CONFLICTING REPORTS: WHEN GUN RIGHTS THREATEN FREE SPEECH

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I

INTRODUCTION

The emergence of a judicially cognizable Second Amendment right of individuals to keep and bear arms in *District of Columbia v. Heller*[1] and *McDonald v. Chicago*[2] has opened a new arena for collisions between constitutional interests. Gun rights advocates frequently argue that guns complement or even promote the expressive freedom protected by the First Amendment, mainly through the insurrectionist logic that the people need arms in order to resist the kind of tyrannical government that would suppress speech.[3] In the real world, however, guns far more commonly impede and chill free speech than protect or promote it. The Supreme Court's declaration that the Second Amendment "surely elevates *above all other interests* the right of law-abiding, responsible citizens to use arms in defense of hearth and home"[4] heightens the urgency of assessing collisions between interests grounded in the First and Second Amendments.

This Article catalogs and analyzes collisions between free speech and gun rights. The most important and hotly debated of those collisions is the clash between the First Amendment rights to assemble and speak in public political protests and the asserted Second Amendment right to carry firearms openly in public places. Beyond protests, public university students' First Amendment rights to speak and learn clash with the asserted Second Amendment right to carry concealed weapons on university campuses; First Amendment interests in robust political deliberation clash with Second Amendment interests in promoting and securing the right to keep and bear arms; and First Amendment interests in disclosures of information clash with privacy interests grounded in the Second Amendment. In addition, debates about how to address rampant gun violence

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1. 554 U.S. 570 (2008).

2. 561 U.S. 742 (2010).

3. For a thorough treatment of the anti-tyranny argument for the Second Amendment, see DAVID C. WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC (2003).

4. *Heller*, 554 U.S. at 635 (emphasis added).

have led Second Amendment advocates to urge restricting the expressive content of entertainment media as a way of avoiding gun regulations.

Collisions of First and Second Amendment *interests* need not present legally cognizable collisions of First and Second Amendment *rights*. Courts have been actively engaging with First Amendment claims for a century. While First Amendment law still presents deep and profound controversies, we have a fairly solid legal understanding of what the First Amendment protects. The Second Amendment, in contrast, has attracted serious judicial attention for just over a decade. We have only a nascent, hazy sense of what sorts of regulations the Court might strike down as violating the Second Amendment. Whether or not judicially cognizable First and Second Amendment rights collide, we should care about the ways in which gun rights interests undermine free speech interests. Our opportunities to speak, to assemble, to protest, to learn, and to advocate form the spine of our democratic culture.

Part II of this Article catalogs types of First and Second Amendment collisions and considers how present legal doctrine might lead courts or legislatures to assess and resolve those collisions. The frequency and variety of collisions between First and Second Amendment interests show that these superficially similar constitutional protections actually promote sharply divergent, often incompatible values. Part III steps back from the details to consider broad normative tensions in speech-arms collisions: tensions between individual autonomy and communal engagement and between political and social stability and dynamism.

II

COLLISIONS BETWEEN FIRST AND SECOND AMENDMENT INTERESTS

Free speech and gun rights might appear capable of harmonious coexistence. Both promote liberty. Free speech theory entails a sharp distinction between speech and action, and the keeping and bearing of arms is action. Thus, speech and guns occupy different lanes that we might think would not cross. However, the dozen years since the Supreme Court recognized an individual right to keep and bear arms have brought multiple collisions between free speech and gun rights. Taken together, these collisions reveal a deep tension between First and Second Amendment interests.

A. Public Carry vs. Public Discourse

1. The Charlottesville Problem: Open Carry vs. Public Protest

On August 11 and 12, 2017, Charlottesville, Virginia played reluctant host to the deadly "Unite the Right" rally.[5] The rally brought conservative activists from

5. This account draws on an independent review that the Virginia law firm Hunton & Williams performed for the City of Charlottesville after the "Unite the Right" rally. *See* HUNTON & WILLIAMS, FINAL REPORT: INDEPENDENT REVIEW OF THE 2017 PROTEST EVENTS IN CHARLOTTESVILLE, VIRGINIA 4–7 (Nov. 24, 2017).

around the country, including Nazis and other white supremacists, to protest Charlottesville's decision to remove a prominent statue of Confederate general Robert E. Lee from a public park.[6] News of the rally inspired a forceful left-wing counter-protest.[7] Numerous violent incidents unfolded over the two-day event, culminating in the murder of counter-protester Heather Heyer when an Ohio conservative activist plowed his car into a crowd.[8]

Virginia allows the open carrying of firearms without any permit and imposes few restrictions on assault weapons.[9] Numerous participants in the Unite the Right rally, both right-wing protesters and militia members who claimed to want to help keep the peace, openly displayed rifles and handguns during the weekend's tense and often violent events.[10] An independent review commissioned by the City of Charlottesville strongly criticized the Virginia State Police and the Charlottesville police department for deficient planning and preparation and for abjectly failing to protect public safety during clashes between right-wing activists and counter-protestors.[11] After the rally, Virginia Governor Terry McAuliffe defended police inaction, stating: "You saw the militia walking down the street, you would have thought they were an army[.] . . . [They] had better equipment than our State Police had[.] It's easy to criticize, but I can tell you this, 80% of the people here had semiautomatic weapons."[12]

The First Amendment interest in public protest and the Second Amendment interest in openly carrying firearms have collided in numerous other settings.[13] Thirty-six states permit guns at public protests, and nine others presumptively allow guns at protests while leaving municipalities some discretion.[14] Armed militia members at the Charlottesville rally claimed that they displayed weapons to protect all parties' ability to speak without fear of violent retribution.[15] That claim

6. *See id.* at 1, 4 (noting that neo-Nazi Jason Kessler opposed Charlottesville's efforts to remove the Robert E. Lee statue and organized the August 11 and 12 protests).

7. *Id.* at 4.

8. *Id.* at 4–7.

9. *See* Va. Code Ann. § 18.2-287.4 (2016).

10. HUNTON & WILLIAMS, *supra* note 5, at 70, 123.

11. *See id.* at 153–66.

12. Harrison Jacobs, *VA Governor Defends Charlottesville Response: Militia Members Had "Better" Guns Than Police*, BUS. INSIDER (Aug. 13, 2017), https://www.businessinsider.com/virginia-gov-mcauliffe-defends-charlottesville-police-better-semiautomatic-guns-white-nationalists-2017-8 [https://perma.cc/6L54-3B5S].

13. Accounts of prominent armed protests prior to Charlottesville appear in Katlyn E. DeBoer, *Clash of the First and Second Amendments: Proposed Regulation of Armed Protests*, 45 HASTINGS CONST. L.Q. 333, 337 (2018), and Daniel Horwitz, Note, *Open-Carry: Open-Conversation or Open-Threat?*, 15 FIRST AM. L. REV. 96, at 105–06 (2017).

14. Alex Yablon, *The 36 States Where Local Officials Can't Ban Guns at Protests*, TRACE (Sep. 11, 2017), https://www.thetrace.org/2017/09/35-states-local-officials-cant-ban-guns-protests [https://perma.cc/C2QJ-H5UZ].

15. *See* Paul Duggan, *Militiamen Came to Charlottesville as Neutral First Amendment Protectors, Commander Says*, WASH. POST (Aug. 13, 2017), https://www.washingtonpost.com/local/trafficand/commuting/militiamen-came-to-charlottesville-as-neutral-first-amendment-protectors-commander-says/2017/08/13/d3928794-8055-11e7-ab27-1a21a8e006ab_story.html [https://perma.cc/52E2-PCEK].

tracks gun rights advocates' argument that minority factions can effectively use open carry to protect themselves against hostile majorities.[16] Critics respond that right-wing activists' and militia members' display of firearms in Charlottesville chilled left-wing counter-protesters' speech and, more broadly, that public display of firearms inevitably chills the speech of unarmed people who would like to challenge the arms-bearers' political message.[17] Even if some armed protestors have benign intentions, unarmed protesters and law enforcement have no way to distinguish those self-appointed watchmen from bad actors who wield guns to intimidate opponents.[18] Based on this concern about chilling speech, the American Civil Liberties Union announced after Charlottesville that it would no longer defend the right to bear arms in public protests.[19]

Both sides in the debate over armed protests might present speech interests. The open carrying of a firearm arguably serves, at least in some contexts, not just the Second Amendment interest in self-defense but also the First Amendment interest in expressing an idea. Commentators differ about whether open carry has meaningful expressive content.[20] In most contexts, open carry is action, not speech. Every action has some expressive content—when I walk down the street, I convey the message that I'm walking down the street—but First Amendment law depends on a speech-conduct distinction that excludes most instances of open carry from First Amendment protection.[21] To the extent open carry conveys a message of intimidation, that message would constitute a "true threat" ineligible for First Amendment protection.[22] The strongest case for a First Amendment interest in open carry arises when gun rights activists display their weapons in political demonstrations in support of open carry itself.[23] Even in that setting, however, many government restrictions could presumably satisfy the First

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

17. *See* 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 [https://perma.cc/WWJ6-RVL3].

18. Eugene Volokh, however, has insisted that "the legal system has had, and should have, little difficulty distinguishing individual citizens' permissible legal possession for self-defense from mob action aimed at attacking or terrorizing." Volokh, *supra* note 16, at 103.

19. *See* Joe Palazzolo, *ACLU Will No Longer Defend Hate Groups Protesting With Firearms*, WALL ST. J. (Aug. 17, 2017), https://www.wsj.com/articles/aclu-changes-policy-on-defending-hate-groups-protesting-with-firearms-1503010167 [https://perma.cc/8GEB-7G3C].

20. *Compare* David M. Shapiro, *Guns, Speech, Charlottesville: The Semiotics of Semiautomatics*, 106 GEO. L.J. ONLINE 1, 2 (2017) ("Because of their semiotic content, the firearms displayed in Charlottesville . . . constitute speech within the meaning of the First Amendment."), *with* DeBoer, *supra* note 13, at 341–48 (contending that the open display of firearms generally lacks expressive content).

21. *See* Gregory P. Magarian, *Political and Nonpolitical Speech and Guns*, 28 WM. & MARY BILL RTS. J. 429, 441–43 (2020) (explaining and analyzing the First Amendment speech-conduct distinction).

22. *See* Virginia v. Black, 538 U.S. 343, 359–60 (2003) (explaining the "true threats" exemption from First Amendment protection).

23. *See* TIMOTHY ZICK, THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS 220 (2018); DeBoer, *supra* note 13, at 346–47.

Amendment's allowance for content-neutral regulations of expressive conduct.[24] Courts generally have rejected claims that open carry expresses a coherent message, finding that carrying a firearm is conduct outside the First Amendment's protection.[25] I proceed on the premise that any constitutional grounding for the interest in openly carrying a gun at a political protest lies in the Second Amendment. The question is whether, and to what extent, First Amendment concerns about the chilling of speech can justify legal restrictions on open carry.

The Supreme Court's decisions in *Heller* and *McDonald* do not settle whether the Second Amendment protects open carry, although *Heller* validates the historical pedigree of *concealed* carry bans.[26] Gun rights advocates promote open carry through a familiar libertarian argument: We should get to carry guns for self-defense wherever we go.[27] They sometimes also advance a communitarian argument: The presence, and proliferation, of guns will keep public spaces safe as "good guys with guns" protect everyone's capacity to speak freely.[28] That argument, however, has little theoretical or empirical foundation. On the First Amendment side, the argument that open carry chills speech starts out as an individual autonomy argument about the right to speak without fear. The free speech argument has a broader societal corollary: Open carry, by chilling speech, deprives the public of valuable information from the chilled speakers.[29] Thus, the problem of open carry and public protest mainly pits a gun rights autonomy argument against a communal free speech argument. We will see this pattern recur in other speech-arms collisions.

The argument that guns chill speech at public protests presents two potential difficulties. First, the extent to which open carry intimidates speakers is an empirical question for which we lack data.[30] However, First Amendment law has

24. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (articulating the First Amendment test for regulations of expressive conduct).

25. *See* Kendall Burchard, Note, *Your 'Little Friend' Doesn't Say 'Hello': Putting the First Amendment Before the Second in Public Protests*, 104 VA. L. REV. ONLINE 30, 33–34 (2018) (compiling court decisions about the expressive content of carrying firearms). The Second Circuit used similar reasoning to reject an argument that a municipal ban on transporting a firearm outside the city violated gun owners' First Amendment right of expressive association by limiting their capacity to join gun clubs outside the city. *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45, 67–68 (2d Cir. 2018), *vacated as moot*, 140 S. Ct. 1525 (2020) (per curiam).

26. *See* District of Columbia v. Heller, 554 U.S. 570, 626 (2008) (discussing historical cases and commentators' views on the right to concealed carry).

27. *See, e.g.*, Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1515 (2009) ("[S]elf-defense has to take place wherever the person happens to be. Nearly any prohibition on having arms for self-defense in a particular place . . . is a substantial burden on the right to bear arms for self-defense.").

28. Joseph Blocher and Darrell Miller call this the "marketplace of violence" argument for gun rights. *See* JOSEPH BLOCHER & DARRELL A. H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* 155 (2018).

29. "[T]he presence of a gun in public," writes Darrell Miller, "has the effect of chilling or distorting the essential channels of a democracy—public deliberation and interchange." Darrell A. H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1309–10 (2009) (footnote omitted).

30. ZICK, *supra* note 23, at 218–19.

long taken arguments about the chilling of speech seriously without data.[31] Moreover, the Charlottesville story highlights one concrete way that open carry chills speech: the intimidation of police. Police protection is a crucial (if often underappreciated) aspect of a meaningful right to expressive freedom.[32] Police presence at a contentious public protest can cool the threat of violence between and among factions, while police withdrawal puts the threat of private violence back in play, as Charlottesville illustrates.[33] Thus, even without empirical data, the argument that open carry chills speech deserves to be taken seriously. Second, any chill from open carry comes from private actors whose actions cannot form the basis for constitutional complaints.[34] However, the Court has invoked the First Amendment to limit government actions that enable private chilling.[35] Indeed, a finding that enactment of an open carry law encouraged private chilling of speech might form a basis for a constitutional claim.[36] In any event, the First Amendment interest in unencumbered public protest need not support an independent constitutional claim; it need only overcome Second Amendment objections to government regulation of guns at public protests.

How should we resolve the collision of speech and arms in public protests? The simplest solution would be a broad legal ban on open carry. A more targeted approach would zone open carry by banning guns specifically at public protests.[37] Such a ban would situate protests among the "sensitive places" where *Heller* permits restrictions on Second Amendment rights.[38] A narrower variation on zoning would give law enforcement discretion to contain armed protesters in specified zones within or adjacent to protests.[39] These targeted approaches have First

31. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002) (presuming without data that a federal ban on virtual child pornography chilled protected speech); Laird v. Tatum, 408 U.S. 1, 13 (1972) (accepting without data that an Army program to infiltrate public meetings chilled political dissent).

32. *See, e.g.*, Forsyth Cty. v. Nationalist Movement, 505 U.S. 123 (1992) (striking down on First Amendment grounds a local ordinance that let the city charge public demonstrators variable fees for law enforcement protection).

33. *See* Dahlia Lithwick & Mark J. Stern, *The Guns Won*, SLATE (Aug. 14, 2017), https://slate.com/news-and-politics/2017/08/the-first-and-second-amendments-clashed-in-charlottesville-the-guns-won.html [https://perma.cc/5227-EM2S] (explaining how the lack of police presence led to violence in Charlottesville).

34. ZICK, *supra* note 23, at 223 (explaining that any "alleged injury relates most directly to private decisions to openly carry firearms at public protests, and not to any unlawful act of government").

35. *See, e.g.*, Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 99 (1982) (citing instances of private harassment and intimidation to justify a First Amendment bar on government collection and disclosure of information about campaign contributions to a controversial political party).

36. *See* Reitman v. Mulkey, 387 U.S. 369, 378–79 (1967) (letting private actions support a Fourteenth Amendment claim after the state had amended its constitution to block municipalities from banning housing discrimination, explaining that the amendment "would involve the State in private racial discriminations to an unconstitutional degree").

37. *See* DeBoer, *supra* note 13, at 341.

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

39. *See* Shapiro, *supra* note 20, at 4–6 (explaining the concept, benefits, and downsides of open-carry zones).

Amendment parallels in arguments for according certain speech-promoting institutions special First Amendment status[40] and for allowing certain restrictions on speech in distinctive settings like elections.[41] However, engineering a special legal basis for regulating protests would create an unacceptable risk that governments might restrict not just guns at protests but also speech itself. The idea of a "protest" does not define a legal category, and protests are not subject to substantial government management. Rather, protests are a fluid, contestable, radically democratic phenomenon. The Supreme Court in recent years has shown public protesters scant concern and occasional disdain.[42] Meanwhile, the federal government and most states have recently enacted or considered various measures to strangle public protests.[43] Well-intended efforts to thread the speech-arms needle by specifically disarming protests might cause the unintended harm of legitimating schemes to suppress protests.

To avoid the First Amendment problems with singling out protests for special legal treatment, a zoning approach would need to be general rather than limited to protests. Law enforcement would need discretion to zone open carry based on public safety concerns in any setting, without regard to the content of the underlying speech or assembly. Like targeted protest zoning, generalized zoning of open carry would parallel the sort of "time, place, and manner" regulation that the First Amendment permits for speech on public property.[44] If the Supreme Court were to announce Second Amendment protection for public carry, open carry zoning would require a judicial backstop to ensure that particular instances of zoning did not violate gun rights. The generalized zoning approach would not be perfect from a free speech standpoint, because unarmed protesters' freedom from armed intimidation would depend on law enforcement's discretion. Even so, a generalized zoning approach would substantially ameliorate public guns' chilling effect on public speech.

2. State Universities: Concealed Carry vs. Public Education

Pro-gun state legislatures are increasingly using their powers over state universities to extend concealed-carry mandates to university campuses, including

40. *See generally* Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005) (discussing which institutions' speech should be protected in which ways).

41. *See* Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999) (evaluating the possibility of election-specific First Amendment principles).

42. *See* McCullen v. Coakley, 573 U.S. 464, 489 (2014) (distinguishing anti-abortion "counselors" from the less favored category of "protestors").

43. For a catalog of anti-protest legislation introduced in the United States since November 2016, including penalty enhancements for protests near energy pipelines, broadening of trespass offenses to sweep in protests, and shields from civil liability for police officers who kill so-called rioters, see *US Protest Law Tracker*, INT'L CTR. FOR NOT-FOR-PROFIT LAW, http://www.icnl.org/usprotestlawtracker [https://perma.cc/2DJG-MQKU].

44. *See, e.g.*, *McCullen*, 573 U.S. at 477.

classrooms.[45] As of August 2018, sixteen states had statutory bans on carrying concealed firearms on university campuses; twenty-three states gave universities discretion to decide whether to allow concealed firearms; and ten states mandated concealed carry on campuses, usually with limited exceptions.[46] Numerous states are presently considering legislation to create or extend campus carry mandates.[47] Five years ago, twenty-one states had statutory bans and twenty-two gave universities discretion to set campus carry policies.[48] In 2011, those numbers were twenty-nine ban states and nineteen discretion states, with Utah the sole mandatory carry state.[49] The trend toward mandatory campus carry has strong momentum.

The arguments for and against mandatory campus carry track those from the public protest setting. On the gun rights side, the argument that campus carry will deter "bad guys with guns" appears highly dubious. Accordingly, gun rights advocates emphasize individual autonomy: gun owners should be able to defend themselves on campuses just like anywhere else.[50] Free speech advocates counter that a concealed carry mandate will cause professors, students, and others on campus to self-censor for fear of sparking a violent response, thus chilling speech and undermining universities' core mission of promoting free, vigorous exchanges of ideas.[51]

Some free speech advocates frame their objection to mandatory campus carry as a defense of academic freedom.[52] Unfortunately, academic freedom is a highly contested and doctrinally underdeveloped concept.[53] If academic freedom belongs to public universities as institutions, then it arguably has no role in protecting against actions of their state governments, because state universities are generally subdivisions of the states that govern them.[54] In contrast, if academic

45. No court or commentator to date has posited a Second Amendment right to carry a firearm on state university campuses. *See* Shaundra K. Lewis, *Crossfire on Compulsory Campus Carry Laws: When the First and Second Amendments Collide*, 102 IOWA L. REV. 2109, 2135–37 (2017).

46. *Guns on Campus: Overview*, NAT'L CONFERENCE OF STATE LEGISLATURES (Aug. 14, 2018), http://www.ncsl.org/research/education/guns-on-campus-overview.aspx [https://perma.cc/6V5Q-58WC].

47. *See* Teri Lyn Hinds, *2018 State Legislation Governing Guns on Campus*, NAT'L ASS'N OF STUDENT PERS. ADMIN'RS (Feb. 22, 2018), https://www.naspa.org/blog/2018-state-legislation-governing-guns-on-campus [https://perma.cc/WF5E-23VA] (reporting on pending or proposed legislation to promote campus carry rights in nine states in 2018).

48. *See* Brandi H. LaBanc et al., *The Debate Over Campus-Based Gun Control Legislation*, 40 J.C. & U.L. 397, 402–03 (2014) (citing National Conference of State Legislatures data current as of 2014).

49. Lewis, *supra* note 45, at 2113.

50. *See, e.g.*, Erik Gilbert, *Campus Carry Is Not About Preventing Mass Shootings*, INSIDE HIGHER EDUC. (June 12, 2017), https://www.insidehighered.com/views/2017/06/12/campus-carry-about-right-individual-self-defense-not-preventing-mass-shootings [https://perma.cc/BC4G-QT9Y] (advocating the individual autonomy argument for campus carry over the deterrence argument).

51. *See* Lewis, *supra* note 45, at 2111–12.

52. *See, e.g.*, *id.* at 2117–29.

53. *See generally* Karen Petroski, *Lessons for Academic Freedom Law: The California Approach to University Autonomy and Accountability*, 32 J.C. & U.L. 149 (2005).

54. Two state high courts have held that universities lack authority under state laws to restrict firearms on public university campuses. *See* Regents of Univ. of Colo. v. Students for Concealed Carry on Campus, 271 P.3d 496 (Colo. 2012); Univ. of Utah v. Shurtleff, 144 P.3d 1109 (Utah 2006); *but see* Lewis,

freedom belongs to individuals within public universities, then it should protect those individuals from state suppression of their academic speech and learning. However, while the Supreme Court has recognized certain First Amendment protections for university faculty[55] and students,[56] the Court has never defined the full contours of academic freedom in public university settings. The free speech objection to campus carry seems best conceptualized as an ordinary First Amendment argument.

One federal court has categorically rejected any First Amendment concern with mandatory campus carry. In *Glass v. Paxton*, a group of professors challenged a Texas law, passed in 2015, that forced state university campuses to permit concealed carry.[57] The professors contended that concealed firearms in their classrooms would cause them to self-censor out of fear that a student with a concealed firearm would use the weapon to intimidate them or their students.[58] The Fifth Circuit threw the case out for lack of standing.[59] The court accused the professors of trying to "manufacture standing by self-censoring [their] speech based on what [they] allege[] to be a reasonable probability that concealed-carry license holders will intimidate professors and students in the classroom."[60] The court held that, for the professors even to get a hearing on the merits, they would need to show "a certainty that a license-holder will illegally brandish a firearm in a classroom."[61] In other words, the fear of guns cannot produce a judicially cognizable chilling of speech until and unless someone actually uses a gun for intimidation—at which point, of course, judicial redress would no longer be possible. Even then, the *next* instance of intimidation would not be provable with certainty. The Fifth Circuit's holding effectively forecloses any legal remedy for concealed firearms' chilling of speech.

If the Fifth Circuit's reasoning in *Glass* prevails nationwide, then First Amendment law will have no role in limiting public carry on campus, or for that matter in public protests. Even so, the interest in an open and robust learning environment can and should inform policy debates. Mandatory campus carry provides dubious benefits while causing substantial harms. Recent studies indicate that both professors and students would be less likely to teach and engage in debate over controversial topics in the presence of a firearm.[62] On the other side

supra note 45, at 2118–20 (advocating a view of institutional academic freedom that would protect some measure of autonomy for public universities from state control).

55. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) (holding that academic freedom principles bar public universities from conditioning employment of faculty on loyalty oaths designed to ferret out Communists).

56. *See, e.g.*, Healy v. James, 408 U.S. 169 (1972) (holding that a public college's refusal to recognize a student group violated student members' First Amendment freedom of association).

57. Glass v. Paxton, 900 F.3d 233, 236–37 (5th Cir. 2018).

58. *Id.* at 236.

59. *Id.* at 237–42.

60. *Id.* at 242.

61. *Id.* at 241.

62. *See* EMILY REIMAL ET AL., URBAN INST. JUSTICE POLICY CTR., GUNS ON COLLEGE CAMPUSES: STUDENTS' AND UNIVERSITY OFFICIALS' PERCEPTIONS OF CAMPUS CARRY

of the dispute, no evidence appears to show that concealed carry makes campuses safer. To the contrary, a public health study on campus firearms shows that public carry laws increase violence.[63] The study emphasizes the distinctive dangers of guns on university campuses because of young adults' cognitive developmental limitations, vulnerability to mental illness, and high incidence of alcohol abuse.[64] Many students and others claim that campus carry degrades their autonomy by chilling their speech and endangering their safety.[65]

The debate over campus carry represents a stark collision of the interests in gun rights and free speech. If we take the free speech objections to campus carry seriously, then treating university campuses as gun-free "sensitive places," as permitted by *Heller*, makes sense.[66] That solution does not present the same problems as in the public protest setting. Universities, unlike protests, are distinctive institutions under First Amendment law, subject to substantial government administration.[67] Barring firearms on campuses would protect important free speech interests while only marginally affecting armed self-defense.

B. Gun Rights vs. Public Information

Discussions of guns, gun rights, and gun regulations matter deeply to policymakers and to ordinary people in both their citizen and consumer roles. Accordingly, everyone should favor engaged political deliberation and informed public discussion about guns. Gun rights advocates, however, increasingly seek to suppress public information about guns. Those efforts have taken several different forms: actions to suppress legislative debates about gun regulation and lawsuits

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LEGISLATION IN KANSAS 9 (Aug. 2019), https://www.urban.org/sites/default/files/publication/100963/guns_on_college_campuses_1.pdf [https://perma.cc/3QLY-5VYS] (describing a study on students' willingness to engage in debate with an armed student); Colleen Flaherty, *Not in My Classroom*, INSIDE HIGHER EDUC. (Apr. 28, 2017), https://www.insidehighered.com/news/2017/04/28/study-professors-widely-oppose-campus-carry-inimical-academic-freedom-fewer-would [https://perma.cc/EDK8-PPHU] (reporting on preliminary results of a study conducted by University of Texas Ph.D. candidate Joslyn Krismer).

63. *See* DANIEL W. WEBSTER ET AL., FIREARMS ON COLLEGE CAMPUSES: RESEARCH EVIDENCE AND POLICY IMPLICATIONS 13–16 (2016), https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/_archive-2019/_pdfs/GunsOnCampus.pdf [https://perma.cc/5Q5B-Y876] (describing differences in violent crime rates between right-to-carry and non-right-to-carry states).

64. *See id.* at 16–21; *see also* Brian J. Siebel, *The Case Against Guns on Campus*, 18 GEO. MASON U. CIV. RTS. L.J. 319, 323–34 (2008) (discussing various dangers caused by guns in campus environments).

65. *See, e.g.*, REIMAL ET AL., *supra* note 62, at 6–12 (reporting Kansas public university students' and administrators' concerns and predominantly negative views about the effects of concealed firearms on campus); Michael R. Cavanaugh et al., *Student Attitudes Toward Concealed Handguns on Campus at 2 Universities*, 102 AM. J. PUB. HEALTH 2245 (2012) (reporting strong majorities of students at two public universities in Texas and Washington who opposed concealed handguns on campus); Flaherty, *supra* note 62 (discussing results of a survey in which faculty members at a large southern research university, likely the University of Texas, overwhelmingly opposed and feared negative consequences from a campus carry mandate).

66. *See* DiGiacinto v. Rector & Visitors of George Mason Univ., 704 S.E.2d 365, 370 (Va. 2011) (holding a state university campus to be a "sensitive place" within the meaning of *Heller*).

67. *See* Schauer, *supra* note 40, at 1274 (discussing universities as special First Amendment institutions).

about gun violence; suits to block states from publicly disclosing facts about gun ownership; and laws that bar doctors from asking and telling patients about the public health dangers of guns.

1. Suppression of Political, Legal, and Public Debate About Guns

The gun lobby's furthest-reaching strategy for blocking government consideration of gun regulations has been to starve public and legislative debates by barring federal agencies from collecting and reporting information about gun violence. In 1996 Congress enacted the Dickey Amendment, which banned all funding for research on guns and public health from the Centers for Disease Control (CDC).[68] Fifteen years later, Congress extended that funding ban to the National Institutes of Health.[69] Both bans resulted from concerted lobbying by the National Rifle Association (NRA) in retaliation for scientific research that undercut the gun rights agenda.[70] In 2018, responding to the recent wave of mass shootings, Congress lifted the CDC funding ban; but Congress allocated no actual funds to gun research, and researchers doubt the policy change will prove to be anything more than an empty gesture.[71] The research ban has let the NRA denigrate public health concerns about gun violence without having to confront any empirical pushback from the government bodies best situated to gather and analyze relevant data.[72] Even the Dickey Amendment's architect and namesake eventually relented, acknowledging that funding federal research is essential to formulating effective federal policy on gun violence.[73] Although the government has discretion to allocate its resources, imposing a blanket ban on using government funds to learn more about a crucial policy matter embraces ignorance, secrecy, and fear. Such cowardice is antithetical to our First Amendment tradition.

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68. *See* Omnibus Consolidated Appropriations Act, Pub. L. 104-208, 110 Stat. 3009 (1996) (enacting Dickey Amendment).

69. *See* Consolidated Appropriations Act, 2012, Pub. L. 112-74, 125 Stat. 786 (2011).

70. *See* Christine Jamieson, *Gun Violence Research: History of the Federal Funding Freeze*, AM. PSYCHOLOGICAL ASS'N (Feb. 2013), https://www.apa.org/science/about/psa/2013/02/gun-violence [https://perma.cc/4GWU-WN9P].

71. *See* Nell Greenfieldboyce, *Spending Bill Lets CDC Study Gun Violence; But Researchers Are Skeptical It Will Help*, NPR (Mar. 23, 2018), https://www.npr.org/sections/health-shots/2018/03/23/596413510/proposed-budget-allows-cdc-to-study-gun-violence-researchers-skeptical [https://perma.cc/C3JT-W5EF].

72. *See, e.g.*, Michael Hiltzik, *The NRA Has Blocked Gun Violence Research for 20 Years. Let's End Its Stranglehold on Science*, L.A. TIMES (June 14, 2016), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-gun-research-funding-20160614-snap-story.html [https://perma.cc/2AWE-XFNU] (documenting the NRA's' campaign to ban government funding for gun violence research and explaining the consequence that "[a] generation of researchers was discouraged from entering a field in which grants were hard to come by and the political push-back intense").

73. *See* Jay Dickey & Mark Rosenberg, *We Won't Know the Cause of Gun Violence Until We Look for It*, WASH. POST (July 27, 2012), https://www.washingtonpost.com/opinions/we-wont-know-the-cause-of-gun-violence-until-we-look-for-it/2012/07/27/gJQAPfenEX_story.html [https://perma.cc/7CPF-UEPU] (contending "that scientific research should be conducted into preventing firearm injuries and that ways to prevent firearm deaths can be found without encroaching on the rights of legitimate gun owners").

The gun lobby has also restricted legislative consideration of gun regulations by persuading most states to enact preemption statutes, which remove or restrict local governments' traditional authority to regulate firearms. By itself, preemption implicates questions of government structure and does not disturb free speech interests. Several states, however, weaponize preemption by imposing legal liability on individual legislators who violate preemption statutes. Florida and Arizona subject violators to fines of up to $50,000 along with removal from office.[74] Florida, Kentucky, and Mississippi make violators liable for damages and attorney's fees, as do Iowa and Minnesota in narrower circumstances.[75] Kentucky even exposes violators to criminal punishment.[76] These preemption statutes leave somewhat unclear what constitutes a "violation," but presumably any effort by a local official to regulate the preempted field would violate preemption. A legislator thus could face liability even for introducing or sponsoring a proposed gun regulation as a symbolic protest against gun violence. The First Amendment does not protect legislators' exercise of government power.[77] On the other hand, constitutional protections for legislative debates, such as the federal Constitution's Speech or Debate Clause,[78] closely parallel constitutional speech protections. Moreover, barring legislatures from considering gun regulations betrays constituents' First Amendment interests by foreclosing the policy information that legislative debates generate.

Paralleling state restrictions on legislative consideration of gun regulations, the federal Protection of Lawful Commerce in Arms Act (PLCAA) bars most lawsuits in federal and state courts against manufacturers and sellers of guns and ammunition for deaths and injuries from gun violence.[79] The PLCAA has broadly succeeded in choking off litigation against the gun industry, especially manufacturers.[80] However, the Connecticut Supreme Court recently held that the Act did not bar families of the children and adults murdered in the 2012 Sandy Hook Elementary School gun massacre from suing the murder weapon's manufacturer for promoting the weapon's unlawful use.[81] Like allocation of funds and preemption of local gun regulations, creation and restriction of legal causes of action lies

74. *Preemption of Local Laws*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/ [https://perma.cc/9MVJ-3GDR].

75. *Id.*

76. *Id.*

77. *See, e.g.*, Nev. Comm. on Ethics v. Carrigan, 564 U.S. 117 (2011) (rejecting a First Amendment challenge to a state requirement that legislators not vote on matters as to which they have conflicts of interest).

78. U.S. CONST. art. I, § 6 cl. 1.

79. 15 U.S.C. §§ 7901–7903 (2012).

80. *See generally* VIVIAN S. CHU, CONG. RESEARCH SERV., THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT: AN OVERVIEW OF LIMITING TORT LIABILITY OF GUN MANUFACTURERS (Dec. 20, 2012), https://fas.org/sgp/crs/misc/R42871.pdf [https://perma.cc/9KB9-2ER2].

81. Soto v. Bushmaster Firearms Int'l, 331 Conn. 53, 157–58 (Conn. 2019), *cert. denied sub nom.* Remington Arms Co. v. Soto, No. 19-168, 2019 WL 5875142 (U.S. Nov. 12, 2019).

within the government's authority. However, also like those other measures, legal immunity insulates gun violence from public scrutiny. Lawsuits not only correct substantive wrongs but also advance First Amendment values by informing public policy debates. The PLCAA, by shielding the gun industry from most legal liability, cuts off an important source of public information and potential policy reform.

In their most extreme and frightening repudiation of democratic politics, gun rights partisans have used the threat of violence conveyed by the open carrying of firearms to silence legislative deliberation. With increasing frequency, armed activists and sometimes elected officials openly carry firearms into legislative chambers and other government buildings.[82] This trend took an ominous turn in June 2019 in Oregon.[83] The state Senate's Republicans tried to prevent a quorum for a vote on a carbon emissions tax by hiding outside the state. The governor authorized state police to find the legislators, and Republican Senator Brian Boquist threatened to attack the Senate president and to kill officers if they came looking for him.[84] His threats inspired anti-government "patriot" militias, including the Oath Keepers and Three Percenters, to offer the Republican legislators armed protection. The militias then called for an armed show of force at the state capitol to protest the Democrats' scheduled weekend legislative session. The state police viewed the militias' planned protest as a credible threat of violence, and the Senate leadership canceled the session. A year later, armed protesters who opposed Michigan's measures to fight the novel coronavirus stormed the state capitol, leading the legislature to cancel a later session.[85] Such violent chilling of legislative deliberation corrodes the indispensable First Amendment norm of resolving policy differences through political debate.

Gun rights advocates have even begun using government power to penalize private criticism of gun rights. After a February 2018 gun massacre killed 17 people at a Parkland, Florida high school, public pressure mounted for companies to

82. *See, e.g.*, Laura Vozzella, *On the Senate Floor With a Gun on Her Hip, Republican Says Packing Heat Can Deter Violence*, WASH. POST (Jan. 16, 2019), https://www.washingtonpost.com/local/virginia-politics/on-the-senate-floor-with-a-gun-on-her-hip-republican-says-she-will-deter-violence/2019/01/16/75cf17c4-19d0-11e9-9ebf-c5fed1b7a081_story.html [https://perma.cc/S8EQ-8TV7] (describing Virginia Senator Amanda Chase's open carrying of a firearm on the Senate floor).

83. This account is drawn from Aaron Mesh, *Oregon Senate Cancels Saturday Session Amid Reports of Militia Groups Protesting at Capitol*, WILLAMETTE WEEK (June 21, 2019), https://www.wweek.com/news/state/2019/06/21/oregon-senate-cancels-saturday-session-amid-reports-of-militia-groups-protesting-at-capitol/ [https://perma.cc/9JVQ-5UC7], and Jason Wilson, *Oregon Senator Walkout: 'Patriot' Groups Vow to Protect Republicans Who Fled State*, GUARDIAN (June 21, 2019), https://www.theguardian.com/us-news/2019/jun/21/oregon-senator-walkout-patriot-groups-vow-to-protect-republicans-who-fled-state [https://perma.cc/ZZG4-KT6P].

84. *See* Hillary Borud, *Oregon Senator Who Threatened State Police Must Give Notice Before Returning to the Capitol*, OREGONIAN (July 8, 2019), https://www.oregonlive.com/news/2019/07/oregon-senator-who-threatened-state-police-must-give-notice-before-returning-to-the-capitol.html [https://perma.cc/4TK3-L5SA].

85. *See* Carol Thompson, *Michigan Capitol Will Be Closed During Protest Because Legislature Won't Meet*, LANSING ST. J. (May 13, 2020), https://www.lansingstatejournal.com/story/news/2020/05/13/michigan-capitol-closed-during-coronavirus-protest/5183573002/ [https://perma.cc/2G2G-X8RP].

end business relationships with the NRA. Delta Air Lines announced that, in an effort to remain neutral in political battles over gun regulation, it was eliminating a promotional discount it had offered to NRA members. Georgia's legislature responded by amending a pending tax bill to remove a jet fuel tax break that would have saved Delta $40 million. State Republican leaders made clear that the tax change was payback for Delta's policy shift.[86] Georgia thus punished Delta for its expressive act and sought to chill the speech of other companies that might follow suit. The First Amendment bars the government from imposing financial penalties on expressions of ideas.[87] Georgia's retaliation against Delta amounts to a frontal assault, in the name of gun rights, on private speech and on the broader First Amendment interest in informed public debate.

2. Gun Privacy vs. Government Disclosures

Gun rights advocates have begun to assert privacy interests in their gun ownership. Tracking the Supreme Court's recognition that effective exercise of speech and assembly rights sometimes requires shielding speakers' identities from public view,[88] these new "gun privacy" arguments posit anonymity as necessary for the effective exercise of the right to keep and bear arms. Belying their formal parallels to First Amendment doctrine, gun privacy claims substantively undermine the public's First Amendment interest in access to government information about matters of public concern.

Most states shield the identities of gun permit holders from public view.[89] A New York law, however, makes handgun permit holders' names and addresses matters of public record.[90] A local newspaper approached a county government for the names of gun permit holders. In *Doe No. 1 v. Putnam County,*[91] gun owners asked a federal judge to declare the law unconstitutional. They invoked both the Fourteenth Amendment right to privacy and the Second Amendment right to keep and bear arms, arguing that public knowledge of permit holders' identities would expose them to public recriminations and that criminals would use the

86. Richard Fausset, *Georgia Passes Bill That Stings Delta Over N.R.A. Position*, N.Y. TIMES (Mar. 1, 2018), https://www.nytimes.com/2018/03/01/business/delta-nra-georgia.html [https://perma.cc/4Q4P-FLVW].

87. *See, e.g.*, Simon & Schuster, Inc. v. N.Y. State Crime Victims' Bd., 502 U.S. 105 (1991) (striking down a law that garnished earnings from convicted criminals' writings to provide financial compensation for their victims).

88. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) (holding that the First Amendment protects the right to distribute anonymous political leaflets); NAACP v. Alabama, 360 U.S. 240 (1959) (holding that the First Amendment protects a political association's right not to disclose its membership list to the state).

89. Jim Malewitz, *Lawmakers Move Swiftly to Block Release of Gun Permit Records*, STATELINE (Mar. 7, 2013), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/03/07/lawmakers-move-swiftly-to-block-release-of-gun-permit-records [https://perma.cc/GPU6-XQCH].

90. *See* N.Y. Penal Law § 400.00(5)(a).

91. 344 F. Supp. 3d 518 (S.D.N.Y. 2018).

information to figure out from whom they could steal guns.[92] Although the district court dismissed the Fourteenth Amendment claim,[93] it let the Second Amendment claim proceed because the threat of public disclosure might deter people from applying for firearms licenses.[94] The court drew a simplistic parallel to First Amendment doctrine, formulating with little analysis a Second Amendment equivalent to the First Amendment prohibition on government actions that chill speech.[95]

The *Putnam County* court declared that "the licensing scheme in question applies to handgun ownership in one's home—in other words, it veers toward the core of the self-defense right recognized in *Heller.*"[96] Accordingly, the court applied heightened Second Amendment scrutiny. The state claimed important interests in informing the public about matters of governance and in engaging the informed public in enforcement of firearms licensure requirements. The court grudgingly allowed that "in the abstract, these may be important governmental interests," but it declared that "one could be skeptical about what additional assistance the public could provide in enforcing the licensing regime above and beyond what is gained from disclosure to just the government."[97] The court thus treated the plaintiffs' asserted Second Amendment autonomy interest as far weightier than the collective interest in informed self-governance. That hierarchy of values strongly suggests that the plaintiffs' Second Amendment argument will ultimately prevail in the case.

Another gun privacy challenge, *National Rifle Association v. Bondi*,[98] asserted that gun rights advocates should be able to anonymously challenge a gun regulation in court. The NRA, challenging a Florida gun regulation in the wake of the 2018 Parkland, Florida gun massacre, moved for a plaintiff and a witness to proceed under pseudonyms.[99] The plaintiff and the witness claimed that naming them publicly would expose them to threats, harassment, and possibly violence.[100] In addition, a former NRA president testified that she received harassing emails and phone calls after the Parkland shootings.[101] The Federal Rules of Civil Procedure require parties in federal suits to proceed under their own names.[102]

92. *Id.* at 522. That argument carries some irony, as Second Amendment advocates usually insist that public knowledge of gun possession deters crime.

93. *Id.* at 539–41 (finding that possessing a gun permit falls outside of the right to informational privacy). One earlier state court decision barred government disclosure of gun ownership records on privacy grounds, but that decision rested entirely on the court's interpretation of a state privacy statute. *See* Mager v. Dept. of State Police, 595 N.W.2d 142 (Mich. 1999).

94. *Putnam County*, 344 F. Supp. 3d at 535–39.

95. *See id.* at 536–37.

96. *Id.* at 536 (citation omitted).

97. *Id.* at 538 (internal quotation marks omitted).

98. Nat'l Rifle Ass'n v. Bondi, No. 4:18cv137-MW/CAS (N.D. Fla. May 13, 2018) (Order Denying Motion to Proceed Under Pseudonyms).

99. *Id.* slip op. at 2.

100. *Id.* at 4–5.

101. *Id.* at 5.

102. FED. R. CIV. P. 10(a).

Courts have allowed some litigants to proceed anonymously (as in *Putnam County*, where the plaintiffs challenged the legislature's very power to disclose their names), but the Supreme Court has never announced rules to govern litigants' requests for anonymity. The district judge in *Bondi* declared that "[i]f it were *entirely* up to this Court, the Court would not hesitate to grant the NRA's motion," citing "the vitriol that has infected public discourse about the Second Amendment."[103] However, a survey of Eleventh Circuit precedent led the judge to conclude that identification as a gun owner did not fall within the narrow range of conditions that warranted anonymity.[104] The court's reasoning closely tracks the *Putnam County* court's denial of the New York gun owners' Fourteenth Amendment privacy claim.[105]

Putnam County and *Bondi* give gun privacy arguments a meaningful legal toehold. True, the district courts in both cases denied claims grounded in conventional privacy principles.[106] However, the New York court in *Putnam County* recognized a strong Second Amendment basis for a gun privacy principle. Why the NRA did not directly invoke the Second Amendment in its *Bondi* motion is unclear, but the Florida court's reasoning in that case would accommodate an argument that the Second Amendment provides a distinct constitutional right for gun rights litigants to proceed anonymously.

Gun privacy arguments, however, present greater problems than either court acknowledged. In First Amendment doctrine, which provides the template for Second Amendment gun privacy claims, the Supreme Court's anonymity decisions have barred the government from collecting certain information about expressive activity, based on fears that the government itself would use that information to harass or punish speakers.[107] In contrast, the Court has declined to block the government from publicly disclosing information it had already lawfully collected. For example, the Roberts Court in *Doe v. Reed*[108] rejected an argument closely parallel to the claims in *Putnam County* and *Bondi*: that the First Amendment should protect signers of a controversial referendum petition from having their names disclosed under a state open records law.[109]

Moreover, the courts in *Putnam County* and *Bondi* (and for that matter the Supreme Court in *Doe v. Reed*) undervalued the public's First Amendment in-

103. *Bondi*, slip op. at 6 (footnote omitted). Aside from the NRA's witnesses, the only examples the court gave of "vitriol" in Second Amendment discourse involved threats and harassment *by* gun rights advocates against gun violence survivors and advocates of gun regulation. *See id.* at 6–7 nn.5, 6.

104. *Id.* at 7–16.

105. *See id.* at 15 (emphasizing "that there are few privacy concerns at issue in this case") (footnote omitted).

106. Jody Lynee Madeira, critiquing this denial, has sought to ground gun privacy claims in a sociological theory that encroachments on gun owners' privacy cause cognizable stigmatic injury. *See generally* Jody Lynee Madeira, *A Secret Weapon?: Applying Privacy Doctrine to the Second Amendment*, 46 HASTINGS CON. L.Q. 555 (2019).

107. *See* cases cited *supra* note 88.

108. 561 U.S. 186 (2010).

109. *See id.* at 202.

terest in access to politically salient government information. For example, journalists across the country have used gun permit information to expose important government failings, including unlawful issuance of gun permits to felons and people involuntarily committed to mental health facilities.[110] We cannot hope to govern ourselves effectively and wisely without thorough information about public issues and controversies. This is a core insight of First Amendment doctrine[111] and theory.[112] The information necessary for self-government includes the identities of people whom the government has licensed to hold the power of deadly force and of people who ask courts to overturn legislative policy choices. The Supreme Court has made clear that enforcing public ignorance violates the First Amendment.[113]

3. Gun Secrecy vs. Professional Communication

A final collision between gun rights and public information arises from government efforts to promote gun rights by suppressing communication between professionals and the people they serve. This collision inverts the structure of the gun privacy cases. It involves First Amendment objections, focused on speakers' expressive autonomy rights, to government policies grounded in Second Amendment interests.

A Florida statute, the Firearms Owners' Privacy Act,[114] included several restrictions on physicians' communications with patients about firearms. The Act barred physicians from keeping medical records about patients' gun ownership, from asking patients whether they owned guns, and from "harass[ing]" patients about gun ownership.[115] In *Wollschlaeger v. Governor of Florida*,[116] a group of physicians and medical organizations challenged those restrictions as violating physicians' First Amendment freedom of speech. The state sought to justify the provisions based on several interests, including its desire to protect Floridians' Second Amendment rights.[117] Analyzing the case under heightened scrutiny, the

110. *See* Malewitz, *supra* note 89.

111. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (imposing First Amendment constraints on public officials' ability to recover for defamation, based on "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

112. *See generally* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1 (1976).

113. *See, e.g.*, Va. Bd. of Pharmacy v. Va. Citizens' Consumer Council, 425 U.S. 748, 769–70 (1976) (rejecting enforced ignorance about commercial prices as a strategy for protecting consumers from undesirable effects of market competition); N.Y. Times Co. v. United States (Pentagon Papers Case), 403 U.S. 713, 723–24 (1971) (Douglas, J., concurring) (rejecting government secrecy as a means of safeguarding national security).

114. Ch. 2011-112, 2011 Fla. Laws 1776 (codified at Fla. Stat. §§ 790.338, 456.072, 395.1055 & 381.026).

115. *Id.* § 1, 2011 Fla. Laws at 1777 (codified at Fla. Stat. § 790.338); *see also* Mobeen H. Rathore, *Physician "Gag Laws" and Gun Safety*, AMA J. ETHICS (Apr. 2014), https://journalofethics.ama-assn.org/article/physician-gag-laws-and-gun-safety/2014-04 [https://perma.cc/5JXR-N395] (explaining that several other states have enacted or considered similar laws).

116. 848 F.3d 1293 (2017) (en banc).

117. *Id.* at 1312–16.

en banc Eleventh Circuit struck down the provisions as impermissible content-based restrictions on the physicians' speech.[118] As to the Second Amendment justification, the court held that the state had failed to show that the communications restricted by the Act violated anyone's Second Amendment rights; that regulating private conduct was an ineffectual way to protect Second Amendment rights; and that, in any event, the First Amendment bars suppressing information as a means of protecting Second Amendment rights.[119]

Wollschlaeger, much more than *Bondi* or *Putnam County*, takes the public's interest in access to information seriously. *Wollschlaeger*, however, differs from those cases in two important, related ways. First, the Firearms Owners' Privacy Act denied information to people not in their capacity as self-governing citizens but rather in their capacity as consumers of medical services. Thus, *Wollschlaeger* resonates with present First Amendment doctrine's preference for interests in private autonomy and economic liberty over interests in democratic political participation.[120] Second, the only First Amendment interest *Wollschlaeger* legally vindicates is the physician plaintiffs' interest in expressive autonomy. The Eleventh Circuit rejected the state's motion to dismiss the case for lack of standing because "the individual plaintiffs, as doctors, wish to say and do what they believe [the Act] prevents them from saying and doing."[121] Had the Act been challenged not by doctors but instead by patients who claimed the Act denied their First Amendment right to hear their doctors' insights about the public health dangers of firearms, the First Amendment challenge might well have failed.

Taken together, *Wollschlaeger* and the gun privacy cases suggest a mixed resolution for collisions between Second Amendment gun rights interests and First Amendment public information interests. *Wollschlaeger* shows that speakers' First Amendment right to expressive autonomy defeats gun rights interests not squarely recognized in *Heller*. However, *Putnam County* suggests that a judicially recognized Second Amendment interest in gun privacy defeats the First Amendment value of public information.

118. *Id.* at 1320–23.

119. *Id.* at 1312–14.

120. *See* GREGORY P. MAGARIAN, MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT 33–64 (2017).

121. *Wollschlaeger*, 848 F.3d at 1304.

C. Competing Accusations About Causes of Gun Violence

On the numbingly frequent occasions when mass shootings capture public attention, gun control advocates largely blame gun proliferation, pressing for various new gun regulations.[122] In contrast, advocates for gun rights categorically oppose new regulations.[123] They believe that many or most gun restrictions would violate the Second Amendment, and they fear that conceding any causal connection between gun proliferation and gun violence would undermine gun rights.[124] This hard line puts gun rights advocates in a difficult position. If they deny the human costs of gun violence, they appear callous and extremist; but if they acknowledge gun violence as a distinctive social problem, they undermine their raison d'être.

To solve this dilemma, gun rights advocates propose alternative responses. Often they advocate nonlegal measures, typically shifts from supposedly permissive cultural norms to more conservative ones.[125] When gun rights advocates do propose regulatory responses, their proposals shift the focus away from guns and toward measures that threaten other liberties: more power for law enforcement, more constraints on mentally ill people, gun regulations strictly limited to political "out groups" like foreign nationals.[126] Most vigorously and commonly, gun rights advocates seek to shift the blame for gun violence from guns to expressive materials, mainly violent video games. They argue that images of violence in popular media desensitize young people, leading to aberrant violent acts that incidentally involve firearms.[127] The President of the United States has recently made

122. *See, e.g.*, *Keeping Our Schools Safe: A Plan to Stop Mass Shootings and End Gun Violence in American Schools*, EVERYTOWN FOR GUN SAFETY (Feb. 11, 2019), https://everytownresearch.org/reports/keeping-schools-safe-plan-stop-mass-shootings-end-gun-violence-american-schools/ [https://perma.cc/3G9N-8TS9]; *see also* Margot Sanger-Katz & Quoctrung Bui, *How to Reduce Mass Shooting Deaths? Experts Rank Gun Laws*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/interactive/2017/10/05/upshot/how-to-reduce-mass-shooting-deaths-experts-say-these-gun-laws-could-help.html [https://perma.cc/ZT7E-PTXJ] (compiling and discussing proposed gun regulations).

123. *See, e.g.*, *Tell Your U.S. Senators and Representative to Oppose Gun Control*, NAT'L RIFLE ASS'N–INST. FOR LEGISLATIVE ACTION (Aug. 13, 2019), https://www.nraila.org/articles/20190813/tell-your-us-senators-and-representative-to-oppose-gun-control [https://perma.cc/T8JE-3GQE].

124. *See id.*

125. *See, e.g.*, David French, *New Gun Policies Won't Stop Mass Shootings, But People Can*, NAT'L REV. (Feb. 15, 2018), https://www.nationalreview.com/2018/02/new-gun-policies-wont-stop-mass-shootings-but-people-can [https://perma.cc/2JDK-C9ZT]; Christopher Mele & Christina Caron, *Oliver North Blames 'Culture of Violence' for Mass Shootings*, N.Y. TIMES (May 21, 2018), https://www.nytimes.com/2018/05/21/us/nra-oliver-north.html [https://perma.cc/9ABG-U5CB] (reporting remarks of the NRA's incoming president).

126. *See, e.g.*, Anna Merod, *How the NRA Has Responded to Mass Shootings Over the Years*, NBC NEWS (Jun. 15, 2016), https://www.nbcnews.com/storyline/orlando-nightclub-massacre/how-nra-has-responded-mass-shootings-over-years-n592551 [https://perma.cc/5LJZ-Y7AJ] (describing NRA officials' blaming of mass shootings on radical Islam, a failed mental health system, and insufficient funding for police).

127. *See, e.g.*, Mike Jaccarino, *'Training Simulation:' Mass Killers Often Share Obsession With Violent Video Games*, FOX NEWS (Sep. 12, 2013), https://www.foxnews.com/tech/training-simulation-mass-killers-often-share-obsession-with-violent-video-games [https://perma.cc/9LXK-SB89].

this argument.[128] Proponents of the theory that mass culture causes mass shootings seek restrictions on the First Amendment rights of popular media creators and their audiences.

The biggest problem with blaming gun violence on popular culture is that empirical evidence abjectly fails to support the causal linkage.[129] A psychologist who surveyed available empirical data concluded that "'links' between mass shooters and video games are based on illusory correlation and confirmation bias."[130] The Supreme Court has squarely rejected legal and empirical arguments that real-world violence justifies relaxing First Amendment protection for video games.[131] Other courts have similarly rejected states' attempted empirical linkages between video games and violence.[132]

In contrast to the constitutional hazards of efforts to regulate video games, the types of gun regulations most commonly proposed in the wake of mass shootings—strengthened background checks and bans on certain military-grade weapons and ammunition—seem among the least likely sorts of regulations to violate the Second Amendment. *Heller* itself validates "conditions and qualifications on the commercial sales of arms" and regulations of "dangerous and unusual weapons."[133] Whether these proposed gun regulations will gain traction politically is of course a different question.

The ease with which Second Amendment partisans default to throwing speech they dislike under the gun rights bus underscores the broader tension between the interests in gun rights and expressive freedom. First and Second Amendment interests have found great trouble coexisting, let alone working harmoniously to protect some abstract, unitary conception of liberty.

128. *See* Devan Cole, *Trump, McCarthy Cite Video Games as a Driver Behind Mass Shootings*, CNN (Aug. 5, 2019), https://www.cnn.com/2019/08/05/politics/kevin-mccarthy-mass-shootings-video-games/index.html [https://perma.cc/B8X3-BGNR] (describing Trump's condemnation of violent video games).

129. *See* Christopher J. Ferguson, *Violent Video Games, Mass Shootings, and the Supreme Court: Lessons for the Legal Community in the Wake of Recent Free Speech Cases and Mass Shootings*, 17 NEW CRIM. L. REV. 553, 557–59, 560 (2014) (summarizing and discussing methodological flaws with studies that tie violent conduct to video games and stating that "little evidence has emerged to link violent video games with violence-related outcomes"); Patrick M. Markey et al., *Violent Video Games and Real-World Violence: Rhetoric Versus Data*, 4 PSYCHOL. POPULAR MEDIA CULTURE 277 (2015) (explaining that studies suggest a *decrease* in violent crime corresponding to the increase in violent video game sales); Andrew K. Przybylski & Netta Weinstein, *Violent Video Game Engagement Is Not Associated With Adolescents' Aggressive Behaviour: Evidence From a Registered Report*, 6 ROYAL SOC. OPEN SCI. 171474 (2019) (reporting that violent video games are not associated with aggressive behavior).

130. Ferguson, *supra* note 129, at 561.

131. *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011).

132. *See generally* Richard Dillio, *A Critical Miss: Video Games, Violence, and Ineffective Legislation*, 48 FIRST AMEND. STUD. 110 (2014) (discussing court decisions and critiquing empirical arguments).

133. District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (internal quotation marks and citations omitted).

III

NORMATIVE TENSIONS IN SPEECH-ARMS COLLISIONS

Collisions between free speech and gun rights follow normative fault lines that help to explain how these two interests end up clashing so deeply and frequently. This Part briefly sketches two normative oppositions that seem particularly important for understanding the speech-arms tension. Where gun rights require a deep commitment to individual autonomy, free speech depends on a robust vision of communal interaction.[134] Similarly, where gun rights promote a form of social and political stability, free speech opens opportunities for social and political dynamism.

A. Individual Autonomy vs. Communal Interaction

Collisions between First and Second Amendment interests pit communal against individual values. Arguments for gun rights routinely appeal to a highly individualistic vision of the bearer of arms. Certainly the gun rights movement and gun culture gain strength from numbers in the NRA's wildly effective lobbying efforts. Bearing a firearm, however, is a solitary enterprise. In contrast, free speech entails communication between and among multiple people and entities. The Supreme Court, in assessing what counts as speech for First Amendment purposes, considers the perspectives of both speaker and audience.[135] Free speech arguments often start with the paradigm of the individual speaker, but they gain force from the value of public information for communal interaction. The distinction between the essentially individualist nature of gun rights and the essentially communal nature of free speech defines a crucial normative tension in speech-arms collisions.

Gun rights claims in speech-arms collisions appeal centrally to individual autonomy. Open carry activists who want to bring their guns to public protests and concealed carry activists who want to bring their guns to university campuses claim, first and foremost, a right to defend themselves wherever they go. Gun privacy arguments and bans on physician inquiries about guns seek to import to the Second Amendment the quintessentially autonomous "right of the individual to be let alone."[136] When the NRA scuttles federal funding for public health research on guns or secures legal immunity for gun makers and sellers, it is really helping a powerful industry. Its political rhetoric, however, emphasizes the rights and concerns of the individual gun owner.

Individualism permeates the gun rights movement. For decades that movement's defining goal was to establish that the Second Amendment protects not a collective right of the people to form an armed militia but rather an individual

134. *See, e.g.*, OWEN M. FISS, LIBERALISM DIVIDED 15 (1996) ("What the phrase 'the freedom of speech' in the First Amendment refers to is a social state of affairs, not the action of an individual or institution.").

135. *See* Spence v. Washington, 418 U.S. 405, 409–11 (1974).

136. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

right to have a gun.[137] When the Supreme Court fulfilled that goal in *District of Columbia v. Heller*,[138] the Court's opinion subordinated the most historically salient justification for the Second Amendment—the collective interest in resisting tyrannical government—to a disaggregated individual right to personal self-defense. The Court read the Militia Clause out of the Second Amendment.[139] As Reva Siegel has pointed out, the *Heller* Court's highly idiosyncratic "originalist" interpretation of the Second Amendment really operationalizes the individualist political ideology of the gun rights movement and the gun culture.[140] That culture exalts the heroic individualism of the gun owner while condemning gun regulation as a socialist project to oppress that gun owner and take his guns away.[141] The specious "good guys with guns" argument for guns' communal value adds little to the essentially individualistic argument for gun rights.

Many free speech arguments in speech-arms collisions begin with individual autonomy. Opponents of open carry at protests and concealed carry on campuses contend that fear of guns will chill speakers, denying individuals the effective right to say what they please. Litigants who want to sue gun manufacturers and companies like Delta that express qualms about gun rights assert their autonomy to push back against guns and gun culture. The Eleventh Circuit in *Wollschlaeger v. Governor of Florida*[142] became the only court to vindicate a First Amendment right against gun rights interests because so far it is the only court to have heard a complaint that a government promoted gun rights at the expense of speakers' expressive autonomy.

Even in those collisions, however, expressive autonomy interests stand alongside broader First Amendment interests in public discourse. Critics of public carry worry not just that public guns will chill speakers but that the chill will deprive audiences of valuable information. Gun violence litigation not only redresses private injuries but also informs public debates and policy discussions about gun violence. The legal analysis in *Wollschlaeger* may have turned on physicians' expressive autonomy, but the essential interest in the case was patients' access to fully informative medical care. The free speech interests in other speech-arms collisions are predominantly or wholly communal. Defunding government research on gun violence deprives the political community of valuable

137. *See* Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3 (2000) (tracing the development of the individual right argument in late twentieth century legal scholarship); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008) (situating the Second Amendment individual rights argument in gun rights politics).

138. 554 U.S. 570 (2008).

139. *See id.* at 595–600; *see also* Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 75-79 (2012) (critiquing the *Heller* Court's abandonment of the Militia Clause).

140. *See generally* Siegel, *supra* note 137.

141. *See, e.g.*, Brett Samuels, *NRA's LaPierre Warns Conservatives of 'Socialist State'*, HILL (Feb. 22, 2018), https://thehill.com/business-a-lobbying/375044-lapierre-warns-conservatives-of-socialist-state [https://perma.cc/EG6L-FTVV].

142. 848 F.3d 1293 (2017) (en banc).

knowledge. Curbing legislative processes impedes the people's elected representatives from determining and serving the public interest. Gun privacy claims conceal government information from the public. Blaming gun violence on popular culture exposes mass media to government censorship.

Communal free speech values in speech-arms collisions reflect rich and potent communal elements in broader First Amendment theory. The familiar "marketplace of ideas" metaphor extols the collective apprehension of truth and treats expressive freedom as the best structure for determining truth.[143] Democracy-centered theories of the First Amendment posit expressive freedom as providing the political community with the information necessary for collective self-government.[144] Thomas Emerson's safety valve theory views expressive freedom as protecting society from violent action by letting dissenters blow off steam.[145] Vincent Blasi's "checking value" holds that the First Amendment serves the political community by curbing government abuses.[146] First Amendment provisions beyond the Free Speech Clause focus on communal interests. The Press Clause protects the capacity of the news media to inform the public about the workings of government and other matters of public concern.[147] The freedom of expressive association protects the right of groups and communities to express and share ideas.[148] Communication does not happen in a vacuum of individual autonomy. Rather, it requires constructive interactions between and among speakers and audiences.

While communal interests matter deeply in First Amendment theory, they can be difficult or impossible to vindicate in First Amendment litigation, as illustrated by the Fifth Circuit's denial on standing grounds of campus carry's chilling effect in *Glass v. Paxton*.[149] That difficulty leaves the impression of a false equivalence between the competing interests in speech-arms collisions. If only individual autonomy mattered, then resolving these collisions would come down to a choice about which sort of autonomy—the freedom to speak or the right to keep and bear arms—mattered more.Once we see that the speech side of speech-arms collisions also embodies a communal interest in public communication, and that the arms side presents no communal interest of any substance, then resolving those collisions presents a choice between a broader and a narrower set of interests.

143. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Homes, J., dissenting).

144. *See generally* MEIKLEJOHN, *supra* note 112.

145. *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 884–86 (1963).

146. *See generally* Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RES. J. 521 (1977).

147. *See generally* C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY (2002).

148. *See generally* Ashutosh Bhagwat, *Associational Speech*, 1220 YALE L.J. 879 (2011).

149. 900 F.3d 233 (5th Cir. 2018).

B. Stability vs. Dynamism

My examination of current problems in First Amendment doctrine has emphasized the doctrine's importance for mediating between stability and dynamism in politics and society.[150] I have criticized the present Supreme Court under Chief Justice John Roberts for accelerating a turn in First Amendment doctrine away from enabling dynamism and toward preserving stability. I have advocated, in opposition to the Roberts Court, a First Amendment model of *dynamic diversity*, which seeks to maximize the range of both participants and ideas in public discourse. Dynamic diversity opens space for dissident speakers to advocate, and for the public to assess, novel and bold ideas for political and social change. The opposition between stability and dynamism within First Amendment law and theory recurs in speech-arms collisions. The gun rights arguments in those collisions assert the importance of guns for protecting social and political stability. In contrast, the free speech arguments appeal to the potential for dynamic discussion and debate.

Gun rights arguments in speech-arms collisions emphasize the importance of guns for preservation and protection. Public carry advocates see threats in the political intensity of public protests and in the intellectual foment of universities. They argue that carrying weapons protects them from those threats while also enabling them to protect others from violent disruptions. Their desire to carry guns outside the home suggests a desire to carry the home itself, to be as safe at a protest or a college lecture as in one's private preserve. Gun privacy arguments reflect the anxiety that public knowledge of gun owners' identities will expose them to harassment and even violence. Gun rights arguments in other speech-arms collisions appeal even more directly to stability. Cutting off funding for research into gun violence ensures that no advance in knowledge will disrupt the gun rights status quo. Preventing legislation and litigation about gun violence forecloses change in gun laws and policies. Barring physicians from talking to their patients about guns cuts off the risk that health information might cause gun owners themselves to change their lifestyles. Blaming popular culture for gun violence kills two destabilizing birds with one bullet, blocking changes in gun policies while attacking cultural materials that stimulate youthful rebellion against adult authority.

The broader gun rights movement and gun culture likewise fixate on safety, security, and stability. Fear of change creates the imperative for armed self-defense. The shift in *Heller* from an anti-tyranny theory of the Second Amendment to a personal self-defense theory embodies a lurch from dynamism to stability. At a certain level of abstraction, the Second Amendment's allowance for an armed populace to rise up as one and overthrow a tyrannical government promotes stability by preserving a non-tyrannical status quo. In more immediate terms, though, nothing could strike closer to the core of social stability than an armed insurrection against the government. Whatever else armed rebellion does,

150. *See generally* MAGARIAN, *supra* note 120.

it surely brings dynamic change. In contrast, personal self-defense embodies a fear of change. The world of gun rights partisans is a dark, violent place. Their homes, families, and property provide shelter from outside dangers. Potential change means the threat that bad people will hurt or kill them and their families and steal their property. The government cannot or will not protect them.[151] Only their guns keep them safe.

In sharp contrast, arguments for choosing free speech over gun rights emphasize what speech can achieve and transform. True, the argument that public carry chills speech appeals to safety. Yet opponents of public carry in protests and universities demand safety not to stand still but rather to forge ahead. The counter-protesters who stood up to armed white supremacists in Charlottesville sought to tear down the monuments of an old order. The students, faculty, and others who decry campus carry want to debate bold ideas and fresh insights. Gun control advocates use scientific research, the legislative process, the courts, and the public square to pursue a radical shift in the laws and culture of a society saturated with firearms. Efforts to inform the public through all those arenas, through government disclosures, and even through physicians' unconstrained medical advice serve the interest in conceiving and implementing new polices and behaviors. Blaming gun violence on gun proliferation and not on media imagery maintains a focus on policy change while vindicating an energetic cultural landscape. Where the arguments for gun rights in speech-arms collisions cling to the stable world we know, the arguments for free speech aspire to the dynamic world we can imagine.

Gun rights partisans have no story to tell about how gun proliferation moves our society forward. Free speech advocates have the path of dynamism, creativity, and progress all to themselves. For many people in this fraught socio-political moment, pursuing dynamism is a hard sell. The anxieties of our age, including anxiety about gun violence, have helped to submerge dynamism as a theme in present free speech discourse. However, dynamic arguments for choosing free speech over gun rights spring from the defining insights of our First Amendment tradition. Justice Brandeis, chiding a state's fervor to suppress its political opponents, declared: "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty."[152] Justice Jackson, subordinating patriotic fervor to freedom of conscience in the heat of wartime, proclaimed: "[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."[153] These foundational principles contrast the dynamic hope of free speech with the fearful stability of gun rights.

151. *See* Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 728–32 (2011) (situating the Second Amendment right of self-defense in a sense of anxiety about the government's failure to protect the people from violence).

152. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

153. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

IV

CONCLUSION

Gun rights threaten free speech. A gun rights partisan might just as easily flip the script and argue that free speech threatens gun rights. To my knowledge, however, no gun rights advocate has ever made that argument out loud. Doing so would undercut gun rights advocates' common portrayal of the Second Amendment as harmonious with the First Amendment. It would set the novel, contentious Second Amendment right to keep and bear arms against the established, cherished First Amendment right of expressive freedom. Thus, even if one rejects this Article's normative priority for free speech over gun rights, consideration of speech-arms collisions greatly complicates the argument for gun rights. On the other hand, anyone who shares this Article's normative inclination should recognize the danger that speech-arms collisions pose to expressive freedom. Collisions between First and Second Amendment interests reveal an intractable opposition. That opposition will only grow as the Supreme Court expands Second Amendment jurisprudence. Our legal future thus presents a stark choice between robust communication and gun proliferation.