



THE FIRST AND SECOND AMENDMENTS ARE
NOT MUTUALLY EXCLUSIVE: A LOOK AT
THE FIRST AND SECOND AMENDMENTS
AFTER THE “UNITE-THE-RIGHT” RALLY IN
CHARLOTTESVILLE, VIRGINIA

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James Madison defined factions as “a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”¹ Madison noted the dangers of factions, describing them as “the mortal diseases under which popular governments have everywhere perished.”² In his mind, there were two methods of “curing the mischiefs of faction[s]:” either remove the causes or control its effects.³ Madison wrote Federalist No. 10 to argue in favor of a representative form of government as opposed to a direct democracy; specifically citing the dangers of factions as one of the compelling reasons in favor of the former.⁴ Although Madison’s vision of a young and new United States of America has blossomed into something well beyond his imagination, his warnings of factions have stayed relevant throughout the nation’s history.

In August 2017, the American Civil Liberties Union (ACLU) helped defend the rights of white nationalists to hold a rally at Emancipation Park in Charlottesville, Virginia.⁵ The event, originally billed as an ideological and constitutional battle to protect the civil liberties and rights of those with, at best, unpopular opinions, is now remembered as a day of violence. In addition to the scuffles that broke out between opposing groups of protesters, a

¹ THE FEDERALIST NO. 10 (James Madison).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Joseph Goldstein, *After Backing Alt-Right in Charlottesville, A.C.L.U. Wrestles With Its Role*, NEW YORK TIMES, Aug. 17, 2017, <https://www.nytimes.com/2017/08/17/nyregion/aclu-free-speech-rights-charlottesville-skokie-rally.html?mcubz=0>, (last visited Oct. 2, 2017).

thirty-two-year-old woman was killed, and 19 others were injured after a rallygoer drove his car into a group of pedestrians.⁶ The ACLU's defense of white supremacist groups is not a new occurrence. Nearly forty years ago, in *Nationalist Socialist Party of America v. Village of Skokie*, the ACLU won what many viewed as one of its seminal cases, in which a small group of Neo-Nazis were permitted to hold a rally in the small town of Skokie, Illinois.⁷ It has always been the ACLU's policy to consider the potential for violence in defending free speech cases in public gatherings. After Charlottesville, that factor will likely take on more weight the next time the organization determines whether to litigate on behalf of white nationalists.⁸

The cancelation of "alt-right" or "right-wing" speakers and protests has become more commonplace.⁹ With silence from the ACLU on several of these controversies, there is a growing sentiment that hate speech should no longer be considered protected speech under the First Amendment.¹⁰ A survey of college campuses, published by the Brookings Institution, shows that 4 in 10 survey takers believed, regardless of their political affiliation,

⁶ Joe Heim, *Recounting a day of rage, hate, violence and death: How a rally of white nationalists and supremacists at the University of Virginia turned into a "tragic, tragic weekend"* WASHINGTON POST, Aug. 14, 2017, https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?noredirect=on&utm_term=.d20416b6e658 (last visited on Jan. 21, 2019).

⁷ Goldstein, *supra* note 5.

⁸ *Id.*

⁹ *Id.* (As the article mentions, there have been several "right-wing" speakers canceled at UC Berkeley and Texas A&M).

¹⁰ *Id.*

that hate speech is not protected under the First Amendment.¹¹ It is unclear whether those who were surveyed believed that hate speech *should not* be protected as opposed to believing hate speech is *currently not* protected. In fact, two months after the violent events in Charlottesville, Florida Governor Rick Scott declared a state of emergency in Alachua County in anticipation of demonstrations at the University of Florida protesting an event where a known white nationalist was scheduled to speak.¹² However, for the purposes of this comment, one should read with the assumption that hate speech is in fact protected speech as held and reaffirmed by the United States Supreme Court in several cases.¹³

In the court proceedings leading up to Charlottesville, the ACLU brought suit on behalf of a man from Charlottesville, who was organizing a rally to protest the removal of a statue of Confederate general Robert E. Lee. The statue was located in Emancipation Park, which had been renamed from Lee Park in June of 2017.¹⁴ The city initially granted the permit for the protest at Emancipation Park but then attempted to relocate the

¹¹ Catherine Rampell, *A chilling study shows how hostile college students are toward free speech*, opinion piece, WASHINGTON POST, Sept. 18, 2017, https://www.washingtonpost.com/opinions/a-chilling-study-shows-how-hostile-college-students-are-toward-free-speech/2017/09/18/cbb1a234-9ca8-11e7-9083-fbdf6804c2_story.html?utm_term=.a923068bd63d (last visited on Oct. 2, 2017).

¹² Eric Levenson, *State of emergency declared ahead of white supremacist speech in Florid*, CNN, Oct. 17, 2017, <https://www.cnn.com/2017/10/17/us/university-florida-richard-spencer-speech/index.html> (last visited April 17, 2019).

¹³ See *Matal v. Tam*, 137 S. Ct. 1744, 1750 (2017); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); *Nat'l Socialist Party v. Skokie*, 432 U.S. 43, 44, 97 (1977).

¹⁴ Goldstein, *supra* note 5.

demonstration to a larger park, citing safety concerns. The larger park was in a less accessible location, about a mile away from Emancipation Park.¹⁵ The ACLU argued the symbolism associated with holding the protest in Emancipation Park, where the statue was going to be removed, was significant and the District Court agreed.¹⁶ Due to the outcome of the case, some have placed a degree of responsibility on the ACLU for the violence that happened in Charlottesville, and others have expressed fear that other municipalities will now be more hesitant to let groups with extreme views hold rallies.¹⁷

The escalation of polarizing viewpoints, facially, appears to simply be an issue of the First Amendment and its protections afforded to free speech. However, words alone are not the sole cause of the violence that occurred in Charlottesville and are not the only determining factor in court-sanctioned and city-approved protests. This article highlights the difficulties that lawyers, judges, politicians, and Americans as a whole face in reconciling our notions of individual liberty with the safety and equality of all people. Part I of this article analyzes the relevant jurisprudence of First and Second Amendment law. Part II discusses the facts and circumstances surrounding the events in Charlottesville using the legal frame work provided in Part I, and briefly applies that legal analysis to the events. Part III postulates any possible solutions, problems, and difficulties, in reconciling the First and Second Amendments' protections in the country's highly polarized political climate. The unique Federalism issue, of the right to bear arms as enumerated in Virginia's state constitution will also be discussed.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

I. Analyzing the First and Second Amendments

A. First Amendment

It is common knowledge that the First Amendment of the United States Constitution guarantees the right of all individuals to freely and openly express themselves. For the purposes of this discussion, it is important to understand the notion that the First Amendment prohibits the Government from viewpoint discrimination.¹⁸ The Supreme Court has held that viewpoint discrimination is an “egregious form of content discrimination” and the Government must not regulate speech if the rationale for restriction lies in ideology or speaker opinion.¹⁹

The First Amendment is not a blanket protection to say and do whatever one chooses at any given time. In the context of public protests, there are restrictions called “time, place, and manner” regulations.²⁰ In *Cox v. New Hampshire*, these restrictions were recognized by the Supreme Court due to the traditional authority given to municipalities to control and regulate public streets.²¹ *Cox*

¹⁸ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828-29 (1995); *see also* *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-643 (1994) (stating discrimination against speech because of its message is presumed to be unconstitutional); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (stating “any restriction on expressive activity because of its content would completely undercut the ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wise-open’”).

¹⁹ *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45-46 (1983) (also stating that any such regulations must be neutral as to both viewpoint and subject matter).

²⁰ *Mosley*, 408 U.S. at 98-99 (stating that in certain circumstances states may have a legitimate interest in prohibiting some picketing to protect public order but these circumstances must be carefully scrutinized).

²¹ *Cox v. New Hampshire*, 312 U.S. 569, 576-77 (1941); *see also* *Cox v. Louisiana*, 379 U.S. 559, 574 (1965) (reaffirming several decisions that

validated a licensing scheme for public gatherings and the right of a municipality to charge for said licenses if the funds are used for a limited purpose, such as policing or controlling the gathering.²²

In the infamous flag burning case of *Texas v. Johnson*, the Supreme Court definitively reinforced the right of self-expression contained within the First Amendment.²³ The test for determining whether expressive conduct falls within the First Amendment is whether the particular conduct contains sufficient “communicative elements” and whether there was an intent to convey a particular message.²⁴ In *Johnson*, the Court recognized that speech and non-speech were identical; stating that in order to justify the suppression of expression, it must be determined that the suppression and governmental interest is unrelated to such expression.²⁵ A year after the *Johnson* decision, a federal flag protection statute was challenged before the Supreme Court. The Flag Protection Act sought to criminalize any compromise to a flag’s physical integrity.²⁶ The Government sought to categorize such conduct within the categories of obscenity or “fighting words” which do not receive protection under the First Amendment.²⁷

there is no place for violence under the right to protest and that there is a proper time and place for such protests).

²² *Cox*, 312 U.S. at 576-77.

²³ *Texas v. Johnson*, 491 U.S. 397, 404 (1989); see also, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505 (1969) (upholding the rights of students to use their expressive nature and that they have a right to wear black armbands to protest American military action in Vietnam).

²⁴ *Johnson*, 491 U.S. at 404.

²⁵ *Id.* at 407.

²⁶ *United States v. Eichman*, 496 U.S. 310, 315 (1990).

²⁷ *Id.*

Nonetheless, the Supreme Court chose not to reconsider *Johnson* and reaffirmed its decision in *Johnson*, while also reaffirming the broad protections guaranteed under the First Amendment.²⁸

B. Second Amendment

District of Columbia v. Heller and *McDonald v. City of Chicago* make up the modern foundations of our understanding of Second Amendment law.²⁹ Despite the language of the Second Amendment, an individual's right to bear arms for the purposes of self-defense in a home, was not recognized until *Heller* in 2008.³⁰ *McDonald* extended this right to the states through the use of the Fourteenth Amendment.³¹ *Heller* and *McDonald* have left the issue unclear as to the right to bear arms outside of one's home, thus leaving state governments to enact vastly different gun laws and regulations. For example, the Constitution of the Commonwealth of Virginia has an enumerated right to bear arms, which has been interpreted as a right that exists outside a home.³² Circuit courts are still split on the type of scrutiny to apply when determining the constitutionality of laws which seek to regulate firearms. Most courts have begun to apply a hybrid two-step analysis, first

²⁸ *Id.* at 318-19.

²⁹ Beth Coplowitz, Comment, *Fitting a Gun in a Circle—a How-To Guide: A Comprehensive Look at the Standard of Review for Gun Regulations Under the Second Amendment*, 71 U. MIAMI L. REV. 895, 898-899 (2017).

³⁰ *Id.*; See *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

³¹ Coplowitz, *supra* note 29, at 901-04.

³² VA. CONST. art. I, § 13; see also *Digiaccinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127 (2011) (surprisingly a case of first impression on the application and applicability of Virginia's right to bear arms as enumerated in their state constitution).

determining whether intermediate or strict scrutiny applies, then determining whether an undue burden exists.³³

Guns are a sensitive topic. It is no secret firearms are extremely dangerous, and can be used for horrible means. The right to bear arms, like all other rights, applies to law-abiding citizens. Convicted criminals and those who have had their rights lawfully extinguished are not the focus of this discussion. The United States Constitution supplies a method of due process to rescind an individual's inalienable rights through the legal system. The purpose of this article is not to debate whether the Second Amendment should exist, whether it is outdated, or any other common criticisms.

It is not unreasonable or too farfetched to imagine a world, or for that matter, a Supreme Court case, in which the Second Amendment's right to bear arms extends outside the home. *Heller* only recognized the right to bear arms inside a home and the Court purposefully did not discuss nor decide the issue of the right to bear arms outside a home.³⁴ For instance, several states across the country have either concealed carry and/or open carry gun laws, dictating whether and how an individual may carry a legally obtained firearm.³⁵ Every state in the United States has a concealed carry law; forty-two states require a permit to carry a concealed weapon;³⁶ forty-three states, including Virginia, have open carry laws; eleven states require a permit to openly carry, and thirty-two

³³ Coplowitz, *supra* note 29, at 908-11.

³⁴ *Id.* at 898.

³⁵ Mark Hardy, *States That Allow Concealed Carry*, AMERICAN CONCEALED, Aug. 11, 2016, <https://americanconcealed.com/articles/second-amendment/states-that-allow-concealed-carry/> (last visited on Dec. 15, 2017).

³⁶ *Id.*

states, including Virginia, do not.³⁷ As every state has some process for allowing the possession firearms outside of the home, it is not difficult to imagine a situation in which either the restriction of both concealed carry and open carry laws would be held unconstitutional.

C. Guns: Speech or Symbol?

Guns are not speech.³⁸ Much like the flag in *Johnson*,³⁹ possessing a gun could be considered a symbol in both the exercise of one's Second Amendment right to bear arms, and First Amendment right of freedom of expression. In this instance, the individual possessing the symbolic firearm is provided legal protections under the First Amendment. However, an individual must use the firearm in an expressive manner in order to constitute it as a symbol before it can be protected under the First Amendment as protected speech.⁴⁰ In cases involving the arrest of individuals who were openly carrying a firearm, especially in states with ambiguous gun carry laws, the First Amendment protection arguments have been prominently used as a defense, albeit a consistently unsuccessful one.⁴¹

³⁷ *Id.*

³⁸ Daniel Horwitz, Article, *Open-Carry: Open-Conversation or Open-Threat?*, 15 FIRST AMEND. L. REV. 96, 112 (2016).

³⁹ *Texas v. Johnson*, 491 U.S. 397, 402 (1989).

⁴⁰ *Id.*

⁴¹ *Id.*; See *Burgess v. Town of Wallingford*, 569 F. App'x 21, 23 (2d Cir. 2014); *Chesney v. City of Jackson*, 171 F. Supp. 3d 605, 616 (E.D. Mich. 2016); *Deffert v. Moe*, 111 F. Supp. 3d 797, 814-15 (W.D. Mich. 2015); *Baker v. Schwarb*, 40 F. Supp. 3d 881, 895 (E.D. Mich. 2014).

D. True Threats

True threats are forms of communication the conveyor intends to express.⁴² Further, the conveyor intends to communicate that they have an intent to commit an act that is not only unlawful but also violent. True threats are often targeted at a particular group or individual.⁴³ Do guns contain a *per se* true threat or even a *per se* true threat to kill? The answer to this question is key to the way in which the United States approaches guns rights and regulation. Daniel Horwitz, author of *Open-Carry: Open-Conversation or Open-Threat?* suggests, “any time an individual openly displays a gun, intentional or not, the message is clear: that individual now has the power to kill.”⁴⁴ Horwitz argues the harm of restricting free speech while simultaneously bearing arms must be weighed against the harm that those arms could *possibly* cause against other individuals.⁴⁵ Horwitz cites several cases in attempt to support the argument that guns cannot be categorized as a symbol;⁴⁶ arguing guns are more likely to be placed into a category of true threats, especially if one operates under the premise that guns do in fact contain a *per se* true threat.⁴⁷ The author

⁴² Horwitz, *supra* note 38, pg. 115-17 (the article also points out that courts and commentators have difficulty identifying the level of scrutiny necessary to constitute a true threat).

⁴³ *Id.*

⁴⁴ *Id.* at 117.

⁴⁵ *Id.*

⁴⁶ Horwitz, *supra* note 38.

⁴⁷ *See generally* Horwitz, *supra* note 38.

vehemently argues there is a clear, true threat, contained within a gun.⁴⁸

Courts have been deciding symbolism issues in First Amendment law using the rationale that a symbol by itself does not contain speech and therefore, a symbol, without more, is not covered by the First Amendment until an individual uses the symbol to convey a message.⁴⁹ However, placing guns under the category of a true threat would remove them from a symbolism analysis altogether. This would fundamentally narrow First Amendment analysis on guns from something that is in need of an operator to convey a message, to an instrument that can only convey one message, death. The idea of carrying a weapon, either open or concealed, as an exercise of an individual's Second Amendment rights, may already be conflated to encompass the First Amendment rather than the Second. Any time an individual is known to have a gun, it may be seen as an attempt at a form of expression under the First Amendment. If the expression is then categorized as a true threat, the analysis blurs the very essence of rights enumerated within the Constitution.

E. The Language Itself

The First Amendment and Second Amendment are closely related linguistically.⁵⁰ The legal language, which is nearly identical in both amendments, asserts strong and seemingly absolute protections. The phrases "shall not be infringed or abridged" contained within both amendments are vastly different than, for example, the Fourth Amendment's "unreasonable" language.⁵¹

⁴⁸ *Id.*

⁴⁹ See Coplowitz, *supra* note 29.

⁵⁰ Joseph Blocher, Article, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U.L. REV. 375, 399-400 (2009).

⁵¹ *Id.* at 401.

Scholars have also shown the history surrounding the adoption of the First and Second Amendments, as well as the creation of the United States of America itself, originated on the idea of political dissent.⁵² The First Amendment, and many will argue, also the Second, promotes the values of political dissent, democracy, and the ability to empower individuals to resist government oppression or suppression.⁵³

While it is true that the First and Second Amendments have limited authority, the claim by Joseph Blocher, author of *Categoricalism and Balancing in First and Second Amendment Analysis* that, “we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose,” is a gross over simplification.⁵⁴ Yes, there are limits placed on free speech. However, these limits are narrow, as Blocher himself states there are exceptions for obscenity, libel, and disclosure of state secrets.⁵⁵ Besides narrow exceptions, the First Amendment essentially protects citizens who speak for any purpose, especially those who speak of extremely unpopular or, in Blocher's words, “wrong-headed views.”⁵⁶

Similarly, Second Amendment exceptions would also be required to be narrow if one were to make textualist arguments, given the language of the amendments. This would be especially true if the limitations do not affect other individuals. Looking at the exceptions of the First Amendment, the commonality between

⁵² *Id.* at 400.

⁵³ *Id.*

⁵⁴ Blocher, *supra* note 50, at 406.

⁵⁵ *Id.* at 405 (this list being illustrative and not exhaustive).

⁵⁶ *Id.*

exceptions show an outward effect on other individual(s).⁵⁷ For example, libel has the effect of injuring the reputation of another individual; disclosure of state secrets has the effect of possibly injuring not only other individuals, but also the country as a whole; and obscenity essentially has its roots in a lack of expression or symbolism, which would take such speech outside the bounds of First Amendment. Absent any direct outward effect, excluding the effect on individuals who simply are offended by the expression,⁵⁸ generally all other speech is protected. The same must then ostensibly be true for the Second Amendment. If legal analysts and judicial interpreters want to keep any sort of reputable authority, it would strain credibility to argue that the strong language of the First Amendment bears no relation to the nearly identical language of the Second.

F. Inferences Upon Inferences Upon Inferences

There are several inferential steps one must take to reach the conclusion that a law-abiding citizen with a gun *will* hurt others. One must not only presume that a person in possession of a firearm will injure another person, but also that the possessor intends to use the firearm to cause injury. If this rationale used for the Second Amendment is true, the same ostensibly should be true for free speech under the First Amendment. Anyone who can talk has the capability to use words and expression to profess libel, obscenity, or any other type of verbal or non-verbal act that would fall outside the bounds of the First Amendment. People have the ability to express “true threats,” yet it is not presumed that people will. For example, people do not necessarily buy insurance with the intention of using it. Many people buy insurance for the peace of mind in knowing they or their loved ones will be taken care of in the event of a catastrophe. It is many times a “just-in-case” product. While no one *hopes* to use insurance, it is there if needed. This can also be a

⁵⁷ *Id.*

⁵⁸ *See supra* note 13 (offending others is not grounds for restricting one’s First Amendment rights).

theory behind the use of firearms for self-defense. Proponents of the ideology that firearms inherently represent a “true threat” should ask themselves whether their reasoning is rooted in a different interpretation of the Constitution and Second Amendment, or if it is actually rooted in a disagreement therewith. If the First Amendment is used to restrict rights enumerated in the Second Amendment by placing firearms in a true threat category, both amendments will ultimately lose their potency.

G. Looking into the Future

The First and Second Amendments will likely continue to clash as the current state of legal analysis cannot seem to separate the Amendments as two distinct concepts when both the right of freedom of expression and the right to bear arms are simultaneously exercised. While this incongruity is only taking place in a very small corner of constitutional case law, if either the First or Second Amendment are effectively used to silence the other, it could result in a nullification of one or both of the Amendment’s broad protections. It is important to note, free speech and the right to bear arms are rooted in political dissent and not as a means to hurt others, and while legally obtained firearms should not be used to silence those with different viewpoints, the First Amendment should not be used to belittle the Second.

II. Charlottesville Through a Constitutional Lens

The violence which took place in Charlottesville was a tragedy. It should be unconscionable for a person to lose their life for engaging in one of the most fundamental and essential rights founded in the United States of America and its Constitution. Unfortunately, historians will point out that the death of Heather Heyer is consistent with history.⁵⁹ Protests in the United States

⁵⁹ *See generally*, HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES (Harper Perennial ed., 2005) (this book discusses several protest movements, along with several other topics, within United States History

have a bloody past, in which deaths are not unusual occurrences.⁶⁰ The country's history of protests is filled with bloodshed, death, and violence, sometimes at the hands of the government.⁶¹ Nevertheless, the past (and present) does not excuse the events at Charlottesville. Furthermore, the Second Amendment should not become a target of blame for the violence at Charlottesville. It is important to note, Heather Heyer, the woman killed during the violence, did not die from firearms.⁶² She died from injuries she sustained after being hit by a car driven by a white nationalist.⁶³

U.S. District Court Judge Glen E. Conrad presided over the attempt to relocate the Charlottesville protest from Emancipation Park.⁶⁴ Judge Conrad wrote, "merely moving [the] demonstration to another park will not avoid a clash of ideologies."⁶⁵ He also acknowledged that a change in location would not change the need for law enforcement, fire, and medical services at Emancipation Park due to the park being at the center of the original idea behind

and the fight that many individuals went through by exercising their First Amendment rights).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See supra* note 6.

⁶³ Dahlia Lithwick and Mark Joseph Stern, *The Guns Won: Charlottesville showed that our First Amendment jurisprudence hasn't reckoned with our Second Amendment reality*, SLATE, Aug. 14, 2017, http://www.slate.com/articles/news_and_politics/jurisprudence/2017/08/the_first_and_second_amendments_clashed_in_charlottesville_the_guns_won.html (last visited on Dec. 16, 2017).

⁶⁴ *Id.*

⁶⁵ *Id.*

the protest.⁶⁶ Changing the location of the protest, Judge Conrad believed, would only result in having to assign city personnel to two locations, thereby stretching the city's resources.⁶⁷ As *Slate* and several other reputable news organizations reported, both white nationalists and counter protesters attended the Charlottesville rally with weapons and firearms, with many people openly carrying semi-automatic guns.⁶⁸

The *Slate* article is rooted in the idea that the events in Charlottesville demonstrated that the Second Amendment "won," and that it overpowered the First Amendment, just like guns would overpower words. There is a popular and consistent idea circulating, that while Judge Conrad's holding was technically correct in its legal analysis, it still somehow seemed wrong.⁶⁹ Judge Conrad's decision was supported by a healthy list of legal precedent in holding that the First Amendment prohibited the city of Charlottesville from relocating the white nationalist rally due to the content of the demonstrator's speech.⁷⁰ Yet, articles from *Slate*, *The New York Times*, *Time*, and other media outlets appear to be on a similar consensus, that once guns are added into the equation, either the First Amendment or the Second Amendment needs to give way and the legal analysis must fundamentally change.⁷¹

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Lithwick and Stern, *supra* note 63.

⁷⁰ *Id.*

⁷¹ See e.g. Lithwick and Stern, *supra* note 63; Goldstein, *supra* note 5; Martin London, *Why States Should Ban Guns From Political Rallies*, TIME, Aug. 22, 2017, <http://time.com/4910900/first-amendment-second-amendment-charlottesville/> (last visited on Dec. 21, 2017)

Specifically, the *Slate* article, written by Dahlia Lithwick and Mark Stern, criticizes Judge Conrad for a failure to reconcile First Amendment precedent with the “reality” of the Second Amendment.⁷² Lithwick and Stern argue that Judge Conrad failed to answer the central and important question of whether “when demonstrators plan to carry guns and cause fights, does the government have a compelling interest in regulating their expressive conduct more carefully than it’d be able to otherwise?”⁷³

While there are several issues with the authors’ legal question, if properly reframed, the question is the root of the debate. Essentially, in a non-legal phrasing, which Amendment should take priority? Which Amendment is more powerful, the First or the Second? In this context and framing, Lithwick and Stern argue that the right to bear arms trumped the freedom of speech in Charlottesville,⁷⁴ and protestors who attended the rally with firearms effectively silenced the protestors who came unarmed.⁷⁵ However, seeing as both white nationalists and counter protestors showed up armed, it’s tough to determine which viewpoints were heard that day. Additionally, even if only the white nationalists came armed, there is no evidence that counter protestors would have been effectively silenced, although that is not too hard to imagine.

(arguing that there is no Constitutional right to bear arms at political rallies and that state gun laws can regulate that).

⁷² Lithwick and Stern, *supra* note 63.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

III. Constitutional Protections in a Polarized Political World

There is a myriad of hypothetical changes/solutions to the above-mentioned constitutional issues. Some policies would necessarily require hefty legislative lifting by either state or federal legislatures. Other avenues, such as steps taken by a state or federal judiciary, could bypass the legislative process by interpreting state or federal law, while analyzing a challenged state or federal program/regulation. Substantive change to gun regulation, especially the regulation of legally obtained firearms by presumptively law-abiding citizens, will likely prove incredibly difficult to achieve without a functioning legislative body or courts altering the ways they interpret civil liberties or constitutions.

A. Balancing Civil Liberties

It is unclear if its legally possible to restrict a person's Second Amendment rights in order for a group or an individual to exercise their First Amendment rights. Looking past the already questionable license⁷⁶ and fee required to protest in nearly every state in the country,⁷⁷ the first question to ask is whether a judge should deny⁷⁸ a group or individual's First Amendment right to assemble and protest if it could be proven that a large number of protestors were going to be carrying firearms. Without a deep analysis of the question, many people may view the answer as an easy yes. Presumably, proponents of the affirmative answer to this

⁷⁶ See *supra* note 22.

⁷⁷ *Protest Laws by State*, FIND LAW: CIVIL RIGHTS, <http://civilrights.findlaw.com/enforcing-your-civil-rights/protest-laws-by-state.html> (last visited on Dec. 29, 2017) (Every state in the Union has some form of permit requirement/application procedure and nearly all fifty states also require a fee for the application ranging anywhere from \$30 to \$150).

⁷⁸ It necessarily follows that if a permit is denied, one would be denied from exercising their First Amendment rights.

question might rationalize that if guns and weapons of any kind are going to be commonplace at an event, that fact alone should be heavily scrutinized, and event organizers should likely try to restrict guns all together. Framed in this context, the answer seems very simple and logical.

The second question to ask is whether a judge could deny a group or individual's First Amendment right to assemble and protest if it could be proven that a large number of protestors would be concurrently exercising their Second Amendment rights. Hopefully, the answer to this question does not come as easily. One must assume that carrying a legally obtained firearm openly, concealed, or both is constitutional.⁷⁹ Despite in Charlottesville, where many protestors were openly carrying firearms,⁸⁰ a different situation where many are only carrying concealed firearms should not change the analysis. It should make no difference to the analysis whether or not others can physically see a gun, and if it does, one should re-assess what their fundamental issues with law abiding citizens carrying legally obtained weapons actually are.

If the concern is the safety of all individuals in a public setting, the visibility of firearms could be a major factor. There could even be an argument that openly carrying firearms, as opposed to carrying concealed firearms would be safer, at least from the perspective of law enforcement. If the concern is inciting violence by toting firearms openly, the issue can become much more complicated. In this instance, protestors would have to be carrying firearms with the intent to intimidate and frighten others with the possibility of significant harm or even death.⁸¹ Intent alone would be incredibly hard to prove, along with demonstrating

⁷⁹ See *supra* pages 8-10.

⁸⁰ Lithwick and Stern, *supra* note 63.

⁸¹ To be fair, I do not doubt that there are indeed people out there that would do exactly what I am describing.

an attempt at incitement. A protestor would have to be actively pointing their firearm at others or threatening to shoot them. It would be futile to argue that the mere presence of a firearm on a person, either in a holster or being carried by a strap on a person's back, is enough for intent to incite violence or intimidate others; this type of legal standard would create a very large and murky grey area of the law.

A protestor who is simply in possession of a firearm can hardly be considered to be "inciting violence." Intent to intimidate, frighten, incite violence, or threaten would bring the analysis into the realm of a true threat.⁸² The overarching answer to the fundamental question also depends on how one answers the legal questions contained within a true threats analysis as well.⁸³ If one believes guns in fact are a *per se* true threat, which in this case would be the "easy way out" of the analysis, the issue of due process would still need to be analyzed.⁸⁴

Even on a fundamental and theoretical level, it is unclear if it is possible to constitutionally restrict or flat out deny the use, access, or exercise of one inalienable right at the expense of another. People do not forfeit their Fourth Amendment rights to be free from unreasonable searches or seizures⁸⁵ when they exercise their First Amendment rights to practice religion by attending a

⁸² See *supra* pages 12-13.

⁸³ See *supra* pages 10-11.

⁸⁴ *Infra* page 23.

⁸⁵ U.S. CONST. amend. IV ("The right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

house of worship.⁸⁶ If the Second Amendment right of individuals to “bear arms” are to be restricted during an exercise of First Amendment rights of expression, it could easily follow that the Fourth Amendment right to be free from unreasonable searches and seizures would diminish as well, considering there would most certainly be calls for searches of individuals at public protests to check for the possession of firearms. An argument could be made that if guns were to be banned at protests, the searches of individuals would then be justified and therefore, the Fourth Amendment would still be in effect.⁸⁷ However, looking at the analysis, we have effectively gone from a protest of individuals gathered in a public space, to lengthy lines of protestors awaiting entry into a sectioned-off public area, which can only be accessed upon a search or perhaps a pass through of a metal detector.

Many see slippery slope arguments as an argument of last resort and dramatization, but the public policy implications from anything of this nature could have a staggering and chilling effect. Large protests could be denied simply due to a city’s lack of funds to control the event. Or, perhaps more likely, the price of permits and application fees for public gatherings, demonstrations, and even parades, could skyrocket. This would effectively place the power of assembly exclusively into the hands of those who can afford it.⁸⁸ Municipalities would necessarily need more time to organize, which would likely cause permit applications to be obtained further in advance, and possibly cause demonstration organizers to lose out

⁸⁶ Obviously, places of worship are private areas that are presumably allowed to prohibit firearms but the analogy of losing one right at the expense of another still holds true.

⁸⁷ *See supra* note 79.

⁸⁸ *See supra* note 72 (with some major cities already charging \$150 for an application fee, without a guarantee of the permit being issued, and with some requiring deadlines as early as ninety days in advance, it is hard to see how any sort of increase in these policies would benefit the democratic process or public at large).

on political momentum. Long lines to essentially enter “free speech zones” could act as a deterrent for many people wanting to participate in demonstrations. Furthermore, a scrupulous police force at an event would also likely deter groups of people traditionally fearful of law enforcement, including undocumented immigrants, and historically oppressed minority populations. The consequences of changing the way firearms are monitored at demonstrations may seem dramatic, or far-fetched, but it only takes one major event to dramatically change how security is conducted in the United States. For example, in response to the September 11, 2001 terrorist attacks, the Transportation Security Administration was hastily formed, and airport security functions have never been the same.⁸⁹ Now, in order to travel on commercial airlines, people are subjected to extensive searches of their bodies and belongings.⁹⁰ The analogy here is nearly identical. It is not hard to imagine a large number of people being killed or injured at a protest, rally, or public gathering. Consequently, the state of public protests or gatherings could quickly change overnight, especially if the deaths at this hypothetical event were to happen at the hands of guns.⁹¹

B. Due Process

The right to due process is rooted in the Fifth Amendment and is applied to individual states through the Fourteenth Amendment.⁹² It is difficult to imagine how due process can fit into the analysis. Procedural due process, which would more likely be at

⁸⁹ Rick Seaney, *After 9/11: Are We Safer in the Air?*, ABC NEWS, Aug. 25, 2011, <http://abcnews.go.com/Travel/911-safer-air/story?id=14372486> (last visited April 17, 2019).

⁹⁰ *Id.*

⁹¹ Just to clarify, this is not an argument for less safety precautions. While it may at times seem so, there is a fine line between a world with total security and a free society.

⁹² U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

issue here, “imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”⁹³ The fundamental requirement of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner.”⁹⁴ For the purposes of this article, whether or not due process has been served is not wholly relevant.⁹⁵ All that needs to be recognized is that in order to take away a liberty interest from a law abiding citizen, there needs to be an appropriate procedure to ensure against an erroneous deprivation.⁹⁶ Regardless of whether the state actor seeking to restrict a fundamental right is the federal government or a state, the analysis is essentially the same. However, for purposes of analyzing Charlottesville, the applicable state firearms laws and the Fourteenth Amendment should be the focus of the discussion. The Fourteenth Amendment states in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

⁹³ *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

⁹⁴ *Id.* at 333.

⁹⁵ *See id.* at 335 (For reference, the three factors are: “[1.] The private interest that will be affected by the official action; [2.] The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [3.] The Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

⁹⁶ *Id.*

nor deny to any person within its jurisdiction the equal protection of the laws.⁹⁷

For the purposes of the Second Amendment, the key term in the Fourteenth Amendment is “liberty,” which ultimately means fundamental rights like those that are enumerated in the Bill of Rights.

The Second Amendment is fully applicable to the states.⁹⁸ However, the application of due process of law in the context of guns and the Second Amendment is unclear.⁹⁹ In *McDonald v. City of Chicago*, the Supreme Court, in deciding the issue of due process pertaining to the Second Amendment, discussed the fact that other rights, such as the First Amendment, were also once considered not to be binding to the states through the due process clause.¹⁰⁰ The court noted, it was not until the 1930’s that the First Amendment was considered a fundamental right applicable to the states.¹⁰¹ In fact, it was only until the very late 1800’s, with the Fourteenth Amendment immediately preceding this new found enlightenment, that courts and scholars started to consider whether the due process clause prohibited states from infringing inalienable rights set out in the Bill of Rights.¹⁰²

What is interesting about the *McDonald* decision is the way the Court framed the issue of whether the Second Amendment is incorporated into the concept of due process. The Court posed the

⁹⁷ U.S. CONST. amend. XIV, § 1.

⁹⁸ *McDonald v. City of Chi.*, 561 U.S. 742, 750 (2010).

⁹⁹ *Id.* at 753.

¹⁰⁰ *Id.* at 759.

¹⁰¹ *Id.*

¹⁰² *Id.*

question of whether “the right to keep and bear arms is fundamental to our scheme of ordered liberty or . . . whether this right is “deeply rooted in this Nation's history and tradition[?]”¹⁰³ Ultimately, the Court concluded that while the Second Amendment is deeply rooted in the Nation’s history and tradition, the Second Amendment is better suited to the category of “among those fundamental rights necessary to our system of ordered liberty.”¹⁰⁴ Further, the Court in *McDonald* also specifically stated that Constitutional rights, which have controversial public safety implications, are not limited to the Second Amendment, and this fact should not place the Second Amendment in a fundamentally different category than the rest of the Bill of Rights in terms of the application of due process.¹⁰⁵

The general gun debate in the United States should not be viewed as a debate between total anarchy of gun laws versus a total and complete ban of guns, although it may often seem as if it is. In *McDonald*, the court struck down a Washington D.C. firearms ban, finding that due process was required before an individual could be prohibited from obtaining a handgun for the purposes of self-defense of his home.¹⁰⁶ Due process as applied to guns, as the *McDonald* Court noted, does not affect in any way, regulations prohibiting, for example, those who are mentally ill from obtaining guns.¹⁰⁷

¹⁰³ *Id.* at 767 (internal citations omitted).

¹⁰⁴ *McDonald*, 561 U.S. at 77.

¹⁰⁵ *Id.* at 783.

¹⁰⁶ *Id.* at 750.

¹⁰⁷ *Id.* at 786.

C. Due Process and Public Assembly

McDonald definitively established that due process under the Fourteenth Amendment applies to states in relation to the Second Amendment. There is currently no clear legal doctrine that reconciles the First, Second, and Fourteenth Amendments in the context of public assembly. In Charlottesville, protestors, at least before the protest, had a presumption of innocence as law-abiding citizens. At the time of the demonstration, Virginia state law allowed people to openly carry firearms, but required a permit to carry concealed firearms.¹⁰⁸ Absent the hypothetical interpretation of the Second Amendment right to exist outside the home, a weapons ban at the Charlottesville protest would have worked well in relation to due process. Arguably, due process would not be required in this situation. However, in a world where the Second Amendment right to possess firearms is understood to exist outside the home, the due process analysis is not nearly as easy. If there is a constitutional right to possess firearms outside of the home, due process would be triggered in an attempt to restrict the possession of firearms in a public place. This would require a procedure in place in order to ensure that every person attempting to attend the protest with a firearm would be afforded due process. Postulating the scope and reasonable methods of affording due process in this situation is incredibly difficult, if not impossible. Would it be constitutional to restrict one's right to carry a legally obtained firearm without due process? Assuming the right to bear arms is the most narrow and strict interpretation of *Heller*, and the right is exclusively for the possession of handguns, for the use of self-defense within the home, then the answer is no. However, if the right to bear arms is presumed to be fundamental outside the home,

¹⁰⁸ *Firearms / Concealed Handguns*, VA. ST. POLICE, <http://www.vsp.state.va.us/Firearms.shtm>, (last visited on Dec. 31, 2017).

due process and the possession of a legal firearm in a public space, will have much stronger implications and protections.

D. State and Federal Gun Laws

Arguably, there is a need for a more uniform understanding of how state and federal gun laws effect the analysis of granting protest-permits. The federal courts' interpretation of the Second Amendment is scarce and unclear.¹⁰⁹ Due to the hands-off approach of the federal government, states have taken the bulk of responsibility in regulating firearms. This has led to drastically different gun laws across the nation.¹¹⁰ Federalism can be summarized as a separation of powers between all areas of federal and state governments. While there is no single sentence in the Constitution that explicitly sets forth the Federalist system, the different parts of the Constitution inherently create the system by delegating certain powers and restrictions to different areas and levels of government. The Tenth amendment can be seen as one aspect of this delegation of authority. The Tenth Amendment states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹¹¹ Traditionally, the Tenth Amendment has been seen as giving states the power to regulate anything not delegated to the Federal government or specifically mentioned in the Constitution. Interestingly, firearms are specifically mentioned in the Constitution, yet states have been the primary legislators and regulators of firearms.

Article 1, section 13 of the Constitution of the Commonwealth of Virginia protects the right to bear arms for all of its citizens, which contains language that is nearly identical to the

¹⁰⁹ Coplowitz, *supra* note 29, at 908-11.

¹¹⁰ Hardy, *supra* note 35.

¹¹¹ U.S. CONST. amend. X.

Second Amendment of the United States Constitution.¹¹² Section 13 states:

That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.¹¹³

This amendment poses two interesting roads to follow. First, there is language that is nearly identical to the Second Amendment, specifically the phrase, “the right of the people to keep and bear arms shall not be infringed.”¹¹⁴ This phrase has been interpreted very differently by both the Supreme Court of Virginia and the Federal court system.¹¹⁵ Second, the language of section 13 poses additional questions as to what and how much power Virginia has over the regulation of firearms, and what the second half of the amendment, starting after “infringed” actually means.¹¹⁶

¹¹² VA. CONST. art. I, § 13.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chi.*, 561 U.S. 742 (2010). *But see Digiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127 (2011).

¹¹⁶ VA. CONST. art. I, § 13.

E. Statutory Interpretation – Part I

While the Federal court's interpretations of the Second Amendment through *Heller*¹¹⁷ and *McDonald*¹¹⁸ have been discussed, the Supreme Court of Virginia has interpreted Article 1, section 13 of its constitution differently.¹¹⁹ Surprisingly, *Digiacinto v. Rector & Visitors of George Mason University*, a recent Second Amendment case from 2011, was a case of first impression for the Supreme Court of Virginia.¹²⁰ Initially, the court in *Digiacinto* held the right to bear arms in Section 13 was "co-extensive" with the Second Amendment of the federal constitution, "concerning all issues in the instant case."¹²¹ Therefore, for the rest of the opinion, the Court would analyze *Digiacinto*'s state and federal constitutional rights concurrently.¹²²

Despite stating that the rights contained within the Federal and Virginia amendments were nearly identical in scope and meaning, the Supreme Court of Virginia glossed over the holdings in both *Heller* and *McDonald*.¹²³ The court briefly mentioned the two cases then turned to an analysis of the restriction of firearms from sensitive places. The latter of which was only discussed briefly

¹¹⁷ See discussion *supra* pages 7-9.

¹¹⁸ See discussion *supra* pages 24-26.

¹¹⁹ See *Digiacinto*, 281 Va. 127.

¹²⁰ *Id.* at 133.

¹²¹ *Id.* at 134 (this phrase leaves open the question as to whether the Virginia Supreme Court wanted to leave open room for disagreement with federal interpretation).

¹²² *Id.*

¹²³ *Id.* at 134-35.

in *Heller* and *McDonald*.¹²⁴ While the Court's analysis is technically correct in using *Heller* and *McDonald*, its use is fundamentally flawed because *Digiacinto* was not a case about the use of firearms inside the home for self-defense.

The holdings of both *Heller* and *McDonald* ultimately only recognized the right to bear arms inside the home for self-defense. However, in *Digiacinto*, the issue was the possession of a firearm on the campus of George Mason University (GMU), by an individual who was not a student, but frequently used the campus facilities.¹²⁵ Therefore, any such analysis of a possession of a firearm could not be done under a *Heller* or *McDonald* analysis because the entire situation took place outside of any type of concept which could resemble the "home." *Heller* and *McDonald* only apply to *Digiacinto* in the most abstract and distant ways. Language in both *Heller* and *McDonald* state that neither holding disturbs laws and regulations that restrict firearm possession in cases such as the mentally ill, or in *Digiacinto*'s case, in "sensitive places."¹²⁶ In that sense, both cases do apply; that a law or regulation restricting firearms from those enumerated classes are not presumptively unconstitutional. However, anything further would then have to be analyzed and recognized through state law and could not be challenged under the Second Amendment of the United States Constitution because according to the U.S. Supreme Court, the constitutional right to bear arms ends as soon as a person leaves their home.¹²⁷

In *Digiacinto*, the Supreme Court of Virginia stated that laws and regulations "restricting the carrying of firearms" in "sensitive places," such as schools and government buildings, are

¹²⁴ *Id.*

¹²⁵ *Digiacinto*, 281 Va. at 131.

¹²⁶ *Id.* at 135.

¹²⁷ *See supra* note 108.

“presumptively legal.”¹²⁸ As previously stated, Digiacinto was not a student nor an employee of GMU, but did frequently use university resources, such as the library.¹²⁹ Digiacinto desired to carry his firearm on campus, but as per state regulation, it was prohibited.¹³⁰ The regulation read as follows:

Possession or carrying of any weapon by any person, except a police officer, is prohibited on university property in academic buildings, administrative office buildings, student residence buildings, dining facilities, or while attending sporting, entertainment or educational events. Entry upon the aforementioned university property in violation of this prohibition is expressly forbidden.¹³¹

Digiacinto argued the GMU regulation violated his constitutional right to carry a firearm, that GMU lacked statutory authority to regulate firearms, and that the regulations conflicted with state law.¹³² GMU argued the right to bear arms is not absolute and the Second Amendment did not prevent the prohibition of firearms in sensitive places.¹³³ These sensitive places, GMU argued, included university buildings and “widely attended university events.”¹³⁴

¹²⁸ *Id.*

¹²⁹ *Digiacinto*, 281 Va. at 131.

¹³⁰ *Id.*

¹³¹ *Id.* at 130-31.

¹³² *Id.* at 131.

¹³³ *Id.* at 133.

¹³⁴ *Id.*

The Supreme Court of Virginia ultimately held that GMU, in its entirety, was a sensitive place and that the regulation did not violate either section 13 of the Virginia's Constitution or the Second Amendment of the U.S. Constitution.¹³⁵ While the outcome in *Digiacinto* broadly seems to be in line with federal court decisions, the language and reasoning of the decision calls for a closer look. First, the Supreme Court of Virginia found that "GMU is a sensitive place," which would in turn, allow for justification of such a regulation.¹³⁶ The Court was of the opinion that a university, which "traditionally has not been open to the general public," is fundamentally different than a public street or park.¹³⁷ Despite GMU being a public university, which most certainly has facilities the general public use, GMU is an "institute of higher learning that is devoted to its mission of public education."¹³⁸

On its face, the Supreme Court of Virginia's reasoning in *Digiacinto* seems wholly logical, but the court's holding may not fully comport to current Second Amendment jurisprudence. In *Heller*, The U.S. Supreme Court did not create a "sensitive places" exception for future courts to follow. *Heller* simply mentioned the presumptive validity of restrictions of firearms at places such as schools and government buildings, and used the term "sensitive places" as a grouping mechanism.¹³⁹ Deeming an entire public university a "sensitive place" which would then allow for a complete prohibition of a constitutional right, is not something to take lightly. The *Digiacinto* Court expressed that in its view, the regulation did not necessarily impose a total ban of firearms on

¹³⁵ *Digiacinto*, 281 Va. at 136-37.

¹³⁶ *Id.* at 137.

¹³⁷ *Id.* at 136.

¹³⁸ *Id.*

¹³⁹ *District of Columbia v. Heller*, 554 U.S. 570, 573 (2008).

campus, and therefore it was constitutional.¹⁴⁰ This necessarily means that a regulation totally banning all firearms would be unconstitutional. This statement by the Court is interesting due to the language of section 13.¹⁴¹ The regulation prohibits the possession of a firearm “on university property in academic buildings, administrative office buildings, student residence buildings, dining facilities, or while attending sporting, entertainment or educational events.”¹⁴² The regulation’s list of areas where firearms are prohibited effectively covers anything on a university campus, which begs the question; is the regulation effectively a total ban on firearms? Also noteworthy is that the regulation prohibits possession of firearms in on-campus student residences, which could be considered a “home” for the purposes of *Heller* and *McDonald*. It could then be argued that the Supreme Court of Virginia’s holding extinguishes a person’s right to possess firearms for self-defense in their homes upon becoming a college student and choosing or needing to live on-campus. It’s doubtful that, upon becoming a college student, an individual does not need or effectively loses the right to use self-defense.

Despite the Courts illogic, it essentially said the carrying of firearms in a public place is constitutional, if not for sensitive places.¹⁴³ This confusing case is some of the only information and analysis Virginia has on its state constitutional right to bear arms, which seems much less restrictive than *Heller*. For the Supreme Court of Virginia, the deciding line seems to be somewhere before a university campus or buildings, wherever that might be.

¹⁴⁰ *Digiacinto*, 281 Va. at 136.

¹⁴¹ See discussion *supra* page 31-32.

¹⁴² *Digiacinto*, 281 Va. at 130-131.

¹⁴³ *Id.* at 136-137.

F. Statutory Interpretation – Part II

The second half of section 13 of Virginia's Constitution reads "that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power."¹⁴⁴ Seeing as *Digiacinto* was a case of first impression for the Supreme Court of Virginia, section 13 has not been heavily litigated, especially the second half of it.¹⁴⁵ The first question to ask is whether this clause has any true legal meaning. If not, the clause could be summarized as immaterial, but yet still hold historical importance. However, if the clause does have a true legal meaning, that meaning and its implications to firearms regulation may be difficult to ascertain.

The first clause of the second half of Section 13, referencing standing armies, seems to support the idea that the second clause is nothing but dicta. It is a warning so to speak, about the historical dangers of armies present amongst citizens in a time of peace. This argument is supported by the first clause of Section 13, which reads, "[t]hat a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state."¹⁴⁶ Much like the Second amendment of the U.S. Constitution, which references militias comprised of everyday citizens, these clauses can be seen as pure history; an idea that once was popular but which is no longer viable.

However, what is unique about Section 13 of Virginia's Constitution is that both the words militia, mainly understood to

¹⁴⁴ VA. CONST. art. I, § 13.

¹⁴⁵ *Supra* note 111.

¹⁴⁶ VA. CONST. art. I, § 13.

mean citizen armies,¹⁴⁷ and military,¹⁴⁸ are used, and they seem to be used differently. When reading the first and second clause together (referring to the second half of Section 13), support for the argument that these clauses have legal meaning gain much weight. Essentially, the plain meaning of Section 13 seems to be that the authors of Virginia's Constitution intended that, groups of armed citizens, in theory, would help regulate and subdue the standing army of the United States.¹⁴⁹ This regulation could be achieved by, in the eyes of the authors, a hypothetical threat of civilian resistance. It seems that in the authors' minds, if they could guarantee an inalienable right to bear arms to all citizens, any threat of liberty at the hands of a powerful federal army could be mitigated.

Another strange caveat of Section 13 is the last phrase, "civil power."¹⁵⁰ This phrase is used in relation to the regulation of standing armies. However, it is quite odd the authors did not just use the phrase militia or civil militia. Whether the phrase is simply a term of art, or the authors intended to be metaphorical and more ideological in their conveyance, the different language, necessarily begs legal analysis into the meaning. If "civil power" means something other than a militia, it is possible the words militia and military actually contain a distinctly different meaning. Stated differently, the phrase "civil power" may leave open the possibility for courts to interpret any specific gun regulation differently than it would be if civil militia would have been used instead of civil power.

¹⁴⁷ See VA. CONST. art. I, § 13 (defining the composition of a militia as "comprised of the body of the people").

¹⁴⁸ *Id.* (referring to "standing armies" and that their regulation can be governed by the citizens, i.e. their militia).

¹⁴⁹ VA. CONST. art. I, § 13.

¹⁵⁰ *Id.*

The end of the clause reads, “and governed by, the civil power.”¹⁵¹ Therefore, it is plausible for Virginia courts to interpret this clause to actually mean the legislature has an enumerated power to regulate firearms. It is a very easy argument to make that, “civil power” means the will of the people, i.e. democracy.

The legal analysis of Section 13 dramatically changes depending on which definition is attributed to those select few words and phrases. If military and militia are used interchangeably and the authors intended to refer to both as one indistinguishable entity, the term “civil power” more likely seems to mean the will of the people to govern through the legislative process. If military and militia are fundamentally distinct entities, a debate of the definition of “civil power” remains. However, defining “civil power” in the second scenario as the will of the people, renders Section 13 utterly confusing. Therefore, it is more probable that “civil power” was a term of ideological art used to refer to the armed civil militia, but without giving clear constitutional consent to essentially wage war against the federal government in order to regulate the militia.

While this distinction may not seem important, it appears the definitions of one or two words, are the difference between interpreting a constitutional power to substantively regulate the use of firearms and a near absolute restriction of government regulation of firearms.¹⁵² These distinctions vary between every state in the United States, as each state constitution contains different language. While states already regulate firearms, using individual constitutions to do so would be a new avenue. Virginia, which did not litigate a case dealing with a state right to bear arms until 2011, presumably is not alone in that context. Depending upon the

¹⁵¹ *Id.*

¹⁵² *See* Blocher, *supra* note 50 (The language of the Second Amendment and Section 13 both contain absolutist language, “shall not be infringed”).

interpretation of the language used in each constitution, states could regulate firearms consistent therewith.

G. Fears Come to Fruition

There is one last piece of scholarship that still must be addressed. An essay, *Your 'Little Friend' Doesn't Say 'Hello': Putting The First Amendment Before The Second in Public Protests* by Kendall Burchard, was published while this article was nearing completion, and addresses a few of the issues that have been discussed here.¹⁵³ Burchard's main argument is for all public protests be designated as sensitive places, which would prohibit the possession of firearms for any and all who would attend the protest, except for law enforcement.¹⁵⁴ To support this proposition, Burchard cites five cases, including *Digiacinto*, which hold that certain places, including an entire university campus, could be designated as sensitive places.¹⁵⁵

Burchard simultaneously argues that those attempting to exercise free expression and ideas under the First Amendment need to have protection from armed law enforcement. Burchard writes, "in Charlottesville and in other similar instances, the state is unable to secure the speaker's rights, their protection, or the protection of their listeners because an individual's "self-defense" right challenges the state's monopoly on violence."¹⁵⁶ First, it is a distortion of the Second Amendment to frame the issue as "self-defense" versus free speech, let alone framing it as "self-defense" versus a "state's monopoly on violence," whatever that might be.

¹⁵³ Kendall Burchard, Essay, *Your 'Little Friend' Doesn't Say 'Hello': Putting The First Amendment Before The Second in Public Protests*, 104 VA. L. REV. ONLINE 30.

¹⁵⁴ *See Id.* § 3.

¹⁵⁵ *Id.*; *See also supra* note 138.

¹⁵⁶ *See* Burchard, *supra* note 153.

Burchard argues that First Amendment doctrine demands “an unpopular speaker’s protection from the hostile audience and the heckler’s veto” and therefore, protests, demonstrations, and the like are “entitled to police protection to ensure the speaker’s ability to speak.”¹⁵⁷ While the government certainly cannot discriminate on the basis of view point or content of speech,¹⁵⁸ abdicating all individual self-defense rights to the state during a protest is not the right cause of action. The state does not have the power under the First Amendment to force individuals to listen to anyone who wants to speak.

Burchard opines that Charlottesville created a situation where “the exercise of ‘self-defense’ rights” castrated the state’s ability “to maintain order or protect and serve the public safety interest.”¹⁵⁹ Burchard therefore concludes that an individual’s right to self-defense should be secondary to police power, state power, and “the public interest in freedom of expression.”¹⁶⁰ Essentially, any right an individual may have to use self-defense during a protest, regardless of the presence of a firearm, should be secondary to the freedom of expression and the First Amendment. Obviously, when viewed in a vacuum, a “violent” act, like self-defense can be seen as something “negative” when compared to expressive conduct, like speech, which generally carries a positive connotation to it. But again, this is the conflation between two fundamental rights that is difficult to reconcile. Burchard even abandons using the word “firearms” and replaces it with the much broader term of “self-defense.” Law abiding individuals do not seek out opportunities to use self-defense. Designating all self-defense rights

¹⁵⁷ *Id.*

¹⁵⁸ *See supra* note 18.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

to police officers is not only anathema to the idea of a free state, but also speaks to the previous arguments of cost and personnel.¹⁶¹

Due process, which Burchard did not address, is the most difficult and fundamental hurdle that must be overcome to prescribe any of the ideas floated in the essay. If armed individuals are threatening others who are trying to exercise their First Amendment rights, that is a problem. However, making threats is already illegal, regardless if it is at a protest. The difficulty with designating a public protest as a sensitive place is that protests contain an inherent, natural fluidity due to their presence in an open public space. A protest can be held near citizens walking by, who are not participating. This again is analogous to an argument discussed earlier.¹⁶² Protests would necessarily need to be sectioned off and First Amendment/free speech zones would need to be created, especially if the safety and defense of all individuals attending were to be legally designated to law enforcement. Searches of all wishing to protest would necessarily have to occur to ensure that no individuals were carrying anything law enforcement would deem unsafe.

Ultimately, one of the major issues with Burchard's argument, and similar arguments made about this topic, is the generalized presumption that individuals who are carrying firearms legally will use them.¹⁶³ Burchard writes "the expressive rights of demonstrators and protesters alike are severely curtailed when firearms are permitted at demonstrations because disagreement could result in death."¹⁶⁴ This presumption is borderline offensive. To essentially argue that law-abiding citizens who legally obtain and

¹⁶¹ See discussion *supra* p. 23.

¹⁶² See discussion *supra* p. 23.

¹⁶³ *Id.*

¹⁶⁴ See Burchard, *supra* note 153.

carry firearms are in any way likely to use their firearm on those who they might have an ideological disagreement with is absurd.

Burchard concludes by reaffirming the argument for state obligated protection at protests.¹⁶⁵ However, there is a large and important argument contained in these closing sentences: “[T]he policy justification for carrying a firearm in public for the lawful purpose of self-defense loses credence in light of the state’s obligation to protect the speakers, the listeners, and the municipality writ large during permitted demonstrations.”¹⁶⁶ This article is not long enough to cover the lengthy analysis needed to examine the true implications of what Burchard is advocating for. However, it is important to note that the amount of liability that would be placed upon the state and/or municipality if it were to take on this responsibility of defense, would be unfathomable. It would necessarily open the door to litigation the next time an individual suffers harm at a protest. Furthermore, the government could assert sovereign immunity, leaving citizens without any right to self-defense during a protest *and* no legal recourse if the state were to fail at its obligation.¹⁶⁷ The only way to defeat sovereign immunity would be if state or federal lawmakers passed legislation specifically designating liability to the government without recourse in any type of immunity law.¹⁶⁸

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See generally W. E. Shipley, Comment Note, *Municipal immunity from liability for torts*, 60 A.L.R.2D 1198 (discussing the body of immunity law in conjunction with municipalities). See also Gary L. Wickert, Detailed Chart, *Suing The King: State Sovereign Immunity And Tort Liability In All 50 States*, <https://www.mwl-law.com/wp-content/uploads/2013/03/STATE-GOVERNMENTAL-LIABILITY-IN-ALL-50-STATES-CHART-GLW-00211981.pdf>.

¹⁶⁸ See Shipley, *supra* note 167; Wickert, *supra* note 167.

IV. Conclusion

Issues facing the United States pertaining to gun regulation must be addressed. However, when two fundamental rights clash, both must be viewed as entirely separate, whole, and distinct. Diminishing one right at the expense of the other renders either one or both ineffective and deficient. What is a right if it can simply wither away at the introduction or exercise of another right?

The First and Second Amendments to the U.S. Constitution are nearly as old as the United States itself. The two politically dissenting ideas, along with another fundamental concept, due process, have for the most part survived the test of time. Ignoring a violation of a right, or attempting to circumvent a right through crafty wordsmanship might “solve” a temporary problem, but it will only serve as precedent to accomplish a similar task in the future. Take for example the national dialogue generated as a result of comments made by President Donald Trump following a fatal shooting of students at Marjory Stoneman Douglas High School in Parkland, Florida.¹⁶⁹ President Trump publicly stated that he would prefer a system of confiscating weapons before any due process procedures.¹⁷⁰ Admittedly the idea is not likely to be enacted, but the fact that it was even been conceived, or remotely normalized in a national dialogue, is a cause for concern. Normalizing restrictions of fundamental rights is a long and dark road that should not be followed.

¹⁶⁹ Jack Healy, *Scared but Resilient, Stoneman Douglas Students Return to Class*, N.Y. TIMES, Feb. 28, 2018, <https://www.nytimes.com/2018/02/28/us/stoneman-douglas-parkland-shooting.html> (last visited April 17, 2019).

¹⁷⁰ Toluse Olorunnipa, et al. *President Trump's 'Take the Guns First' Remark Sparks Due Process Debate*, TIME, March 3, 2018, <http://time.com/5184160/trump-guns-due-process/> (last visited April 17, 2019).

While this issue is certainly niche, the overall ideas are applicable in broader concepts of gun control and legislation. There is no doubt the status quo of national gun law is unacceptable. However, changes *must* be made in a way that is consistent with the Second Amendment and the Bill of Rights as a whole. Any solution that ignores the Second Amendment to achieve an immediate fix will ultimately come back to hurt other areas of the law and other fundamental rights.

Reflecting on the words and ideas of James Madison, in Federalist No. 10, his fear was of both majority and minority factions.¹⁷¹ The root of Madison's fear was the loss of liberty.¹⁷² He posed two methods of dealing with factions; remove the causes or control the effects.¹⁷³ Removing the causes would be worse than factions themselves:

It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.¹⁷⁴

The second remedy, to control its effects, is also not a practical solution to Madison. "The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable

¹⁷¹ See Madison, *supra* note 1.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

obstacle to a uniformity of interests. The protection of these faculties is the first object of government.”¹⁷⁵

Madison saw factions as inevitable, with a republic governmental structure acting as not only the sole mitigating factor, but as the defender of the very freedoms that allow humans to create the very factions that are anathema to a free society. Madison’s topic and conclusion both serve as a perfect analogy for the difficulties discussed in this article. Madison did not see an absolute cure for the disease of factions because he believed that one did not exist. Frankly, at least in the eyes of the law, a solution to this issue may not exist. A faction, whose attempts can be deduced to a reduction of liberty, is the exact fear Madison was speaking of, and just as Madison argued, this disease is best cured in the arena of the mind, philosophy, and individual mentality.

¹⁷⁵ *Id.*