address important governmental concerns. The government would rely on the same concerns discussed earlier, namely that firearms are a threat to public safety and/or a deterrent to the exercise of expressive rights.¹³⁰ Open-carry zones would not ban armed protests. They would instead limit the places where protesters could openly display firearms.

One problem with the open-carry zone is that it might *exacerbate*, rather than resolve, the government's public safety and expressive chill concerns. This would probably not be a concern if all those placed in the zone were

127. See, e.g., *Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 206 (2d Cir. 2004) (upholding New York's anti-mask statute on ground that wearing mask is not sufficiently expressive to be covered by the First Amendment).

128. See Shapiro, *supra* note 24, at 4–6.

129. See Zick, *supra* note 52, at 591–606 (discussing use and effects of speech zoning and other spatial restrictions).

130. See *supra* notes 103–12 and accompanying text.

advocates for open carry rights—as, for example, in the hypothetical discussed earlier. However, assuming a broader expressive right to openly carry firearms is recognized, zoning could bring armed protesters and counter-protesters together in the same small pen or zone. That would seem to make armed conflict *more*, rather than less, likely.

The zoning option raises an important point about trading off free speech rights in the context of armed protests. As officials seek to reduce the possibility of violence and intimidation, they may be tempted to take measures that negatively impact the First Amendment rights of protesters and counter-protesters. Thus, in order to reduce the potential for violence, they might reduce the number of protesters that are allowed in certain places or restrict spontaneous gatherings that are hard to police.

In other words, zoning may ultimately diminish, rather than protect, First Amendment rights.¹³¹ Open-carry zones could limit armed speakers to certain out-of-the-way locations, where discharge of firearms is less likely to harm the general public. Zoning might also make it less likely that those inside the zone will engage in robust expressive activities—both with one another and with those located outside the zone. If the concern at an open public protest is that speakers will trim their sails out of fear of armed reprisal, that sort of intimidation seems more likely to occur in the close quarters of an armed pen or zone. Thus, displacing protesters, whether armed or not, in an effort to reduce tensions or in furtherance of public safety poses a distinct danger to the First Amendment rights of all protesters.¹³²

Other measures that negatively impact peaceful protest in order to respond to the special concerns raised by armed protests would raise similar First Amendment concerns. For instance, the denial of permits on grounds related to the content of the proposed event, or the identity of the speakers, would violate the First Amendment.¹³³ So too would charging a fee to armed protesters that was higher than the fees charged to other protesters, or that varied depending on the likelihood that violence might occur at the event.¹³⁴ Further, restricting or prohibiting certain groups of protesters from assembling in a particular place, or at a particular time, would also violate their First Amendment speech and assembly rights. Finally, enforcement of

131. See Zick, *supra* note 52, at 591–606 (discussing various harms to free speech from zoning and other spatial tactics).

132. See ZICK, *supra* note 26, at 1–2 (discussing controversy over free speech zone constructed at the 2004 Democratic National Convention in Boston, which a federal court described as an “internment camp” and a “pen”).

133. See, e.g., *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939) (holding that authorities may not exercise unbridled discretion to decide which pamphlets may be distributed in public places).

134. See *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 132–33 (1992) (invalidating variable permit fee).

“unlawful assembly” or public “riot” laws against otherwise peaceful protesters would raise serious First Amendment concerns.¹³⁵

A final option, which has thus far escaped commentators’ notice, is to require (either through permit regulations or other means of enforcement) that armed protesters carry only *unloaded* firearms. Even assuming one has a free speech right to display a firearm at a protest, that right does not necessarily include a right to display a loaded firearm. I consider below whether the Second Amendment would permit a restriction on the carrying of unloaded firearms at public protests.¹³⁶ The First Amendment concern is, of course, distinct.

Although an arms-carrier could argue that carrying a loaded firearm is intended to express something distinctive in terms of Second Amendment rights, in order to come within the First Amendment’s coverage the act would have to be likely to be understood by an audience.¹³⁷ However, absent some communication beyond the act of open carry itself, whether a firearm is loaded or unloaded would be known only to the carrier. In context, a public audience would not likely understand what the carrier was seeking to express through the act of loading the firearm. In terms of audience understanding, the only visible “expression” is the open carrying of the firearm. Thus, even in contexts where open carry might be expressive, as during protests centering on Second Amendment rights, speakers could not claim that the loading of the firearm was itself an aspect of covered speech. If this is correct, a Second Amendment proponent seeking refuge under the First Amendment’s free speech guarantee may gain only the right to demonstrate or protest in public carrying an unloaded firearm.

In sum, it is possible that courts might recognize a narrow Free Speech Clause right to openly carry firearms at public protests about or concerning the Second Amendment or the subject of gun rights including open carry. It is not likely that they will recognize a broader expressive right to open carry. Any limited expressive rights could be subject to content-neutral place measures, such as anti-masking laws and open-carry zoning. The First Amendment may ultimately protect only the right to openly carry an unloaded firearm. If so, the First Amendment would be of little value to proponents of public Second Amendment rights—at least assuming the point is to openly carry a firearm capable of being discharged.

135. See generally John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2 (2017) (discussing the offense of “unlawful assembly” and its enforcement in the contexts of public protests).

136. See *infra* Section IV.E.

137. See *Spence v. Washington*, 418 U.S. 405, 409–11 (1974) (holding that conduct can be expressive where a speaker intends to convey a message and an audience is likely to understand what the speaker is communicating).

D. EXPRESSIVE ASSOCIATION AND “PEACEABLE” ASSEMBLIES

The First Amendment also protects a right to “peaceably” assemble with others.¹³⁸ Over the years, the Supreme Court has transformed the Assembly Clause into a right of “expressive association.”¹³⁹ That right, which is now generally considered ancillary to the free speech right, protects joining with others for the purpose of engaging in expressive activities. Thus, a group that joins together expressly to advocate for gun rights, like the National Rifle Association, generally possesses First Amendment rights to communicate its chosen messages, determine its membership criteria, and choose its own members.¹⁴⁰

Restrictions on open carry could implicate the First Amendment right of expressive association. Merely belonging to a social club that involves the use or enjoyment of firearms would not bring a firearms possessor within the coverage of the expressive association right.¹⁴¹ However, if the group was formed to express a point of view about Second Amendment rights, the right may be invoked in challenges to certain open carry restrictions. Thus, for example, participants in the hypothetical gun rights rally discussed above might be covered by the right of expressive association and might invoke that right to challenge a range of open carry regulations.

This could provide an important additional measure of protection for arms-carriers. If a measure interferes with the group’s ability to communicate its pro-Second Amendment message, the government would have to justify it under a *heightened* scrutiny standard that requires a showing that it is necessary to serve a significant interest.¹⁴² Thus, under the expressive association doctrine, it would be more likely that a court would demand a showing of actual violence or effect on expressive rights and consider more carefully whether a restriction on collective expression is tailored to any harm shown.

There are a couple of potential objections to raising the right of expressive association in the context of my hypothetical open carry public protest. First, it might be argued that the restriction does not interfere with any right of the group to express a pro-gun message. Rather, the measure merely requires that when they do so, participants appear at a public protest unarmed. This reprises the question whether there is an expressive element to the open carry of firearms at public protests. The Supreme Court has been quite deferential to associations in terms of both the description of the group’s message *and* the extent to which government regulations are alleged

138. See JOHN D. INAZU, LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 20–62 (2012).

139. See *id.* at 63–150 (explaining the gradual transformation from assembly to association).

140. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653–56 (2000) (invalidating anti-discrimination law on grounds that it violated First Amendment right to associate for expressive purposes).

141. See *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 883 F.3d 45, 67–68 (2d Cir. 2018) (holding that regulation affecting persons wishing to engage in recreational and competitive firearms activities did not implicate or violate First Amendment right of expressive association).

142. See *Dale*, 530 U.S. at 655–60 (applying heightened scrutiny to state anti-discrimination law).

by groups to interfere with that message.¹⁴³ Assuming the same deference would be afforded the organizers of the pro-firearms rally, the right of expressive association would indeed be implicated.

There is another First Amendment consideration, this one arising from the language of the Assembly Clause—the actual source of the modern right of expressive association.¹⁴⁴ The provision covers the right to “peaceably” assemble. Not much is known about the original understanding of the term “peaceably,” although evidence from early commentary suggests that it indicates assemblies were considered protected so long as they were consistent with public peace and public order.¹⁴⁵ Thus, public assemblies that were either violent or illegal would not be considered “peaceable,” but gatherings that raised no imminent prospect of violence or disorder would be covered by the assembly right.¹⁴⁶

No court has ruled on whether an armed assembly at a public protest is “peaceable” under the terms of the Assembly Clause. As discussed further below, early state laws did prohibit the public carrying of firearms by paramilitary organizations.¹⁴⁷ They support the proposition that a narrow class of armed assembly—the private militia—could be banned from public places. These unlawful assemblies would not be covered by either the First Amendment or Second Amendment.

However, it seems doubtful that merely carrying a firearm openly in the presence of others would, by itself, disqualify a pro-Second Amendment group from invoking the assembly/association right. It is true that law enforcement and prosecutors have enforced “unlawful assembly” laws in ways that sometimes fail to distinguish imminently threatening or otherwise dangerous assemblies from others.¹⁴⁸ However, as noted, the states have overwhelmingly decided to permit some form of open carry.¹⁴⁹ The mere act of demonstrating with a firearm, as part of a group organized to advocate Second Amendment rights, would not be enough to render an assembly unpeaceable or unlawful. Some act of breaching the peace, other than the act of carrying a firearm (where that act is legal), would likely be required to render open carry itself non-peaceable. Unlawful or non-peaceable assemblies

143. See *id.* at 653 (“As we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression.”).

144. See generally INAZU, *supra* note 138 (examining the history of the Assembly Clause).

145. See Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 560–69 (2009) (recounting early American understanding of the right of peaceable assembly).

146. See Tabatha Abu El-Haj, *All Assemble: Order and Disorder in Law, Politics, and Culture*, 16 U. PA. J. CONST. L. 949, 968–93 (2014) (examining early history of public assemblies).

147. See *infra* notes 160–72 and accompanying text.

148. See generally Inazu, *supra* note 135 (discussing enforcement of “unlawful assembly” in the context of public protests).

149. See *Open Carry: State by State*, *supra* note 11 (providing comprehensive survey of state open carry laws).

would be those that pose a significant risk of violence or communicate a threat.¹⁵⁰

E. EXPRESSIVE CHILL AS A GROUND FOR LIMITING OPEN CARRY

Another issue, again from the perspective of the First Amendment, is whether carrying firearms at public protests in some manner infringes the free speech and assembly rights of unarmed protest participants. The theory would be that the presence of firearms “chills” expressive activity by making participants apprehensive or concerned about their physical safety.¹⁵¹ This would curb dissent and more generally suppress the exercise of First Amendment rights.

The expressive “chill” argument relates to the general concern, discussed earlier, that First Amendment and Second Amendment rights are *inherently* incompatible in the context of public protests.¹⁵² The question is whether protest participants could invoke the First Amendment as a ground for restricting open carry rights that a legislature or court had previously recognized.

As discussed earlier, we can assume that there is at least a potential tension between the act of carrying firearms and the act of engaging in protest activities. For some, protesting in the presence of armed counter-protesters heightens tensions, engenders fear, and intimidates protesters. Some will either not participate in protests or will trim their sails for fear that expression will lead to violent reactions from armed protesters.

Under current precedents, the concern about “chilling” First Amendment rights at public protests does not provide a valid basis for restricting or banning Second Amendment rights. Three separate considerations support this conclusion.

First, the Supreme Court has held that the mere prospect that speech may be chilled or inhibited by some future governmental action does not constitute a cognizable harm under the First Amendment.¹⁵³ It has held that

150. Professor Dorf has argued more broadly that most armed protest groups can be considered non-peaceable. See Dorf, *supra* note 123 (“As a simple matter of common sense, a march or rally by people who are heavily armed is not an exercise of what the First Amendment calls ‘the right of the people *peaceably* to assemble.’ Even a child knows that.”). However, as Professor Dorf appears to recognize, the mere fact of open carry by participants is not adequate evidence to support suppressing an assembly. See *id.* (“Does that mean that *every* march or rally by people carrying weapons can be banned? No.”). The participants must presumably do something more than openly carry firearms to evince an intent to do or threaten violence. *Id.*

151. For discussions of the concept of expressive chill, see Leslie Kendrick, *Speech, Intent and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1649–50 (2013); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 268–69 (1985); Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect”*, 58 B.U. L. REV. 685, 692–701 (1978); Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 142–43 (1997).

152. See *supra* Section II.C.

153. See *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (holding that subjective chill is not a cognizable injury).

the subjective fear or concern that government officials are engaged in surveillance or other activities that impact expressive concerns is not an adequate basis for challenging those actions on free speech and association grounds.¹⁵⁴ By the same logic, in the context of public protests, the merely subjective fear or concern that the presence of firearms places protesters in danger of bodily injury or death would not suffice as a cognizable injury or harm. Without more, protesters could not challenge statutory or other public carry protections on the ground that they “chill” public expression.

Second, in the public protest scenario, the allegedly chilling activity is that of *private*, not governmental, actors. The discomfort and fear in this context stem directly from the (presumptively lawful) acts of *private* arms-carriers. In the parlance of constitutional law, the challenge relates to private action rather than state action. The only action taken by the state is the authorization of open carry, which we are again presuming to be a decision within its police power. While it is true that the government may have authorized the exercise of Second Amendment rights in public places in this scenario, the purported injury relates directly to an individual’s decision to carry a firearm at a public protest and not any unlawful act of government. This sort of expressive “chill” argument is not cognizable.¹⁵⁵

Third, many things protest participants do and say can be intimidating or even speech-inhibiting. Protesters and counter-protesters yell, engage in demonstrative expressive conduct, and sometimes disobey legal restrictions on speech and assembly for disruptive purposes. Public events, particularly large protests and demonstrations, are not for the faint of heart. Courts that recognize this reality are not likely to conclude that the mere subjective fear of violence, without more, is a valid justification for restricting or prohibiting open carry during public protests.¹⁵⁶

IV. DISARMING PUBLIC PROTESTS

As Part III’s analysis indicates, the First Amendment is likely to play a relatively limited role in terms of influencing the scope and exercise of open carry rights at public protests. Whether and how open carry will be permitted at public protests will largely be determined by a combination of Second Amendment, state law, and local enforcement considerations. This Part does

154. See *id.* at 13–14 (“Allegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.”); see also *Clapper v. Amnesty Int’l*, 568 U.S. 398, 410–20 (2013) (concluding that plaintiffs’ allegations that they might be subject to surveillance by federal law enforcement agencies failed to establish standing to challenge surveillance program).

155. See Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1477 (2013) (proposing that private chill is properly attributable to government only where the state has violated some rule or “trespassed a constitutional norm”).

156. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (“But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”).

not address whether there is a Second Amendment right to openly carry firearms in public places. Rather, it focuses on the menu of options currently available to state and local officials in terms of regulating open carry at public protests. Thus, assuming some form of public carry will be recognized in a particular jurisdiction, the question is what options are available to harmonize or reconcile public expression and firearms at public protests.

A. *EXISTING FIREARMS OFFENSES*

We can begin with some low-hanging fruit. On some occasions, including in one instance at the 2017 Charlottesville rally, individuals have discharged their weapons near or in the direction of protesters.¹⁵⁷

There is, of course, no Second Amendment right to discharge a weapon into a crowd of protesters or counter-protesters. Nor do public arms-bearers have a right to use or brandish firearms in unlawful or intimidating ways.¹⁵⁸ Putting aside any instances of valid self-defense, there is no Second Amendment right to discharge a weapon with the intent to harm another or place a person in fear of imminent bodily injury or death.

Thus, enforcement of criminal laws prohibiting the use of firearms to menace, assault, murder, or commit acts of domestic terrorism would not violate the Second Amendment. They constitute the floor, or minimum degree, of regulation necessary to assure that public protests do not become bloodbaths.

Of course, there are severe limitations with regard to these regulations. They punish, but often do not prevent, firearms offenses. Further, as with many of the regulations discussed below, there are significant policing challenges associated with enforcing these laws in the context of public protests.¹⁵⁹ For example, distinguishing the menacing or angry display of firearms from the non-threatening sort may be difficult in the context of a crowded and contentious protest. The limited point here is that there are criminal laws already on the books that restrict the brandishing and use of firearms at public protests.

B. *BANNING ARMED PRIVATE MILITIAS AND OTHER ARMED ASSEMBLIES*

About half the states, including those recognizing open carry rights, ban private militias and paramilitary groups from parading or drilling in public places while armed or limit their right to do so.¹⁶⁰ These laws have a long and

157. See Robles, *supra* note 5.

158. See, e.g., Fla. Stat. Ann. § 790.053(1) (West 2017) (allowing a person who is licensed to carry a concealed firearm to “briefly and openly display the firearm to the ordinary sight of another person, unless the firearm is intentionally displayed in an angry or threatening manner, not in necessary self-defense”).

159. See *infra* Part V.

160. See, e.g., VA. CODE ANN. § 18.2-433.2 (2014); see also ARK. CODE ANN. § 5-71-302 (2016); CAL. PENAL CODE § 11460 (West 2011); COLO. REV. STAT. § 18-9-120 (West 2012);

established historical pedigree. Even assuming there is a Second Amendment right to open carry, bans on armed private militias are likely to survive Second Amendment challenges.

In *Presser v. Illinois*, decided in 1886, the Supreme Court observed that a state law prohibiting bodies of men from associating together as military organizations, or drilling or parading with firearms, would not violate the Second Amendment.¹⁶¹ *Presser* does not definitively resolve the Second Amendment question, since it was decided before the right to keep and bear arms was incorporated against the states.¹⁶² However, *Heller* interpreted *Presser* as standing for the proposition that the Second Amendment does not prevent states from prohibiting “private paramilitary organizations” from parading in public with firearms.¹⁶³ Given *Heller*’s statements and originalist foundations, states can likely enforce longstanding prohibitions on the presence of armed paramilitary groups at public protests.

Enforcement of the paramilitary laws could have a significant effect on open carry at public protests. At protests like the “Unite the Right” event in Charlottesville, paramilitary groups with long rifles raised some of the greatest concerns in terms of safety and the potential chilling of expression. Some individuals openly carrying arms in Charlottesville self-identified as members of “militia” groups.¹⁶⁴ The city of Charlottesville has recently filed a lawsuit seeking to enjoin a number of these groups from returning to the city for future protests.¹⁶⁵ If successful, the lawsuit will set a precedent for excluding armed private militia groups from public protests. Owing to First Amendment concerns, the city could not prevent the groups themselves from attending future protests. But they could require that they do so without openly carrying firearms.

CONN. GEN. STAT. § 53-206B (2012); FLA. STAT. ANN. § 790.29 (West 2017); GA. CODE ANN. § 16-11-151 (2011); IDAHO CODE § 18-8103 (2016); 20 ILL. COMP. STAT. ANN. § 1805/94A (West 1992); LA. STAT. ANN. § 14:117.1 (2004); MICH. COMP. LAWS ANN. § 750.528A (West 2004 & Supp. 2018); MINN. STAT. ANN. § 609.669 (2018); MO. REV. STAT. § 574.070 (2018); MONT. CODE ANN. § 45-8-109 (2009); NEB. REV. STAT. ANN. § 28-1481 (LexisNexis 2015); N.J. STAT. ANN. § 2C:39-14 (West 2016); N.M. STAT. ANN. § 30-20A-3 (West 2016); N.Y. MIL. LAW § 240(6) (MCKINNEY 2012); N.C. GEN. STAT. § 14-288.20 (2017); OKLA. STAT. tit. 21, § 1320.10 (2015); OR. REV. STAT. § 166.660 (2003 & Supp. 2018); 18 PA. CONS. STAT. ANN. § 5515 (West 2015); 11 R.I. GEN. LAWS § 11-55-2 (2002); S.C. CODE ANN. § 16-8-20 (2015); TENN. CODE ANN. § 39-17-314 (West 2010); WASH. REV. CODE ANN. § 9A.48.120 (West 2015).

161. *Presser v. Illinois*, 116 U.S. 252, 254-65 (1886).

162. *See id.* at 265.

163. *District of Columbia v. Heller*, 554 U.S. 570, 621 (2008).

164. *See Duggan, supra* note 94 (discussing presence of militia groups in Charlottesville).

165. Laura Jarrett, *Charlottesville Suing to Stop Private Militias at Future Rallies*, CNN (Oct. 12, 2017, 11:04 AM), <https://www.cnn.com/2017/10/12/politics/charlottesville-militia-lawsuit/index.html>. Several militia groups have voluntarily agreed not to attend future rallies and demonstrations in Charlottesville; *see* John Early, 3 *Militia Groups Connected to Unite the Right Rally Settle Lawsuits*, NBC29.COM (May 30, 2018, 12:46 PM), <http://www.nbc29.com/story/38204693/settlements-from-unite-the-right-05-16-2018>.

Of course, the private paramilitary laws do not apply to the unaffiliated individual who openly carries a firearm at a public protest. In order to prohibit individuals from engaging in open carry under the terms of the state bans, the group in question would have to, at a minimum, organize itself as a military organization. This could limit the effect of the armed private militia bans. Some groups will self-identify as citizen or private militia, as they did in Charlottesville.¹⁶⁶ However, in other cases, an inquiry into the group's organizational history, structure, uniforms, practices, and other indicia that the group has organized as a military unit might be required.

An organized group that appears at a public protest with firearms visible may be questioned in order to determine whether the private armed militia ban applies. Another option would be to address the application of the private armed militia ban in advance, for instance through permitting requirements. However, that option will work only where the putative militia group is the applicant rather than just part of the crowd that shows up on the day of a permitted event. It also requires either that the group self-identifies as a militia or military group or that permitting authorities have the necessary facts to determine whether a group is subject to the ban.

Another complication, applicable to at least some armed paramilitary bans, is that they require a showing that the person arrested has the purpose or intent of furthering civil disorder.¹⁶⁷ This *mens rea* requirement might preclude enforcement of the law against some persons involved with armed and organized militias.

Although there are some enforcement difficulties with such laws, *Heller* strongly suggests that bans on armed paramilitary or militia groups would withstand Second Amendment challenge.¹⁶⁸ These laws are one potentially potent tool for restricting the presence of armed groups at public protests.

A separate set of state laws prohibit groups from parading, marching, or simply "associating" in public with firearms.¹⁶⁹ Some commentators maintain that these laws also fall under what might be called the "Presser exception" to Second Amendment coverage.¹⁷⁰ However, there are two potential

166. See Duggan, *supra* note 94.

167. See, e.g., VA. CODE ANN. § 18.2-433.2(1) (2014).

168. District of Columbia v. Heller, 554 U.S. 570, 675–76 (2008) (Stevens, J., dissenting).

169. See ALA. CODE § 31-2-125 (LexisNexis 2016); FLA. STAT. ANN. § 870.06 (West 2017); GA. CODE ANN. § 38-2-277 (2011); IDAHO CODE § 46-802 (2014); 20 ILL. COMP. STAT. 1805/94 (West 1992); KAN. STAT. ANN. § 48-203 (2005); KY. REV. STAT. ANN. § 38.440 (LexisNexis 2013); LA. STAT. ANN. § 29:31 (2007); ME. STAT. tit. 37-B, § 342 (2001 & Supp. 2017); MASS. GEN. LAWS ch. 33, §§ 129–31 (1999); MINN. STAT. ANN. § 624.61 (West 2018); MISS. CODE ANN. § 33-1-31 (2010); NEV. REV. STAT. § 203.080 (LexisNexis 2015); N.H. REV. STAT. ANN. § 111:15 (West 2013); N.Y. MIL. LAW § 240 (McKinney 2012); N.C. GEN. STAT. § 127A-151 (2017); N.D. CENT. CODE § 37-01-21 (2014); ORLA. STAT. ANN. tit. 44, § 23 (2014); 30 R.I. GEN. LAWS § 30-12-7 (2016); TEX. GOV'T CODE § 437.208 (West Supp. 2017); WASH. REV. CODE § 38.40.120 (West 2003); W. VA. CODE ANN. § 15-1F-7 (LexisNexis 2014 & Supp. 2018); WYO. STAT. ANN. § 19-8-104 (2015).

170. See Tirschwell & Lefkowitz, *supra* note 119, at 179–80.

complications with that claim. First, it is not clear that the exception the Court seemed to recognize in *Heller* is broad enough to apply to any and all gatherings of two or more persons. After all, the Court explicitly referred to “private paramilitary organizations.”¹⁷¹ Second, neither *Presser* nor *Heller* otherwise addressed the public exercise of Second Amendment rights. The claim that government can ban *all* armed assemblies, regardless of their nature or the *mens rea* of their participants, assumes a narrow public Second Amendment that the precedential record does not seem to affirm.

In addition, there may be enforcement complications with state armed assembly laws. Organized parades and marches, particularly ones that have been permitted, may be readily identifiable. However, at public gatherings it may not always be clear who is assembling with whom. There may be questions concerning the applicability of armed assembly laws to spontaneous gatherings, or individuals who happen to be participating in the same event or occupying the same public space.

In sum, although state anti-paramilitary laws are on solid constitutional footing, it is less clear that *Presser* and *Heller* authorized broader bans on armed assemblies. Both types of laws also raise enforcement difficulties, including identification of covered associations and organizations.

C. GOING ARMED TO THE TERROR OF THE PEOPLE

A few states have laws that prohibit carrying firearms “to the terror of the people.”¹⁷² In some others, going armed “to the terror of the people” has been a common law offense since the nineteenth century.¹⁷³ This crime, which prohibits a form of intimidation-by-firearm, has deep roots in English common law.¹⁷⁴ As with armed paramilitary bans, this lineage would help in cases where states need to defend enforcement of “armed to the terror of the people” laws.

171. *Heller*, 554 U.S. at 621.

172. See, e.g., S.C. CODE ANN. § 22-5-150 (2015) (prohibiting any person from going “armed offensively, to the terror of the people”).

173. See *O’Neill v. State*, 16 Ala. 65, 67 (Ala. 1849); *State v. Huntly*, 25 N.C. (3 Ired.) 418, 418 (1843); *State v. Staten*, 232 S.E.2d 488, 490 (N.C. Ct. App. 1977); *Simpson v. State*, 13 Tenn. (5 Yer.) 356, 357–58 (1833); see also Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 LAW & CONT. PROB., no. 2, 2017, at 11, 11–12 (discussing early common law concerning public arms-bearing).

174. See 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 110 (1832) (“The offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the statute of Northampton.”). Under the common law rule, because carrying a dangerous weapon (such as a firearm) in populated public places naturally terrified the people, it was a crime against the peace—even if unaccompanied by a threat, violence, or any additional breach of the peace. See *Chune v. Piott* (1615) 80 Eng. Rep. 1161, 1162 (“Without all question, the sheriffe hath power to commit . . . if contrary to the Statute of Northampton, he sees any one to carry weapons in the high-way, in terrorem populi Regis; he ought to take him, and arrest him, notwithstanding he doth not break the peace in his presence.”).

In some recent instances, state law enforcement authorities have charged “going armed to the terror of the people” as a means of disarming protesters and counter-protesters.¹⁷⁵ For example, North Carolina authorities arrested a protester for “going armed to the terror of the people” who had appeared at the public site of a rumored KKK rally in Durham with his semi-automatic rifle in hand.¹⁷⁶ North Carolina permits the open carry of firearms. However, its case law provides that a person is guilty of the offense of “going armed to the terror of the people” if he arms himself with an “unusual or dangerous weapon” and goes upon the public highways with the purpose of terrifying the public.¹⁷⁷ In the Durham case, police had received complaints from bystanders who had seen the armed person and reported to law enforcement officers on the scene that they were frightened.¹⁷⁸ As this example shows, in states where open carry may otherwise be permitted, the offense of “going armed to the terror of the people” could be deployed to disarm protesters and counter-protesters who arrive at protests openly carrying firearms.

As mentioned, one significant thing prohibitions on “going armed to the terror of the people” have going for them is historical lineage. *Heller* suggests that state laws with long historical pedigrees, including measures banning armed private militias, are likely to be considered consistent with the Second Amendment.¹⁷⁹ Even assuming there is a statutory or constitutional right to open carry in a particular state, laws prohibiting “going armed to the terror of the public” may validly limit that right. Relatively few states have such laws or recognize the common law offense.¹⁸⁰ Other states, as well as localities with some legislative flexibility, could enact this offense or recognize it in case law.

As the Durham incident shows, “going armed to the terror of the people” might be cited as a basis for disarming some protesters. Much depends, however, on how this offense is charged and enforced. Most notably, if the subjective fear of bystanders is used as the sole predicate for effectively *banning* open carry in public places, as it appears it may have been in the Durham case,

175. See Lithwick & Li, *supra* note 21.

176. See Virginia Bridges, *A Durham Man Brought a Semi-Automatic Rifle to a Rumored KKK Rally. Did He Break the Law?*, HERALD SUN (Sept. 6, 2017, 9:30 AM), <http://www.heraldsun.com/news/local/counties/durham-county/article171511767.html>.

177. See *State v. Dawson*, 159 S.E.2d 1, 11–12 (N.C. 1968) (describing elements of the crime and upholding conviction where defendant, armed with a carbine and four pistols, drove on the public highways at night, firing bullets into a store and two homes).

178. See Lithwick & Li, *supra* note 21.

179. See *District of Columbia v. Heller*, 554 U.S. 570, 674–75 (2008) (suggesting longstanding militia bans do not violate Second Amendment); *id.* at 627 (observing that limits on certain weapons are “fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons’”).

180. See Early, *supra* note 165; Jarrett, *supra* note 165.

Second Amendment concerns may arise.¹⁸¹ The offense would not be a limit on certain forms of open carry, but a broad prohibition on open carry rights recognized under state laws.

There are other potential impediments to using this offense to limit open carry at protests. First, the law or offense may be very difficult to enforce. Officers may have difficulty discerning which armed protesters are frightening or terrorizing protest participants or members of the public. This concern could be mitigated by using proxies or factors such as the type of weapon carried, the manner in which it is carried, and the reactions of bystanders to determine whether the offense has been committed. Second, the offense itself may be too vague to provide proper notice to arms-carriers concerning their criminal liability.¹⁸² The elements of the offense, which generally require a person to openly carry a dangerous or unusual weapon with the intent to frighten or terrorize another, may fail to place persons openly carrying firearms on notice concerning the specific forms of public carry that are prohibited. Vagueness issues may lead to arbitrary or biased enforcement by law enforcement.¹⁸³ Thus, persons affiliated with certain groups, such as the KKK, might be targeted for arrest. Finally, prosecutors may have difficulty proving the requisite intent or purpose—to frighten or terrorize the public by openly carrying firearms.¹⁸⁴

Thus, as in the case of armed militia bans, there are interpretation and enforcement concerns with regard to “going armed to the terror of the people.” Of course, in cases where violent or menacing use a firearm is involved, there is no need to resort to these laws or offenses. “Going armed to the terror of the people” may be a charge deployed in cases of what appear to otherwise be peaceful forms of open carry. Again, the potential danger is that authorities will use this offense to disarm *anyone* based on the reported subjective fears of bystanders. This would enable officials to disarm persons based on a form of subjective “chill.”¹⁸⁵

181. The frequency of charges might lend some credence to this concern. In 2016, North Carolina officials charged “going armed to the terror of the people” over three hundred times. See Bridges, *supra* note 176.

182. See, e.g., *Papachristou v. Jacksonville*, 405 U.S. 156, 171 (1972) (holding vagrancy ordinance unconstitutionally vague).

183. See, e.g., *Lovell v. Griffin*, 303 U.S. 444, 452–53 (1938) (invalidating local ordinance that vested unbridled discretion concerning distribution of materials on public streets in city official).

184. Cf. *Virginia v. Black*, 538 U.S. 343, 359–61 (2003) (invalidating Virginia threats law on grounds that it required only that government proved a cross-burning occurred, without any further proof of intent to intimidate).

185. See *supra* Section III.E (rejecting argument that open carry can be limited owing to concerns about expressive chill).

D. PLACE AND TIME/EVENT REGULATIONS

Heller emphasized that Second Amendment rights are not absolute.¹⁸⁶ Depending, of course, on how a future Court interprets public Second Amendment rights, reasonable regulations concerning the place or time of their exercise might be constitutional.

Heller specifically recognized that the right to bear arms is subject to certain place regulations.¹⁸⁷ The Court observed that the right to keep and bear arms does not extend to certain “sensitive places.”¹⁸⁸ *Heller* singled out government buildings and school facilities as examples.¹⁸⁹ However, the Court did not indicate that these places exhaust the category of “sensitive places.”

Lower courts interpreting *Heller*’s “sensitive places” language have held that public places including parking lots and national park lands constitute “sensitive places” where keeping and bearing firearms can be prohibited.¹⁹⁰ States currently prohibit open carry at or near other “sensitive places,” including city halls, health care facilities, elementary schools, polling places, national and local monuments, and public transportation facilities.¹⁹¹ Some states with open carry laws also limit open carry in certain populous cities.¹⁹² Under similar reasoning, states could likely ban open carry on or near capitol grounds and on university campuses. Note that all of the listed places are popular protest venues. Thus, the “sensitive places” exception to Second Amendment coverage could significantly limit the presence of openly carried firearms at public protests and similar events.

Of course, again assuming there is some right to openly carry firearms in public, the place exception would presumably not apply to *all* public properties. For instance, public parks are traditional forums for the exercise of expressive rights. Although *Heller* did not clarify what precisely made school and government *buildings* sensitive, one might surmise that it was concerned that the primary mission or purpose of those properties might be undermined

186. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

187. *Id.*

188. *Id.* at 626–27.

189. *Id.*

190. *See, e.g.*, *United States v. Dorosan*, 350 Fed. App’x 874, 875–76 (5th Cir. 2009) (concluding that a parking lot belonging to the U.S. Postal Service was a sensitive place); *United States v. Masciandaro*, 648 F. Supp. 2d 779, 790 (E.D. Va. 2009) (“Although *Heller* does not define ‘sensitive places,’ the examples given—schools and government buildings—plainly suggest that motor vehicles on National Park land fall within any sensible definition of a ‘sensitive place.’”).

191. *See, e.g.*, D.C. Code § 7-2509.07(a) (West 2012) (prohibiting the carrying of firearms in the places listed and other locations).

192. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 6108 (West 2015) (allowing open carrying of handguns everywhere in the state of Pennsylvania, except Philadelphia, where a person must be licensed to carry a firearm in order to openly carry); *id.* (open carry of long guns prohibited in Philadelphia); VA. CODE ANN. § 18.2-287.4 (2014 & Supp. 2018) (prohibiting open carry of handguns in certain populous cities and counties).

by the potential for armed confrontation. Public parks, by contrast, provide a space for the exercise of constitutional rights. Thus, it is harder to make the case that the presence of firearms is incompatible with the basic operation of a public park.

We might approach the issue from the perspective of time rather than place. Thus, perhaps *Heller's* “sensitive places” language could be extended to what we might refer to as “sensitive events”—protests, pickets, demonstrations and the like.¹⁹³ These events would be deemed sensitive owing merely to the fact that firearms would pose a potentially lethal danger to those assembled. One problem with this approach is that it transforms what appears to be a relatively narrow place exemption into something far broader. Since literally *any* public gathering might be considered “sensitive” under this reasoning, the “sensitive events” approach would effectively operate as a ban on firearms at public protests, demonstrations, and rallies. To be sure, that may or may not be constitutional under some future Supreme Court precedent. However, such a determination does not seem to follow from *Heller's* cryptic “sensitive places” exemption. A separate problem is that according all public events “sensitive” status solely on the basis of the presence of firearms again presumes an answer to the question whether the Second Amendment has a public dimension. Assuming that it does, the assumption of sensitivity is suspect.

Notwithstanding such concerns, a few states have expressly restricted or banned open carry at certain events or during certain times, including specifically at demonstrations, pickets, and other public events.¹⁹⁴ Thus, some state laws prohibit non-law enforcement personnel from carrying firearms within 1000 feet of a “demonstration.”¹⁹⁵ North Carolina law makes it a crime for

[A]ny person participating in, affiliated with, or present as a spectator at any parade, funeral procession, picket line, or demonstration upon any private health care facility or upon *any public place owned or under the control of the State or any of its political*

193. For an argument that firearms ought to be excluded from political rallies and demonstrations under *Heller's* “sensitive places” exception, see Morgan, *supra* note 119.

194. See ALA. CODE § 13A-11-59 (LexisNexis 2015); CAL. PENAL CODE § 17510 (West 2012); D.C. Code § 7-2509.07(a)(14) (West 2012); 430 Ill. Comp. Stat. § 66/65(a)(10) (West 1992); 720 ILL. COMP. STAT. § 5/24-1(a)(8) (West 2010 & Supp. 2018); MD. CODE ANN. CRIM. LAW § 4-208 (2002 & Supp. 2017); N.C. GEN. STAT. § 14-277.2 (2017).

195. See, e.g., D.C. Code § 7-2509.07(a)(14) (West 2012); see also ALA. CODE § 13A-11-59 (LexisNexis 2015). Alabama law defines “demonstration” as follows:

Demonstrating, picketing, speechmaking or marching, holding of vigils and all other like forms of conduct which involve the communication or expression of views or grievances engaged in by one or more persons, the conduct of which has the effect, intent or propensity to draw a crowd or onlookers. Such term shall not include casual use of property by visitors or tourists which does not have an intent or propensity to attract a crowd or onlookers.

subdivisions to willfully or intentionally possess or have immediate access to any dangerous weapon.¹⁹⁶

Note that these event- or time-based restrictions (limits that apply during demonstrations and other similar events) are broader in scope than the specific place limitations discussed earlier. Thus, rather than focusing solely on particular “sensitive places” such as elementary schools and polling places, laws like North Carolina’s apply in *any* public place. The laws are presumably intended to further government interests in public safety and perhaps preservation of First Amendment speech and assembly rights. Again, the government presumably bears the burden of demonstrating that these concerns are justified and that the regulations are aimed at a real and not hypothetical problem.¹⁹⁷ Assuming they can carry that burden, there is the matter of tailoring. While it is true that the regulations are tailored insofar as they only apply during the duration of a demonstration or similar event, some courts might nevertheless fault legislatures for failing to limit open carry bans to particularly sensitive places, as *Heller* suggests. Moreover, depending on the definition of “demonstration” the state law adopts, a time- or event-based regulation could effectively ban the presence of firearms in public parks and other public places where expression occurs.

Assuming they are consistent with the Second Amendment, states and localities could enforce place-based and time/event-based restrictions in a number of ways. For instance, they could condition a protest permit on the agreement not to openly carry firearms in certain places or during the duration of a permitted event. This option would only be effective, in terms of limiting open carry at public protests, in the event the permit applicants were the ones intending to carry firearms at the event. Note that assuming the spatial or event-based restriction is a reasonable limit on open carry, the permit requirement would not constitute an unconstitutional condition on the right to keep and bear arms.¹⁹⁸ A perhaps more effective means of enforcing place and time/event restrictions is to use law enforcement checkpoints or other means of disarming protesters seeking access to the identified “sensitive place” or arms-restricted event.

Thus far, we have considered some broad-based place or event regulations. But states and localities could also adopt narrower measures—for example, regulations intended to physically separate open-carry protesters from others attending public protests. As discussed in Part II, localities could spatially restrict those who openly carry firearms to “open-carry zones,” or

196. N.C. GEN. STAT. § 14-277.2(a) (2017) (emphasis added).

197. See, e.g., *State v. Oaks*, 594 S.E.2d 788, 793 (N.C. Ct. App. 2004) (noting violent and deadly consequences that may be associated with the carrying of deadly weapons at demonstrations).

198. See generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (discussing the concept of unconstitutional conditions as applied to various constitutional rights).

other locations along the protest route.¹⁹⁹ Depending on their dimensions and placement along the protest route or within the protest venue, such measures may survive First Amendment scrutiny.²⁰⁰ As a limited restriction on open carry rights, zoning may also survive review under the Second Amendment.

As in the First Amendment context, officials may have a difficult time defending “open-carry zones” under the Second Amendment.²⁰¹ Thus, some courts may view zones as potentially exacerbating, rather than reducing, the potential for armed confrontation. Armed protesters and counter-protesters may be confined to crowded zones, making it more likely that armed confrontation will occur.²⁰² Whether “open-carry zones” would serve government interests relating to facilitating the exercise of expressive rights is also an open question—particularly with regard to the expressive rights of those confined to the zone, but also to some extent with regard to those situated outside but near the zones. A court looking for a reasonable connection between the spatial restriction and the government’s interests in safety and order might find this specific solution wanting.

To summarize: Limits on open public carry at designated “sensitive places” stand the best chance of surviving review under the Second Amendment. *Heller* expressly recognizes this particular limit on the right to keep and bear arms.²⁰³ States and, where permitted, localities, would be able to limit open carry of firearms in certain places that are particularly popular among protesters—including state capitols, government buildings, public plazas near sensitive places, and college campuses. It is less clear whether governments could limit open carry during demonstrations or protest. It is unlikely that such regulations can be justified under *Heller*’s sensitive places rationale. Some courts might view such measures skeptically, in part owing to the fact that they are potentially broad restrictions on the public exercise of Second Amendment rights. However, it is also possible that courts will consider such regulations to be justifiable and narrowly tailored in light of public safety and other concerns. Finally, “open-carry zones” and other spatial restrictions may be suspect under the Second Amendment. States and localities that resort to zoning would bear the burden of convincing courts that the measures are adequately tailored to interests in public safety and preserving expressive rights. Depending on how the zones are constructed, this might not be possible.

199. See *supra* notes 128–30 and accompanying text (discussing expressive chill argument).

200. See *supra* notes 128–30 and accompanying text.

201. See *supra* notes 130–32 and accompanying text (discussing First Amendment implications of open-carry zones).

202. See *supra* notes 131–32 and accompanying text.

203. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

E. MANNER REGULATIONS

In addition to place and time/event restrictions on open carry, jurisdictions could regulate the *manner* in which firearms are openly carried. The proposals discussed here are akin to manner of speech regulations, rather than categorical bans on menacing displays of firearms or “going armed to the terror of the people.” They would impose narrower restrictions on the display or use of firearms at public protests.

Officials can obviously require that openly carried firearms are properly holstered (in the case of handguns) or carried (in the case of long guns).²⁰⁴ These would be reasonable safety regulations, not bans or restrictions on the practice of open carry. These kinds of regulations would not prevent the discharge or unlawful use of firearms, but they might make such incidents less likely to occur.

A more effective means of reducing the potential for deadly or violent encounters at public protests where open carry is allowed is to limit open carry to *unloaded* firearms. Many states have enacted such restrictions, particularly with regard to long guns.²⁰⁵ As discussed earlier, the display of unloaded firearms may ultimately be all that the *First Amendment* protects with regard to the expressive display of arms.²⁰⁶ Does the Second Amendment go further and protect a right to openly carry a *loaded* firearm?

This sort of manner regulation would permit an individual to keep and bear arms during a public protest but would effectively render the firearms non-deadly weapons. In the many jurisdictions where concealed carrying of handguns is allowed, a ban on loaded long guns is likely to be upheld. The

204. See, e.g., TEXAS PENAL CODE § 46.02 (2016) (providing that some licensed carriers can display firearms so long as they are carried in a shoulder or belt holster).

205. See, e.g., Iowa Code § 724.4(1) (2018) (prohibiting open carry of loaded long guns); N.D. CENT. CODE § 62.1-03-01(1) (Supp. 2017) (person may openly carry a handgun during daylight hours, as long as the gun is unloaded); TENN. CODE ANN. § 39-17-1308(a)(1) (West 2010 & Supp. 2018) (person may openly carry a long gun if it is unloaded); UTAH CODE ANN. §§ 76-10-505(1)(b), 76-10-523(2)(a) (LexisNexis 2017) (prohibiting open carry of loaded long guns unless person has a concealed carry permit); VA. CODE ANN. § 18.2-287.4 (2014 & Supp. 2018) (prohibiting the open carry of certain types of loaded rifles and shotguns in specific populous cities and counties). In North Dakota, a person may openly carry a handgun only during daylight hours, as long as the gun is unloaded. N.D. CENT. CODE § 62.1-03-01(1). If the person has a concealed weapons permit, he or she may carry the handgun loaded at any time of day. N.D. CENT. CODE § 62.1-03-01(2)(a). Law enforcement officials may also be able to enforce an unloaded weapons requirement in other circumstances. See Ian Cummings & Glenn E. Rice, *Confused about Antifa, Protests and KC Gun Laws? Here's the Deal*, KAN. CITY STAR (Sept. 14, 2017, 1:50 PM), <http://www.kansascity.com/news/local/article173300641.html> (discussing instance where police ordered protesters to remove ammunition from their guns under local concealed carry ordinance, even though state law generally allowed open public carry).

206. See *supra* Section III.C.

loaded long gun ban would leave in place an alternative means of self-defense (the core of the Second Amendment right).²⁰⁷

However, where no such alternative is available, manner regulations that effectively disarm an individual may raise serious Second Amendment concerns. Limiting open carry to unloaded firearms could make public protests safer, in the same way that an outright ban would. Insofar as chilling effects on speech are a concern, an unloaded open carry requirement would not likely reduce these effects (since most might assume the firearms are loaded, at least absent knowledge of the local jurisdiction's laws). Where the right to carry firearms in public is recognized under state law or judicial decision, this kind of manner restriction might be viewed as too severe since it undermines the core self-defense justification for the right to keep and bear arms.

In sum, while the *First Amendment* may not require the state to recognize a right to openly carry a loaded firearm, the *Second Amendment* and state laws well might. In particular, jurisdictions that impose a ban on loaded long guns with no alternative for concealed carry of a loaded handgun, or that ban loaded handguns with no option for carrying loaded long guns, could face serious Second Amendment and state law challenges.

F. ARMS-SPECIFIC RESTRICTIONS

Finally, officials might adopt and enforce measures that restrict the *types* of "Arms" that protesters and counter-protesters can openly carry. As discussed earlier, *Heller* does not recognize a right to keep and bear *any* weapon one wishes, but only Arms in common use when the Second Amendment was ratified.²⁰⁸ *Heller*, of course, did not address the specific types of firearms that can be prohibited at public protests or in public places generally.

Five states and the District of Columbia currently ban the open carrying of handguns.²⁰⁹ Six states and the District of Columbia either ban the open carrying of long guns or require a permit to do so.²¹⁰ Whether these bans and restrictions are consistent with *Heller's* articulation of the Second

207. See, e.g., *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 961 (9th Cir. 2014) ("[F]irearm regulations which leave open alternative channels for self-defense are less likely to place a severe burden on the Second Amendment right than those which do not.").

208. See *Heller*, 554 U.S. at 626 ("From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.").

209. See CAL. PENAL CODE §§ 26350, 25850 (West 2012); D.C. CODE ANN. § 22-4504.01 (West Supp. 2012); FLA. STAT. ANN. § 790.053(1) (West 2017); 720 ILL. COMP. STAT. 5/24-1(a)(10) (West 2010 & Supp. 2018); N.Y. PENAL LAW § 265.01(1) (McKinney 2017); S.C. CODE ANN. § 16-23-20(12) (2015).

210. See CAL. PENAL CODE § 26400(a) (Supp. 2018); D.C. CODE § 22-4504.01 (West Supp. 2012); FLA. STAT. ANN. § 790.053(1) (West 2017); 720 ILL. COMP. STAT. 5/24-1(a)(10) (West 2010 & Supp. 2018); MASS. GEN. LAWS ch. 140, § 129C (West 2002); MINN. STAT. ANN. § 624.7181 (West 2018); N.J. REV. STAT. ANN. § 2C:39-5(c) (West 2016).

Amendment's coverage has been a subject of recent litigation, and several petitions to the Supreme Court to decide the issue have been denied.²¹¹ As scholars have noted, prohibitions on carrying concealed and lethal firearms in public are of longstanding origin.²¹² Once again, under *Heller*, this historical pedigree is a plus—although it is not necessarily dispositive. Thus far, courts have been receptive to public safety justifications in cases involving open public carry.

Some states ban assault-style and large capacity rifles such as the AR-15. *Heller* indicates that weapons “most useful in military service” are outside the scope of the Second Amendment.²¹³ On that basis, as well as its conclusion that such a ban is justified by the state’s public safety interests, the Fourth Circuit recently upheld Maryland’s ban on assault rifles.²¹⁴ Removing assault-style rifles from public protest events would obviously be an important constraint on what some consider intimidating open carry activities in that specific context.

States also impose bans on the open carry of a variety of other weapons. For example, Illinois prohibits any person from carrying “a tear gas gun projector or bomb or any object containing noxious liquid gas or substance, other than an object containing a non-lethal noxious liquid gas or substance designed solely for personal defense carried by a person 18 years of age or older.”²¹⁵ Illinois also bans the public possession of machine guns, “any rifle having one or more barrels less than 16 inches in length or a shotgun having one or more barrels less than 18 inches in length,” and “any bomb, bombshell, grenade, bottle or other container containing an explosive substance of over one-quarter ounce for like purposes, such as, but not limited to, black powder bombs and Molotov cocktails or artillery projectiles.”²¹⁶ These are likely within the class of “dangerous and unusual weapons” that *Heller* indicated were not within the coverage of the Second Amendment.²¹⁷ They were also not the sorts of weapons in “common use” when the Second Amendment was ratified.²¹⁸ Thus, *Heller* itself recognizes that a range or class of deadly weapons is not within the Second Amendment’s coverage. These weapons can also be excluded from public protests.

211. See, e.g., *Peruta v. California*, 137 S. Ct. 1995 (2017), cert. denied, (raising question whether Second Amendment protects concealed carry in public where open carry is banned); *Norman v. Florida*, 138 S. Ct. 469 (2017), cert. denied, (raising question whether Florida’s open carry ban is constitutional).

212. See Joseph Blocher & Darrell A.H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 HARV. J. LEGIS. 279, 286 n.47 (2016) (collecting examples of early state laws prohibiting open and concealed carry of certain lethal weapons).

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

214. See *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir.), cert. denied, 138 S. Ct. 469 (2017).

215. 720 ILL. COMP. STAT. 5/24-1(a)(3) (West 2010 & Supp. 2018).

216. *Id.* § 5/24-1(a)(7).

217. *Heller*, 554 U.S. at 627 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *148–49 (1769)).

218. *Id.* at 627.

Finally, as scholars have noted, Arms are not necessarily limited to only the lethal variety.²¹⁹ Tasers and smart guns could serve the same core self-defense purpose attributed to handguns, thus raising the intriguing question whether states could limit open carry to non-lethal firearms. Whether the Second Amendment guarantees a right to keep and bear lethal arms is an open question. Among other things, the answer depends on how one interprets Second Amendment dangerousness and “common use” scope limitations, the availability of non-lethal alternatives capable of providing an adequate means of self-defense, and the actual justifications for protecting the Second Amendment right to keep and bear arms.²²⁰

At present, these are all open questions. A law restricting open carry to non-lethal firearms would go a long way toward reconciling the exercise of First Amendment and Second Amendment rights at public protests. It would reduce the possibility of deadly violence (although not all arms-related violence), and may reduce the inhibiting effects on expression that many associate with the presence of deadly firearms.²²¹

In sum, there are many alternatives available to state and local officials who are troubled by the open presence of firearms at public protests. Unlawful uses, armed paramilitary groups, and various forms of intimidation and domestic terrorism can be prohibited. Even in jurisdictions that otherwise protect open carry, the open carry of firearms can likely be banned in a variety of sensitive places and at certain sensitive events. In some circumstances, states and localities may be able to defend bans on the open carry of loaded weapons. Finally, certain particularly dangerous weapons, including assault-style military rifles, can be excluded at protest events. None of these measures will guarantee that firearms will never be used to inflict injury at public protests. None will perfectly reconcile or harmonize expression and firearms in that context. However, along with appropriate and lawful regulations of expressive activities, appropriate and lawful regulations of open carry at public protests might ensure that the two rights can co-exist.

V. THE FUTURE PUBLIC SECOND AMENDMENT

The Supreme Court may ultimately recognize some form of Second Amendment right to keep and bear arms in public places. Obviously, any

219. See Blocher & Miller, *supra* note 212 (proposing and analyzing a hypothetical ordinance that limits public carrying to non-lethal weapons). See generally Craig S. Lerner & Nelson Lund, Heller and Nonlethal Weapons, 60 HASTINGS L.J. 1387 (2009) (discussing the regulation of nonlethal firearms technologies under current Second Amendment standards); Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199 (2009) (discussing regulations of stun guns and other nonlethal weapons).

220. See Blocher & Miller, *supra* note 212, at 289–90 (discussing non-lethal weapons and self-defense); *id.* at 293–300 (discussing possible justifications and their relevance to a regulation barring lethal open carry).

221. See *supra* note 16 and accompanying text.

decision of this nature will significantly shape the future of public Second Amendment rights. But whether or not the Supreme Court weighs in—indeed, even if it does so and declines to recognize a right to open carry—it seems likely that in most jurisdictions the open carrying of firearms will be permitted in many public places and present at public protests. Thus, many jurisdictions will be faced with the issues raised by open carry at public protests and other events. Part II described the public dimensions of the First Amendment and Second Amendment as we know them today. Part IV examined a variety of regulatory options that might affect whether and how Second Amendment rights are exercised in public places, and whether they are consistent with public First Amendment and Second Amendment doctrines. Part V now broadens the inquiry to ask what our long experience with public First Amendment rights might tell us about the future public exercise of Second Amendment rights. It begins with several general lessons or observations based upon that experience. Turning to more specific concerns, I argue that the future of our public Second Amendment will depend, in large part, on three things: (1) how Second Amendment rights are exercised and policed at public events such as protests and demonstrations; (2) the balances or tradeoffs that will occur when expression and firearms rights come into tension or conflict with one another in public places; and (3) the nature and success of efforts to clarify or settle the *justifications* for the public exercise of Second Amendment rights.

A. GENERAL LESSONS FROM THE PUBLIC FIRST AMENDMENT

First Amendment and Second Amendment rights are obviously distinct in many descriptive and other respects.²²² Public exercises of these rights raise distinctive interpretive and enforcement concerns. The point of drawing some lessons from our public free expression experience is not to suggest that the public Second Amendment ought to be governed by public First Amendment doctrines and principles.²²³ Indeed, as I will note, there are already notable differences in the development of the public dimensions of these rights. Rather, it is to highlight the broader events and influences that shaped the recognition of public expressive rights, many of which will likely also affect the development of the public Second Amendment.

When assessing the nascent public Second Amendment, one initial observation concerns the historical arc of the two rights. We have a rich tradition of both arms-keeping and public expression. Initially, both rights were well-recognized and generally accepted by the American public.²²⁴ We

222. See Magarian, *supra* note 17, at 55–57 (discussing normative differences between speech and firearms activities).

223. See *id.* at 54–57 (describing descriptive and doctrinal distinctions between free speech and the right to keep and bear arms).

224. See generally Abu El-Haj, *supra* note 146 (examining early exercises of public speech and assembly rights).

have witnessed a gradual attitudinal change with regard to public expression. Starting in the early 20th Century, public dissent and assembly were often treated much the same way that some have come to view the open carrying of firearms—as insurrectionist, intimidating, and criminal.²²⁵ Speech critical of government and assembling with others to advocate its overthrow were considered inherently dangerous activities—“clear and imminent dangers,” as the Court sometimes characterized them.²²⁶ As such, restrictions on public expression permeated American law. Owing to the perceived inherent dangers associated with such activities, even peaceable speech and assembly were not always tolerated.²²⁷

One important limit on early speech and assembly rights was the fact that there was no recognized right to use public places, including streets and parks, for expressive purposes.²²⁸ Until the late 1930s, the government controlled these places or “forums,” as they would later be called, just as any other private property owner did—that is to say, the state as title-holder could determine who was invited to speak or gather in public places and who was to be excluded.²²⁹ It would take the better part of four additional decades to establish the nature and scope of expressive rights in public places.²³⁰

All of which is to say that the public First Amendment has not always protected the exercise of speech and assembly rights. Public, official, and judicial support for these rights has ebbed and flowed. Recognition of rights to speak, assemble, proselytize, pamphleteer, and engage in other activities in public was not guaranteed, but rather was hard-earned. Creating public “breathing space” for these rights required a confluence of social, political, and constitutional events. Among other things, broad social and constitutional movements relating to labor, suffrage, and civil rights helped to expand interpretations of public First Amendment rights.²³¹ The fact that such activities are no longer considered a presumptive danger to society is the product, in part, of a shift in First Amendment jurisprudence that occurred

225. See *id.*; see also ZICK, *supra* note 26 (discussing nature of dissent in early free speech and assembly cases).

226. See *Abrams v. United States*, 250 U.S. 616, 627–28 (1919) (Holmes, J., dissenting); *Debs v. United States*, 249 U.S. 211, 216 (1919); *Schenck v. United States*, 249 U.S. 47, 52 (1919).

227. See INAZU, *supra* note 138, at 20–62 (discussing history of the right of assembly and effect of “emerging anticommunist hysteria” on the right of assembly); see also El-Haj, *supra* note 146, at 561–69 (describing early limits on the right to assemble in public places).

228. See El-Haj, *supra* note 146, at 580–84 (discussing evolution of courts’ approach to public forums).

229. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939) (recognizing for the first time, in dictum, a First Amendment-based right of access to public streets).

230. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983) (describing the categorical approach to expressive rights in public places); *Cox v. Louisiana*, 379 U.S. 536, 545–46 (1965) (invalidating the conviction of the leader of a civil rights group protesting racial segregation).

231. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270–72 (1964) (observing that debate on matters of public concern should be “uninhibited, robust, and wide-open”).

nearly 150 years after ratification. Over time, the Supreme Court became a champion of public speech and assembly rights.

Although certainly part of an historical and constitutional tradition, in jurisprudential terms the Second Amendment, like the First Amendment, was largely dormant for most of the nation's history. The Supreme Court seemed to have concluded, coincidentally also in 1939, that the Second Amendment protected only a collective or militia-based right.²³² This effectively stymied the jurisprudential development of the Second Amendment, including its public dimension. *Heller* birthed a *private* Second Amendment, again leaving the public dimension of the right largely unsettled. Historically, states have restricted openly carrying firearms in public, much as officials imposed restrictions on public speech and assembly activities. However, in the past three decades, legislatures have loosened or removed restrictions on open carry.

The "Roberts Rules of Order" concerning expressive activities in public places were established largely with reference to the Supreme Court's public forum doctrine.²³³ Today, speakers are subject to different rules and regulations depending on what kind of public property they seek to access for expressive purposes.²³⁴ Government is authorized to regulate where, when, and sometimes how public expression occurs, in the interest of furthering public safety, order, and other collective interests.²³⁵ In the case of the Second Amendment, these Roberts Rules are primarily being fashioned by state legislatures eager to expand public open and concealed carry rights. In the absence of a Supreme Court decision, legislative recognition of open carry rights has provided a valuable boost to the development of the public Second Amendment. States are currently constructing the specific rules that will be used to refine the scope and exercise of open carry rights at public protests and in public places more generally.

As in the case of early speech and assembly rights, firearms rights have not been embraced everywhere or to the same extent in all jurisdictions. Thus, as discussed, although nearly all states provide some form of protection for open carrying of firearms, many impose what are essentially time, place, and

232. See *United States v. Miller*, 307 U.S. 174, 178 (1939) (sustaining indictment under the National Firearms Act as applied to possession of a sawed-off shotgun). Compare *District of Columbia v. Heller*, 554 U.S. 570, 637-40 (Stevens, J., dissenting) (arguing that courts had long held that the Second Amendment protected only a militia-based right to keep and bear arms), with *Heller*, 554 U.S. at 619-26 (interpreting prior precedents as recognizing an individual right to bear arms in common use).

233. See Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 12 (describing Court's evolving time, place, and manner doctrine as establishing a "Roberts Rules" for public expression).

234. See *Perry*, 460 U.S. at 45-46 (summarizing modern public forum doctrine).

235. See *Frisby v. Schultz*, 487 U.S. 474, 486-88 (1988) (upholding restrictions on "targeted picketing" outside the residence of an abortion provider).

manner regulations.²³⁶ Among other things, states have identified some sensitive places where firearms are not allowed, required licenses to carry firearms in public, and restricted the carrying of loaded firearms.²³⁷

Over time, support for speech and assembly rights has largely eclipsed the early public skepticism and fear of these activities. As I have indicated, this took time—decades, in fact. Establishing the First Amendment’s Roberts Rules for public expression certainly helped in this regard. The public First Amendment became a reality not through the full and absolute embrace of the aforementioned dissidents and rogues, but by recognizing the need for some limits and controls on their expression. Thus, speakers were prohibited from inciting violence, communicating threats, or uttering “fighting words.”²³⁸ The First Amendment answered the challenges of public safety, order, and competing uses of public property not by broadly banning expression, but by regulating it in ways that reduced the potential for violence, harm, and disorder.

In the context of public protests, many still view the display of firearms as a dangerous and unwelcome activity—essentially a form of intimidation. Arguments equating firearms with violence or unlawful activity are rather common.²³⁹ So are calls for banning open carry during protests.²⁴⁰ In this respect, advocates for open carry face the same sort of skepticism that speakers and public assemblies did for a good portion of the 20th Century. Some insist that, by its very nature, and in particular owing to the intimidation and fear that visible firearms can cause, open carry is inherently incompatible with public order and safety—not to mention robust public expression.²⁴¹

Again, the public First Amendment experience may hold some relevant lessons in this regard. Over time, there has been a broad shift in public, judicial, and official attitudes concerning public First Amendment rights. Today, the public First Amendment protects expression that causes significant discomfort or raises serious safety concerns. The public First Amendment now protects a wide range of potentially disruptive and intimidating activities, including face-to-face proselytizing, picketing, flag burning, and funeral

236. See *supra* Part IV (analyzing various measures).

237. See, e.g., *United States v. Dorosan*, 350 Fed. App’x 874, 875–76 (5th Cir. 2009) (concluding that a parking lot belonging to the U.S. Postal Service was a sensitive place).

238. See *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (holding that incitement is not covered speech); *Watts v. United States*, 394 U.S. 705, 708 (1969) (holding that true threats are not covered speech); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (holding that fighting words are not covered speech).

239. See *supra* note 16.

240. See Feinblatt, *supra* note 16 (arguing for a ban on open carry at public protests); see also Frum, *supra* note 16 (“Within metropolitan areas, there is no reason—zero—that a weapon should ever be carried openly.”).

241. See *supra* discussion in Section II.C.

protesting.²⁴² The beneficiaries of this expansion have included Jehovah's Witnesses, the Ku Klux Klan, anti-abortion sidewalk counselors, flag burners, funeral protesters, and a virtual rogues' gallery of agitators and dissidents. In public places, audiences have been told to avert their eyes when confronted with expression they find upsetting or offensive.²⁴³ Those operating in the realm of the modern public First Amendment must have a relatively thick skin, and a certain degree of "civic courage."²⁴⁴

Again, in certain respects, today's public arms-carrier stands in the company of the public First Amendment's long gallery of dissidents. Some view the open arms-carrier, like the public proselytizer, abortion counselor, flag burner, and funeral protester, as an inherent threat to public order.²⁴⁵ Whether that sentiment or perspective can be overcome will depend on a number of factors which will help define the future of the public Second Amendment. Supreme Court recognition of open carry rights will obviously be important. But if *Heller* is any guide, any Supreme Court decision is likely to leave many questions open. Thus, for example, the development and enforcement of the Roberts Rules for open carry will be an important part of the process. So will public attitudes about the presence of firearms at public protests and in public places. Whether the public Second Amendment will demand the sort of thick skin and civic courage of protest participants that the First Amendment does remains to be seen. Much will depend, as I discuss below, on how open carry rights are exercised and defended.²⁴⁶ The open firearms carrier may be treated as a disruptive, but tolerated, dissident. Or his actions may be cast as a presumptive crime, rather than the exercise of a constitutional right.

This brings me to a final lesson, in terms of general approach or rhetoric, from our long experience with public First Amendment rights. The First Amendment asserts a blanket prohibition: "Congress shall make no law . . . abridging the freedom of speech."²⁴⁷ However, in public places, absolutist approaches and arguments gave way to the reality that public expression had to be subject to certain limits.²⁴⁸ The Free Speech Clause does not grant

242. See *McCullen v. Coakley*, 134 S. Ct 2518, 2531–32 (2014) (invalidating abortion clinic buffer zones that suppressed speech of sidewalk counselors); *Snyder v. Phelps*, 562 U.S. 443, 464–65 (2011) (overturning civil tort judgment against protesters at military funeral); *Texas v. Johnson*, 491 U.S. 397, 418–20 (1989) (invalidating conviction for flag desecration); *Cantwell v. Connecticut*, 310 U.S. 296, 308–11 (1940) (invalidating breach of peace conviction stemming from public proselytizing).

243. See *Cohen v. California*, 403 U.S. 15, 21 (1971).

244. *Doe v. Reed*, 56 U.S. 186, 228 (2015) (Scalia, J., concurring).

245. See *supra* note 242.

246. See *infra* Section V.C.

247. U.S. CONST. amend I.

248. Justice Hugo Black's apparent change of attitude with regard to First Amendment absolutism is instructive. See, e.g., Hugo L. Black, *Assoc. Justice of the Supreme Court*, James Madison Lecture at the New York University School of Law: The Bill of Rights (Feb. 17, 1960),

individuals license to say whatever they wish, wherever they wish, in any manner they desire.²⁴⁹ The rhetoric of First Amendment absolutism was tamed, in part, by the actual experience of public expression.

Heller itself expressly rejects Second Amendment absolutism.²⁵⁰ Yet, as Professor Joseph Blocher has observed, when it comes to the Second Amendment much of our political and social discourse still adopts absolutist terms.²⁵¹ The idea that *any* regulation of the right to keep and bear arms, including limits on open carry, is intolerable is flatly inconsistent with the right recognized in *Heller*.²⁵² It is also inconsistent with the general conception of constitutional rights, including First Amendment rights, which grant not absolute but only limited protections against state interference.

As the public First Amendment demonstrates, absolutist arguments are short-sighted and ultimately self-defeating. The American public will no more tolerate unfettered open carry than it will accept unrestricted freedom of expression. Further, defining the limits of a constitutional right can clarify and strengthen the core values and purposes of that right. Thus, over time, arguments about the “core” of the Free Speech Clause have helped courts and scholars identify its principal justifications and sharpened their articulation and application.²⁵³ Thus, the actual scope of the public Second Amendment is likely to be significantly influenced by the nature of the justifications proffered for its protection. The process of developing these justifications is perpetual, and there will always be disagreements about what the “core” includes. However, the “core” of the Second Amendment and the scope of the public Second Amendment can only be ascertained through application of a non-absolutist rights framework.

In sum, there is much open carry proponents and regulators can learn from our experience with the public dimension of First Amendment rights.

in 35 N.Y.U. L. REV. 865, 880 (1960) (expressing the view that the First Amendment did not admit of any qualifications on the freedom of speech); see also *Adderley v. Florida*, 385 U.S. 39, 46–47 (1966) (upholding limits on public protest in driveway and curtilage abutting public jailhouse in an opinion by Justice Black); Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 442–44 (1967) (discussing the question of whether the First Amendment should be read literally under an absolutist approach, whether there are any exceptions, and the ensuing “balancing war” (for which Justice Black is partly responsible)).

249. See *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

250. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (“Of course the right was not unlimited, just as the First Amendment’s right of free speech was not . . .”).

251. Joseph Blocher, *Panel IV: Has the Constitution Fostered a Pathological Rights Culture? The Right to Bear Arms: Gun Rights Talk*, 94 B.U. L. REV. 813, 820–22 (2014). See generally Dan M. Kahan, *The Gun Control Debate: A Culture-Theory Manifesto*, 60 WASH. & LEE L. REV. 3 (2003) (analyzing the problems surrounding “the terms in which the gun control debate is cast”).

252. *Heller*, 554 U.S. at 627.

253. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273–74, 722 (1964) (identifying the “central meaning of the First Amendment” that public criticism of government must be protected); *Schenck v. United States*, 249 U.S. 47, 49–51 (1919) (acknowledging that free speech right likely extends beyond protection against prior restraints).

The public First Amendment is the product of decades of experimentation with the exercise, and limits on the exercise of, expressive rights. We will more fully understand what the public Second Amendment encompasses and entails only after similar dynamics have had a chance to act upon it.

B. EXERCISING AND POLICING OPEN CARRY

A number of different factors will likely influence the future of the public Second Amendment Roberts Rules and public rhetoric will be part of the story. However, as the First Amendment experience demonstrates, a large part of what influences the scope of public constitutional rights is the manner in which those rights are actually exercised and policed. In other words, the public First Amendment teaches that the scope of the public Second Amendment will depend, in part, on the manner in which open carry is exercised and policed at public protests and similar events.

The public speakers who mounted the earliest challenges to limits on expressive activities were not a rambunctious crowd. In fact, most were arrested and convicted even though they were engaged in peaceful, non-threatening forms of public expression.²⁵⁴ The early exercises of free speech and assembly for which litigants sought protection largely took the form of responsible and non-violent dissent—pamphleteering, proselytizing, and orderly public speaking. Not all of these speakers were successful in challenging limits on public speech and assembly.²⁵⁵ But some were, and the nature and character of speakers that came before the Court in the earliest stages of First Amendment interpretation allowed free expression to establish a public foothold and set the stage for a future expansion of public expressive rights.

This suggests that the manner in which early open carriers exercise their rights will have a perhaps significant bearing on the development of the public Second Amendment. In this respect, it is noteworthy that at least to date the violence and injuries sustained at public protests and demonstrations have not been related to the discharge of firearms. At the Charlottesville “Unite the Right” march, there was a single incident of weapons discharge, which ultimately led to criminal charges.²⁵⁶ Most of the violence occurred as protesters and counter-protesters clashed using sticks, batons, and other

254. See ZICK, *supra* note 26 (discussing early free speech and assembly cases).

255. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573–74 (1942) (upholding conviction for breach of peace based upon profanities uttered to local law enforcement); *Abrams v. United States*, 250 U.S. 616, 623–24 (1919) (upholding conviction under federal Espionage Act for distributing circulars advocating disruption of munitions manufacture during wartime).

256. See *Bromwich & Blinder*, *supra* note 6 (discussing fatality that occurred at Charlottesville “Unite the Right” rally).

weapons.²⁵⁷ Indeed, thus far, there have been very few reports of gun violence or unlawful brandishing of weapons at public protest events.

But of course, this could change in an instant. A mass murder or other catastrophic incident, or worse, a series of them, could at the very least change the tenor of the debate concerning open carry rights at public protests and in public places more generally. It is of course true that even mass murders have so far not produced any meaningful federal gun control measures.²⁵⁸ But violence at public protests where First Amendment rights and expressive traditions are also at issue could threaten an aspect of American free speech culture in a way that leads to more significant limits on public arms-carrying. In some respects, then, the future of the public Second Amendment is in the hands of those who will exercise open carry rights at public protests and similar events.

Our experience with the public First Amendment also shows that public acceptance or tolerance of public rights depends on whether they can be exercised in ways that are generally compatible with the ordinary ebb and flow of public life. As discussed, the First Amendment's Roberts Rules impose certain limits on the exercise of public First Amendment rights.²⁵⁹ These rules grant authorities a broad degree of authority to regulate the time, place, and manner of speech and assembly and to impose order through breach of peace, public disorder, and unlawful assembly laws. There are, and likely always will be, important debates about the *scope* of these powers and limitations.²⁶⁰ However, no one seriously maintains that the First Amendment grants speakers and assemblies an *absolute* right to exercise their rights as they please in public places. Limits on public First Amendment rights have been critical to public acceptance of, or at the very least toleration for, the exercise of those rights. If the public First Amendment were all mobs and mayhem few, other than committed anarchists, would support or participate in the exercise of public speech and assembly rights.

The manner in which public exercises of speech and assembly rights have been policed has also been critically important to the scope of the public First Amendment. Over time, the United States has generally adopted a principle that police officers and other officials have an obligation to ensure, to the

257. See Sheryl Gay Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 12, 2017), <https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html> (describing violent clashes between protesters and counter-protesters).

258. See Sheryl Gay Stolberg, *Why the Push to Ban Rifle 'Bump Stocks' Has Slowed*, N.Y. TIMES (Nov. 8, 2017), <https://www.nytimes.com/2017/11/08/us/politics/bump-stocks-congress-national-rifle-association-mass-shootings.html> (discussing legislative gridlock on gun control efforts in the wake of mass shooting in Las Vegas).

259. See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44–46 (1983) (summarizing modern public forum doctrine).

260. See generally Inazu, *supra* note 135 (discussing limits on the right of assembly); Zick, *supra* note 52 (discussing spatial limits on First Amendment rights).

extent possible, the exercise of constitutional rights in public places.²⁶¹ That principle does not impose an absolute right or guarantee of protection for public First Amendment rights. For instance, speakers and assemblies can cross boundaries that disqualify them from protections when faced with hostile audiences.²⁶² In general, however, police protection has assured public speakers and assemblies that they need not always be polite, quiet, or perfectly constrained.

In terms of policing the public First Amendment, where officials can “negotiate” in advance with regard to the basic terms of public protests and assemblies, they have often been willing to do so.²⁶³ However, insofar as speakers and assemblies refuse to negotiate or engage in uncooperative or disorderly behavior, law enforcement will change tactics by escalating force or taking other steps to maintain public order.²⁶⁴ In such situations, First Amendment rights operate as background principles, but enforcement considerations actually determine the scope of public speech and assembly rights.

This approach to public First Amendment rights has implications for the future exercise of Second Amendment rights. For one thing, it strongly suggests that the scope of public Second Amendment rights will depend to a substantial degree on how effectively they can be policed. Indeed, this may be an even more acute concern with regard to open carry, owing to the potentially lethal consequences of firearms use. So long as law enforcement can effectively maintain public safety and order at armed protests and in other public contexts, open carry will not likely be aggressively policed or restricted.

Whether law enforcement can effectively police open carry remains an open question. Thus far, at least, firearms violence has not posed the greatest threat to order and safety at public events. However, mass public protests and even smaller events are challenging assignments for local and state law enforcement. Adding firearms to the mix will present some distinct challenges. Again, the most obvious difference in terms of policing expression versus firearms is that the latter has the capacity to inflict deadly harm. Moreover, in addition to concerns about the unlawful use of firearms, police now must confront the fact that they no longer have a monopoly on the display or potential use of weapons. They must also deal with the possibility of situational confusion arising from the uncertainty that comes with armed protests. Is the armed person a lawfully carrying protest participant or an

261. See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 552 (1965) (invalidating conviction of the leader of a civil rights group seeking to protest racial segregation); *Edwards v. South Carolina*, 372 U.S. 229, 238 (1963) (invalidating breach of peace convictions against civil rights protesters).

262. See, e.g., *Feiner v. New York*, 340 U.S. 315, 320 (1951) (upholding breach of peace conviction where a hostile crowd threatened a public speaker but speaker refused police orders to desist).

263. See ZICK, *supra* note 26, at 59–60 (discussing “negotiated management” policing strategies).

264. See *id.* at 59 (discussing “escalated force” model of protest policing).

active shooter?²⁶⁵ Finally, police forces may need to be concerned about whether they have adequate firepower to resist or defend against armed protesters.²⁶⁶

It is not yet clear whether the attitude regarding official *facilitation* of public speech and assembly rights will carry over to public carry rights. The general principle that has developed under the First Amendment is that law enforcement ought to protect speakers from hostile crowds in order to preserve their free speech and assembly rights.²⁶⁷ When the public carrying of firearms is lawful in the jurisdiction where a protest occurs, perhaps a similar principle will apply. In other words, the default standard would be protection of the rights-bearer. However, in the First Amendment context, where circumstances indicate that public order and safety cannot be preserved, either because the open carrier is threatening others or is being threatened by others, officers must intervene. Thus, under the Second Amendment, law enforcement officials will likely endeavor, to the extent possible, to preserve public carry rights or at least not unduly burden them. They will act in the case of observable violations, but otherwise exercise restraint. However, as in the public expression context, this default principle of non-intervention will be contingent upon the need to preserve public safety and order.²⁶⁸

As in the case of public speech and assembly rights, limits on open carry will not always be perfectly enforced. At large-scale public protests, participants have been arrested without proper cause or swept up in dragnets and later released.²⁶⁹ A similar phenomenon could occur with regard to open arms-carriers, some of whom may be lawfully exercising open carry rights when they are arrested. As they have in the First Amendment context, unlawful arrests of this sort may lead to significant civil liability judgments under civil rights and other laws.

One final suggestion from the public First Amendment, in terms of enforcement, is the need for local flexibility in dealing with the exercise of

265. See Molly Hennessy-Fiske, *Dallas Police Chief: Open Carry Makes Things Confusing During Mass Shootings*, L.A. TIMES (Jul. 11, 2016, 5:36 PM), <http://www.latimes.com/nation/la-na-dallas-chief-20160711-snap-story.html> (reporting on sniper shooting in Dallas, Texas that claimed the lives of several police officers).

266. See Heim, *supra* note 7 (reporting on criticisms of Charlottesville police response to armed protesters).

267. See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 545–50 (1965) (invalidating breach of peace conviction of leader of civil rights group stemming from public protest of racial segregation, even though a hostile crowd of onlookers was present).

268. Law enforcement's ability to enforce criminal laws will be complicated not only by the specifics of public carry rights, but also by the requirements of the Fourth Amendment with regard to arresting armed protesters. See generally Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1 (2015) (discussing intersection between Fourth Amendment and open carry laws).

269. See Haley Draznin, *New York to pay \$17.9 million to 2004 Republican Convention Protesters*, CNN (Jan. 16, 2004), <https://www.cnn.com/2014/01/15/politics/new-york-republican-convention-settlement/index.html> (describing police tactics at national political convention).

public Second Amendment rights. Time, place, and manner restrictions are generally fluid measures imposed to meet the circumstances of a particular event. This is a function of the fact that public protests vary in terms of size, location, and safety implications. Local responses can be tailored to events as they occur and develop.

In contrast, many localities are currently stymied in their ability to respond to public carry at public protests, marches, and demonstrations.²⁷⁰ As noted earlier, local laws may be expressly preempted or prohibited by state laws protecting open carry in public places.²⁷¹ Local officials and law enforcement may need the same or similar flexibility with regard to open carry as they have with regard to public expression.

C. BALANCING EXPRESSIVE AND OPEN CARRY RIGHTS

Another potential influence on the development of the public Second Amendment will be the balancing of expressive and firearms rights at public protests and similar events. As the analysis in this Article has shown, tensions can arise where both First Amendment and Second Amendment rights are exercised in public places. I have argued that the available evidence does not demonstrate an *inherent* incompatibility between robust expression and open carry. That is not the same thing as claiming speakers and assemblies will not experience discomfort or even feel subjectively threatened by the presence of firearms at public events. The form the public Second Amendment will take is going to depend, in part, on how the public, police, officials, and especially judges balance or reconcile open expression and open carry.

I have expressed skepticism with regard to abstract claims of expressive “chill,” specifically in the context of public protests.²⁷² Courts should be mindful of the doctrinal and practical limitations of broad chill claims. The exercise of public expressive rights has always required that speakers and assemblies muster the fortitude to manage and navigate tensions on the ground. Further, predictions of public disorder or harm have not sufficed to justify limiting the exercise of constitutional speech and assembly rights. The expressive arms-carrier and the open carrier alike are entitled to the same presumption that subjective concerns about possible violence are not an adequate reason for limiting the exercise of public constitutional rights.

First Amendment and Second Amendment rights will be balanced against one another, in part as they are exercised and policed. In addition, precedents might provide a clue as to how courts will ultimately balance these rights in the public sphere.²⁷³ Thus, in some cases, the Supreme Court has

270. See generally Schragger, *supra* note 23 (discussing limits on city authority to deal with armed protests).

271. See *supra* note 23.

272. See *supra* Section II.C.

273. For a discussion of balancing as a form of constitutional reasoning, see generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

concluded that First Amendment rights are of paramount concern, even where they might infringe or threaten other constitutional rights or interests. The Court has held, for example, that a cellphone caller's interest in maintaining the privacy of his conversations must yield to First Amendment concerns regarding the distribution of information of public concern.²⁷⁴ However, the Court has also held that First Amendment rights may sometimes have to yield when they interfere with the right to vote.²⁷⁵ Thus, in direct conflicts between the First Amendment, on the one hand, and other constitutional rights or interests, freedom of expression only sometimes prevails.²⁷⁶

In these cases, there was a direct conflict between First Amendment and other rights. The situation concerning public expression and open carry is somewhat different. There is a tension between these rights, or at least there can be, but they are not necessarily in direct conflict with one another. In that sense the situation closely resembles the tension between expressive and abortion rights occasioned by protests and other forms of speech and assembly near health care clinics. The Supreme Court has upheld some restrictions on expression near clinics, in part owing to concerns about preserving access to abortion rights.²⁷⁷ More generally, it has sought to navigate or defuse the tensions between exercises of expressive rights in public places and government interests in safety, order, and repose.²⁷⁸ This seems to be the most likely template concerning expressive and open carry rights—a general balancing of rights and interests, performed on a case-by-case basis.

In the specific case of expressive and firearms rights at public protests, there are several possible outcomes with regard to this ad hoc balancing of interests. Some officials and courts might be convinced that restrictions on open carry are a necessary means of preserving expressive rights. If so, they

274. See *Bartnicki v. Vopper*, 532 U.S. 514, 528–30 (2001) (concluding that freedom of speech outweighed right to privacy in intercepted cell phone conversations); see also *Snyder v. Phelps*, 562 U.S. 443, 454–57 (2011) (holding that members of a church who protested at military funerals and conveyed messages such as “God Hates Fags” could not be held liable for the common law tort of intentional infliction of emotional distress).

275. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 206–08 (1992) (plurality opinion) (holding the right to engage in political speech near polling places could be restricted in the interest of protecting the unfettered exercise of the right to vote).

276. See *id.*

277. See, e.g., *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 374–76 (1997) (upholding fixed buffer zones in part on ground that they were necessary to preserve women's access to pregnancy-related services).

278. See, e.g., *McCullen v. Coakley*, 134 S. Ct. 2518, 2536 (2014) (invalidating buffer zone around abortion clinics on ground that it was not narrowly tailored to address safety and other state concerns); *Hill v. Colorado*, 530 U.S. 703, 725 (2000) (upholding state law restricting certain unwanted approaches near abortion clinics); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 757, 774 (1994) (invalidating broad bubble provision that banned all unwanted physical approaches, but upholding thirty-six-foot buffer zone and other injunctive provisions).

may restrict or even ban open carry rights in order to protect free speech and assembly. Alternatively, in some jurisdictions, officials who lack the authority or political will to limit open carry rights might instead seek to limit speech and assembly in order to resolve any conflicts with public carry rights. In fact, this has already occurred. For example, Virginia's governor proposed strict limits on public speech and assembly near the Robert E. Lee memorial in Richmond, a site that has attracted armed protesters in the past.²⁷⁹ The proposed rules would restrict crowd sizes to 500 (down from 5,000) and require permits for events that attract more than 10 people.²⁸⁰ Assuming the state retains its open carry laws, this proposal would drastically reduce free speech and assembly rights in response to a fear of violence at certain protests.

The most likely scenario, as in the abortion clinic expression cases, is that local officials will adopt measures designed to accommodate both expressive and open carry rights. Those measures will be judged primarily by Second Amendment standards, with some consideration given to the preservation of First Amendment rights. *Heller* does not resolve whether any of the proposals discussed in Part III would violate the Second Amendment. That will also depend on a number of factors: whether there is a right to carry firearms in public places, the scope of any such right, how the term "Arms" will be interpreted, and the standard of review applicable to Second Amendment regulations.²⁸¹

D. JUSTIFYING OPEN CARRY

In addition to the foregoing considerations, the constitutionality of specific restrictions and the future of the public Second Amendment will depend on the underlying values or purposes—i.e., self-defense, autonomy, or the prevention of governmental tyranny—that the Second Amendment is purportedly intended to serve.²⁸² Here, too, the free speech experience highlights some helpful lessons.

The justifications and values associated with First Amendment expressive rights have been debated and refined over the course of many decades. No single justification presently controls, in the sense that it is regarded as the *definitive* justification for protecting free expression.²⁸³ Instead, the Supreme

279. See Haag, *supra* note 20 (discussing recent proposal to restrict protests at Lee monument).

280. *Id.*

281. See, e.g., *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011) (“[W]e conclude that a lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside of the home.”).

282. See Blocher & Miller, *supra* note 76, at 293–99 (examining Second Amendment theories as they might relate to restrictions on carrying lethal weapons); Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 347–54 (2016) (discussing Second Amendment theories).

283. See generally FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982) (examining various theories that are said to justify protection for freedom of speech).

Court and most scholars have adopted a pluralistic approach to free speech justifications, invoking several to justify speech and assembly protections in public (and other) places.

A concern for speaker autonomy has been important to the development of free speech jurisprudence. Justifications of this nature adopt the basic premise that individuals ought to decide for themselves what “speech” entails, subject to only narrow exceptions.²⁸⁴ The concept of the “marketplace in ideas,” which posits that the value of free speech lies in testing truth and falsity against one another, has also played a critical role in defining the scope of expressive rights.²⁸⁵ Finally, the notion that freedom of speech facilitates self-government by ensuring access to information about matters of public concern has played a critically important role in justifying speech and assembly protections, including in public venues.²⁸⁶ These theories or justifications have all significantly influenced the development of the First Amendment, including its public dimension.

Heller observes that the “core” or “central component” of the right to keep and bear arms is self-defense.²⁸⁷ Insofar as that justification extends out of doors, open carry rights will rest on a constitutional footing that may significantly limit the power to regulate firearms in public places. The right to keep and bear arms might apply anywhere confrontation could occur, including at public protests and demonstrations. That would not mean government would be powerless to regulate open carry in public places. However, it would influence the nature and scope of such regulations, in the sense that laws and regulations would need to preserve the ability to defend oneself in public venues. Thus, for example, regulations that make firearms more difficult to access or fire could be deemed suspect under this rationale.

Of course, *Heller* does not purport to fully determine the normative justifications or values relating to Second Amendment rights in general, or open carry rights in particular. Thus, it is possible that a future decision might conclude that open carry serves autonomy values, much as freedom of speech

284. See, e.g., BAKER, *supra* note 53 (arguing for the “liberty” rationale of free speech over the “marketplace of ideas” rationale); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981) (arguing for the abandonment of content distinctions in first amendment analysis).

285. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also JOHN MILTON, *AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND* 69 (The Floating Press 2009) (1644) (“Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?”).

286. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 24–25 (1960) (discussing self-government and other democratic values associated with freedom of speech).

287. See *District of Columbia v. Heller*, 554 U.S. 570, 599, 630 (2008) (recognizing the core self-defense justification).

does.²⁸⁸ This could expand both the places where firearms could be carried, as well as the types of arms the Second Amendment protects. Thus, just as a speaker has broad latitude to communicate viewpoints and content, an open carrier might have a broad right to decide how to exercise open carry rights. Again, this rationale or justification would affect the scope and nature of the public Second Amendment.

Other theories and values may also influence the scope and application of public Second Amendment rights. For example, the Second Amendment might embrace what some scholars have referred to as a “marketplace of violence,” similar to the First Amendment’s marketplace in ideas.²⁸⁹ That justification could complement or even extend the self-defense value, by justifying open carry in terms of deterring all manner of threats. Open carry might also facilitate self-government, for example by deterring or preventing tyrannical government action.²⁹⁰ That justification, if accepted, might support a right to keep and carry the sorts of arms necessary to effectively resist official uses of force—including in public places.

As the First Amendment example shows, one does not have to have a unitary theory or single justification for open carry rights. The normative values of the Second Amendment are not yet fully elaborated or established. As with expression, the choice of justifications or values will likely impact the scope of Second Amendment rights and the breadth of the government’s regulatory authority. Thus, we can add to the already discussed factors likely to influence the public Second Amendment a theoretical component. At present, the Second Amendment lacks a clear and cogent set of normative values. As the First Amendment example shows, those values will be critically important to building out the public Second Amendment. Thinking them through now, in the context of actual controversies, can help us determine whether protesters will carry firearms at all, what kinds of arms they might carry, and under what circumstances open carry can be restricted.

E. LOOKING FORWARD

When it comes to constitutional rights, predictions are a perilous exercise. The First Amendment and Second Amendment are themselves good examples. Few would have predicted the current status and scope of either right, at least from their rather humble beginnings.

When venturing to predict or envision the future public Second Amendment, a principal consideration is the possibility that the Supreme Court will formally recognize a public right to carry firearms openly and/or in concealed fashion. Although *Heller* emphasizes self-defense in the home,

288. See Blocher & Miller, *supra* note 76, at 294 (examining application of autonomy theory to Second Amendment).

289. *Id.* at 295.

290. *Id.* at 299.

the decision is not necessarily limited to the private sphere. Indeed, its language emphasizes the importance of firearms possession to respond to “confrontation.”²⁹¹ Moreover, historically speaking, the right to keep and bear arms has never been strictly confined to the home. Although it is hardly a foregone conclusion, it seems likely that a future Supreme Court decision will recognize some right to carry firearms in public.

The nature and scope of that right might be informed by the sorts of considerations discussed in this Part. Thus, as the Court waits to decide the contours of the public Second Amendment, it may be considering how concealed and open carry rights are being exercised, policed, and regulated. The Court is likely also waiting for an appropriate case or vehicle, one involving a particular regulation of the public Second Amendment, in which to begin expounding on the public dimension of the right.

In the meantime, states and localities will continue to experiment with permissive, strict, and intermediate public carry regimes. If, as seems likely, the current pattern holds, we will continue to have arms at some public protests and in public places more generally. If open carry is used in intimidating ways, some states and localities (where permitted) may restrict firearms in certain places or at certain events, such as mass public protests. They might convince some courts to treat mass protests and other expressive events as “sensitive places” under *Heller*, or otherwise to uphold narrow regulations.²⁹² But as in the abortion example, where expression and abortion rights have sometimes been a combustible mix, the likelihood is that expression and firearms will occupy the same public spaces.

This will likely be the case even if public protests produce mass casualties owing to firearms use.²⁹³ While it is true that the exercise of open (and concealed) carry rights will have some impact on the future public Second Amendment, even abuses of that right will not likely result in a firearms-free public sphere. We are far more likely to see a patchwork of regulations and restrictions, designed to preserve Second Amendment and First Amendment rights. As the patchwork develops, both rights are likely to be burdened to some extent as they are subject to legislative and judicial balancing. Again, this is the model that the expression-abortion intersection has followed in public areas at or near abortion clinics.

Public officials and law enforcement will not permit public protests to become Wild-West style shootouts in the public square. Peaceful and orderly protest and open carry can and likely will, at least in most instances, co-exist. The central burden will fall on law enforcement, which will be tasked with

291. *Heller*, 554 U.S. at 592 (observing that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation”).

292. See Morgan, *supra* note 119.

293. See, e.g., Hennessy-Fiske, *supra* note 265 (reporting on shooting at Dallas protest).

applying the layered restrictions on expression and open carry in public places and at public events.

The abortion clinic example is, again, instructive. Especially during their early encounters, public expression and abortion rights had an uneasy relationship.²⁹⁴ Violence and disorder were not uncommon, as protesters sought to deny access to abortion services and to harass women seeking abortions. Over time, however, the rules of engagement were largely worked out such that both rights can be preserved. We can expect to see similar tensions in the expression-open carry relationship, particularly in early stages. There may well be some violent, perhaps even deadly, confrontations involving firearms at public protests. Such incidents will help define the future contours of the public Second Amendment. But again, they will almost certainly not dictate an absolute ban on firearms in public places. If the experience of the public First Amendment is any guide, the public Second Amendment will be characterized by a patchwork of regulations that preserve the basic right but limit its encroachment on other individual rights and government interests.

VI. CONCLUSION

Public protests have become armed and potentially dangerous events. Some fear that the arming of public protests will chill First Amendment free speech and assembly rights. Indeed, there is a question whether exercises of open carry and expressive rights in this context are inherently incompatible.

Thus far, states have overwhelmingly supported open carry in public places. And so far, at least, open carry rights have been peacefully exercised. Whether expressive and open carry rights can be reconciled in the context of public protests and similar events will depend on many factors. Among them, of course, is whether the Supreme Court will ultimately decide to recognize a public right to keep and bear arms.

In the meantime, and in all likelihood in the event of such a decision, states and localities will have an array of options for diminishing the tension between these two rights. States and localities already have a variety of measures at their disposal, including general criminal laws, bans on armed militias, restrictions on open carry in sensitive places, and other safety measures. Additional measures can be adopted, assuming states have the political will to do so. Although some regulations will be easier to defend and enforce than others, and jurisdictions will need to proceed with caution, this Article argues that neither the First Amendment nor Second Amendment generally stands in the way of reasonable limits on open carry at public protests.

294. See generally JOSHUA C. WILSON, *THE STREET POLITICS OF ABORTION: SPEECH, VIOLENCE, AND AMERICA'S CULTURE WARS* (2013) (detailing the history of abortion protests).

Of course, none of the measures discussed in this Article will guarantee that public order and safety will prevail. This has been equally true of the regulation of First Amendment rights to speak and assemble. The battle in the courts will only be one determinant of the future public Second Amendment. As our long and complicated experience with the public exercise of First Amendment rights shows, what the public Second Amendment will look like in the future will depend to a large extent on how open carry rights are exercised, policed, balanced against expressive rights, and normatively justified. These are the principal factors that transformed freedom of speech and assembly from presumptive threats to public order into an accepted part of American constitutional culture.

It is too early to tell whether open carry will follow that path. The public Second Amendment will take shape as and when similar forces act upon it. I have predicted that the Supreme Court will ultimately recognize some form of public Second Amendment right. But as with *Heller*, the decision will likely leave many questions unanswered. The answers will be worked out, as they have in the First Amendment context, as states and localities encounter the challenges associated with armed protests and armed public places more generally. If the First Amendment experience provides an appropriate analogy, some means of keeping and bearing arms will likely be prohibited as unlawful or uncovered. More generally, Second Amendment rights will be subject to reasonable time, place, and manner regulations—banned from certain areas, confined to others, and limited insofar as necessary to preserve other individual rights and further important public interests.