

# VIRGINIA LAW REVIEW ONLINE

---

VOLUME 104

JANUARY 2018

30–44

---

## *ESSAY*

### YOUR ‘LITTLE FRIEND’ DOESN’T SAY ‘HELLO’: PUTTING THE FIRST AMENDMENT BEFORE THE SECOND IN PUBLIC PROTESTS

*Kendall Burchard\**

*“I can tell you this, 80 percent of the people here had semiautomatic weapons. You saw the militia walking down the street, you would have thought they were an army. I was just talking to the State Police upstairs; they had better equipment than our State Police had.”<sup>1</sup>*

VIRGINIA Governor Terry McAuliffe gave the preceding statement August 13, 2017, a day after the “Unite the Right” rally in Charlottesville, Virginia forced Americans to confront racist ideologies and deplorable dogmas most hoped had ended with V-Day in 1945. Nazi sympathizers and members of the alt-right invaded the city with tiki torches, protective gear, shields, and guns, protesting the Charlottesville City Council’s decision to remove a statue of Confederate General Robert E. Lee from Emancipation Park.

---

\* J.D. Candidate 2019, University of Virginia School of Law. I would like to thank members of the *Virginia Law Review* for the opportunity to discuss the events of August 11 and 12 in Charlottesville and collectively seek a way forward. I am grateful to Michael Dooley for his helpful critiques through the editing process. I am thankful for my parents’ support and encouragement, for DW for reminding me why I came, KKF for the wake-up call(s), and CS, ME, and LAH for their friendship and support. Errors are my own.

<sup>1</sup> Sheryl Gay Stolberg, McAuliffe Counters Critics of Police Response to Charlottesville Violence, N.Y. Times (Aug. 13, 2017), <https://web.archive.org/web/20170813232231/https://www.nytimes.com/2017/08/13/us/charlottesville-protests-white-nationalists.html> (quoting Virginia Governor Terry McAuliffe).

“We didn’t aggress. We did not initiate force against anybody,” white nationalist Chris Cantwell told reporter Elle Reeves. “We’re not nonviolent. We’ll fucking kill these people if we have to.”<sup>2</sup>

And kill they did. Three people died during the Unite the Right rally. Heather Heyer, age 32, died after a Nazi sympathizer plowed into a crowd on Charlottesville’s Downtown Mall with his vehicle, and state troopers Lieutenant H. Jay Cullen and Trooper-Pilot Berke M. M. Bates died in a helicopter crash while on their way to respond to the day’s events.<sup>3</sup> Despite the fact that guns were not to blame for these deaths, the display of firearms at protests and demonstrations in Charlottesville and in similar rallies before and after the events of August 11 and 12 have forced cities and municipalities to grapple with Second Amendment rights in relation to First Amendment freedoms. Armed protesters are constitutionally—and in most cases, statutorily—granted a right to bear arms for the purposes of self-defense in certain circumstances; however, the presence of their firearms may chill the speech and expressive rights of unarmed demonstrators or of fellow armed protesters by their very display.

But some gun advocates have argued that, separate and apart from the Second Amendment, the First Amendment further protects the “speech” and expression of their firearms. The First Amendment protects expression, but the line dividing protected speech and conduct from unprotected speech and conduct is often malleable, with protection hinging on good lawyering and favorable facts. This Essay will offer preliminary thoughts regarding the tension between First and Second Amendment rights, and specifically address whether the display of firearms can be construed as symbolic speech. Furthermore, this Essay will explore whether protest sites can be classified as “sensitive places” where prohibitions on the possession of firearms may constitutionally stand under *District of Columbia v. Heller*.<sup>4</sup> This is by no means an exhaustive analysis—instead, I hope it will serve as the foundation for future scholarship considering the questions at issue.

---

<sup>2</sup> Interview by Elle Reeves with Chris Cantwell, white supremacist and “Unite the Right” attendee, in Charlottesville, Va. (Aug. 12, 2017), <https://www.vox.com/identities/2017/8/16/16155942/charlottesville-protests-nazis-vice>.

<sup>3</sup> Emma Bowman & Wynne Davis, Charlottesville Victim Heather Heyer ‘Stood Up’ Against What She Felt Was Wrong, Nat’l Pub. Radio (Aug. 13, 2017), <http://www.npr.org/sections/thetwo-way/2017/08/13/543175919/violence-in-charlottesville-claims-3-victims>.

<sup>4</sup> 554 U.S. 570, 626–27 (2008).

For the purposes of this Essay, I will be using “demonstrators” to refer to the members of the alt-right and Nazi movement, and “protesters” to describe the people of Charlottesville and surrounding communities who protested against the presence and premise of the Unite the Right demonstrators. Part I addresses whether openly carrying a firearm in public can constitute expression protected under the First Amendment, and considers whether an unloaded gun is entitled to constitutional protections irrespective of whether loaded guns are protected expression. Part II assesses the scope of the Second Amendment right to self-defense discussed by the Supreme Court in *Heller*, and briefly discusses the deepening circuit split over whether there is a right to carry a firearm for self-defense outside of an individual’s home. After finding that historical evidence and case law support the right to carry a firearm for purposes of self-defense outside the home, Part III explains why the law should protect First Amendment rights over those of the Second Amendment, and discuss how public protests can be classified as a “sensitive place” at which firearms may constitutionally be forbidden.

#### I. THE FIRST AMENDMENT: OPEN CARRY AS SYMBOLIC SPEECH

The line between protected expression and unprotected conduct at times disappears in First Amendment jurisprudence. Although the Supreme Court has rejected “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea,”<sup>5</sup> it has recognized some conduct may be “sufficiently imbued with elements of communication” to fall within the scope of the First Amendment.<sup>6</sup> To determine whether conduct constitutes speech for First Amendment purposes under *Spence v. Washington*, the guiding case on the issue, we must ask whether “[a]n intent to convey a particularized message was present” and whether “in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”<sup>7</sup> As the Court implied in *Texas v. Johnson*<sup>8</sup> and *Tinker v. Des Moines*

---

<sup>5</sup> *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

<sup>6</sup> *Spence v. Washington*, 418 U.S. 405, 409 (1974).

<sup>7</sup> *Id.* at 410–11.

<sup>8</sup> 491 U.S. 397, 404–06 (1989) (finding flag burning was protected under the First Amendment though the flag itself was not entitled to automatic protection).

*Independent Community School District*,<sup>9</sup> “[s]omeone has to do something with the symbol before it can be speech.”<sup>10</sup> Items themselves are not expressive; although a flag or an armband may be associated with particular nations or causes, it takes the addition of a person’s action and intention for the item to become classified as symbolic speech.

Some open carry advocates have sought protection for the right to carry firearms within the First Amendment’s “symbolic speech” doctrine.<sup>11</sup> Courts that have considered whether open carry amounts to expressive conduct worthy of First Amendment protection have so far found the argument unpersuasive, though they have recognized that under certain circumstances gun possession may function as protected expression. For example, the U.S. Court of Appeals for the Ninth Circuit conceded in *Nordyke v. King* that “[g]un possession can be speech” upon a satisfactory showing under *Spence*,<sup>12</sup> but also noted, “[t]ypically a person possessing a gun has no intent to convey a particular message, nor is any particular message likely to be understood by those who view it.”<sup>13</sup> Similarly, in *Baker v. Schwarb*, the Eastern District of Michigan found that two gentlemen walking down a public sidewalk with two holstered handguns and two rifles were not protected by the First Amendment because they “gave no visual cues to provide context for their actions” and instead of conveying a message to others, “passer-byes were simply alarmed and concerned for their safety and that of their community.”<sup>14</sup> In *Northrup v. City of Toledo Police Division*, relying on *Baker*, the Northern District of Ohio found that because Northrup “had to explain the message he intended to convey” he vastly undermined his own argument “that observers would likely understand the message,” a condition required under *Spence*.<sup>15</sup>

---

<sup>9</sup> 393 U.S. 503, 507–511 (1969) (finding wearing armbands in protest constituted protected speech).

<sup>10</sup> *Nordyke v. King*, 319 F.3d 1185, 1189 (9th Cir. 2003).

<sup>11</sup> Tyler Yzaguirre, *Why Gun Owners Should Use the First Amendment to Protect Open Carry*, *The Hill* (Aug. 8, 2017), <https://perma.cc/L4WW-Q2DK>.

<sup>12</sup> *Nordyke*, 319 F.3d at 1190 (citing *Spence*, 418 U.S. at 410–11).

<sup>13</sup> *Id.*

<sup>14</sup> *Baker v. Schwarb*, 40 F. Supp. 3d 881, 895 (E.D. Mich. 2014).

<sup>15</sup> *Northrup v. City of Toledo Police Div.*, 58 F. Supp. 3d 842, 848 (N.D. Ohio 2014), *aff’d* in part, *rev’d* in part on other grounds, 785 F.3d 1128 (6th Cir. 2015).

The case that has come closest to satisfying *Spence* is *Burgess v. Wallingford*.<sup>16</sup> In a purportedly expressive display, Richard Burgess wore a t-shirt supporting Connecticut's right to bear arms and kept gun rights brochures on his person as he attempted to enter Yale Billiards while wearing a loaded gun visible in his hip holster.<sup>17</sup> Despite this, the District of Connecticut found Burgess's conduct was outside of First Amendment protection because reasonable minds "could disagree regarding whether his shirt established a great likelihood that others would interpret his weapon as a particularized message regarding the Second Amendment rather than, for example, a weapon carried for protection."<sup>18</sup> As of this writing, none of the courts that have considered whether public gun possession can be protected as symbolic speech have found that the gun's "expression" was more than merely ancillary to the firearm's intended function, and thus was undeserving of First Amendment protection.

For the purposes of argument, consider how the calculus would change if we deprived the firearm of its functionality. Can an unloaded gun qualify as expression, once it is no longer an actual threat to the bodily integrity of those in the near vicinity? If the gun cannot physically harm anyone, its holder must intend for it to serve another purpose. However, unlike other expressive items, such as signs, flags, or armbands, the sight of a gun immediately insinuates harm regardless of whether or not it has the potential to do so. Reasonable minds and seasoned experts alike would be unable to discern a loaded "actual threat" from an unloaded "perceived threat," and the cost of miscalculation is insurmountably high. If gun possession can be speech upon a satisfaction of *Spence*, the gun-bearers must grapple with the message they intend to convey with their firearm. While inexpressive conduct categorically falls outside of the First Amendment's purview, some expressive conduct can also fall outside the scope of its protection.<sup>19</sup> It is important to be precise about the message the speaker intended to convey because the speaker's intention must align with the

---

<sup>16</sup> 2013 WL 4494481, at \*1 (D. Conn. May 15, 2013).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at \*9 (discussing First Amendment claim under §1983).

<sup>19</sup> See *Virginia v. Black*, 538 U.S. 343, 362–63 (2003) (upholding Virginia's ban on cross burning with intent to intimidate despite its expressive nature because of cross burning's "long and pernicious history as a signal of impending violence").

listener's likely understanding of the message in order to satisfy *Spence*.<sup>20</sup> The following discussion considers what firearms might "say"—should they be found to be expressive—and suggests the applicable constitutional limitations.

*A. Gun Says "Pro-Second Amendment"*

If demonstrators intend to advocate for permissive gun laws in traditional public forums like parks, streets, and sidewalks, then gun possession could be construed as political speech. However, having the item for which individuals are advocating present at the demonstration is unnecessary. Supreme Court jurisprudence establishes that the manner in which protests are conducted can be regulated as long as the government provides "ample alternative channels" for the communication of the protester's message.<sup>21</sup> Similarly, restrictions on speech in traditional public forums may be subject to content-neutral and narrowly tailored time, place, and manner restrictions designed to serve a compelling state interest.<sup>22</sup> Government regulation of expressive activity is content-neutral as long as it is "justified without reference to the content of the regulated speech."<sup>23</sup> Therefore, a city or municipality could construct a "manner" restriction to prohibit potentially harmful items from appearing at protests so long as the regulation is applied regardless of viewpoint and justified without regard to its communicative impact.<sup>24</sup> The argument is similar to those found compelling in the context of the prohibition of sound amplification at outdoor events,<sup>25</sup> restrictions on protests outside of abortion clinics,<sup>26</sup>

---

<sup>20</sup> *Spence*, 418 U.S. at 410–11.

<sup>21</sup> *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (finding a prohibition on sleeping in a public park to convey the plight of homelessness was constitutional in part because protests retained "ample alternative channels" to communicate their intended message).

<sup>22</sup> *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

<sup>23</sup> *Clark*, 468 U.S. at 293.

<sup>24</sup> *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968).

<sup>25</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989) (finding "[t]he principle justification for the sound-amplification guideline is the city's desire to control noise levels," not expression, and is therefore content-neutral).

<sup>26</sup> *Hill v. Colorado*, 530 U.S. 703, 731 (2000) (finding that a comprehensive statute was "evidence against there being a discriminatory governmental motive," and that the restrictions amounted to prudent location restrictions, not content restrictions).

and permitting processes for demonstrations more broadly.<sup>27</sup> The communication of the ideas themselves is not prohibited, but the way in which the message may be conveyed to the public is subject to reasonable regulation. Consider demonstrations in support of the legalization of marijuana, or against holding exotic animals in captivity. Although the government may not stop the protests from occurring based on the protester's view, the government need not permit marijuana to be present at the protest because it furthers the protest's aim, nor need it allow exotic animals to roam free to convey the protester's message. So it follows that firearms need not be permitted at pro-Second Amendment demonstrations, because the message may be adequately conveyed without the item at issue present.

*B. Gun Says "Be Afraid" or "I Will/I Want Others To Harm You/Others"*

If, however, the firearm's intended message is one of intimidation, threat, or bodily harm, then the expression may be statutorily prohibited<sup>28</sup> as well outside of the First Amendment's protection.<sup>29</sup> Speech that amounts to mere "offense" is protected under the First Amendment.<sup>30</sup> However, the benefits of some forms of speech, such as

---

<sup>27</sup> *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) ("Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people . . . has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.").

<sup>28</sup> See Va. Code Ann. § 18.2-282 (2014) ("It shall be unlawful for any person to point, hold[,] or brandish any firearm . . . whether capable of being fired or not, in such manner as to reasonably induce fear in the mind of another or hold a firearm . . . in a public place in such a manner as to reasonably induce fear in the mind of another of being shot or injured."). However, statutes criminalizing threatening speech must be interpreted "with the commands of the First Amendment clearly in mind." *Watts v. United States*, 394 U.S. 705, 707 (1969).

<sup>29</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." (citation omitted)).

<sup>30</sup> *Cohen v. California*, 403 U.S. 15, 21 (1971) ("[T]he mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense.").

“fighting words” and words intended to cause violence, are “clearly outweighed by the social interest in order and morality” and are outside of the First Amendment’s scope.<sup>31</sup> Notwithstanding this, case law has circumscribed restrictions on these utterances to very specific instances.<sup>32</sup> Most applicable here are bars against “true threats” and the incitement of imminent lawless action. True threats fall outside of First Amendment protection insofar as they “communicate a serious expression of an intent to commit an act of unlawful violence to a *particular individual* or a *group of individuals*.”<sup>33</sup> In application, however, the standard has been difficult to discern and apply—particularly the intent element.<sup>34</sup>

Speech inciting imminent lawless action is similarly unprotected.<sup>35</sup> The test for discerning such speech, established in *Brandenburg v. Ohio*, prohibits states from forbidding speech unless “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>36</sup> Modern interpretations of the incitement doctrine suggest “implicitly encourag[ing] the use of” force may be enough to satisfy the first prong of the *Brandenburg* test.<sup>37</sup> Regardless of whether an unloaded gun is used purely for expressive purposes, if the speaker intends violence to result from the speech and it is likely that violence will result, the gun-bearer’s claim to First

---

<sup>31</sup> See *Chaplinsky*, 315 U.S. at 572.

<sup>32</sup> See *Elonis v. United States*, 135 S. Ct. 2001, 2014 (2015) (Alito, J. concurring in part and dissenting in part) (requiring some degree of intent to threaten); *Virginia v. Black*, 538 U.S. 343, 359 (2003) (emphasizing “fighting words” and threats that are sufficiently particularized to an individual or group of individuals); *R.A.V. v. St. Paul*, 505 U.S. 377, 390–91 (1992) (striking down a city ordinance which regulated “fighting words” predicated “on the basis of race, color, creed, religion or gender” as viewpoint discrimination); *Watts*, 394 U.S. at 707–08 (requiring that threats “be distinguished from what is constitutionally protected speech”).

<sup>33</sup> *Black*, 538 U.S. at 359 (emphasis added).

<sup>34</sup> See *Elonis*, 135 S. Ct. at 2013–14 (Alito, J., concurring in part and dissenting in part) (emphasis in original) (“[T]he Court refuses to explain what type of intent was necessary. Did the jury need to find that *Elonis* had the *purpose* of conveying a true threat? Was it enough if he *knew* that his words conveyed such a threat? Would *recklessness* suffice? The Court declines to say.”).

<sup>35</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

<sup>36</sup> *Id.* at 447.

<sup>37</sup> *Nwanguma v. Trump*, 2017 WL 3430514, slip. op. at \*3 (W.D. Ky. Aug. 9, 2017) (quoting *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 246 (6th Cir. 2015)), appeal filed, see Brief of Appellants at 2, *Nwanguma v. Trump*, No. 17-6290 (6th Cir. Dec. 13, 2017).



Amendment protection fails because its speech is outside of the amendment's protection.<sup>38</sup>

### C. Gun Says "Stop Speaking"

Intellectual exercises aside, courts have also consistently found against laws and actions that chill the expressive freedoms of others, particularly in relation to political speech.<sup>39</sup> Firearms at protests and rallies undoubtedly chill the otherwise protected political speech of those both for and against the rally's message for fear of violence, and this in turn runs directly contrary to the First Amendment's core intention of protecting constructive political discourse.<sup>40</sup> Although the gun holders may in turn claim their political speech is chilled by prohibiting firearms at rallies, such regulation would create a "benign chilling effect" and would be permissible because the expression of violence and intimidation falls outside of First Amendment protection.<sup>41</sup>

## II. SECOND AMENDMENT: THE FUNDAMENTAL RIGHT TO CARRY A FIREARM IN PUBLIC FOR PURPOSES OF SELF-DEFENSE

The Second Amendment guarantees "the right of the people to keep and bear Arms, shall not be infringed."<sup>42</sup> The Supreme Court recognized in *District of Columbia v. Heller* that the Second Amendment codifies a "pre-existing" individual right for "law-abiding citizens" to "possess and carry weapons in case of confrontation" regardless of service in a militia.<sup>43</sup> However, the Court recognized the right is "not unlimited"<sup>44</sup> and carefully cabined Second Amendment rights to protect "the right of law-abiding, responsible citizens to use arms in defense of the hearth

---

<sup>38</sup> *Brandenburg*, 395 U.S. at 447–48.

<sup>39</sup> See, e.g., *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (finding statutory provisions making treasonable or seditious words or acts grounds for dismissal had a "chilling effect" on expressive freedoms); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 278–80 (1964).

<sup>40</sup> See *Sullivan*, 376 U.S. at 269 (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)).

<sup>41</sup> See Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. Rev. 685, 690 (1978) (emphasis omitted).

<sup>42</sup> U.S. Const. amend. II.

<sup>43</sup> 554 U.S. 570, 592–93, 625 (2008) (emphasis omitted).

<sup>44</sup> *Id.* at 626.

and home.”<sup>45</sup> Two years later, in *McDonald v. City of Chicago*, the Court reaffirmed its finding that “the need for defense of self, family, and property is most acute in the home”<sup>46</sup> and incorporated the right to “possess a handgun in the home for the purpose of self-defense” to the states through the Due Process Clause of the Fourteenth Amendment.<sup>47</sup> However, the *Heller* and *McDonald* Courts did not purport to discern the “full scope of the Second Amendment,” and the extent to which the right to bear arms outside of the home has yet to be established.<sup>48</sup>

Lower courts are divided on whether the right to bear arms for the lawful purpose of self-defense extends outside of the home. In July 2017, the D.C. Circuit addressed discrepancies among the circuits over whether laws prohibiting carrying firearms in public without a showing of “proper” or “good” cause were constitutional in *Wrenn v. District of Columbia*.<sup>49</sup> The Second,<sup>50</sup> Third,<sup>51</sup> and Fourth<sup>52</sup> Circuits have upheld “proper cause” requirements, deferring to state legislatures to properly determine the balance between the Second Amendment and public safety concerns. However, as the Ninth Circuit noted in a decision that was subsequently vacated, and as the D.C. Circuit acknowledged, these courts may have employed the very interest-balancing test proposed by Justice Breyer in *Heller* that was handily rejected by the majority.<sup>53</sup> *Heller* requires a rigorous historical inquiry to discern the scope of the rights protected within the Second Amendment because constitutional rights “are enshrined with the scope they were understood to have when the people adopted them.”<sup>54</sup> After conducting a comprehensive historical

---

<sup>45</sup> Id. at 635 (emphasis added).

<sup>46</sup> 561 U.S. 742, 767 (2010) (quotation and citation omitted).

<sup>47</sup> Id. at 791.

<sup>48</sup> *Heller*, 554 U.S. at 626 (declining to opine on the full scope of the Second Amendment); *McDonald*, 561 U.S. at 859 (Stevens, J., dissenting) (noting how the Court declined to “express an opinion” on “carriage of firearms outside the home”).

<sup>49</sup> 864 F.3d 650, 661–64 (D.C. Cir. 2017).

<sup>50</sup> *Kachalsky v. County of Westchester*, 701 F.3d 81, 99–100 (2d Cir. 2012) (upholding “proper cause” requirement to concealed carry).

<sup>51</sup> *Drake v. Filko*, 724 F.3d 426, 439 (3rd Cir. 2013) (upholding “justifiable need” standard to open or concealed carry).

<sup>52</sup> *Woollard v. Gallagher*, 712 F.3d 865, 880 (4th Cir. 2013) (upholding a “good-and-substantial-reason requirement” to open or concealed carry).

<sup>53</sup> *Wrenn*, 864 F.3d at 664 (quoting *Peruta v. County of San Diego*, 742 F.3d 1144, 1173–75 (9th Cir. 2014), vacated by 824 F.3d 919 (2016) (en banc)).

<sup>54</sup> *Heller*, 554 U.S. at 592, 634–35.

analysis, the Seventh,<sup>55</sup> Ninth,<sup>56</sup> and D.C. Circuits<sup>57</sup> have essentially reached the conclusion that for “the vast majority of responsible, law-abiding citizens . . . carrying weapons in public for the lawful purpose of self-defense is a central component of the right to bear arms”<sup>58</sup> and therefore the right may not be categorically prohibited but for “longstanding” prohibitions found by the *Heller* court to be constitutional.<sup>59</sup>

In June 2017, the Ninth Circuit’s petition for certiorari to address the scope of the Second Amendment’s protection outside of the home was denied<sup>60</sup> and in October 2017 the District of Columbia declined to appeal the D.C. Circuit’s ruling in *Wrenn* to the Supreme Court.<sup>61</sup> A definitive ruling from the Court about the extent of Second Amendment rights to carry firearms in public must therefore wait for another case.

Although the Court may recognize some Second Amendment right to carry a firearm in public in the future, the extent of the right will in part be informed by what may appropriately be classified as “self-defense.”<sup>62</sup> If our law only permits carrying guns for self-defense, does that preclude firearms that historically have been used as tools of aggression, like assault rifles? May an individual carry more than one firearm at a time for “self-defense”? How many rounds may an individual load or carry on their person under the guise of self-defense? These questions, too, naturally lead to others—should someone be in violation of these laws, will the government be able to stop them? Or, as in Charlottesville, will those exercising their Second Amendment rights have “better

---

<sup>55</sup> *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012).

<sup>56</sup> *Peruta*, 742 F.3d at 1175.

<sup>57</sup> *Wrenn*, 864 F.3d at 662.

<sup>58</sup> *Id.* at 664 (quoting *Peruta*, 742 F.3d at 1173–75).

<sup>59</sup> *Heller*, 554 U.S. at 626–27 (affirming longstanding prohibitions on the possession of firearms by the mentally ill, felons, etc.).

<sup>60</sup> *Peruta v. County of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016) (declining to reach the open carry question and instead limiting its decision to the constitutionality of prohibiting concealed carry), cert. denied *Peruta v. California*, 137 S. Ct. 1995 (2017).

<sup>61</sup> Ann E. Marimow & Peter Jamison, D.C. Will Not Appeal Concealed Carry Gun Ruling to Supreme Court, *Wash. Post* (Oct. 5, 2017), <https://perma.cc/8C6M-FER5>.

<sup>62</sup> *Heller*, 554 U.S. at 628–29 (finding prohibitions against handguns were unconstitutional because they are “overwhelmingly chosen by American society” for the lawful purpose of self-defense and have been “the quintessential self-defense weapon”).

equipment than [the] State Police had” and encourage the state to stand down?<sup>63</sup>

### III. THE FIRST BEFORE THE SECOND: LIMITATIONS AND SENSITIVE PLACES

Firearms at protests and rallies force fundamental rights into direct conflict. Gun-bearers have the right to speak, to assemble, to express themselves within the confines of the law and exercise their Second Amendment rights to defend themselves should the situation require it.<sup>64</sup> Unarmed attendees also have the right to speak, assemble, and express themselves within the confines of the law, and should be able to do so free from fear for their bodily integrity.<sup>65</sup> Looking both to Charlottesville and beyond, how should courts approach situations in which demonstrators feel that they must exercise their Second Amendment rights to defend against a “hostile audience,”<sup>66</sup> while the audience perceives the speaker’s speech to be hostile in and of itself? When both sides fight for their views in the marketplace of ideas and the “fight” could be properly construed as a war, whose rights should prevail at the expense of the others’?

As the Court has recognized in *Heller*, the right to carry a firearm in public is not absolute. “Longstanding” prohibitions, like those barring

---

<sup>63</sup> 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?referer=https://t.co/SbvYUNVHOG?amp=1&\\_r=0](https://www.nytimes.com/2017/08/13/us/charlottesville-protests-white-nationalists.html?referer=https://t.co/SbvYUNVHOG?amp=1&_r=0) (quoting Virginia Governor Terry McAuliffe). State police dispute the claim that they were unprepared or otherwise intimidated by the demonstrator’s firearms. Arelis R. Hernández, *Charlottesville Police Chief Defends Officers, Police Response at Violent Rally*, Wash. Post (Aug. 14, 2017), <https://perma.cc/SQ25-D4P5>.

<sup>64</sup> See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (“[E]ven though a person has no ‘right’ to a valuable governmental benefit . . . the government . . . may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.”). But see Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. Legal Analysis 61, 67 (2013) (“But an amusing aspect of the unconstitutional conditions doctrine is that there is no doctrine. At least there is no snappy and established test for analyzing unconstitutional conditions questions.”).

<sup>65</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (recognizing the right to bodily integrity as part of the “liberty” interest in the Due Process clause).

<sup>66</sup> The “hostile audience” problem is exemplified by *Feiner v. New York*, where Chief Justice Vinson described the power of the “audience,” in disagreement with the speaker, to effectively silence the speaker by raising their voices, displaying threatening behavior, etc. 340 U.S. 315, 320 (1951).

the mentally ill and felons from lawfully owning firearms, are constitutionally permissible.<sup>67</sup> Similarly, and of particular consequence when suggesting appropriate constitutional limitations on firearms in public protest sites, laws can prohibit possession in “sensitive places,” including “schools and government buildings.”<sup>68</sup> These are constitutional in part because bans on particular locations allow carriers to maintain an “undiminished right of self-defense” by providing proper notice so they may avoid those locations.<sup>69</sup>

Lower courts have interpreted “sensitive places” to include county property,<sup>70</sup> national parks,<sup>71</sup> post office parking lots,<sup>72</sup> university campuses,<sup>73</sup> and airplanes.<sup>74</sup> Schools, government buildings, and the additional examples lower courts have recognized as sensitive places have in common a particular obligation for the locations to provide security for their inhabitants and a “regular presence of the police or other state provided security.”<sup>75</sup> Similarly, lower courts have found sensitive places encompass locations that, “unlike homes, . . . are public properties where large numbers of people, often strangers (and including children), congregate for recreational, educational, and *expressive activities*.”<sup>76</sup>

These explanations suggest an individual’s “well established . . . right to receive information and ideas”<sup>77</sup> supersedes another’s right to bear arms in public when such places 1) provide or should provide the proper security necessary to diminish the need for defense of self and others

---

<sup>67</sup> *Heller*, 554 U.S. at 626–27.

<sup>68</sup> *Id.*

<sup>69</sup> *Wrenn*, 864 F.3d at 662 (quoting *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012)).

<sup>70</sup> *Nordyke v. King*, 563 F.3d 439, 459–60 (9th Cir. 2009), vacated en banc, 611 F.3d 1015 (9th Cir. 2010) (remanding to the panel to reconsider in light of *McDonald*).

<sup>71</sup> *United States v. Masciandaro*, 648 F. Supp. 2d 779, 790–91 (E.D. Va. 2009) (finding prohibitions on guns in national parks are constitutional because it is an area “where large numbers of people, often strangers (and including children), congregate for recreation[.]”).

<sup>72</sup> *United States v. Dorosan*, 350 F. App’x 874, 875–76 (5th Cir. 2009).

<sup>73</sup> *DiGiacinto v. Rector and Visitors of George Mason Univ.*, 704 S.E.2d 365, 370 (Va. 2011) (finding George Mason University “is a school” and “its buildings are owned by the government” and therefore the campus is a “sensitive place” within the meaning of *Heller*).

<sup>74</sup> *United States v. Davis*, 304 F. App’x 473, 474 (9th Cir. 2008).

<sup>75</sup> George A. Nation III, *The New Constitutional Right to Guns: Exploring the Illegitimate Birth and Acceptable Limitations of This New Right*, 40 Rutgers L. J. 353, 414 (2009).

<sup>76</sup> *Masciandaro*, 648 F. Supp. 2d at 790 (emphasis added).

<sup>77</sup> *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

and/or 2) serve as a place for expressive activity. Although under current jurisprudence these two elements may be independently sufficient to justify a sensitive place, together they justify a protest's classification as a sensitive place because the preservation of the protest's expressive activity is greatly constrained or empowered depending on the state's failed or proper exercise of its police power, respectively.

Although it is well established that police do not have a duty to protect individuals from private harms,<sup>78</sup> the calculus shifts when expression is at issue because First Amendment doctrine has come to demand an unpopular speaker's protection from the hostile audience and the heckler's veto.<sup>79</sup> Protests and demonstrations are entitled to police protection to ensure the speaker's ability to speak. However, in Charlottesville and in other similar instances, the state is unable to secure the speaker's rights, their protection, or the protection of their listeners because an individual's "self-defense" right challenges the state's monopoly on violence.<sup>80</sup> As the Fourth Circuit has recognized, "public safety interests often outweigh individual interests in self-defense."<sup>81</sup> When we are left with situations in which the exercise of "self-defense" rights castrates the state's ability to maintain order or protect and serve the public safety interest, an individual's right to self-defense should be secondary to the police power of the state and to the public interest in freedom of expression.

The expressive rights of demonstrators and protesters alike are severely curtailed when firearms are permitted at demonstrations because disagreement could result in death. As a result, protest sites may be rightly classified as "sensitive places" insofar as the state provides security (and may indeed have a duty to do so) and the traditionally-

---

<sup>78</sup> See, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005) (declining to find an "interest" in restraining order because police retain discretion as to how to enforce the law); *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195–96 (1989) (holding Due Process Clause confers no affirmative right to governmental aid, even when aid may be necessary to protect life).

<sup>79</sup> See *Cox v. Louisiana*, 379 U.S. 536, 551 (1965); *Gregory v. City of Chicago*, 394 U.S. 111, 117–20 (1969) (Black, J., concurring); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 97 (1972); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134–36 (1992).

<sup>80</sup> See, e.g., *Stolberg*, *supra* note 63 (noting how police response in Charlottesville was viewed as flawed and how militia members had access to "better equipment than [the] State Police").

<sup>81</sup> *Masciandaro*, 638 F.3d at 470.

protected unfettered exchange of ideas demands the minimization of harm to speakers and listeners.

#### IV. CONCLUSION

Guns don't speak. Although they may command attention and fear, the objects themselves are not inherently expressive. Even if they were used in expressive means, the messages conveyed could reasonably fall outside of First Amendment protection. In Charlottesville and around the country, First Amendment protections should not be extended to rights protected under the Second Amendment because the countervailing public safety interests and interest in encouraging expressive activities demand public protests become "sensitive places" excluded from the right to bear arms. Although unloaded guns may seem more expressive to those aware of their benign state, reasonable observers will perceive the threat of harm just as they would if the gun were loaded. This perception chills expressive freedoms and silences worthwhile debate. Furthermore, the policy justification for carrying a firearm in public for the lawful purpose of self-defense loses credence in light of the state's obligation to protect the speakers, the listeners, and the municipality writ large during permitted demonstrations. At public protests like those in Charlottesville and across the country, protection should be satisfied by the state; therefore, sacrificing expressive freedoms for firearms is unacceptable.