

LEAVE YOUR GUNS AT HOME: THE CONSTITUTIONALITY OF A PROHIBITION ON CARRYING FIREARMS AT POLITICAL DEMONSTRATIONS

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ABSTRACT

Armed protest has long been a tool of American political groups. Neo-Nazis, socialists, fascists, antifascists, the Black Panthers, neo-Confederates, and others have all taken up arms not necessarily to do violence, but to do politics. But such protests always risk rending a violent hole in our social fabric. If war is politics by other means, armed protests erase the distinction.

This Note argues that the Constitution's relevant guarantees of individual rights—the First and Second Amendments—do not include a constitutional right to armed protest.

With respect to free speech, it is unlikely that current doctrine would cover armed protests. But, considering ongoing First Amendment expansion, this Note argues for a categorical exclusion of guns, and perhaps other express constitutional guarantees, from expressive conduct doctrine.

As for the Second Amendment, armed protest is not within the historically understood scope of the right to keep and bear arms. More importantly, though, Heller's "sensitive places" exception recognizes a fundamental reality about the relationship between the First and Second Amendments: the Second Amendment must cede certain arenas—churches, government buildings, schools, theaters, protests, and the like—to the First. Instruments of violence cannot be permitted to distort outcomes in the marketplace of ideas.

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“Don’t take your guns to town, son
 Leave your guns at home, Bill
 Don’t take your guns to town.”
 - Johnny Cash¹

INTRODUCTION

On August 12, 2017, a group of white nationalists gathered in Charlottesville, Virginia, to protest the impending removal of a statue of Robert E. Lee from Emancipation Park.² One of the largest gatherings of white supremacists in modern history,³ the event brought together groups like Identity Evropa,⁴ the National Socialist Movement,⁵ and Vanguard America,⁶ among others. Despite the groups’ violent ideologies, one rally leader, Christopher Cantwell, claimed the hallowed mantle of the lawful protestor: “We’re here obeying the law. We’re doing everything that we’re supposed to do, trying to express opinions.”⁷

1. JOHNNY CASH, *Don’t Take Your Guns To Town, on THE FABULOUS JOHNNY CASH* (Columbia Records 1958).

2. Jacey Fortin, *The Statue at the Center of Charlottesville’s Storm*, N.Y. TIMES (Aug. 13, 2017), https://www.nytimes.com/2017/08/13/us/charlottesville-rally-protest-statue.html?_r=0 [https://perma.cc/T7XR-QDER]. Emancipation Park was previously named Lee Park. *Id.*

3. Patrick Strickland, *Unite the Right: White Supremacists Rally in Virginia*, AL JAZEERA (Aug. 13, 2017), <http://www.aljazeera.com/news/2017/08/unite-white-supremacists-rally-virginia-170812142356688.html> [https://perma.cc/9A49-G2LN].

4. See *Identity Evropa*, ANTI-DEFAMATION LEAGUE (last visited Dec. 14, 2017), <https://www.adl.org/education/resources/profiles/identity-evropa> [https://perma.cc/9B76-H9PZ] (describing the group as “focused on the preservation of ‘white American culture’ and promoting white European identity”).

5. See *National Socialist Movement*, S. POVERTY L. CTR. (last visited Dec. 14, 2017), <https://www.splcenter.org/fighting-hate/extremist-files/group/national-socialist-movement> [https://perma.cc/B8XF-A5GP] (“[T]he National Socialist Movement (NSM) is one of the largest and most prominent neo-Nazi groups in the United States.”).

6. See *Vanguard America*, ANTI-DEFAMATION LEAGUE (last visited Dec. 14, 2017), <https://www.adl.org/education/resources/backgrounders/vanguard-america> [https://perma.cc/7FVU-WH8U] (“VA is a white supremacist group that opposes multiculturalism and believes America should be an exclusively white nation.”).

7. VICE, *Charlottesville: Race and Terror – VICE News Tonight on HBO*, YOUTUBE (Aug. 14, 2017) [hereinafter *Charlottesville: Race and Terror*], <https://www.youtube.com/watch?v=RIrcB1sAN8I> [https://perma.cc/7V48-8GPF]; see also First Amended Complaint for Injunctive and Declaratory Relief at 65–66, *City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17000560-00 (Va. Cir. Ct. Charlottesville Jan. 4, 2018), available at <http://www.law.georgetown.edu/academics/centers-institutes/constitutional-advocacy-protection/upload/charlottesville-complaint.pdf> [https://perma.cc/XE6C-765F] (compiling similar statements about the First Amendment and free speech from groups associated with the protest).

Unsurprisingly, that wasn't the full story. Just seconds later, Cantwell remarked: "We're not non-violent. We'll fucking kill these people if we have to."⁸ After retreating from the Lee statue, another white nationalist threatened "to send at least 200 people with guns" back to the statue.⁹ There was nothing necessarily illegal about a plan to march 200 armed protestors onto government property. Virginia is an open-carry state;¹⁰ most people¹¹ can legally carry most weapons¹² in most places.¹³ In addition to invoking the First Amendment, the white supremacists operated under a permissive interpretation of the Second.¹⁴

Activists on the left, arriving to counter-protest, did not bring an olive branch to a gun fight. Armed antifascists ("antifa")—including Redneck Revolt, "a pro-worker, anti-racist organization" that practices "armed community defense"¹⁵—stood ready with openly displayed assault weapons.¹⁶ Were it not for antifa, Dr. Cornel West said from the scene, community members and clergy "would have been crushed like cockroaches."¹⁷

Thus, Charlottesville was simultaneously occupied by armed fascists and armed antifascists. Even though each group operated with

8. *Charlottesville: Race and Terror*, *supra* note 7.

9. *Id.*

10. VA. CODE ANN. §§ 18.2-279 to 18.2-311.2 (2017).

11. *Id.* §§ 18.2-308.1:1 to 18.2-308.1:5, 18.2-308.2:01 & 18.2-308.7 (prohibiting certain classes of persons from possessing firearms).

12. *Id.* §§ 18.2-288 to 18.2-298 (banning machine guns), 18.2-299 to 18.2-307 (banning sawed-off shotguns and rifles) & 18.2-308.5 (banning plastic firearms).

13. *Id.* §§ 18.2-283 (prohibiting firearms in a house of worship), 18.2-283.1 (prohibiting firearms in courthouses), 18.2-287.01 (prohibiting firearms in airport terminals) & 18.2-287.4 (prohibiting open carry in certain cities).

14. See JOSEPH BLOCHER & DARRELL A.H. MILLER, *THE POSITIVE SECOND AMENDMENT 6-7* (2018) (explaining the importance of distinguishing between what the Second Amendment requires and what it allows).

15. REDNECK REVOLT: ABOUT, <http://www.Redneckrevolt.org/about/> [<https://perma.cc/E8TU-Y7ET>] (last visited Dec. 14, 2017).

16. David A. Graham, *Could Police Have Prevented Bloodshed in Charlottesville?*, ATLANTIC (Aug. 14, 2017), <https://www.theatlantic.com/politics/archive/2017/08/could-the-police-have-prevented-bloodshed-in-charlottesville/536775/> [<https://perma.cc/B6PJ-NBFA>].

17. Peter Hermann, Joe Heim & Ellie Silverman, *Police in Charlottesville Criticized for Slow Response to Violent Demonstrations*, CHI. TRIB. (Aug. 12, 2017, 7:41 PM), <http://www.chicagotribune.com/news/nationworld/ct-charlottesville-police-response-20170812-story.html> [<https://perma.cc/D5Q7-56SP>].

the implicit blessings of the first two amendments to the Constitution,¹⁸ the outcome was disastrous.

Heather Heyer, an unarmed counter-protester, was killed when James Alex Fields—photographed earlier bearing the Vanguard America insignia¹⁹—rammed his car into a crowd.²⁰ The attack injured 19 others.²¹ Two police officers, Lt. H. Jay Cullen and Trooper Berke M.M. Bates, died when the helicopter they were using to monitor the clashing factions crashed.²² In addition to these three deaths, at least thirty-five people were injured in the day's violence.²³

It is almost miraculous that the violence was not much worse. Somehow, no one was shot, although one white supremacist fired his gun near a group of counter-protestors.²⁴ But the specter of what might have happened does not lessen the tragedy of what did happen. Blood was shed because the deterrent effect of militia weaponry²⁵ bought the far right enough breathing room to inflict violence on innocent

18. First Amendment protection was explicit for the white supremacist protesters. See *Kessler v. City of Charlottesville*, No. 3:17CV00056, 2017 WL 3474071, at *3 (W.D. Va. Aug. 11, 2017) (rejecting Charlottesville's attempt to stop the rally from happening).

19. Nicole Hensley, *Charlottesville Crash Suspect James Fields Brandished Shield for Vanguard America Hate Group Before Attack*, N.Y. DAILY NEWS (Aug. 13, 2017, 9:09 AM), <http://www.nydailynews.com/news/national/charlottesville-suspect-held-hate-group-shield-attack-article-1.3407245> [<https://perma.cc/T7JB-6PF9>]. Vanguard America denied any ties to Fields. *Id.*

20. 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> [<https://perma.cc/999S-TY9E>].

21. *Id.*

22. 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> [<https://perma.cc/JP9R-VJ6G>].

23. *Deadly Car Attack, Violent Clashes in Charlottesville: What We Know Now*, USA TODAY (Aug. 13, 2017, 3:13 PM), <https://www.usatoday.com/story/news/nation/2017/08/13/charlottesville-protests-what-we-know-now/562911001/> [<https://perma.cc/6Q5F-VXRT>].

24. Evan Simko-Bednarski, *Man Arrested for Firing Gun at Charlottesville Rally*, CNN (Aug. 28, 2017, 9:08 AM), <http://www.cnn.com/2017/08/27/us/man-arrested-gun-charlottesville-rally/index.html> [<https://perma.cc/8XHB-XA6L>].

25. In addition to the white supremacists who came to protest the statue's removal, several right-wing militias attended the protests in an alleged attempt to protect the protestors' right to free speech. The militias, who claimed to disavow the white supremacists' message, were more heavily armed than the white supremacists. Joanna Walters, *Militia Leaders Who Descended on Charlottesville Condemn 'Rightwing Lunatics'*, GUARDIAN (Aug. 15, 2017, 2:12 PM), <https://www.theguardian.com/us-news/2017/aug/15/charlottesville-militia-free-speech-violence> [<https://perma.cc/ZUF2-VAX4>].

people.²⁶ The police either could not or would not intervene; the government was outgunned on American soil.²⁷

It is tempting to view Charlottesville apocalyptically—to see in the day’s violence a vision of the future where the government, hands tied by the First and Second Amendments, can take no action to prevent political violence. Such a view is already taking hold in some corners. The American Civil Liberties Union has engaged in public hand-wringing over whether to continue representing such demonstrators.²⁸ At *Slate*, Dahlia Lithwick and Mark Joseph Stern offered a bleak rundown of the supposed clash between the First and Second Amendments in Charlottesville, declaring: “The Guns Won.”²⁹

But these concerns are unduly pessimistic. The First Amendment has survived gunfights before, and the Constitution does not prevent us from adequately responding to those who seek to dangerously combine guns and political expression. Ironically, the 19th-century prosecution of a socialist immigrant may help to illuminate the hard constitutional questions posed by 21st-century Nazis.

The late 1800s were a hotbed of unrest. As the beleaguered nation emerged from the Civil War, industrialization began to work a massive transformation, fueled by a wave of cheap labor from European immigrants.³⁰ The workers, not content to endure the brutal indignities of these early factories, formed unions and began to strike for fairer working conditions.³¹ In response, industrialists recruited private security forces and successfully lobbied the federal government to use

26. Sheryl Gay Stolberg, *Hurt and Angry, Charlottesville Tries to Regroup From Violence*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-protests-white-nationalists.html> [https://perma.cc/XFD7-LVCV].

27. *See id.* (quoting Virginia Gov. Terry McAuliffe’s claim that the militias were more heavily armed than the state police forces).

28. Joseph Goldstein, *After Backing Alt-Right in Charlottesville, A.C.L.U. Wrestles With Its Role*, N.Y. TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/nyregion/aclu-free-speech-rights-charlottesville-skokie-rally.html> [https://perma.cc/D5UC-7E4E].

29. Dahlia Lithwick & Mark Joseph Stern, *The First and Second Amendments Clashed in Charlottesville. The Guns Won*, SLATE (Aug. 17, 2017, 7:34 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/08/the_first_and_second_amendments_clashed_in_charlottesville_the_guns_won.html [https://perma.cc/Y9KG-PCHL]; *see also* Luppe B. Luppen (@nycsouthpaw), TWITTER (Sept. 2, 2018, 12:00 PM), <https://twitter.com/nycsouthpaw/status/1036328043474837504> [https://perma.cc/3LVF-RYEW] (“Where open carry was always headed, protests and counterprotests looking more and more like paramilitary shows of force. This is the America the NRA has made.”).

30. *The Early Labor Movement*, PBS, <http://www.pbs.org/opb/historydetectives/feature/the-early-labor-movement/> [https://perma.cc/WLU8-EHCC] (last visited Aug. 31, 2018).

31. *Id.*

the national army to break strikes.³² Violence was common, with fatalities on both sides.³³

Following the 1874 creation of the Illinois National Guard³⁴ (at the time, privately financed by wealthy businessmen),³⁵ a group of German socialists in Chicago, opposed to a world where “police clubs and militia rifles outweighed the Constitution,”³⁶ created the *Lehr und Wehr Verein* (“Education and Defense Association”).³⁷ Its purpose was simple: “When the workingmen are on their guard, their just demands will not be answered with bullets.”³⁸

To wit, they armed themselves and marched.³⁹ It was at the head of one such march on September 24, 1879, that Hermann Presser was arrested for violating the Illinois Military Code, enacted to prohibit the workers’ marches.⁴⁰ Presser rode a horse and bore a cavalry sword while 400 of his comrades marched behind him with rifles.⁴¹ Ultimately, the Supreme Court rejected both First and Second Amendment defenses to Presser’s march.⁴²

As Charlottesville and *Presser v. Illinois* illustrate, the American practice of armed protest is neither exclusively modern nor exclusively

32. G. William Domhoff, *The Rise and Fall of Labor Unions in the U.S.*, U.C. SANTA CRUZ (Feb. 2013), http://www2.ucsc.edu/whorulesamerica/power/history_of_labor_unions.html [<https://perma.cc/AH72-PN4G>] (“[C]orporate leaders put their efforts into creating stronger military forces to control workers [M]ilitia units were often directly funded and supplied by corporate leaders The regular army also developed close ties to the industrial companies The use of private security forces in labor disputes also grew.”).

33. Domhoff notes:

American labor relations were the most violent in the Western world with the exception of Russia Between 1877 and 1900, American presidents sent the U.S. Army into 11 strikes, governors mobilized the National Guard in somewhere between 118 and 160 labor disputes, and mayors called out the police on numerous occasions to maintain “public order.”

Id.

34. Stephen P. Halbrook, *The Right of Workers to Assemble and to Bear Arms: Presser v. Illinois, One of the Last Holdouts Against Application of the Bill of Rights to the States*, 76 U. DET. MERCY L. REV. 943, 946 (1999).

35. *Id.* at 946–47.

36. *Id.* at 950 (quoting Christine Heiss, *German Radicals in Industrial America: The Lehr- und Wehr- Verein in Gilded Age Chicago*, in *GERMAN WORKERS IN INDUSTRIAL CHICAGO 1850–1910: A COMPARATIVE PERSPECTIVE* 215 (Hartmut Keil & John B. Jentz eds., 1983)).

37. *Id.* at 947.

38. *Id.* at 948 (quoting NATHAN FINE, *LABOR AND FARMER PARTIES IN THE UNITED STATES: 1828–1928*, at 106–07 (1928)).

39. *See id.* at 953–55 (describing *Lehr und Wehr Verein* marches).

40. *Presser v. Illinois*, 116 U.S. 252, 253–54 (1886).

41. *Id.* at 254–55.

42. *Id.* at 269. The decision in *Presser* is discussed in greater detail *infra* Part II.B.1.

right wing. From socialists to fascists, from the Black Panthers⁴³ to the Ku Klux Klan,⁴⁴ from 19th-century workers fighting for dignity to 21st-century 4chan posters aggrieved by diversity,⁴⁵ Americans have always mixed guns and politics. In an era when both American guns and American politics seem more dangerous than ever,⁴⁶ the question is whether this tradition remains viable.

Commentators and civic associations question the sustainability of current jurisprudence, which, painting broadly, is protective of both guns and speech.⁴⁷ Similarly, courts are faced with complaints like one filed by the City of Charlottesville,⁴⁸ which alleged that the clashing protestors engaged in “unlawful paramilitary activity that transformed the city into a virtual combat zone.”⁴⁹

43. See ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 231 (2011) (“If it hadn’t been for the Black Panthers, a militant group of Marxist black nationalists committed to ‘Black Power,’ there might never have been a modern gun rights movement.”).

44. See Alex Yablon, *How to Keep Armed Militias Out of Your City*, THE TRACE (Sept. 3, 2018), <https://www.thetrace.org/2018/09/armed-militias-right-wing-extremism-state-laws> [<https://perma.cc/Y9L7-XHHW>] (detailing “a 1979 incident in North Carolina, when neo-Nazis and Klan members armed with assault weapons attacked a Communist demonstration in the city of Greensboro, killing five leftists and injuring more than a dozen”).

45. The flag of “Kekistan,” popularized on 4chan, was flown at Charlottesville. See Hatewatch Staff, *Flags and Other Symbols Used by Far-Right Groups in Charlottesville*, S. POVERTY L. CTR. (Aug. 12, 2017), <https://www.splcenter.org/hatewatch/2017/08/12/flags-and-other-symbols-used-far-right-groups-charlottesville> [<https://perma.cc/BWQ5-RRGC>] (“The ‘national flag of Kekistan’ mimics a German Nazi war flag . . . A 4chan logo is emblazoned in the upper left hand corner. Alt-righters are particularly fond of the way the banner trolls liberals who recognize its origins.”).

46. See, e.g., PEW RESEARCH CTR., *THE PARTISAN DIVIDE ON POLITICAL VALUES GROWS EVEN WIDER* 1 (2017), <http://assets.pewresearch.org/wp-content/uploads/sites/5/2017/10/05162647/10-05-2017-Political-landscape-release.pdf> [<https://perma.cc/EZZ5-VAVG>] (detailing the polarization of American politics).

47. See, e.g., *supra* notes 28–29 and accompanying text.

48. Redneck Revolt, Vanguard America, the Virginia Minutemen Militia, and a number of independent defendants were named. First Amended Complaint for Injunctive and Declaratory Relief, *supra* note 7, at 7–15.

49. Press Release, Geo. Law Ctr., Georgetown Law’s ICAP Sues to Prevent Paramilitary Groups’ Return to Charlottesville (Oct. 12, 2017), <https://www.law.georgetown.edu/news/georgetown-laws-icap-sues-to-prevent-paramilitary-groups-return-to-charlottesville/> [<https://perma.cc/8SFL-JRFR>]. The case ended in a win for Charlottesville after a state judge rejected demurrers filed by alt-right organizer Jason Kessler and Redneck Revolt. Ruling on Demurrer at 1, 19, City of Charlottesville, et al. v. Pa. Light Foot Militia, et al., No. CL17000560-00 (Va. Cir. Ct., July 7, 2018), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/07/2018.07.07-Letter-Opinion-Ruling-on-Defendants-Demurrer-to-Complaint.pdf> [<https://perma.cc/26WH-UME5>]. The defendants then entered into a consent decree prohibiting them from “returning to demonstrations in Charlottesville in groups of two or more while armed with weapons.” Melissa Gomez, *Charlottesville Rally Organizer Agrees to*

Legal academics have begun to face the issue as well. Prominent First Amendment lawyer Floyd Abrams noted that the white supremacists “will certainly claim that everything they did, everything they said, and every action they took was protected by the First Amendment,”⁵⁰ and Alan Dershowitz claimed that “[t]he First Amendment was designed to protect this kind of unpopular and hateful expression.”⁵¹ Several recent and upcoming articles come down on the other side, arguing that state laws that prohibit armed protest are constitutional.⁵²

This Note argues for the validity of bans on armed protest through two novel constitutional arguments. The first is that gun possession—even (or, perhaps, especially) at political rallies—ought to be categorically excluded from First Amendment coverage as expressive conduct. The second is that the First Amendment necessarily limits the Second Amendment by way of the Second’s “sensitive places” exception, which ought to be interpreted to protect those places where the presence of guns negatively impacts the exercise of free speech, including political rallies.

Discourage Violence in Future Demonstrations, N.Y. TIMES (July 12, 2018), <https://www.nytimes.com/2018/07/12/us/jason-kessler-charlottesville-violence-discourage.html> [<https://perma.cc/JNQ7-ZMMY>].

50. Leah Litman & Lark Turner, *The Easy Take and the Right Take on the Charlottesville Lawsuit*, TAKE CARE (Oct. 16, 2017), <https://takecareblog.com/blog/the-easy-take-and-the-right-take-on-the-charlottesville-lawsuit> [<https://perma.cc/KW7S-YM7V>].

51. *Id.*

52. Katlyn E. DeBoer, *Clash of the First and Second Amendments: Proposed Regulation of Armed Protests*, 45 HASTINGS CONST. L.Q. 333, 334 (2018); Eric Tirschwell & Alla Lefkowitz, *Prohibiting Guns at Public Demonstrations: Debunking First and Second Amendment Myths After Charlottesville*, 65 UCLA L. REV. DISC. 172, 174 (2018); Timothy Zick, *Arming Public Protests*, 104 IOWA L. REV. (forthcoming Nov. 2018), <https://ssrn.com/abstract=3137374> [<https://perma.cc/C9HR-94ZB>]; Kendall Burchard, Essay, *Your ‘Little Friend’ Doesn’t Say ‘Hello’: Putting the First Amendment Before the Second in Public Protests*, 104 VA. L. REV. ONLINE 30, 41–43 (2018); Michael C. Dorf, *Constitutional Arithmetic Post-Charlottesville: Sometimes One Plus One Equals Zero*, TAKE CARE (Aug. 20, 2017), <https://takecareblog.com/blog/constitutional-arithmetic-post-charlottesville-sometimes-one-plus-one-equals-zero> [<https://perma.cc/QECS-EU66>]. For a survey of state laws regarding armed protest as of September 2017, see Alex Yablon, *The 36 States Where Local Officials Can’t Ban Guns at Protests*, THE TRACE (Sept. 11, 2017), <https://www.thetrace.org/2017/09/35-states-local-officials-cant-ban-guns-protests> [<https://perma.cc/P597-CNAQ>].

I. THE FIRST AMENDMENT⁵³

The First Amendment is, perhaps, America’s most robustly enforced constitutional guarantee.⁵⁴ The main thrust of its protection is that any government regulation of speech is presumptively unlawful.⁵⁵ This Part first lays out the accepted First Amendment principles necessary to analyze the question of guns at political rallies—coverage and protection analysis, expressive conduct doctrine, and the Amendment’s categorical exceptions—and then applies those principles to armed protest. This Part ultimately concludes that armed protest is not covered by the First Amendment because it is not speech.⁵⁶

A. *Background & Methodology*

1. *Coverage and Protection.* Government regulation of speech may stand only if: (1) the speech falls within an excepted, unprotected category, which is to say that it is not speech within the Amendment’s meaning,⁵⁷ or (2) the government satisfies a certain level of scrutiny, based on the nature of the regulation or the speech.⁵⁸ First Amendment

53. “Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble” U.S. CONST. amend. I. The First Amendment has been applied to the states through incorporation via the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

54. See Frederick Schauer, *The Wily Agitator and the American Free Speech Tradition*, 57 STAN. L. REV. 2157, 2159 (2005) (book review) (“[A] robust First Amendment entails societal tolerance for what is potentially a not inconsiderable amount of real harm. American society, with its traditions and its history, has largely decided that it should tolerate this harm”).

55. *Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972) (“[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

56. I do not analyze the question of armed protest under the theoretically applicable First Amendment right to assembly primarily because that right has “withered into a mere afterthought, nothing more than a historical artifact.” Nicholas S. Brod, Note, *Rethinking a Reinvigorated Right to Assemble*, 63 DUKE L.J. 155, 159 (2013); see also John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 566 (2010). Any attempt to characterize an action as assembly that could colorably be characterized as speech would be, at best, a waste of time. Second Amendment advocates should consider the fate of the Assembly Clause to be a cautionary tale about letting the Free Speech Clause swallow and absorb gun rights. See *infra* Part I.B.2.b.

57. But see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (rejecting the idea that excepted categories of speech are “entirely invisible to the Constitution”).

58. John A. Humbach, *The Constitution and Revenge Porn*, 35 PACE L. REV. 215, 223 n.44 (2014).

scholarship refers to these concepts, respectively, as “coverage” and “protection.”⁵⁹

Utilizing this dual framework, courts first ask whether the First Amendment covers the conduct in question—that is, whether the First Amendment even “shows up.”⁶⁰ For example, the First Amendment clearly “shows up” when the government censors a book, but is nowhere to be found when the government regulates a power plant’s carbon dioxide emissions. Even some actual speech stands outside the umbrella of First Amendment coverage.⁶¹ Fraud,⁶² criminal solicitation,⁶³ and violent threats⁶⁴ are all carried out through speech, but nonetheless may be proscribed without reference to the First Amendment.⁶⁵

If the First Amendment does cover the speech, the question becomes how much protection it provides. In theory, all speech that is covered by the First Amendment may nonetheless be lawfully regulated if the government sufficiently justifies the regulation.⁶⁶ Certain categories of speech, like commercial speech,⁶⁷ and certain categories of regulation—namely, content-neutral regulation⁶⁸—ease the government’s justificatory burden.

2. *Expressive Conduct.* For the First Amendment to cover (and protect) an activity, that activity must be speech. But not all “speech” is speech. While the Court has rejected “the view that an apparently limitless variety of conduct can be labeled ‘speech’” simply because the actor intended to express an idea,⁶⁹ non-speech conduct may nevertheless be “sufficiently imbued with elements of communication”

59. See, e.g., Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004) [hereinafter Schauer, *Boundaries of the First Amendment*] (noting the distinction between coverage and protection).

60. Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1617–21 (2015).

61. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

62. See *Illinois ex rel. Madigan v. Telemktg. Assocs., Inc.*, 538 U.S. 600, 612 (2003) (“[T]he First Amendment does not shield fraud.”).

63. See *United States v. Williams*, 553 U.S. 285, 297 (2008) (“Offers to engage in illegal transactions are categorically excluded from First Amendment protection.”).

64. See *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam) (“What is a threat must be distinguished from what is constitutionally protected speech.”).

65. See *infra* Part I.A.3.

66. EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 3 (6th ed. 2016).

67. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983).

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

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

to merit coverage.⁷⁰ Therefore, while the guarantee of free speech obviously does not cover arson, rape, or trespassing, it does cover the burning of the U.S. flag,⁷¹ the possession of hardcore pornography,⁷² and sit-ins to protest segregation.⁷³

The Court has developed a specific test for such “expressive conduct.” The First Amendment covers conduct when (1) the actor intends to convey a “particularized message,”⁷⁴ and (2) it is likely that those who view the conduct would understand the message.⁷⁵

3. *Categorical Speech Exceptions.* Even as the First Amendment covers some non-speech conduct, some actual speech falls outside of its ambit, represented in the popular imagination as falsely shouting “Fire!” in a crowded theater.⁷⁶ Relevant exceptions include incitements, threats, and speech integral to unlawful conduct.

Speech is unprotected as incitement when it aims to incite or produce “imminent lawless action” and it is likely to do so.⁷⁷ Thus, the Constitution permits advocating the violent overthrow of the United States government, so long as the advocate does not specify that the revolution should begin immediately, or if the advocacy is unlikely to produce the sought-after coup.⁷⁸

Threats of violence are not covered by the First Amendment, but the mens rea required to remove a threat from coverage is an open question. *Virginia v. Black*⁷⁹ suggested that speech directed “to a person or a group of persons with the *intent* of placing the victim[s] in fear of bodily harm or death” was not covered.⁸⁰ Eugene Volokh

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

71. *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

72. *Stanley v. Georgia*, 394 U.S. 557, 559 (1969).

73. *Brown v. Louisiana*, 383 U.S. 131, 142 (1966).

74. *Spence*, 418 U.S. at 410–11. *But see* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 569 (1995) (suggesting a “particularized” message is not necessary for First Amendment coverage). Some courts have continued to require a particularized message, while others have generated entirely new tests. *See* *Cressman v. Thompson*, 719 F.3d 1139, 1148–50 (10th Cir. 2013) (discussing the tests used in various circuits).

75. *Spence*, 418 U.S. at 410–11.

76. *See* *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”).

77. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

78. *Id.* at 453–54.

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

80. *Id.* at 360 (emphasis added).

therefore interprets *Black* to require a mens rea of purposefulness.⁸¹ But, as Volokh goes on to note, “[b]oth before and after *Black* . . . many lower courts held that the First Amendment standard is negligence.”⁸² Under a negligence standard, threatening speech would not be covered if a reasonable speaker should have known that their speech would inspire fear.⁸³

The First Amendment also does not cover “speech or writing used as an integral part of conduct in violation of a valid criminal statute.”⁸⁴ Under this exception, the solicitation of a crime can be punished,⁸⁵ as can, for example, the announcement of an illegal discriminatory hiring policy, because the announcement of the policy would further the illegal discrimination.⁸⁶ Similarly, the First Amendment provides no defense when, in violation of a valid ordinance against outdoor fires, one burns a flag, even though flag burning is otherwise protected.⁸⁷

B. Application

An application of the above principles to the question of armed demonstrations reveals that: (1) the possession of a gun, even at a political demonstration, is not expressive conduct under current doctrine, (2) expressive conduct doctrine ought to be construed so as to avoid First Amendment analysis of activities more properly analyzed under other constitutional guarantees, and (3) armed demonstration may additionally fall into one or more of the categorical speech exceptions. Accordingly, the government can tell demonstrators to leave their guns at home.

1. *Armed Demonstration Fails the Expressive Conduct Test.* To date, courts have refused to categorically exclude keeping and bearing

81. VOLOKH, *supra* note 66, at 222.

82. *Id.*

83. *Id.*; see also MODEL PENAL CODE § 2.02 (AM. LAW INST., Official Draft and Revised Comments 1985) (“A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct.”).

84. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

85. Eugene Volokh, *The “Speech Integral to Criminal Conduct” Exception*, 101 CORNELL L. REV. 981, 993 (2016).

86. *Id.* at 983 (citing *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006)).

87. *Id.* at 1010 (citing *Bohmfalk v. City of San Antonio*, No. SA-09-CV-0497 OG (NN), 2010 WL 2303387, at *3-4 (W.D. Tex. June 4, 2010) and *City of Columbus v. Meyer*, 786 N.E.2d 521, 529 (Ohio Ct. App. 2003)).

arms from the First Amendment.⁸⁸ Thus, an analysis of expressive conduct doctrine in action, as applied to armed demonstration, is merited. Here, courts' rejections of attempts to justify weapon possession as free speech provides guidance on how to conduct such an analysis.

In June 2010, Shawn Northrup was walking down a street with his family, handgun holstered on his hip, when a passing motorcyclist started an argument with him about openly carrying a gun.⁸⁹ The motorcyclist called the police, and after they arrived, Northrup made a "furtive movement"—that is, he reached for his cell phone. The police officers removed Northrup's gun from its holster, handcuffed him, and placed him in the back of a police car.⁹⁰ Northrup was cited for "failure to disclose personal information."⁹¹ Northrup raised a First Amendment challenge, contending that he "was engaged in symbolic speech by openly carrying a firearm in a holster," which "expressed his opinion that Ohioans should exercise their fundamental right to bear arms."⁹² The district court concluded that "the fact that Northrup . . . had to explain the message he intended to convey undermines the argument that observers would likely understand the message."⁹³

Likewise, the Eastern District of Michigan rejected the First Amendment claims of "two young, heavily armed men . . . one of them dressed all in black and sporting sunglasses, and both carrying impressive looking rifles and handguns in full view," who had been "briefly detained" by police in a twenty-minute encounter.⁹⁴ During the detainment, one of the men stated: "I'm just exercising my First Amendment rights or my Second Amendment rights."⁹⁵ As to his First Amendment claim, the court simply noted that, "[b]ased upon the numerous emergency calls the City of Sterling Heights received from

88. See *Nordyke v. King*, 319 F.3d 1185, 1190 (9th Cir. 2003) ("As the district court noted, a gun protestor burning a gun may be engaged in expressive conduct. So might a gun supporter waving a gun at an anti-gun control rally."); *Burgess v. Wallingford*, No. 11-cv-1129, 2013 WL 4494481, at *9 (D. Conn. May 15, 2013) ("Gun possession may, in some contexts, meet [the expressive conduct] test and invoke First Amendment analysis."), *aff'd*, 569 F. App'x 21 (2d Cir. 2014).

89. *Northrup v. City of Toledo Police Div.*, 58 F. Supp. 3d 842, 845 (N.D. Ohio 2014), *rev'd on other grounds*, 785 F.3d 1128 (6th Cir. 2015).

90. *Id.* at 845–46.

91. *Id.* at 846.

92. *Id.* at 847.

93. *Id.* at 848.

94. *Baker v. Schwarb*, 40 F. Supp. 3d 881, 884 (E.D. Mich. 2014).

95. *Id.* at 886.

concerned citizens, it seems clear that these random observers did not apprehend that the Plaintiffs were” trying to convey a message.⁹⁶

A final example is instructive. Richard Burgess went to a pool hall, wearing a pistol in a holster on his hip, as well as a shirt “which quoted the Connecticut State Constitution regarding the right to bear arms.”⁹⁷ He also “had copies of a . . . brochure explaining [his organization’s] position on the legality of carrying firearms.”⁹⁸ After refusing multiple requests to conceal his weapon, Burgess left the bar.⁹⁹ Police had already been called, and he was arrested for disorderly conduct, a charge which was later dismissed.¹⁰⁰ Burgess subsequently filed a complaint against the police department.¹⁰¹ The court held that, because reasonable officers could disagree on whether it was likely that others would recognize the man’s message, the officers were entitled to qualified immunity:

While plaintiff’s shirt makes it more likely that those who viewed his overall conduct would understand his message than if he were only openly carrying his weapon, [it was unclear that his possession of a gun was a] particularized message regarding the Second Amendment rather than, for example, a weapon carried for protection.¹⁰²

As these cases indicate, gun possessors frequently fail to express a particularized message that others are likely to understand. Burning the American flag, with no other speech, clearly conveys a message.¹⁰³ Waving a gun in the air does not. An actor attempting to argue that his armed demonstration is protected expressive conduct would be required to show that viewers would likely understand the demonstration as expressive of a message,¹⁰⁴ rather than as a threat or for self-defense. Such a showing is extremely unlikely because “[t]here is no way to effectively divorce the use of a gun as an instrumentality of violence and self-defense from any intended use of it as a symbol.”¹⁰⁵ Consider the confusion wrought by the rash of protestors who carried

96. *Id.* at 895.

97. *Burgess v. Wallingford*, No. 11-cv-1129, 2013 WL 4494481, at *1 (D. Conn. May 15, 2013).

98. *Id.*

99. *Id.* at *1–2.

100. *Id.* at *2.

101. *Id.*

102. *Id.* at *9.

103. *Texas v. Johnson*, 491 U.S. 397, 404–06 (1989).

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

105. DeBoer, *supra* note 52, at 345.

assault weapons to President Barack Obama’s healthcare town halls in 2010.¹⁰⁶ One such protestor told an interviewer that he carried the gun “because he could.”¹⁰⁷ Another claimed he was attempting to express the message that “if you don’t use your rights, then you lose your rights.”¹⁰⁸ The concerned reaction from bystanders, as in *Baker v. Schwarb*,¹⁰⁹ indicates that those messages were not received.¹¹⁰

Even when, as in *Burgess v. Wallingford*,¹¹¹ the individual clearly has a political stance on gun rights, he will have difficulty proving that onlookers would likely view his gun as sending a message rather than as a tool of violence or self-defense. Thus, the idea that “[a]ctivists hoping to use guns as symbols may have more success convincing courts of their intention if they do so while demonstrating at a traditional march or rally”¹¹² is incorrect.

In fact, armed demonstration at a pro- or anti-gun political rally might constitute the *weakest* expressive conduct case: a potential viewer would understand the message only by explanation from the surrounding context, not solely through the actor’s conduct. The Court has made clear that explanation by actual speech—that is, by any protected First Amendment activity, such as signage—is fatal to an expressive conduct claim.¹¹³

Despite the inherent difficulty gun possessors have in satisfying expressive conduct doctrine, courts have thus far been unwilling to categorically exclude gun possession from First Amendment coverage.

106. Mark Thompson, *When Protesters Bear Arms Against Health-Care Reform*, TIME (Aug. 19, 2009), <http://content.time.com/time/nation/article/0,8599,1917356,00.html> [<https://perma.cc/MPW5-Q4R8>].

107. *Dozens Armed With Guns Protest Obama Speech*, FOX NEWS (Aug. 18, 2009), <http://www.foxnews.com/politics/2009/08/18/dozen-armed-guns-protest-obama-speech.html> [<https://perma.cc/5HFT-GSFY>].

108. *Id.*

109. *Baker v. Schwarb*, 40 F. Supp. 3d 881 (E.D. Mich. 2014).

110. *Interview with Gun-Toting Protester at Obama Rally Was Staged*, CNN (Aug. 18, 2009, 7:08 PM), <http://www.cnn.com/2009/POLITICS/08/18/obama.protest.rifle/index.html> [<https://perma.cc/P54G-4PRJ>].

111. *Burgess v. Wallingford*, No. 11-cv-1129, 2013 WL 4494481 (D. Conn. May 15, 2013).

112. Daniel Horwitz, Note, *Open-Carry: Open-Conversation or Open-Threat?*, 15 FIRST AMEND. L. REV. 96, 115–16 (2017).

113. See *Northrup v. Toledo Police Div.*, 58 F. Supp. 3d 842, 848 (N.D. Ohio 2014) (discussing Supreme Court guidance in this regard), *aff’d in part, rev’d in part, and remanded by* 785 F.3d 1128 (6th Cir. 2015); see also *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) (“The fact that such explanatory speech is necessary is strong evidence that the conduct . . . is not so inherently expressive that it warrants protection under *O’Brien*. If combining speech and conduct were enough to create expressive conduct, a . . . party could always transform conduct into ‘speech’ simply by talking about it.”).

However, and counterintuitively, such a categorical exclusion would be in the interests of both advocates and opponents of broad gun rights.

2. *Let Guns be Guns (or, It's Time to Limit Expressive Conduct Doctrine)*. Despite rejecting the idea that “an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea,”¹¹⁴ the Court’s own expressive conduct test contains no limitation on the conduct that might qualify.¹¹⁵ The Court has even conceded that “sleeping, *arguendo*, may be expressive conduct.”¹¹⁶ In fact, as a group of prominent First Amendment scholars recently opined, “[n]early every human activity can be cast as expressive in some way; nearly every conduct-regulating law will have some incidental effect on human activity that is not purely mechanical.”¹¹⁷

But if individuals continue to press First Amendment gun claims, as the above cases suggest is likely, it may be time to limit the doctrine. When there is another constitutional guarantee directly on point, courts should avoid the temptation to analyze conduct under the Free Speech Clause.¹¹⁸

For example, an individual who refuses to allow troops to quarter in his home by barring his door is clearly communicating a message that is understood by those who witness the refusal. Yet to argue that

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

115. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974). That said, the burden is expressly on the actor to show that “the First Amendment even applies” in expressive conduct situations because “[t]o hold otherwise would be to create a rule that all conduct is presumptively expressive.” *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

116. *Clark*, 468 U.S. at 294–95; *see also* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1743 (2018) (Thomas, J., concurring in part and concurring in the judgment) (arguing that a wedding cake is “inherently communicat[ive]” because, in part, it communicates that “a wedding has occurred” (citation omitted)).

117. Brief of Floyd Abrams et al. as Amici Curiae in Support of Respondents at 9, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018). Though slightly less prominent, the panelists on America’s best-named legal podcast recently made a similar point. *Tony Story, Mic Dicta* (Feb. 12, 2018), <https://soundcloud.com/micdicta/episode-7-tony-story> [<https://perma.cc/XQF4-6ZS5>] (discussing, at 14:35, the implications of a broad understanding of expressive conduct).

118. I essentially propose a categorical rule—carrying a gun should never constitute expressive conduct—that I expect to be the consistent outcome of courts that do apply the expressive conduct test to the act. *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 434 (2009) (“[B]alancing may eventually evolve into categoricalism through the usual mechanisms of common law. . . . Balancing may eventually calcify into a category. . . .”); *see also* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62 (1992) (“A rule may be understood as simply the crystalline precipitate of prior fluid balancing that has repeatedly come out the same way.”).

the individual's activity is protected under the First Amendment, rather than the Third,¹¹⁹ would be absurd. An indigent defendant demanding to speak to a lawyer is sufficiently protected by the Sixth Amendment,¹²⁰ and when he refuses to incriminate himself, there's no need for First Amendment protection because the Fifth Amendment acts as his aegis.¹²¹ Similarly, if an individual cannot justify his possession of a gun under the constitutional right to "keep and bear Arms," courts have no business bailing him out with the First Amendment.

The above examples evoke the very core of the respective amendment's guarantee, and are thus *ad absurdum* in one sense. But to treat weaker or peripheral cases from other amendments as presenting strong First Amendment claims is an unwarranted constitutional lifeline. As discussed below, limiting expressive conduct doctrine when explicit guarantees apply would not result in the underenforcement of constitutional rights but would, in fact, strengthen the Free Speech Clause's neighbors in the Bill of Rights.

a. Limiting Expressive Conduct Doctrine Poses No Danger of Underenforcement. Underenforcement is already a sensitive issue in the gun rights arena. Advocates frequently refer to the judicial branch's gun jurisprudence with anger over a perceived lack of respect. Before *Heller*, they argue, the treatment of the Second Amendment was "embarrassing."¹²² And post-*Heller*, gun rights are apparently still treated as "second-class."¹²³

And of course, many of America's most cherished (or most controversial) constitutional rights have emerged from the "penumbras"¹²⁴ of the Constitution, where different rights,

119. U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

120. *Id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

121. *Id.* amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself.").

122. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989).

123. *Friedman v. City of Highland Park*, 136 S. Ct. 447, 450 (2015) (Thomas, J., dissenting from the denial of certiorari) ("I would grant certiorari to prevent the Seventh Circuit from relegating the Second Amendment to a second-class right."); *see also* *Silvester v. Becerra*, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from the denial of certiorari) (claiming that the decision below was "symptomatic of the lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right" and that "the Second Amendment is a disfavored right in this Court").

124. *Griswold v. Connecticut*, 381 U.S. 479, 483, 485 (1965).

enumerated and unenumerated, are left free to interact and percolate to the surface in new ways. The rights to use contraceptives,¹²⁵ undergo abortions,¹²⁶ and enter into a same-sex marriage¹²⁷ all emerged from this constitutional alchemy.

As such, it is understandable that anyone seeking to safeguard civil liberties generally or gun rights specifically would be hesitant to draw *ex ante* limits on where in the Constitution litigants can seek protection. In reality, though, limiting expressive conduct doctrine in this way would not endanger unenumerated rights. Only those rights which have constitutional text *directly on point* should be excluded from expressive conduct doctrine. The rule would not preclude expressive conduct arguments about unenumerated rights.

The actual unearthing of “hidden” constitutional rights reinforces this point. For example, the Court’s decision in *Griswold v. Connecticut*, which provided constitutional protection to the provision of contraceptives to a married couple, relies in part on the privacy right inherent in the First Amendment. However, that right emerges from the Amendment’s guarantee of association, not of expressive conduct.¹²⁸ In *Roe v. Wade*, the Court invoked a right of privacy “founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action,” with no reference to expressive conduct doctrine.¹²⁹ Nor did the Court base its decision invalidating state bans on homosexual intercourse in *Lawrence v. Texas*¹³⁰ on the fact that such intercourse is an expressive act, instead relying on the Equal Protection Clause.¹³¹ A test which merely limits the applicability of expressive conduct doctrine does not undermine the First Amendment ideals and principles upon which the above decisions, and others like them, are based.

b. Limiting Expressive Conduct Doctrine Will Strengthen Guaranteed Rights. Avoiding expressive conduct analysis will protect constitutional gun rights, not diminish them. Experience has shown that accepting other constitutional claims as free speech claims leads to

125. *Id.*

126. *Roe v. Wade*, 410 U.S. 113, 129 (1973).

127. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2587–89 (2015).

128. *See Griswold*, 381 U.S. at 484 (“Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one . . .”).

129. *Roe*, 410 U.S. at 153.

130. *Lawrence v. Texas*, 539 U.S. 558 (2003)

131. *Id.* at 585.

“a constitutional distortion.”¹³² Illustrative examples of weakened constitutional guarantees can be drawn relatively easily from the Free Speech Clause’s First Amendment neighbors.

Strategic litigants frequently will attempt to portray their non-free speech arguments—such as those centering on the exercise of religion, press freedom, or the ability to assemble—as free speech claims. They do so because those claims are more likely to win, due to the rhetorical and legal strength of the Free Speech Clause.¹³³ This process creates a feedback loop—more and more claimants are incentivized to introduce, and subsequently win, other constitutional claims on free speech grounds. Those wins create a body of good free speech precedent. Meanwhile, the neglected provision is unable to build up that *corpus juris*, and it is often left with more difficult claims that involve no communicative activity, creating a body of unfavorable precedent when those claims lose. The result is an “obscuring or even undermining” of the neglected constitutional text.¹³⁴ Many suggest that this has already happened with the Free Exercise Clause, with “plaintiffs seeking religious protection frequently abandon[ing] the Free Exercise Clause and resort[ing] instead to the Free Speech Clause.”¹³⁵ As a result, Mark Tushnet suggests that the Free Exercise Clause has been “render[ed] . . . redundant.”¹³⁶ Patrick Garry adds that “free exercise, without any accompanying free speech claim, can carry relatively little weight.”¹³⁷

Just as the Free Exercise Clause has been weakened, if not devoured, by the Free Speech Clause, so too has the First Amendment’s express guarantee of the right to “peaceably . . . assemble” been undermined by the Free Speech Clause’s implied right to associate. As John Inazu writes, following the Supreme Court’s lead, “[l]ower courts have generally adopted [the Supreme Court’s] instrumental gloss on expressive association.”¹³⁸ As a result, “[a] social

132. Patrick M. Garry, *Inequality Among Equals: Disparities in the Judicial Treatment of Free Speech and Religious Exercise Claims*, 39 WAKE FOREST L. REV. 361, 363 (2004).

133. See Schauer, *Boundaries of the First Amendment*, *supra* note 59, at 1795 (“[L]awyers representing clients with claims and causes not necessarily lying within the First Amendment’s traditional concerns have reason to . . . modify their core claims to connect them with First Amendment arguments, in the hope that doing so will increase the probability of success.”).

134. *Id.* at 388.

135. *Id.*

136. Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 73 (2001).

137. Garry, *supra* note 132, at 390.

138. John D. Inazu, *The Unsettling “Well-Settled” Law of Freedom of Association*, 43 CONN. L. REV. 149, 174 n.138 (2010).

group is not protected unless it engages in expressive activity such as taking a stance on an issue of public, political, social, or cultural importance.”¹³⁹ The effect has been, essentially, a stealth repeal of an express constitutional guarantee by the judicial branch, which has replaced a broad but qualified freedom of public assembly with a narrow but robust freedom of expressive association. Similarly, Sonja West has argued in favor of “awakening the press clause” of the First Amendment and freeing it from the “constitutional redundancy” of being subsumed into free speech.¹⁴⁰ West argues that the failure to provide particularized constitutional import to the Free Press Clause has led to “a serious weakening, if not an elimination, of our constitutional press rights.”¹⁴¹

Gun rights advocates, who tend to have significant emotional investment in the Second Amendment,¹⁴² should fear a constitutional regime which gradually saps the Second Amendment of its vitality. The form of such constitutional vampirism¹⁴³ is not difficult to imagine in the firearms context. Courts would, over time and in the aggregate, provide greater protection to gun toting that is more obviously communicative than instrumental. Are gun-rights advocates pining for a future in which the possession of decorative weapons is more likely to receive constitutional protection than concealed carry?

Both advocates and critics¹⁴⁴ of gun rights ought to reject the idea of protecting guns under the First Amendment. Both groups have a vested interest in *Heller*'s¹⁴⁵ view of constitutional gun rights as focusing on “self-defense.”¹⁴⁶ Advocates primarily want to avoid

139. *Schultz v. Wilson*, 304 F. App'x 116, 120 (3d Cir. 2008) (citing *Pi Lambda Phi Fraternity v. Univ. of Pittsburgh*, 229 F.3d 435, 444 (3d Cir. 2000)).

140. Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1027–28 (2011).

141. *Id.* at 1056.

142. Peter Moore, *First Amendment Is the Most Important, and Well Known, Amendment*, YOUgov (Apr. 12, 2016, 3:15 PM), <https://today.yougov.com/news/2016/04/12/bill-rights/> [<https://perma.cc/9KCY-6HUG>] (“Republicans (27%) are much more likely than Democrats (6%) to say that the Second Amendment is the most important.”).

143. Schauer refers to this process as the First Amendment’s “magnetism.” Schauer, *Boundaries of the First Amendment*, *supra* note 59, at 1795. For an in-depth examination of the First Amendment’s interactions with other constitutional guarantees, see TIMOTHY ZICK, *THE DYNAMIC FREE SPEECH CLAUSE* (2018).

144. Those who seek to limit constitutional gun rights are also unlikely to be pleased with a regime in which a person taking an assault weapon to counter-protest a march by victims of gun violence garners more constitutional protection than someone defending one’s home with the family shotgun.

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

146. *Id.* at 599.

inroads on the core right of armed self-defense¹⁴⁷ (maintaining the guarantee's *protectiveness*), while opponents mostly hope to ensure its scope does not expand further¹⁴⁸ (thus limiting its *coverage*). Application of the Free Speech Clause will weaken the protection of non-communicative gun rights, as it has done to neighboring First Amendment clauses, while at the same time expanding the coverage of gun rights beyond the core of self-defense. Ultimately, both sides will be dissatisfied.

c. The Unique Difficulties Posed by First Amendment Gun Analysis. Of course, an individual instance of gun possession might truly be both expressive and instrumental—that is, used to send a message and also to defend oneself. But a First Amendment analysis of gun possession has troublesome implications that strengthen the argument for a categorical exclusion of guns from expressive conduct doctrine.

First, if expressive conduct doctrine was without this proposed limit, a particular act of gun possession might be protected by the First Amendment but not by the Second Amendment. In that case, the exceptions to the Second Amendment right listed by the Supreme Court in *Heller*—for example, prohibitions on guns in schools, of “dangerous and unusual weapons,” or of possession by felons¹⁴⁹—would be inapplicable. While the Supreme Court’s First Amendment doctrine might readily handle a challenge to a law prohibiting guns in K-12 schools,¹⁵⁰ it is unclear whether felons’ First Amendment rights should be so readily forfeit,¹⁵¹ or why a gun’s dangerousness should

147. See, e.g., Editorial, *The Right of Self-Defense Is Fundamental*, WASH. EXAMINER (Feb. 26, 2018, 9:02 PM), <https://www.washingtonexaminer.com/the-right-of-self-defense-is-fundamental> [<https://perma.cc/Y9FE-X5AA>] (conceding that “[i]t’s possible to craft gun control laws that do not infringe on the right of self-defense” and acknowledging support for such laws despite pro-gun stance).

148. See, e.g., Editorial, *Getting Control of Guns*, WASH. POST (Jan. 11, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/10/AR2011011006325.html> [<https://perma.cc/3WJ6-9J4Z>] (arguing for “[r]easonable gun control” that “would not violate Americans’ freedoms or inhibit hunting or self-defense”).

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

150. See *Niziolek v. Upper Perkiomen Sch. Dist.*, 228 F. Supp. 3d 391, 398 (E.D. Pa. 2017) (“Under *Tinker*, schools may restrict speech that ‘would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.’” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969))).

151. There is, for example, already significant scholarly resistance to the Court’s pronouncement that the Second Amendment is about self-defense and the Court’s simultaneous exclusion of felons from that right. It is unclear why felons categorically do not possess a Second

bear on the legality of its use in conveying a message. At some point, the slope becomes slippery enough that the First Amendment will readily handle an extreme example—for instance, a prohibition on possession of nuclear weapons would certainly pass even the strictest scrutiny.¹⁵² But to conduct such an analysis concedes that the weapon is *covered* by the First Amendment, and risks the chance that at some lesser level of dangerousness, a judge will find that a certain dangerous weapon is also *protected* by the First Amendment. The categorical exclusion from Second Amendment coverage of “dangerous and unusual weapons” ensures no such risk exists under a Second Amendment analysis.¹⁵³

Second, the First Amendment analysis might be unnecessary because the Second Amendment may incorporate expression to some extent.¹⁵⁴ For example, if the point of promoting gun ownership (on a broad or individual scale) is to deter violence in the first instance,¹⁵⁵ that deterrence is reliant upon would-be aggressors literally getting a message: “Don’t mess with me, or else.” Under such a deterrence theory, self-defense—the “central component” of the Second Amendment¹⁵⁶—is expressive by way of deterrence *before* it is instrumental by way of violence.

Alternatively, the Second Amendment might ponder an even more political message in carrying a weapon. If “[a] well regulated

Amendment right if its core is self-defense. See, e.g., Carlton F.W. Larson, *Four Exceptions In Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1382 (2009) (“It is very hard to see how the felon’s interest in personal defense, in protecting his or her home and family . . . is diminished by his or her status as a convicted felon.”).

152. See R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and “Reasonableness” Balancing*, 8 ELON L. REV. 291, 293–95 (2016) (laying out the standards for strict scrutiny under the First Amendment).

153. For a discussion of the categorical exclusions in the Second Amendment context, see *infra* Part II.B.2.a.

154. A similar but distinct argument applying expressive theories of law to the Second Amendment is found in Darrell A.H. Miller, *The Expressive Second Amendment*, in GUNS IN THE LAW (forthcoming 2018) (manuscript on file with author). Professor Miller’s argument is that “some element other than a simple cost benefit analysis concerning self defense is at play in making decisions about gun rights and policy.” *Id.* Professor Miller does not argue, as I float here, that the Second Amendment may itself protect some kind of expression without reference to the First Amendment.

155. See JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS 20 (3d ed. 2010) (analyzing a “wide array of data” and concluding that “[c]itizens can take private actions that also deter crime”—namely, that “[a]llowing citizens to carry concealed handguns reduces violent crimes” and that “[m]ass shootings in public places are reduced when law-abiding citizens are allowed to carry concealed handguns”).

156. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (emphasis omitted).

Militia . . . [is] necessary to the security of a free State,”¹⁵⁷ perhaps keeping and bearing arms represents an implicit statement to government authorities: “Don’t Tread on Me.”¹⁵⁸ This “insurrectionist theory” of the right has been at the core of the National Rifle Association’s Second Amendment mythmaking for decades,¹⁵⁹ and academics have taken it seriously as well, with David Kopel once referring to guns as “the tools of political dissent.”¹⁶⁰

If either of these theories is correct, the necessary import is that the application of First Amendment doctrine is unnecessary to adequately protect the sorts of expressive gun-related conduct that one might most expect to see. Rather, Second Amendment jurisprudence should be allowed to evolve and sort out these issues.¹⁶¹ In particular, because the deterrence theory assumes a simultaneous instrumentality and expressiveness to gun possession, the question of gun rights under such a theory would seem well suited to analysis under a constitutional guarantee that is not solely concerned with expression. This is especially so because the consequence of applying expressive conduct doctrine to the deterrence theory is an absurdly broad right to open carry in public. After all, the open possession of a weapon is meant to send a deterrent message, and the deterrence theory assumes the message is understood by all. Open carry would thus presumably be covered by the First Amendment. That is, unless the message gun possession sends is a threat.

3. *Threats, Incitements, and Illegal Conduct.* If armed demonstration qualifies as speech, it might nonetheless not be covered if it constitutes a threat conveyed with a culpable mental state. For example, armed demonstration might manage to convey a threat of

157. U.S. CONST. amend. II.

158. See Rob Walker, *The Shifting Symbolism of the Gadsden Flag*, NEW YORKER (Oct. 2, 2016), <https://www.newyorker.com/news/news-desk/the-shifting-symbolism-of-the-gadsden-flag> [<https://perma.cc/A8WZ-5JLC>] (detailing the history and symbolism of the Gadsden Flag and its “Don’t Tread on Me” language).

159. See generally JOSHUA HORWITZ & CASEY ANDERSON, GUNS, DEMOCRACY, AND THE INSURRECTIONIST IDEA (2009) (exploring, in part, the National Rifle Association’s advocacy of the insurrectionist theory of the Second Amendment).

160. David B. Kopel, *Trust the People: The Case Against Gun Control*, 3 J. ON FIREARMS & PUB. POL’Y 77, 103 (1990).

161. See *Heller*, 554 U.S. at 635 (“[S]ince this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . .”); ZICK, *supra* note 143, at 203 (“The Second Amendment needs space to develop on its own, according to the interests and values it serves.”).

violent reprisal for contrary political views, as with the white nationalists in Charlottesville. To the extent that that message is successfully expressed—for example, when observers fear being “crushed like cockroaches”¹⁶²—the relevant inquiry is whether the demonstrator had sufficient mens rea.

If judged by negligence,¹⁶³ armed demonstration would virtually always constitute a threatening statement. Many open-carry demonstrators state that their goal is to normalize or make people comfortable with the open carry of guns,¹⁶⁴ which suggests a recognition that many or most people are uncomfortable with such displays. Thus, it would not be difficult for armed demonstration to meet a negligence requirement—that is, that the carrier should have known that his demonstration would inspire fear.

If the required mens rea is purposefulness, then it would be much more difficult to argue that armed demonstration is a threat. One would have to show that the armed demonstration was directed “to a person or group of persons with the intent of placing the victim[s] in fear of bodily harm or death.”¹⁶⁵

There are undoubtedly some instances when armed demonstrators do intend to place victims in fear of bodily harm or death. Armed militias that counter-protest peaceful calls to prayer at mosques are one example;¹⁶⁶ the explicit threats of the neo-Nazis in Charlottesville another.¹⁶⁷ However, the surrounding context could be exculpatory. Whether the motivation of an armed march is expanded gun rights, collectivist redistribution, or lower speed limits, the collection of signs, banners, chants, and the like could help clarify the intent not to terrorize by explaining the presence of guns.

Similarly, applying the incitement exception to armed demonstration would also be a heavy lift. There may be some cases where the evidence indicates that armed protestors or counter-

162. Hermann, Heim & Silverman, *supra* note 17.

163. See, e.g., *State v. Schaler*, 236 P.3d 858, 867 (Wash. 2010) (requiring proof of at least negligence to prove guilt of threats under a harassment statute).

164. Anna M. Tinsley, *Texas Gun Supporters Divided on Best Approach to Legalizing Open Carry*, STAR TELEGRAM (Nov. 17, 2013, 8:56 PM), <http://www.star-telegram.com/news/state/texas/article3836841.html> [<https://perma.cc/DDN3-8PTT>].

165. *Virginia v. Black*, 538 U.S. 343, 360 (2003).

166. Kurtis Lee & Jenny Jarvie, *Anti-Sharia Rallies Around the U.S. Denounce Islam While Stoking Concerns Among Muslim Groups*, L.A. TIMES (June 10, 2017, 9:00 PM), <http://www.latimes.com/nation/la-na-anti-muslim-rallies-20170610-story.html> [<https://perma.cc/XL3T-RJXZ>].

167. *Charlottesville: Race and Terror*, *supra* note 7.

protestors are aware that their conduct may incite lawless action, either by emboldening their ideological allies or by provoking their enemies. But to lose First Amendment protection, a speaker must truly intend to incite lawlessness; the mere possibility or even knowledge that others will react violently to speech is insufficient to remove it from the coverage of the First Amendment.¹⁶⁸

Finally, some expressive acts of open carry may be excluded from coverage because they are integral to a violation of an otherwise valid general law. For example, where it is already illegal to carry certain types of guns in public, marching with those guns will not automatically shield the demonstrators with the First Amendment.¹⁶⁹ Similarly, many states punish “brandishing,” the improper or threatening display of a weapon.¹⁷⁰ Even if an armed demonstrator was “speaking” by waving his gun in the air, his speech could be properly excluded from First Amendment coverage as integral to the crime of brandishing, much like a flag burner who cannot escape a citation for illegal outdoor burning by invoking the First Amendment.¹⁷¹

II. THE SECOND AMENDMENT¹⁷²

The modern Second Amendment is still in its embryonic stages. Strictly speaking, the Supreme Court has held only the following: neither the federal government (*Heller*)¹⁷³ nor the states (*McDonald v. City of Chicago*)¹⁷⁴ may prohibit keeping a handgun in one’s home for

168. *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969).

169. *DeBoer*, *supra* note 52, at 363.

170. *See, e.g.*, FLA. STAT. § 790.10 (2018) (“If any person having or carrying any . . . firearm . . . or other weapon shall, in the presence of one or more persons, exhibit the same in a rude, careless, angry, or threatening manner, not in necessary self-defense, the person so offending shall be guilty of a misdemeanor of the first degree . . .”).

171. *Volokh*, *supra* note 85, at 1010. A law against brandishing seems to target the very activity (waving the gun around) that would make the conduct expressive in the first place, and thus presents a much closer First Amendment question than a general ordinance against outdoor fires. But such laws predate the Constitution and have existed in harmony with the Bill of Rights since ratification. *See* BLOCHER & MILLER, *supra* note 14, at 14–20 (identifying the extended historical record of laws against brandishing and similar restrictions). The absurdity of disrupting that harmony after more than two centuries of coexistence is a microcosmic illustration of the necessity of turning back the First Amendment’s aggressive expansion at the gates of gun rights.

172. “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II. The Second Amendment was incorporated to the states via the 14th Amendment in *McDonald v. City of Chicago*. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

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

174. *McDonald*, 561 U.S. at 791.

the purpose of self-defense, and the Second Amendment does not necessarily only apply to guns in common use at the time of the founding or guns most useful in warfare (*Caetano v. Massachusetts*).¹⁷⁵

This Part briefly explains the holding of *Heller* and the Second Amendment doctrines necessary to analyze a prohibition on armed demonstrations. It then seeks to demonstrate that, either under a historical analysis or because political rallies are “sensitive places,” the Second Amendment does not cover armed demonstration.

A. *Background and Methodology*

1. *Heller and the New Right to Bear Arms.* In June 2008, the Court essentially forged anew an area of constitutional law when it overturned an unusually restrictive¹⁷⁶ Washington, D.C., gun regulation, and held that an “absolute prohibition of handguns held and used for self-defense in the home” violated the Second Amendment.¹⁷⁷ The Court waved off Dick Heller’s failure to establish why his desire to keep a pistol had “some reasonable relationship to the preservation or efficiency of a well regulated militia.”¹⁷⁸ Self-defense, not militia readiness, it turns out, is the “central component” of the Second Amendment right.¹⁷⁹

Because D.C.’s law was such an outlier, *Heller*’s extensive dicta have provided much of the guidance for lower court decisions since. Namely, the Court listed several types of regulations that it suggested were not called into question by its holding:

[N]othing 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.

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those “in common use at the time.” . . .

175. *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016).

176. Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1577 (2009).

177. *Heller*, 554 U.S. at 636.

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

179. *Heller*, 554 U.S. at 599 (emphasis omitted).

We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of “dangerous and unusual weapons.”¹⁸⁰

McDonald, arriving in 2010, applied *Heller*’s holding to state and local governments.¹⁸¹ Because the law at issue in *McDonald* was nearly identical to the invalidated D.C. law, the Court did not expand on its renewed Second Amendment, other than to recommit to the above dicta.¹⁸² Questions thus left unanswered after *Heller* and *McDonald* include:

- What arms may be borne, and what arms are excluded from Second Amendment coverage entirely?¹⁸³
- Who are the “people” to whom the right is reserved?¹⁸⁴
- Are there impermissible reasons to carry? Does gun possession have to be related to self-defense to receive Second Amendment protection?¹⁸⁵
- Does the Second Amendment extend outside of the home? Is there a right to carry in public?¹⁸⁶ What even is the home?¹⁸⁷ Is public carry limited to open carry, or is concealed carry within its scope?¹⁸⁸
- What tier of scrutiny is appropriate to analyze gun regulations?¹⁸⁹

180. *Id.* at 626–27 (quoting *Miller*, 307 U.S. at 179).

181. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

182. *Id.* at 786.

183. *See* *Kolbe v. Hogan*, 849 F.3d 114, 121 (4th Cir. 2017) (holding that “assault weapons and large-capacity magazines are *not* protected by the Second Amendment” (emphasis in original)), *cert. denied*, 138 S. Ct. 469 (2017).

184. *See* *United States v. Meza-Rodriguez*, 798 F.3d 664, 669–70 (7th Cir. 2015) (holding that unauthorized immigrants are “people” for the purposes of the Second Amendment).

185. *See* *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017) (concluding that the Second Amendment protects “the individual right to carry common firearms beyond the home for self-defense”).

186. *See* *Peruta v. Cty. of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (holding that there is no right to carry a concealed firearm in public), *cert. denied*, 137 S. Ct. 1995 (2017).

187. *See* *Morris v. U.S. Army Corps of Eng’rs*, 990 F. Supp. 2d 1082, 1086 (D. Idaho 2014) (holding that, for Second Amendment purposes, a tent is analogous to a home).

188. *See* *Peruta*, 824 F.3d at 939 (leaving open the question of whether there is “a Second Amendment right for a member of the general public to carry a firearm openly in public”).

189. *See* *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010) (“*Heller* left open the level of scrutiny applicable to review a law that burdens conduct protected under the Second Amendment Our task, therefore, is to select between strict scrutiny and intermediate scrutiny.”).

In other words, the exact contours of the Second Amendment are very much an open question.

2. *A Familiar Tool To Help Explore the Terra Incognita of the Second Amendment.* With so little guidance offered by the Supreme Court, lower courts have been left to their own devices to determine the scope of the Second Amendment right. The resulting morass has been termed by some as a campaign of “massive resistance” to the pro-gun *Heller* ruling¹⁹⁰ or a concerted effort to treat the Second Amendment as a “second-class right.”¹⁹¹ Others have suggested that the confusion is an inevitable byproduct of the Supreme Court’s silence.¹⁹²

For instance, Judge J. Harvey Wilkinson has described Second Amendment jurisprudence “as a vast *terra incognita*” when describing “the dilemma faced by lower courts” in deciding “how far to push *Heller*.”¹⁹³ Opting to “await direction from the Court itself,” Wilkinson wrote: “This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.”¹⁹⁴ Such considerations color the field on which the lower courts play.

Despite the difficulty, one particularly useful—and familiar—tool has emerged from the fray: coverage and protection analysis. “[T]he most common framework [for courts analyzing Second Amendment questions] is a two-pronged inquiry that first asks whether a challenged law imposes a burden on conduct falling within the scope of the Second Amendment, and, second, if it does, whether the law satisfies the applicable level of scrutiny.”¹⁹⁵

190. See, e.g., Alice Marie Beard, *Resistance by Inferior Courts to Supreme Court’s Second Amendment Decisions*, 81 TENN. L. REV. 673, 673 (2014) (discussing “massive resistance” in “federal and state inferior courts” following *Heller*).

191. See *supra* note 123 and accompanying text (discussing concerns about the Second Amendment being relegated to a “second-class right”).

192. Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 962 (2016) (“The lower courts’ treatment of *Heller* is thus defensible under all the models of vertical stare decisis discussed above.”).

193. *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011).

194. *Id.*

195. LAW CTR. TO PREVENT GUN VIOLENCE, POST-HELLER LITIGATION SUMMARY 3 (Mar. 31, 2015), available at <http://smartgunlaws.org/wp-content/uploads/2014/11/Post-Heller-Litigation-Summary-March-2015-Final-Version.pdf> [<https://perma.cc/B8TX-5B7T>]; see also *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) (describing the coverage-protection inquiry as “the prevailing approach”).

Even where courts undertake to apply this two-step test, the content of each step can vary drastically. To begin, it is unclear whether the dicta from *Heller* regarding permissible regulations—the “presumptively lawful” and “longstanding prohibitions” quoted above¹⁹⁶—relate to coverage or to protection. In other words, the question is whether the government can prohibit guns in schools because guns in schools simply are not part of the Second Amendment right, or because the prohibition is justified by a compelling government interest.

The answer is unclear because *Heller* points in both directions. Just before introducing the examples of permissible regulations, *Heller* says “the right secured by the Second Amendment is not unlimited.”¹⁹⁷ This, as the Fourth Circuit later noted, indicates that certain regulations impinge activities “*beyond the scope* of the Second Amendment”—that is, they are not covered.¹⁹⁸ On the other hand, a footnote suggesting such regulations are “*presumptively* lawful” seems to indicate that such regulations could be unlawful under some circumstances, which would be the case if they were subject to protection analysis.¹⁹⁹ For reasons discussed *infra* Part II.B.2.a, this dicta should be understood as exceptions to the right’s coverage.

It is similarly unsettled what factors are relevant in coverage analysis. Some courts perform a historical inquiry into whether the sort of gun possession sought to be covered is analogous to a sort of gun possession which was thought to be traditionally within the Amendment’s guarantee.²⁰⁰ If the challenged regulation has a historical analogue of sufficient pedigree and similarity, the regulation is assumed not to even impact the Second Amendment right.²⁰¹ This has its own logical issues. First, as Justice Breyer pointed out in dissent in *Heller*, the operative question is not “what 18th-century legislatures

196. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 & n.26 (2008).

197. *Id.* at 626.

198. *Masciandaro*, 638 F.3d at 472.

199. *Id.*

200. *See, e.g.*, *Jackson v. City of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (discussing the Second Amendment’s historical scope).

201. *See, e.g.*, *Heller v. District of Columbia* (“*Heller II*”), 670 F.3d 1244, 1272 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“The scope of the right is thus determined by ‘historical justifications.’” (quoting *Heller*, 554 U.S. at 635)); Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 *YALE L.J.* 852, 918 (2013) (“Keeping, bearing, or arms that are directly supported by history or have a colorable historical analogue fall within the protections of the Second Amendment text. Keeping, bearing, or arms that have no historical or colorable historical analogue do not.”).

actually *did* enact, but . . . what they would have thought they *could* enact.”²⁰² Second, as others have pointed out, many of those regulations that Justice Scalia considered “presumptively lawful” due to their longevity actually are fairly modern. For example, prohibitions on felons carrying firearms were broadly promulgated in the 20th century.²⁰³ Similarly, prohibitions on carrying guns in schools are also of relatively recent vintage.²⁰⁴ In practice, most courts do not rely on originalism to analyze Second Amendment cases.²⁰⁵

Rather, courts tend to refuse to answer the first question entirely. Instead, they merely assume, without actually holding, that the right is implicated, and move on to the protection question.²⁰⁶ Sometimes the decision to avoid the coverage question is framed as mandated by the lower courts’ limited role in the constitutional system. Lower courts simply do not know the extent of the Second Amendment right, and thus, when asked to decide whether a particular regulation implicates the right, they are necessarily forced to go beyond what the Supreme Court has declared to be the law of the land. Unwilling to do so, they defer.²⁰⁷

The practice of punting on the coverage step has opened the courts up to criticism from gun rights advocates. Punting on coverage puts all of the eggs in the protection basket, and the protection step’s interest-balancing scrutiny analysis runs closer to Justice Breyer’s dissent in *Heller* than the majority’s historical categoricalism.²⁰⁸ In practice,

202. *Heller*, 554 U.S. at 718 (Breyer, J., dissenting).

203. *See, e.g.*, Larson, *supra* note 151, at 1376.

204. Charles C.W. Cooke, *Gun Clubs at School*, NAT’L REV. (Jan. 21, 2013, 9:00 AM), <http://www.nationalreview.com/article/338167> [<http://perma.cc/B9UE-ZXGN>].

205. Eric M. Ruben, *Justifying Perceptions in First and Second Amendment Doctrine*, 80 L. & CONTEMP. PROBS. 149, 163 (2017) (“[O]riginalism has not been the primary means of deciding cases.”).

206. *See, e.g.*, *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (“[I]t is unnecessary to explore . . . the question of whether and to what extent the Second Amendment right recognized in *Heller* applies outside the home.”); *Kolbe v. O’Malley*, 42 F. Supp. 3d 768, 789 (D. Md. 2014) (“[T]he court . . . will assume, although not decide, that the Firearm Safety Act places some burden on the Second Amendment right.”), *aff’d in part, vacated in part, and remanded by Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016).

207. *See, e.g.*, *Masciandaro*, 638 F.3d at 475 (“There simply is no need in this litigation to break ground that our superiors have not tread.”).

208. *See* Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706–07 (2012) (noting that lower courts “have effectively embraced the sort of interest-balancing approach that Justice Scalia condemned, adopting an intermediate scrutiny test and applying it in a way that is highly deferential to legislative determinations and that leads to all but the most drastic restrictions on guns being upheld”).

critics argue, “[t]he very fact that a court reaches the second step all but guarantees that the challenged law will survive.”²⁰⁹

Why is that outcome all but guaranteed? In dissent in *Heller*, Justice Breyer predicted that “almost every gun-control regulation” would seek justification by invoking perhaps the paramount compelling government interest: “a concern for the safety and indeed the lives of its citizens.”²¹⁰ Sure enough, “almost all Second Amendment cases thereafter” have relied upon public safety to justify firearm regulations.²¹¹ With that interest in mind, perhaps it is unsurprising that courts tend to defer to legislative judgments on the issue of public safety, upholding the majority of gun laws adjudicated.²¹²

B. Application

Armed demonstration is entirely outside the scope of the Second Amendment right. Not only does it fall outside the historically understood ambit of the right, it also is removed from coverage by *Heller*’s “sensitive places” exception.

1. *History*. As many have noted, *Heller*’s inquiry into the historical understanding of the Second Amendment right made extensive use of historical documents from “long after the framing of the Amendment [that] cannot possibly supply any insight into the intent of the Framers.”²¹³ Justice Stevens derided Justice Scalia’s sources as “post-Civil War legislative history.”²¹⁴ In fact, Scalia quoted material as modern as a treatise from 1891.²¹⁵ Such materials, he said, helped “to determine *the public understanding* of a legal text in the period after its enactment or ratification.”²¹⁶

209. Petition for Writ of Certiorari at 25, *Jackson v. City of San Francisco*, 135 S. Ct. 2799 (No. 14-704) (2014); *see also id.* at 20 (“Time and again, courts have used this open-ended inquiry to constrain the scope of the Second Amendment . . .”).

210. *District of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting) (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)).

211. Ruben, *supra* note 205, at 164.

212. Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1472 (2018) (calculating that only 108 out of 1153 challenges have been successful, resulting in a nine percent success rate).

213. *Heller*, 554 U.S. at 670 (Stevens, J., dissenting).

214. *Id.* at 662.

215. *Id.* at 619 (majority opinion).

216. *Id.* at 605.

Setting aside the ongoing debate over Scalia's interpretative method, *Presser*²¹⁷ provides important insight, contemporary with sources used by Scalia, into the public and legal understanding of the Second Amendment right. "We think it clear," the Court wrote, that "forbid[ding] bodies of men . . . to drill or parade with arms in cities and towns unless authorized by law, do[es] not infringe the right of the people to keep and bear arms."²¹⁸ Although the Court did not expand on why it was "clear" that the Second Amendment did not include the right to armed demonstration, its reasoning is evident in its First Amendment holding:

The exercise of this power [to ban armed marches] by the states is necessary to the public peace, safety and good order. To deny the power would be to deny the right of the State to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine.²¹⁹

Under *Heller*'s historical methodology, such a pronouncement surely carries considerable weight,²²⁰ and it provides one basis for finding that armed demonstrations are outside of the scope of the right. As others have noted, many states have generally understood public demonstrations to be outside of the ambit of constitutional gun rights.²²¹

2. *Sensitivity.* *Heller*'s statement that "nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings"²²² poses obvious interpretive difficulty. The list is explicitly

217. *Presser v. Illinois*, 116 U.S. 252 (1886).

218. *Id.* at 264–65. The Court then moved on to apply its "conclusive" answer—later repudiated by incorporation—that the Second Amendment did not apply to the states. *Id.* at 265.

219. *Id.* at 268.

220. The argument here is not that *Presser* is controlling law. Rather, *Presser* is useful as evidence of the historical understanding of the Second Amendment's scope. That said, one might argue that because the Court provided two bases for its Second Amendment holding, and the one on which it relied has since become defunct, this language is now the controlling law from *Presser*. See, e.g., Ruling on Demurrer, *supra* note 49, at 18 (citing *Presser* in holding that the Second Amendment would not prohibit injunctive relief against the Charlottesville defendants).

221. See Tirschwell & Lefkowitz, *supra* note 52, at 179–80 (listing examples of state laws prohibiting armed demonstration); see also *id.* at 182 (noting that many states with preemption laws banning local regulation of firearms allow exceptions for the regulation or prohibition of armed demonstrations).

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

illustrative rather than exhaustive,²²³ yet it provides little guidance for building out the rest of its contents. No broadly accepted theory of “sensitive places” has emerged. After analyzing how courts and academics have fallen short in attempts to create a coherent theory, this Part proposes such a theory.

a. Heller’s Exceptions Are Coverage Exceptions. The first step in developing a sensitive places jurisprudence is determining whether sensitive places are coverage exceptions or merely preordained outcomes of protection-level scrutiny analysis. As discussed,²²⁴ *Heller* points both ways on this question. When first introducing the exceptions, the Court noted that “the right secured by the Second Amendment is not unlimited,” and that it is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”²²⁵ This suggests that there are some gun-related activities that the Amendment simply does not “cover.” In a footnote after introducing the list of exceptions, however, the Court referred to them as “presumptively lawful.”²²⁶ “Presumptions” can be overcome;²²⁷ there may be instances where “presumptively lawful” laws are not lawful. If that is true, then *Heller*’s list of exceptions is a protection-stage inquiry.²²⁸

Ultimately, *Heller*’s limits on the Second Amendment right are best understood as exceptions to *coverage*. In one respect, at least, the Court was extremely clear: “the right secured by the Second Amendment is not unlimited.”²²⁹ Limits on a right are walls drawn

223. *Id.* at 627 n.26 (“We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”).

224. *See supra* notes 197–99 and accompanying text.

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

226. *Id.* at 627 n.26.

227. *See Presumption*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption.”).

228. *See United States v. Masciandaro*, 638 F.3d 458, 472 (4th Cir. 2011) (“The Court’s use of the word ‘presumptively’ suggests that the articulation of sensitive places may not be a limitation on the scope of the Second Amendment, but rather on the analysis to be conducted with respect to the burden on that right.”); *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) (“[The phrase ‘presumptively lawful’] may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny.”).

229. *Heller*, 554 U.S. at 626. The Court also suggested that “[t]he 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 wrongheaded views. The Second Amendment is no different.” *Id.* at 635.

around it, boundaries outside of which the right simply does not apply.²³⁰ The Court's opinion demands an interpretation that some forms of gun possession are outside of the Second Amendment right.²³¹ The way that lower courts treat claims clearly within the exceptions—for example, summarily tossing out Second Amendment challenges by felons with a quick cite to *Heller*²³²—suggests that this is the correct reading of the opinion.²³³

The “presumptively lawful” language does not belie this conclusion. Regulations that fall outside of a constitutional guarantee's boundaries are still only “presumptively lawful,” in that all laws are presumptively lawful under the rational-basis test.²³⁴ Such laws may be unconstitutional for reasons having nothing to do with the Second Amendment; a law creating gun-free school zones, for example, might run afoul of the Commerce Clause.²³⁵

Therefore, those laws that prohibit the carrying of weapons in sensitive places do not implicate the Second Amendment. The task becomes identifying sensitive places.

b. Lower-Court Attempts to Identify Sensitive Places. Courts have mostly avoided straying from *Heller*'s text when dealing with sensitive places. Where possible, judges have relied on the “government

230. See Schauer, *Boundaries of the First Amendment*, *supra* note 59, at 1769 (“All rules—legal or otherwise—apply only to some facts and only under some circumstances.”); *see also id.* at 1765 (describing some speech-like activity as “lying well beyond the boundaries of the First Amendment's concern”).

231. Just as some forms of speech are outside of the First Amendment right. *See supra* Part I.A.3.

232. *See, e.g.,* Hamilton v. Pallozzi, 848 F.3d 614, 626 (4th Cir. 2017) (“[W]e simply hold that conviction of a felony necessarily removes one from the class of ‘law-abiding, responsible citizens’ for the purposes of the Second Amendment, absent . . . narrow exceptions . . .”); *see also* Brief of Plaintiff-Appellee at 12, United States v. Schrag, 542 Fed. App'x 583, No. 12-30344, 2013 WL 1951148 (2013) (“[T]he Supreme Court and this Court have made plain that felons have no Second Amendment rights to possess firearms at all.”).

233. It is theoretically possible that the exceptions are only categorical in the sense that they are “crystallized” versions of repeated interest balancing, as in the process described *supra* note 118.

234. *Heller*, 554 U.S. at 628 n.27; *see also* H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 260–61 (2011) (discussing *Heller*'s treatment of the rational-basis test); Jason Racine, Note, *What the Hell[er]? The Fine Print Standard of Review Under Heller*, 29 N. ILL. U. L. REV. 605, 637 (2009) (“As a result, the presumption created by a law extending only to sensitive places will be that of rational basis.”).

235. *See* United States v. Lopez, 514 U.S. 549, 561–62 (1995) (holding that the Gun-Free School Zones Act exceeded Congress's Commerce Clause authority).

buildings” language to uphold regulations. For example, in *Bonidy v. U.S. Postal Service*,²³⁶ the Tenth Circuit confirmed that “the Second Amendment right to carry firearms does not apply to” post offices because they are federal buildings.²³⁷ The court further held that the post office’s parking lot was “considered as a single unit with the postal building itself,” and thus persons in the parking lot also had no Second Amendment right to bear arms.²³⁸

Other courts have taken the ball and run, stretching the concept of sensitivity to its logical limits and beyond. In *People v. Yarbrough*,²³⁹ the California Court of Appeals held that it did not violate the Second Amendment to attach criminal liability to the concealed carry of a weapon “on a residential driveway.” The driveway, according to that court, “was not closed off from the public and was populated with temporary occupants,” and was thus a “publicly sensitive place[.]”²⁴⁰ That decision’s supposedly self-evident wrongness has served to some as sufficient proof of the need for a coherent sensitive places doctrine.²⁴¹

Other courts have simply avoided the issue. In *United States v. Masciandaro*,²⁴² for instance, the Fourth Circuit dodged the question of a National Park Service parking lot’s sensitivity by holding that the regulation did not violate the Second Amendment no matter whether the parking lot was a sensitive place.²⁴³

c. Academic Theories of Sensitivity. Unfortunately, despite the importance of this question to understanding the constitutionality of a significant proportion of gun regulations in America, very little ink has been spilled on sensitive places, even among legal scholars.

Brian Whitman’s student comment suggests that a place may be sensitive “if there is sensitive information or material contained or conveyed in that place,” or “based upon the type or number of people present.”²⁴⁴ Whitman goes on to propose that, even in a sensitive place,

236. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015).

237. *Id.* at 1125.

238. *Id.*

239. *People v. Yarbrough*, 169 Cal. App. 4th 303 (Cal. Ct. App. 2008).

240. *Id.* at 314.

241. Brian C. Whitman, Comment, *In Defense of Self-Defense: Heller’s Second Amendment in Sensitive Places*, 81 MISS. L.J. 1987, 1993 (2012).

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

243. *Id.* at 473.

244. Whitman, *supra* note 241, at 2017–18.

the constitutionality of a gun restriction further depends on whether the place is public or private property²⁴⁵ and whether there is sufficient security provided.²⁴⁶

Another student comment by Amy Hetzner suggests that, while the other listed exceptions in *Heller* are categorical exceptions, the sensitive places exception is akin to a “time/place/manner” restriction under the First Amendment, and that it “requires a flexibility not afforded by a strictly historical, categorical approach.”²⁴⁷ Hetzner proposes utilizing intermediate scrutiny to judge whether a law is a constitutional sensitive place restriction.²⁴⁸

Finally, Jordan Pratt proposes a “First Amendment-inspired approach” under which courts would look to the First Amendment’s treatment of a place in determining how the Second Amendment analysis should play out.²⁴⁹ For instance, Pratt argues that colleges are less sensitive than elementary and secondary schools in part because college students have greater First Amendment rights.²⁵⁰ With respect to government buildings, he suggests that public land “and any other public property where a broad right to carry firearms may have historically been permitted” are not sensitive places because they are akin to the First Amendment’s “traditional public forum[s],” under which the government has less authority to restrict First Amendment rights.²⁵¹ For reasons discussed in greater depth below, although each of these theories makes reference to First Amendment values or principles, not one adequately protects those values from the presence of guns. A new theory is needed.

d. A New Theory. Any sensitive places theory has to fit the three factors from *Heller*: (1) some meaning of the word “sensitive,” (2) inclusion of schools, and (3) inclusion of government buildings. Schools

245. *Id.* at 2018–19.

246. *Id.* at 2019.

247. Amy Hetzner, Comment, *Where Angels Tread: Gun-Free School Zone Laws and an Individual Right to Bear Arms*, 95 MARQ. L. REV. 359, 381 (2011).

248. *Id.* at 378–79.

249. See generally Jordan E. Pratt, *A First Amendment-Inspired Approach to Heller’s “Schools” and “Government Buildings,”* 92 NEB. L. REV. 537 (2014). Pratt argues that his theory does not consist of “clon[ing] and import[ing] in unmodified form” First Amendment doctrine into the Second Amendment, but instead utilizes “broad themes from First Amendment law.” *Id.* at 574.

250. *Id.* at 577–79.

251. *Id.* at 583.

and government buildings may be sensitive for different reasons.²⁵² Nonetheless, a theory relying on a common denominator between the two would not necessarily be wrong, and it might in fact have the advantage of a certain cleanness.

One theme runs through each of the three proposed tests above: the First Amendment. Whitman proposes protecting “sensitive information or material,” especially in instances when “the information conveyed may be controversial or evoke violent reactions,” such as in “places of worship.”²⁵³ Hetzner kicks sensitive places to the protection question by comparing it to First Amendment jurisprudence’s time/place/manner restrictions.²⁵⁴ And Pratt not only imports First Amendment terminology, he argues that the Second Amendment should distinguish between places in, more or less, the exact same way the First Amendment does.²⁵⁵

Between Whitman and Pratt²⁵⁶—that is to say, between considering First Amendment concerns and layering First Amendment doctrine on top of the Second Amendment—the former has the better argument. Borrowing so heavily from the First Amendment is an ill fit for the Second Amendment.²⁵⁷ Nothing about college students having greater free speech rights than kindergarteners indicates that undergrads should also have the right to carry a weapon to Philosophy 101. The fundamental nature of the *place* has not changed in a way that merits the Second Amendment reaching into the room. In fact, college classrooms might be *more* sensitive than elementary and secondary classrooms, based on the controversial nature of the material conveyed in some lecture halls.²⁵⁸

252. See *GeorgiaCarry.org, Inc. v. Georgia*, 764 F. Supp. 2d 1306, 1319 (M.D. Ga. 2011) (“A place, such as a school, might be considered sensitive because of the people found there. Other places, such as government buildings, might be considered sensitive because of the activities that take place there.”), *aff’d*, 687 F.3d 1244 (11th Cir. 2012).

253. Whitman, *supra* note 241, at 2017–18.

254. Hetzner, *supra* note 247, at 381.

255. See Pratt, *supra* note 249, at 542 (arguing that “lessons from First Amendment doctrine counsel in favor of a narrow interpretation of *Heller*’s schools and government buildings” exceptions).

256. Because of the conclusion that the sensitive places exception was intended to be a coverage exception, see *supra* Part II.B.2.a, Hetzner’s protection-level test is inapposite.

257. See ZICK, *supra* note 143, at 203 (noting that the First and Second Amendments “pertain to very different activities, serve distinct purposes, and raise disparate regulatory concerns”).

258. See, e.g., Brian Slodysko, *Indiana’s Butler University Faces Backlash Over Trump ‘Resistance’ Class*, CHI. TRIB. (May 5, 2017, 9:26 PM), <http://www.chicagotribune.com/news/nationworld/midwest/indiana/ct-butler-university-trump-resistance-class-20170505-story.html> [<http://perma.cc/A3KX-ASKN>] (noting that conservative backlash to Butler University’s

Much of the focus on *Heller's* “schools” example has been on the special vulnerability children have with respect to gun violence. Undoubtedly, the government has an interest in protecting children from gun violence. And because children are less able to defend themselves, perhaps the government has a stronger interest in protecting children from gun violence than in protecting adults. But the government has an interest in protecting *everyone* from gun violence—as previously discussed, it is the paradigmatic interest used to justify gun regulations.²⁵⁹ Can it really be that schools fall into a categorical exception that other places do not when they invoke the exact same regulatory justification as those other places, just to a slightly greater degree?

That reasoning defies our understanding of categories in the constitutional sense. Rather, the reason that schools are sensitive in the Second Amendment context is that guns have a special capacity to disrupt the school’s educational environment,²⁶⁰ thereby impacting First Amendment interests.²⁶¹ Similarly, the introduction of firearms into government buildings threatens the ongoing viability of a number of First Amendment rights. If government actors must face down armed citizens in their day-to-day job duties, the relatively easy access Americans have to “petition the Government for a redress of grievances”²⁶² will likely become much more circumscribed.

“Resisting Trump” class included “social media posts revealing a phone number and photos of the course’s instructor”).

259. See *supra* notes 210–12 and accompanying text.

260. See, e.g., BRADY CTR. TO PREVENT GUN VIOLENCE, GUN VIOLENCE IN SCHOOLS AUGUST 2016 - MARCH 2017, at 1 (2017), http://www.bradycampaign.org/sites/default/files/SafeSchools-Report_04-2017.pdf [<https://perma.cc/4XQR-R2UN>] (identifying nearly 600 gun incidents in schools nationwide between August 1, 2016, and March 17, 2017, and finding that two-thirds of school districts conducted active-shooter drills in 2016).

261. See *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“Our courts . . . have not failed to apply the First Amendment’s mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. . . . [T]he First Amendment ‘does not tolerate laws that cast a pall of orthodoxy over the classroom.’”); see also *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . .”); *Meyer v. Nebraska*, 262 U.S. 390, 402–03 (1923) (holding that a law preventing any person, including teachers, from teaching any language other than English before the eighth grade violated substantive due process under the Fourteenth Amendment).

262. U.S. CONST. amend. I.

Accordingly, courts should adopt the following test: a place is sensitive under *Heller* when introducing guns into that place seriously threatens core First Amendment interests or activity.²⁶³

To bite the bullet: this test suggests something akin to, although not exactly like, a positive obligation on the government's behalf to enhance First Amendment rights, a position that has been anathema to the Court.²⁶⁴ But the heart of the argument—that the First Amendment has something to say about the reaches of the Second Amendment—is not unheard of. Professor Gregory Magarian has argued that “our best understanding of First Amendment theory and doctrine severely diminishes the Second Amendment's legal potency.”²⁶⁵ But not only does the First Amendment cast doubt on a broad reading of the Second, the First Amendment places firm outer bounds on the Second Amendment.

To understand why, consider the “marketplace of ideas” theory, which proposes that the First Amendment engenders an arena where truth wins out over fiction and the best cure for bad speech is good speech. The marketplace theory is central to our understanding of the First Amendment.²⁶⁶ If the Second Amendment cannot categorically exclude guns from places where truth-seeking debate reaches its peak intensity, then the First and Second Amendments are fundamentally incompatible. America's classrooms, lecture halls, churches, town halls, community centers, parks, and political demonstrations are vital intellectual battlegrounds, but the war within and around those places

263. See *GeorgiaCarry.org, Inc. v. Georgia*, 764 F. Supp. 2d 1306, 1319, (M.D. Ga. 2011) (holding that a church is a “sensitive place” because the state has an “important governmental interest” in “protecting the free exercise of religion”), *aff'd*, 687 F.3d 1244 (11th Cir. 2012); see also Burchard, *supra* note 52, at 42–43 (arguing that the First Amendment right to receive information from others' expressive activity helps to inform a “sensitive place” theory that precludes armed demonstrations).

264. Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1507 (2013) (distinguishing “between positive and negative” theories of the First Amendment and explaining that “it is difficult to identify cases in which a court has held that the First Amendment requires affirmative action to enhance positive rights”).

265. Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 49 (2012).

266. See *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (describing the First Amendment's purpose as “preserv[ing] an uninhibited marketplace of ideas in which truth will ultimately prevail” (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984))); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“Those who won our independence by revolution were not cowards. . . . If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”).

must remain one solely fought with words. The presence of guns threatens that speech.²⁶⁷ The only way to ensure the vitality of our national debates is a categorical exclusion of private gun ownership from the essential *fora* in the marketplace of ideas.

To hold otherwise would be to create a massive subsidy in the marketplace of ideas. By constitutional fiat, those ideas that require the threat of violence to overcome reasoned dissent would be freely allowed to exert that threat.²⁶⁸

If marketplace theory is true, one of three possibilities will result: (1) ideas that require the threat of violence to overcome dissent would start to win out over those not making use of that threat, (2) those ideas that were previously not reinforced by the threat of violence would be forced to accept the violence-enabling “subsidy” in order to compete in the marketplace, or (3) the persuasive value of the threat of violence would, at some point, in utter contradiction to millennia of human history, dissipate, and guns would become useless or actively unhelpful in winning political debates. The third possibility seems remote, and neither the first nor the second seems desirable. The solution is to protect the marketplace of ideas from guns, to the extent possible, by protecting from guns those locations most valuable to the marketplace.

Political demonstrations are clearly “sensitive places” under this theory. First Amendment concerns are at their apex when citizens gather to protest and make their voices heard. Rallies implicate not only the right to free speech but also the right of assembly or association.²⁶⁹ Such events involve political speech at the core of the

267. See, e.g., DeBoer, *supra* note 52, at 358 (“Guns instill fear and chill speech that could challenge the ideas of the protester, and, according to philosophers like Milton, eventually bring about the truth through the crucible of the public discourse.”); Kenneth M. Mash, *Guns on Campus: A Chilling Effect*, THOUGHT & ACTION (Fall 2013), available at <http://www.nea.org/assets/docs/HE/TA2013Mash.pdf> [<http://perma.cc/R3NB-2WFM>] (claiming that armed college students could stifle their classmates’ speech through intimidation and even create “a ‘chilling effect’ on faculty being willing to share any of their controversial research with their students”); 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/> [<http://perma.cc/FGG6-TFYZ>] (cataloguing instances of armed protest, including one at a polling station, and noting that “[n]o other advanced democracy” allows such demonstrations).

268. If the basic economic assumptions of the marketplace theory are true, individuals would not seek to use guns to prove points unless the guns would add persuasive value. This Note proceeds under that assumption.

269. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging . . . the right of the people to peaceably assemble.”).

First Amendment.²⁷⁰ Political demonstrations are the beating heart of the American story, starting with the Boston Tea Party, extending through the Civil Rights Era marches on Selma and Washington, and continuing into modern politics with the Tea Party rallies and the Women’s March.

The introduction of weapons into political rallies is an obvious threat to the passionate expression the First Amendment mandates that we encourage by allowing such rallies. Carrying guns at a political demonstration risks either a chilling effect or an outbreak of violence,²⁷¹ as we saw in Charlottesville, and as we have seen before. To preserve America’s vibrant political culture, the Second Amendment must concede the arena of political rallies to the First Amendment.

CONCLUSION

Gil Scott Heron opined that “America is now blood and tears instead of milk and honey.”²⁷² But the truth is that America is both, and always has been. Such is the unavoidable irony at the heart of our national identity. America is Heather Heyer, yes, but we are James Alex Fields, too. We are Eugene Debs, imprisoned for mere speech, and we are his predecessor Hermann Presser, imprisoned for strapping a sword to Debs’ rhetoric. We are Dr. Cornel West, staring down the barrel of neo-Confederate assault rifles in 2017, and we are Christopher Cantwell, staring back. There can be no easy escape from our identity—only reckoning with it and managing it.

Thankfully, the task is not impossible. As the American tradition of armed political demonstrations again rears its ugly head, we are not without tools to confront the challenges posed by those claiming to

270. *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . The right of citizens . . . to speak . . . is a precondition to enlightened self-government and a necessary means to protect it.”).

271. See John Culhane, *Should Protesters Be Allowed to Have Guns?*, POLITICO MAG. (Aug. 18, 2017), <https://www.politico.com/magazine/story/2017/08/18/should-protesters-be-allowed-to-have-guns-215504> [<http://perma.cc/EAY5-27FB>] (“[P]ublic safety and the First Amendment are powerfully linked . . . especially since we now know that [armed demonstrations] can chill not only the counter-demonstrators, but even the police. If they’re afraid to do their jobs, the First Amendment is indeed a hollow guarantee.”).

272. GIL SCOTT-HERON, Comment #1, *on A NEW BLACK POET - SMALL TALK AT 125TH AND LENOX* (FLYING DUTCHMAN RECORDS 1970).

operate within the ambit of both the First and Second Amendments. The Constitution is not so inflexible.

We can, and must, engage in a war of ideas. But let's leave our guns at home.