Open-Carry: Open-Conversation or Open-Threat

Daniel Horwitz
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INTRODUCTION

Before the Republican National Convention in July of 2016, a Change.org 1 petition with over 50,000 2 signatures demanded that open-carry 3 firearms be allowed at the convention or the convention be relocated. 4 The petition used fiery rhetoric proclaiming the “God-given Constitutional right to carry a gun wherever and whenever they please,” and praised the opposition to “Barack HUSSEIN Obama's gun free zones” by the then three remaining Republican presidential candidates Donald Trump, Ted Cruz, and John Kasich. 5 Those same candidates uncomfortably deflected questions about the petition, opting to defer to the security judgment of the Secret Service. 6 It turns out the petition was created as satire, even if many of those who signed it were sincere in their convictions. 7

Despite its origin, the petition perfectly illuminates a tension at the core of American society: the intersection between free speech and firearms. The vision of a convention packed full—candidates and supporters armed to the teeth—is not as

* Juris Doctor Candidate, University of North Carolina School of Law, 2017; Article Editor, First Amendment Law Review.

1 Change.org is a website that facilitates the creation of electronic petitions. See About, CHANGE.ORG, https://www.change.org/about (last visited Mar. 31, 2016).
3 “Open-carry” generally means that individuals are allowed to carry a firearm “open” for the public to see, as opposed to concealed. The definition may vary from state to state. See Chris Stockton, Concealed vs. Open Carry, ALAMO DEF., http://alamodefense.net/index.php?option=com_content&view=article&id=81:concealed-vs-open-carry&catid=34:pistol-reviews&Itemid=96 (last visited Mar. 31, 2016).
4 The convention was held in Ohio, an open-carry state, in the Quicken Loans Arena, a setting that explicitly bans firearms and other weapons. See Nora Kelly, Trolling for Open Carry at the GOP Convention, THE ATLANTIC (Mar. 30, 2016), http://www.theatlantic.com/politics/archive/2016/03/open-carry-petition-gop-convention/476010/.
5 The Hypernationalist, supra note 2.
6 See Kelly, supra note 4.
7 See Kelly, supra note 4.
alien in the United States as it may sound to some.\(^8\) But what exactly is the message of openly carrying a gun? Is it a form of education, a political statement, or an act of public protest? Is openly carrying a gun some form of expression protected by the First Amendment?\(^9\) Or, are open carry advocates just attempting to use the First Amendment as a clever guise to mask a thinly veiled threat?\(^10\) This distinction matters because the First Amendment has historically been more difficult to limit than the Second Amendment.\(^11\)

Contrary to the desire of some open-carry activists, First Amendment protection should not be expanded to provide additional protection for gun holders. Furthermore, in circumstances like political rallies involving armed demonstrators and an unarmed audience, courts should skeptically view openly displayed weapons as speech protected for First Amendment purposes. While an activist openly displaying a gun may be doing so for a permissible purpose such as education, guns provide the ever-present ability to inflict violence on an audience and, therefore, intimidate that audience. As the law currently stands, an act that intimidates an audience is not precluded from First Amendment protection.

Any discussion of gun policy in America must begin with the Second Amendment. As such, it is important to first briefly examine the traditional arguments various political groups make to interpret the Second Amendment. This Note, however, will

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\(^8\) See Michael Rubinkam, *Pa. Chief’s Hearing Halted When Gun Falls on Floor*, NEWSOK, (Oct. 11, 2013), http://newsok.com/pa.-chiefs-hearing-halted-when-gun-falls-on-floor/article/feed/602685 (“A hearing for a Pennsylvania police chief who made profanity-laced Internet videos about liberals and the Second Amendment was halted suddenly Thursday night after a handgun belonging to one of his supporters slid out of its holster and crashed onto the concrete floor.”).

\(^9\) U.S. Const. amend. I. (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”).

\(^10\) Patrick Blanchfield, *What Do Guns Say?*, N.Y. Times Opinionator (May 4, 2014, 6:00 PM), http://opinionator.blogs.nytimes.com/2014/05/04/what-do-guns-say/ (“It’s bringing a gun to an idea-fight, gesturing as close as possible to outright violence while still technically remaining within the domain of speech. Like a military ‘show of force,’ this gesture stays on the near side of an actual declaration of war while remaining indisputably hostile. The commitment to civil disagreement is merely provisional: I feel so strongly about this issue, the gun says, that if I don’t get my way, I am willing to kill for it.”).

\(^11\) Id.
not attempt to analyze the Second Amendment in a new way. Instead, this Note will cover how and why proponents of an individual right to bear arms have attempted to advocate for their position using the First Amendment. This Note will proceed in three parts. Part I will discuss the current debate over the meaning of the Second Amendment. Part II will discuss the gun rights identity politics movement and explain why gun rights activists are attempting to use the First Amendment to bolster their position. Part II will also discuss the meaning conveyed by openly carrying a gun to the gun holder as well as his or her audience. Part III will discuss the current state of First Amendment jurisprudence as it relates to guns, the extent that the government can regulate guns used as symbolic speech, and areas where the policy can be improved.

I. INTERPRETATION OF THE SECOND AMENDMENT

The Second Amendment states, “[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.”12 Some scholars believe this is one of the worst drafted provisions of the Constitution.13 It is unclear how the two clauses of the Second Amendment interact. Is there an individual right of the people to bear arms? Or is there a right for states to maintain militias? Nonetheless, constitutional analysis begins with the written text.

Those who wish to limit the force of the Second Amendment often focus on the opening clause and assert that it has a restrictive purpose.14 The purpose of this clause, they argue, “was to allow the states to keep their militias and to protect them against the possibility that the new national government will use its power to establish a powerful standing army and eliminate the state militias.” 15 It follows that the right of the Second

12 U.S. CONST. amend. II.
14 See Levinson, supra note 13.
15 Id.
Amendment is a state's right and not an individual right. Therefore, states have the power to regulate individual gun ownership, or restrict ownership completely. This is called the collective right to bear arms.

On the other hand, advocates of an individual right to bear arms argue that if the Framers of the Constitution intended to prevent the federal government from prohibiting state-organized militias, they would have said so more explicitly. The legislative history of the Second Amendment is hotly debated by scholars and does not provide clarification. Historical arguments over the Second Amendment include contradictory views grounded in "original intention, original meaning, past practices and understandings, and the trend, or direction, of practices and understandings." In fact, summarizing the arguments between Second Amendment theorists for either model may serve advocates in the modern gun control debate at the expense of being a barrier to a more truthful historical understanding.

The Supreme Court of the United States has only directly addressed the Second Amendment a handful of times – most notably in United States v. Miller in 1939, and more recently in District of Columbia v. Heller in 2008. The law concerning the right to bear arms has developed as challenges have been made against federal attempts to regulate arms.

On Valentine's Day, 1929, members of Al Capone's gang lured seven members of the rival Bugs Moran gang into a garage

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16 See id.
17 See id.
19 Levinson, supra note 13, at 645.
20 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, 380 (2009) (discussing how majority is able to conclude that the Amendment protects a right to armed private self-defense even though absolutely nothing in text of the Amendment nor in its legislative history even mentions private self-defense).
22 See Nation, supra note 20.
to supposedly receive a shipment of hijacked whiskey. Rather than complete the illicit transaction, the Capone gang lined the Moran gang up against a walled and machined-gunned them to death. The hit failed at dispatching Capone’s primary rival for the illegal alcohol market, Bugs Moran, and ignited intense public backlash. Newspapers featured full front-page articles with pictures of the massacre and mug shots of the victims. In response, the Congress passed the National Firearms Act (NFA) in 1934. The NFA “taxed the manufacture, sale, and transfer of short-barreled rifles and shotguns, machine guns, and silencers; required registration of covered firearms; and prohibited interstate transportation of unregistered covered firearms.” Disguised as a tax, the true purpose of the NFA was to deprive the “gangster . . . of his most dangerous weapon, the machine gun.” The NFA purposefully was not intended to restrict pistols or “sporting arms” that a citizen could use for their own protection, rather, it focused on “gangster weapons.”

A decade later, an entirely different set of gangsters would be responsible for the next advancement of gun law. In 1938, police stopped two bank robbers for possessing an unregistered sawed-off shotgun in violation of the National Firearms Act. In United States v. Miller the Supreme Court narrowly held that as applied to one indicted for transporting an unregistered, “double barrel 12-guage shotgun having a barrel less than 18 inches” the National Firearms Act did not violate the Second Amendment and remanded the case for further proceedings. The Court noted that short-barreled shotguns are not part of the “ordinary military equipment or that its use could contribute to the common defense,” and, therefore, may be taxed by the NFA.

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25 Seth Harp, Globalization of the U.S. Black Market: Prohibition, the War on Drugs, and the Case of Mexico, 85 N.Y.U. L. Rev. 1661, 1661 (2010).
26 Id.
27 Id.
28 Id.
31 Id. at 61.
32 See id. at 62–63.
33 See id. at 48–49.
35 Id. at 178.
However, the Court seems to suggest, “The Second Amendment guarantees an individual right to possess and use a weapon suitable for militia service.” Courts struggled to interpret Miller and Second Amendment scholars find that it is an “impenetrable mess” with both collectivists and advocates of an individual right claiming Miller as their own.

Seven decades later, the Supreme Court decided to clear up some of the confusion left from Miller in District of Columbia v. Heller. In a five-to-four decision, the Supreme Court struck down portions of the Firearms Control Regulation Act of 1975 and found that the Second Amendment protects an individual’s right to possess firearms. At the time, it was generally prohibited in the District of Columbia to possess a handgun. No person could carry a handgun without a license issued by the chief of police for one-year periods. Lawfully owned firearms had to be stored “unloaded and dissembled or bound by a trigger lock or similar device unless they are located in a place of business or are being used for lawful recreational activities.” The respondent was a special police officer authorized to carry a handgun while on duty, but denied registration to keep it at home.

Writing for the majority, Justice Scalia determined that the prefatory clause announces a purpose for the operative clause rather than limiting it grammatically. In other words, the “right to bear arms” is not limited to the “militia.” Furthermore, just as the First Amendment protects modern forms of communication, the Second Amendment does not protect only those arms in existence in the 18th century. Because Heller was the first time the Supreme Court examined the Second Amendment.
Amendment in-depth, Scalia believed, “one should not expect it to clarify the entire field.” 46 The Court declined to define the outer limits of the Second Amendment, acknowledging the problem of handgun violence and the “the many amici who believe that prohibition of handgun ownership is a solution.” 47 Specifically, the Court held that nothing in Heller “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.” 48 Additionally, the Court reiterates the holding in Miller that the Second Amendment protects weapons that were “in common use at the time.” 49 Essentially, modern military weapons like an M-16 rifle may be banned even at the expense of making a modern day militia ineffective against a modern military that has access to a combat drones and a nuclear arsenal. Scalia concedes, “the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.” 50

Justices Stevens, Souter, Ginsburg, and Breyer dissented. 51 Justice Stevens argued that the court held in Miller that the Second Amendment “protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons.” 52 He believed that the hundreds of lower court decisions based on that understanding over the past seven decades should bind the Supreme Court in stare decisis. 53 In a separate dissent Justice Breyer criticized the circular reasoning of the majority: “if Congress and the States lift restrictions on the possession and use of machineguns, and people buy machineguns to protect their homes, the Court will have to

46 Id. at 635.
47 Id. at 636.
48 Id. at 626.
49 Id.
50 Id. at 627–28.
51 Id. at 636 (Stevens, J., dissenting).
52 Id. at 637–38 (Stevens, J., dissenting) (citing Miller, 307 U.S. at 178).
53 Id. at 677 (Stevens, J., dissenting).
reverse course and find that the Second Amendment does, in fact, protect the individual self-defense-related right to possess a machinegun."

There has been extensive work on the preceding categories of Second Amendment analysis of textual, structural, and historical arguments as well as further doctrinal, prudential and ethical arguments. This Note, however, will not focus on the nuances of Second Amendment arguments over gun control; instead, it will instead focus on the alternative strategy of incorporating the First Amendment as a tool in the gun debate. Advocates on both sides of the debate argue that guns convey a form of speech. Both sides have looked to the First Amendment to enhance or restrict gun regulation.

II: IDENTITY POLITICS AND THE USE OF GUNS TO CONVEY MEANING

This section discusses the identity politics movement based on support for gun rights and how it is influencing public policy. This section also explores how the constitutional protection for an individual right to bear arms is present in both the First and Second Amendments. Members of the gun rights movement see themselves as educating the public when they openly display guns in public. Unarmed audiences exposed to guns in the context of rallies or demonstrations often feel intimidated by the threat of violence. To fully understand the differences between the two groups, Part II reviews what guns mean, specifically openly carried guns, to both those who bear them and those exposed to them.

The issue of gun control has become more than just a political dispute. For many it has become a matter integrally related to their identity. Identity politics helps to explain why the gun debate is so heated. Identity politics is "political activism by identity groups." Identity groups" may be made up of people who share similar anatomical attributes, or people who share

54 Id. at 721 (Breyer, J., dissenting).
55 See Levinson, supra note 13, at 643.
similar ideologies. More simply stated, identity politics is a term that can be used to describe “[w]hen women vote for female candidates because of their sex or when African Americans vote for an African American candidate because of their race.”

Identity groups who appear particularly vulnerable and sympathetic are more likely to gain public support, and public support is likely to effectuate legal change. Professor Dorf of Columbia University School of Law argues,

Although courts may speak the language of original understanding and subsequent translation when justifying their decisions, the driving force of doctrinal change is rarely the discovery of some previously unknown scrap of paper from Madison’s notes or a state ratifying convention. Nor do courts simply decide in response to a lawyer's argument that some changed circumstance demands a changed understanding of the Constitution's original meaning. Courts adjust doctrine largely in response to social and political movements.

In the 1960s, civil rights activists successfully argued that Jim Crow was a system of institutionalized white supremacy. More recently, the Supreme Court of the United States held that the denial of marriage licenses to same-sex couples violated the Due Process and Equal Protection clauses of the Fourteenth Amendment of the Constitution. Hence, social and political movements stimulate judicial action.

Dorf caricatures the identity politics movement for the individual right to bear arms as “angry white men . . . that [are], very broadly speaking, anti-abortion, anti-affirmative action, anti-gay marriage, anti-tax, and pro-gun.” Dorf believes that proponents of an individual right to bear arms are

57 See id.
58 See id. at 751.
60 Id. at 551; see Civil Rights Act of 1964, 2 U.S.C.A. § 1311 (Westlaw through Pub. L. No. 114-219).
62 See Dorf, supra note 59, at 572.
63 Id at 552.
“disproportionately white, male, and rural.” Dorf’s view is shared by many on the left but is not without criticism.

Professor Massey of University of California, Hastings College of Law responds to Dorf’s caricature of the gun rights movement by examining the composition of gun owners in the United States. As a whole, the gun rights supporters do not see themselves as extremist, fringe, racist, or any of the other stereotypes that are often applied to them. Rather, they see themselves as responsible citizens exercising their constitutional rights. While the precise statistics Massey cites may be disputed, his general point stands—it is incorrect to assume that all gun rights advocates fit one simple stereotype. Ultimately, it is up to the competing political groups to make their case because, as Massey concedes, Dorf may be right that identity politics drive the development of some constitutional rights.

There is a sense among gun control supporters that “the American far right—from elements of the Tea Party to bigoted bloggers to conspiracy theorists—is working itself into an absolute frothy uproar at even the possibility that it may become more difficult to purchase a military-style assault rifle or a magazine that carries dozens of bullets.” This sense is buttressed by reports of armed fringe or extremist groups

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64 Id.
65 See infra notes 74–75, 78–79.
66 See Massey, supra note 21, at 575–576 (“While it may be a literal truth that gun owners are disproportionately white, male, rural, Republicans living in the South, West, or Midwest, it is a truth that obscures the large numbers of gun owners who are none of those things: racial minorities, women, Easterners, Democrats or Independents, and urban dwellers.”).
69 See Massey, supra note 21, at 576.
70 See Massey, supra note 21, at 588.
intimidating unarmed groups or blatantly breaking the law.\textsuperscript{72} The media reports armed biker gangs in Arizona who "intentionally antagonize Muslims" outside of their place of worship,\textsuperscript{73} armed militias in Oregon seizing a federal wildlife refuge,\textsuperscript{74} and counter-demonstrators armed with loaded "AR-15 semi-automatic weapons in full view" protesting a gun safety rally.\textsuperscript{75}

The Coalition to Stop Gun Violence voices a sentiment that many gun control advocates share, "[o]ur politicians, intimidated by the political power of the National Rifle Association (NRA), have refused to act in the wake of tragedy after tragedy."\textsuperscript{76} Despite a year plagued with mass shootings, and even criticism that the NRA was somehow complicit in these shootings, 58% of Americans said they had an overall favorable impression of the NRA.\textsuperscript{77} In turn, advocates of an individual right to bear arms have begun to pursue alternative strategies to expand the debate on gun control including arguing that the First Amendment protects their right to symbolically display guns in various contexts.

\section*{A. What Guns Mean to Those Who Bear Them}

\textsuperscript{72} See Mark Follman, \textit{Spitting, Stalking, Rape Threats: How Gun Extremists Target Women}, \textit{Mother Jones} (May 15, 2014, 6:00 AM), http://www.motherjones.com/politics/2014/05/guns-bullying-open-carry-women-moms-texas.


\textsuperscript{76} See \textbf{The Coalition to Stop Gun Violence}, http://csgv.org/about-us/ (last visited Mar. 28, 2016); \textit{see also Moms Demand Action For Gun Sense in America}, http://momsdemandaction.org/about/ (last visited Mar. 28, 2016) ("For too long, those who stand to profit from easy access to guns have controlled the conversation about gun violence.") (hereinafter "\textbf{Moms Demand Action}").

Given the number \(^{78}\) and diversity of gun owners, there is not a single answer as to why some advocate so forcefully for their firearms, but there are some common themes. Sixty percent of Americans say that personal safety or protection is one reason why they own guns. \(^{79}\) Other top reasons include hunting, “recreation/sport,” and target shooting. \(^{80}\) Perhaps surprisingly, only five percent of those polled listed their “Second Amendment right” as a reason why they own a gun. \(^{81}\) Certainly these numbers do not seem to explain why Wayne LaPierre, Chief Executive of the NRA, would describe the gun control debate as a “once-in-a-generation fight for everything we care about.” \(^{82}\) Critics suggest that gun manufacturers use fear of any form of gun regulation as marketing tool \(^{83}\) for a multi-billion dollar industry. \(^{84}\)

Regardless of why some gun owners have such strong convictions, the conflict between gun rights activists and gun control supporters comes to a head when gun owners openly carry their weapons in public spaces. Given the political backdrop and rhetoric surrounding the gun control issue, in practice, openly bearing guns can have a very different meaning to those who are carrying the guns and any audience exposed to those guns. Many open carry advocates have argued that the symbolic action of openly carrying a gun in a public space is


\(^{80}\) Id.

\(^{81}\) Id.


\(^{83}\) See Bernd Debusmann, Guns in America: the Business of Fear, REUTERS (July 30, 2012), http://blogs.reuters.com/bernddebusmann/2012/07/30/guns-in-america-the-business-of-fear/ (“Gun lovers taking their cue from the NRA fear that any kind of regulation – restrictions on the sale of magazines holding 100 rounds, for example – is a step on the road to the elimination of the U.S. constitution’s Second Amendment . . . .”)

protected as free speech under the First Amendment.\textsuperscript{85} For them, a gun is not a so much a weapon as it is an educational tool.\textsuperscript{86}

Individual open-carry advocates routinely argue that the purpose of carrying a gun for the public to see is, at least in part, motivated by a desire to educate.\textsuperscript{87} This purpose is even clearer in the context of a demonstration or rally. In 2010, one such rally took place simultaneously in Alexandria, Virginia and across the Potomac River in Washington D.C.\textsuperscript{88} The Second Amendment March was formed for the purpose of organizing a nationwide gathering of pro-Second Amendment supporters to stage public rallies.\textsuperscript{89} Protesters carried signs reading, “Guns save lives” and, "Which part of 'shall not be infringed' confuses you?" \textsuperscript{90} In compliance with the strict gun laws in Washington D.C., protesters remained unarmed but in Alexandria, protesters were allowed to carry holstered handguns and sling unloaded rifles over their shoulders.\textsuperscript{91}

“The shot heard ‘round New York,” was fired to protest gun control legislation passed in New York State.\textsuperscript{92} Unlike the Second Amendment March, this protest took place far from large crowds or counter protesters and was composed of about fifty people, standing in the pouring rain.\textsuperscript{93} The goal of the protest was to create a symbolic gesture reminiscent of the “Shot Heard Round the World” that was the start of the Revolutionary War

\textsuperscript{85} Blanchfield, supra note 10 (“According to open carry advocates, their presence in public space represents more than just an expression of their Second Amendment rights, it's a statement, an 'educational,' communicative act — in short, an exercise of their First Amendment freedom of speech.”).

\textsuperscript{86} See id.

\textsuperscript{87} The Elephant in the Room, OPEN CARRY TEXAS, https://opencarrytexas.wordpress.com/2013/09/15/the-elephant-in-the-room/ (last visited Apr. 1, 2016, 2:04 PM) (“We've just proven the only thing we 'knowingly' and 'intentionally' do is educate.”).


\textsuperscript{90} See Wing, supra note 88.

\textsuperscript{91} Id.


\textsuperscript{93} Id.
in Concord, Massachusetts. The Second Amendment advocates argued, “[m]ost people who buy guns are responsible sportsmen, not criminals.” They are opposed to what they see as the “progressive liberal agenda” that does not “like guns” and passes “laws without talking to people who use them appropriately.” There are a variety of non-threatening ways that responsible gun owners use their guns, so responsible gun owners may be surprised when people exposed to their guns are alarmed.

B. What Guns Mean to Those Exposed to Them

Gun owners openly displaying their weapons in a public space intimidate unarmed civilian audiences in a way that they may not intend and of which they might not be aware. The AR-15 semi-automatic rifles displayed by counter protesters in Indiana were loaded because, after all, “[a]ny weapon that is not loaded is just a rock or a club.” One armed protester at the rally in Indiana said the purpose of walking around with his gun was as “a demonstration because a lot of people believe this is some kind of vicious item.” In response to the claim that a gun is just a tool for self-protection, one unarmed onlooker from Moms Demand Action responded that her self-protection was the right to be free “from people like you carrying loaded guns on the street.” Another member of Moms Demand Action reported being “unsettled” by the presence of armed counter protesters and would “have to think twice before holding another event, particularly one where children could be present.”

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94 Id.
95 Id.
96 Id.
97 Id.
99 Moms Demand Action for Gun Sense in America was created to demand action from legislators, state and federal; companies; and educational institutions to establish common-sense gun reforms. See MOMS DEMAND ACTION, supra note 76.
100 See Galer, supra note 98.
possibility that an armed protester might escalate from words to violence without warning.\footnote{102 See e.g., Tessa Berenson, Protesters at Donald Trump Rallies Face Increasing Violence, \textit{TIME} (Oct. 28, 2015), http://time.com/4090437/donald-trump-violence-protests-republican-debate/.}

On the other hand, some armed protesters are fully aware of the intimidating effect their guns convey. In Arizona, a group of bikers staged a “Freedom of Speech Rally” outside of a mosque where they urged their followers to bring guns in response to the deadly attack on the “Draw Muhammad” cartoon contest in Garland, Texas.\footnote{103 See Bridge Initiative Team, \textit{supra} note 73. See also, Kevin Conlon & Kristina Sgueglia, Two Shot Dead After They Open Fire At Mohammed Cartoon Event in Texas, CNN (May 4, 2015), http://www.cnn.com/2015/05/03/us/mohammed-drawing-contest-shooting/.}

The organizer of the rally called on the group to “to utilize there [sic] second amendment right at this event just in case our first amendment comes under the much anticipated attack.”\footnote{104 See Bridge Initiative Team, \textit{supra} note 73.}

Police separated the two sides as demonstrators yelled and taunted each other.\footnote{105 See id.}

The anti-Muslim demonstrators were mostly armed and wore profanity-laced shirts denouncing Islam.\footnote{106 See id.}

While no shots were fired at this demonstration, the possibility of violence increases when large numbers of armed protesters pack an ideologically-charged arena.\footnote{107 See Bridge Initiative Team, \textit{supra} note 73.
108 See Wing, \textit{supra} note 88.

Former Alabama Minutemen leader, Mike Vanderboegh, told one crowd “[i]f I know I’m not going to get a fair trial in federal court . . . I at least have the right to an unfair gunfight.”\footnote{109 See id.}

Many messages may be communicated to an unarmed audience by a gun-toting protester, but one message is certain: the gun carrier is prepared to kill someone.\footnote{108 See id.}

Openly displayed guns only harm freedom of speech when the audience is intimidated. Therefore, the only justification for regulating guns that are used in a way that should
be protected by the First Amendment is to do so when an audience is reasonably intimidated. By way of illustration, the United States government faces no reasonable threat from armed individuals engaging in protests. The “Shot Heard ‘Round New York”\textsuperscript{110} posed no threat to the security of the New York state government.

In 2014, the U.S. Bureau of Land Management sent agents to Cliven Bundy’s ranch in Nevada to round up his cattle because he had refused to secure the necessary permits or pay required fees.\textsuperscript{111} Anti-government groups and other supporters gathered in the hundreds to blockade a federal interstate—many wearing tactical gear and training their weapons on federal agents.\textsuperscript{112} The federal agents backed down, “citing safety concerns and returned the cattle they had seized.”\textsuperscript{113} Unlike in 2014, the FBI and Oregon State police did not back down in arresting Cliven Bundy’s son Ammon Bundy for seizing a federal wildlife refuge in Oregon in 2016.\textsuperscript{114} During the arrest, one member of Bundy’s group “Citizens for Constitutional Freedom” was killed and another was injured.\textsuperscript{115} The United States government possesses sufficient military and police forces, as well as other remedies, to negate any threat of intimidation.

Guns mean different things to different people. Gun owners may see themselves as responsible citizens exercising a fundamental right and teaching fellow citizens about that right, while at the very same time a counter-protester may see someone who has the power to kill when a situation becomes too heated. But does the First Amendment protect openly displaying guns as a form of symbolic speech?

\textbf{PART III: GUNS AND THE FIRST AMENDMENT}

\textit{A. Are Guns Speech?}

\begin{footnotesize}
\textsuperscript{110} Hirsch, \textit{supra} note 92.
\textsuperscript{111} Reuters, \textit{Nevada Rancher Cliven Bundy Indicted For 2014 Standoff}, \textit{HUFF. POST} (Feb. 18, 2016), http://www.huffingtonpost.com/entry/cliven-bundy-indicted_us_56c5605ae4b0c3e550553ceee.
\textsuperscript{112} Blanchfield, \textit{supra} note 10.
\textsuperscript{113} See Reuters, \textit{supra} note 112.
\textsuperscript{114} See Turkewitz & Johnson, \textit{supra} note 74.
\textsuperscript{115} Id.
\end{footnotesize}
Simply put, no, guns are not speech. Burning a flag may be speech, but the flag itself is not speech but a symbol; a gun by itself is only a symbol. In other words, “[s]omeone has to do something with the symbol before it can become speech.” Whether or not an action constitutes speech for First Amendment purposes is the primary, and most crucial, question of the analysis. It is also the question in which most claims for First Amendment protection for openly carrying firearms as a form of speech will fail. That being said, some conduct involving guns may constitute speech for First Amendment purposes subject to some limitations.

The First Amendment protects speech, but it may also protect conduct, if that conduct is “sufficiently imbued with elements of communication.” Expressive conduct, or symbolic speech, is not without limit. 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.’” In order for expressive conduct to qualify as speech for First Amendment purposes, “the court must determine that (1) there was intent to convey a particularized message at the time of the conduct; and (2) there was a great likelihood that ‘the message would be understood by those who viewed it.’” Additionally, the “context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol.” Finally, the court may look to other factors such as the long-
recognized “communicative connotations” of actions or objects, such as flags.

Free-speech litigation often arises when gun carriers legally display their firearms in open carry states but nevertheless are detained or arrested. In *Deffert v. Moe*, the plaintiff was legally and openly carrying a FNP-45 tactical pistol in a leg holster, with a TLR-2 rail-mounted tactical and laser sight, while walking down a public sidewalk. A person spotted the plaintiff who at the time was wearing camouflage pants, and singing to himself “Hakuna Matata,” a song from the movie, *The Lion King*. The concerned citizen who spotted the plaintiff called the police because “it just seemed alarming” to see the plaintiff wearing camouflage and openly carrying a pistol and the caller did not know if it was legal to carry a gun. The plaintiff alleges that he was also wearing a shirt with the slogan “It’s not the Tool, it’s the Fool” to show his opposition to gun control measures, although it was cold and the shirt was concealed by his jacket. The Court in *Deffert* was rightfully skeptical that the plaintiff intended to “carry his [gun] in his leg holster to increase awareness on the topic of gun control.”

Similarly, in *Chesney v. City of Jackson*, the plaintiff was arrested after openly carrying a pistol while trying to obtain a new title for one of his motorcycles from the Michigan Secretary of State office. The plaintiff argued unsuccessfully that he openly carried “in order to promote awareness of and educate others, including law enforcement, on the legality of open carry.” The court noted in its decision that the plaintiff, in his deposition testimony, failed to state that his purpose in traveling

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124 Id.
125 See *e.g.*, *Stromberg v. California*, 283 U.S. 359 (1931); *Board of Education v. Barnette*, 319 U.S. 624, 632 (1943).
127 The TLR-2 rail-mounted tactical and laser sight is a combination flashlight, and red aiming laser that can be attached to firearms.
128 *Deffert*, 111 F. Supp. 3d at 814.
129 Id. at 803.
130 Id. at 802.
131 Id. at 814.
132 Id.
134 Id. at 610.
135 Id. at 617.
to the Secretary of State office was to educate on the legality of open carry, and that he routinely carried his gun whenever he could, suggesting there was nothing especially noteworthy about openly carrying his gun at the Secretary of State’s office. The argument that simply exercising the right to openly carry guns is a form of communication falls flat. Unlike flags, courts have not recognized guns as having longstanding communicative connotations.

Courts consistently and rightfully reject the claim that simply carrying a gun is a protected form of speech.

Even when the open-carrier’s purpose is to educate the public on the legality of open-carry, courts often reject First Amendment claims based on the likelihood that those who viewed it would understand the message. The plaintiff in Burgess v. Wallingford was charged with disorderly conduct for openly carrying a gun at a pool hall even though he was wearing a shirt that quoted the Connecticut State Constitution regarding the right to bear arms and also had copies of a Connecticut Citizens Defense League brochure stating the group’s position. The court noted that despite the fact that the 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,” and some may interpret “his weapon as a particularized message regarding the Second Amendment” it was also reasonable to believe that the plaintiff was simply carrying a weapon for self-protection.

In Nordyke, the Ninth Circuit suggested in dicta that “a gun protestor burning a gun may be engaged in expressive conduct. So might a gun supporter waving a gun at an anti-gun

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136 *Id.*

137 See Nordyke v. King, 319 F.3d 1185, 1190 (9th Cir. 2003).


142 *Id.* at *28.
control rally.” Courts should be receptive to the idea that a gun openly carried in the context of a political rally supporting the Second Amendment constitutes a form of symbolic speech. In many cases, guns carried in these events really can be used to make a statement, for “educational” purposes. In the context of rallies, some groups such as Open Carry Texas assert that another reason for openly carrying weapons is to “condition Texans to feel safe around law-abiding citizens that choose to carry them.” Certainly the “Shot Heard ‘Round New York” was intended to convey a particular message at the time of the conduct and there was a great likelihood that those who viewed it would understand the message. The message was certainly louder by utilizing guns to amplify the message, and it is unlikely that the media would bother reporting that story if guns were conspicuously absent.

If the plaintiff in Deffert had more clearly stated ahead of time his purpose of educating the public, perhaps by advertising an event on a website, the court may have been more receptive to his First Amendment claim. After all, the Plaintiff was the cause of an impromptu educational conversation between the concerned citizen and emergency dispatch in which the dispatcher explained to the caller that open carry is legal in Michigan, precisely the goal the plaintiff claimed to have in mind. Similarly, the plaintiff’s unsuccessful claim in Burgess prompted a discussion between police officers on “whether Connecticut state law permitted the unconcealed carry of a firearm and whether someone could be arrested for disturbing others by unconcealed carry of a firearm.” Activists hoping to use guns as symbols may have more success convincing courts

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143 Nordyke, 319 F.3d at 1190.
145 Hirsch, supra note 92.
147 Id. at 802.
148 Id. at 813–14.
of their intention if they do so while demonstrating at a traditional march or rally.

It is important to look closely at both the message of demonstrators openly displaying guns at rallies and how observers will understand that message. For example, courts should be skeptical that the armed bikers staging a “Freedom of Speech Rally” outside of a mosque in Arizona intended to communicate a particularized message with their guns that viewers would understand. Comments on the organizer of the rally’s Facebook page indicated protesters should bring guns for the purpose of self-defense—there is no mention of any communicative purpose.151

The First Amendment does not protect the right of a person to say something when it constitutes a “true threat.”152 “True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” 153 Courts and commentators have struggled with the level of intent necessary to constitute a true threat.154 As Professor David Hudson of Vanderbilt Law School asks,

[M]ust a speaker subjectively intend to intimidate or threaten others? Or is it sufficient if the speaker makes a comment that a recipient reasonably believes is a threat? Should true threats be interpreted under a “reasonable speaker” or “reasonable recipient” standard? Is there a difference between a true threat and intimidation or is intimidation a special subset of the more general category of true threats?155

Hudson concludes by asking whether intimidation becomes a “synonym for, or subset of, true threats” and when speech

150 See Bridge Initiative Team, supra note 73.
151 See id.
153 Id.
155 Id.
crosses the line from “protected speech into unprotected threats or intimidation.”

It appears likely that the armed protesters outside of the mosque in Arizona were at least in part attempting to convey a threat to their targets based on their intentionally provocative rhetoric and the large number of guns carried by protesters. Regardless of the true intent of each individual armed protester, given the apparent circumstances in Arizona, a reasonable audience member could certainly feel threatened.

Guns cannot convey speech without an action by an individual, but any time an individual openly displays a gun, intentional or not, the message is clear: that individual now has the power to kill. The harm of restricting the free speech of armed protesters must be weighed against the harm of audiences exposed to the immediate possibility of being killed.

B. Can the government regulate symbolic displays of guns?

Governments may reduce the danger to the public from armed demonstrations subject to the limitations of the First Amendment. When a court determines that conduct is sufficiently expressive to receive First Amendment protection, the next step is to determine whether the government has the power to regulate that conduct. If the regulation in question is related to the suppression of free expression then a court must apply strict scrutiny. If the government regulation only incidentally limits First Amendment freedoms then the four-part O'Brien test is applied:

If [the regulation] is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

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156 Id.
157 See Bridge Initiative Team, supra note 73.
160 O'Brien, 391 U.S. at 377. The O'Brien test for non-communicative conduct is less stringent than First Amendment strict scrutiny. Johnson, 491 U.S. at 403.
The government has an important and substantial interest in promoting public safety. Public demonstrations have the potential to quickly escalate to violence without proper policing. While gun rights activists may dispute the efficacy of the government restricting guns or creating a “gun-free zone” at public rallies and demonstrations, determining the most effective way to promote public safety is a political decision best left to the expertise of legislators or government agencies.

If the government decides to regulate guns that are being used as a form of symbolic speech, the regulation that the government chooses must be unrelated to the suppression of free expression. Furthermore, the incidental restriction on First Amendment freedoms must be “no greater than is essential.” Police have asked armed protesters to take steps like holstering and unloading their guns, or even sticking tiny American flags into the barrel of their guns. The line separating a limitation that is overly burdensome from an acceptable one is thin. Furthermore, token steps to circumvent otherwise valid laws will not be successful. A facial attack on an ordinance prohibiting the presence of firearms at gun shows failed because “the presence of a handful of NRA Tribute Rifles at a show at which the vast majority of the prohibited guns bear no message whatsoever does not impugn the facial constitutionality of the Ordinance.” Further litigation is necessary to fully define the boundaries of the right of individuals to use guns as a form of symbolic speech.

C. Is the current state of the law adequate?

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164 Id.
165 Wing, supra note 88.
166 Blanchfield, supra note 10.
167 Nordyke v. King, 319 F.3d 1185, 1190 (9th Cir. 2003).
The First Amendment may protect the open display of guns as speech in certain situations, but more protection should be given to audiences exposed to intimidation by guns. In situations like the Freedom of Speech Rally at the mosque in Arizona, political minorities may have no recourse to make their voices heard over a majority that is willing to use guns for intimidation or threats. Governments may be forced to disperse demonstrations that are attended by armed counter-protesters to reduce the risk of gun violence and in effect a “heckler’s veto”\textsuperscript{168} will occur – only this time the hecklers will be armed. This runs counter to the spirit of the First Amendment, which protects the “freedom of speech” and the “right of the people to peaceably assemble,”\textsuperscript{169} presumably without fear of being shot.

The true threat doctrine is not developed enough in its present state for lower courts to apply it consistently and fairly. As it stands, the public’s, and more importantly, law enforcement’s understanding of what constitutes a true threat is too hard to meet. The average unarmed protester will not be comforted by some of the meager steps\textsuperscript{170} police have asked armed protesters to take to limit the risk of intimidation, while simultaneously avoid infringing the First Amendment’s protection of expressive activity. When unarmed audiences are aware that guns are easily accessible, it is reasonable for them to experience harmful intimidation even if that intimidation does not rise to a level that is currently unprotected by the First Amendment.

CONCLUSION

Open-carry protesters may view themselves as responsible gun owners educating the public, or may be more insidiously attempting to threaten targets through a show of

\textsuperscript{168} Ken White, Lawsplainer: How the Sixth Circuit Stood Up to Hecklers (And Cops), POPEHAT (Nov. 5, 2015), https://popehat.com/2015/11/05/lawsplainer-how-the-sixth-circuit-stood-up-to-hecklers-and-cops/ (“Heckler's veto' is a term used to describe situations where authorities limit or punish speech because of angry, threatening, or violent responses to the speech.”).

\textsuperscript{169} U.S. CONST. amend. I.

\textsuperscript{170} Demanding protesters keep “guns... unloaded... or... otherwise hav[e] the barrel or action blocked” is insufficient when it would only take moments to make the gun fully operational. Blanchfield, supra note 10.
force. Either way, the perspective of the audience should be the focus of the analysis by lawmakers and courts alike. In the context of demonstrations involving armed protesters, the true threat doctrine should be clarified to hold that the First Amendment does not protect speech a reasonable audience would find intimidating. This test has the benefit of promoting political speech without the possibility of violence, as well as permitting demonstrations against the government without excessively limiting the rights of gun carriers. While it is certainly possible that in the future armed political party conventions will be the norm, until reasonable audiences are not intimidated by the possibility of violence, guns and “free speech” are largely incompatible.