

CHARLOTTESVILLE, THE FIRST AMENDMENT, THE SECOND AMENDMENT, AND A POTENTIAL CONSTITUTIONAL CRISIS: CAN THE GOVERNMENT REGULATE ARMED PROTESTS?

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In this note I will argue why the government can regulate armed protests. To do this, I will provide two separate methods of regulation and then argue which is the better option. The first method of regulation will use *U.S. v. O'Brien*, to enforce the removal of guns from all protests. This method of regulation, which bans all guns at protests, has received support from three law review articles. I will critique these findings. The second method of regulation will require the government to characterize certain armed protest conduct as expression unprotected by the First Amendment. Lastly, I will review a proposed armed protest regulation and explain its flaws.

SIGNIFICANT BACKGROUND INFORMATION

The nationwide discussion on the regulation of armed protests started on August 11th and 12th, 2017, when white supremacist Jason Kessler organized the “Unite the Right” rally to protest the Charlottesville City Council’s decision to remove the statue of Robert E. Lee from Emancipation Park. White supremacists, white nationalists, Neo-Confederates, Neo-Nazis, and members of the Ku Klux Klan protested and chanted hate speech and some were armed with semi-automatic rifles. The City Council’s decision to remove confederate monuments was a response to the

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2015 Charleston Church Shooting.¹ The hateful protest turned violent when counter protestors, led by Antifa,² a radical left-wing organization, and Black Lives Matter,³ clashed with the protestors. This clash, infamously, resulted in 33 people being injured.⁴ Additionally, on August 12th, around 1:45 P.M., four blocks away from Emancipation Park, a vehicle, driven by a protestor, rammed into a group of counter protestors, killing one person and injuring about twenty.⁵ Later that day, at around 4:40 P.M., two Virginia state troopers lost their lives when a Bell 407 helicopter crashed.⁶

This incident triggered a nationwide discussion on race relations and our toxic political climate—exemplified by the daily coverage of the incident by major newspapers and discussions on every social media platform. President Trump released statements condemning the actions of the protestors and counter protestors, which sparked criticism from both major political parties and media outlets.⁷ Furthermore, a state of emergency was called in Virginia because of the chaos this protest caused.⁸

The ACLU's Virginia branch defended the white nationalists protesting the removal of the confederate statues.⁹ Because of this,

¹ Matt Zapposky, *Charleston Church Shooter: I Would Like to Make it Crystal Clear, I Do Not Regret What I Did*, WASH. POST. (Jan. 4, 2017), https://www.washingtonpost.com/world/national-security/charleston-church-shooter-i-would-like-to-make-it-crystal-clear-i-do-not-regret-what-i-did/2017/01/04/05b0061e-d1da-11e6-a783-cd3fa950f2fd_story.html?noredirect=on&utm_term=.e986ac506fbc.

² Doug Stanglin, *What is Antifa and What Does the Movement Want?*, USA TODAY, <https://www.usatoday.com/story/news/2017/08/23/what-antifa-and-what-does-movement-want/593867001/> (last updated 3:48 A.M. ET Aug. 23, 2017).

³ About Black Lives Matter, <https://blacklivesmatter.com/about/> (last visited April. 23, 2018).

⁴ Benjamin Hart & Chas Danner, *3 Dead and Dozens Injured After Violent White-Nationalist Rally in Virginia*, <http://nymag.com/daily/intelligencer/2017/08/state-of-emergency-in-va-after-white-nationalist-rally.html> (last updated Aug. 13, 2017).

⁵ Hawes Spencer & Richard Perez-Pena, *Murder Charge Increases in Charlottesville Protest Death*, NY TIMES (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/us/charlottesville-fields-white-supremists.html>.

⁶ *Id.*

⁷ Michael D. Shear & Maggie Haberman, *Trump Defends Initial Remarks on Charlottesville; Again Blames 'Both Sides'*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-press-conference-charlottesville.html>.

⁸ Lisa Marie Segarra, *Violent Clashes Turn Deadly in Charlottesville During White Nationalist Rally*, TIME (Aug 12, 2017), <http://time.com/4898118/state-of-emergency-declared-as-violent-clashes-in-charlottesville-continue/>.

⁹ David Cole, *Why We Must Defend Free Speech*, ACLU (Aug. 24, 2017), <https://www.aclu.org/blog/free-speech/why-we-must-defend-free-speech>.

the ACLU faced fierce backlash from government officials and the media.¹⁰ Subsequently, the ACLU Executive Director, stated to the Wall Street Journal: “[I]f a protest group insists ‘No, we want to be able to carry loaded firearms,’ well, we don’t have to represent them. They can find someone else.”¹¹

Likewise, the California ACLU branch echoed the ACLU Executive Director’s statement when it said, “If white supremacists march into our towns armed to the teeth and with the intent to harm people, they are not engaging in activity protected by the United States Constitution.”¹² Regardless, the ACLU’s membership has quadrupled, and received \$83 million in donations since President Trump has been elected.¹³ Since the 2016 Presidential Election the image of the ACLU has been typically aligned with liberal ideas, however, historically, the ACLU has defended KKK and Neo-Nazi organizations rights to protest under the First Amendment.¹⁴ This transformation is best seen with the ACLU tweeting at President Trump “we’ll see you in court.”¹⁵

Therefore, it is likely this stance has something to do with this new image as a liberal policy advocacy group. However, even though former ACLU Executive Director, Ira Glasser, spoke out against this new policy,¹⁶ major news networks supported the ACLU’s decision. Still, the ACLU has not adopted a blanket policy and a decision if the ACLU will represent armed protests will be considered on a case-by-case-basis. However, it’s unlikely the

¹⁰ Joseph Goldstein, *After Backing Alt-Right in Charlottesville, A.C.L.U. Wrestles With Its Role*, N.Y. TIMES (Aug. 12, 2017), <https://www.nytimes.com/2017/08/17/nyregion/aclu-free-speech-rights-charlottesville-skokie-rally.html>.

¹¹ Joe Palazzolo, *ACLU Will No Longer Defend Hate Groups Protesting With Firearms*, THE WALL STREET J. (Aug. 17, 2017), <https://www.wsj.com/articles/aclu-changes-policy-on-defending-hate-groups-protesting-with-firearms-1503010167>.

¹² *Id.*

¹³ See Kathleen Davis, *How The ACLU Is Leading The Resistance*, FAST COMPANY, (May. 4, 2017), <https://www.fastcompany.com/40407576/how-the-aclu-is-leading-the-resistance>.

¹⁴ *ACLU History*, ACLU, <https://www.aclu.org/about/aclu-history> (last visited Apr. 2, 2019).

¹⁵ ACLU (@ACLU), TWITTER (Aug. 25, 2017, 4:40 PM), <https://twitter.com/aclu/status/901227940947656704?lang=en>.

¹⁶ Ira Glassner, *Thinking Constitutionally About Charlottesville*, HUFF POST (Aug. 22, 2017), https://www.huffingtonpost.com/entry/aclu-charlottesville-free-speech_us_599c9bcae4b0d8dde9998c36.

ACLU will protect armed protestors.¹⁷

In my opinion, these statements appear to be solely a public relations decision to bolster the ACLU's new image as a pro-liberal organization. While this will be stated in my last section, violence and threats are not protected under the first amendment; therefore, the ACLU's stance that it will not protect perpetrators of violence and true threats does little to alter who they would have protected to begin with. Additionally, because this new policy will be applied on a case-by-case basis the ACLU can protect armed protestors they deem acted within First Amendment protected speech. Therefore, this new policy is likely simply a public relations tactic by the ACLU.

FIREARM STATISTICS

Regardless, the rise of the question of whether the government should regulate armed protests fails to recognize that there are American gun owners who will not engage in violent armed protests. This 'study' will illustrate how passionate Americans are of their guns and how diverse the ownership pool is. Whereas, because of this, any argument for a ban of armed protests needs to take these numbers into consideration. However, the government still needs to act on gun control to ensure public safety. These numbers will illustrate both points and why the government needs to balance both. Inquiring on the psyche of every United States citizen is dangerous and inherently speculative; because of this, I will use a concrete method. An easier methodology is to examine the number of firearm owners, the political affiliation of firearm owners, and support for firearm regulation among the population.

First, this issue is an unsurprisingly divisive political topic¹⁸ as 42% of Americans live in a household with a gun, 30% currently own a gun, 48% grew up in houses with guns, 59% have friends with guns, and 72% have shot one.¹⁹ Furthermore, along party lines 44% of Republicans own guns, and 22% of Democrats do as

¹⁷ See Joe Palazzolo, *ACLU Will No Longer Defend Hate Groups Protesting With Firearms*, THE WALL STREET J. (Aug. 17, 2017), <https://www.wsj.com/articles/aclu-changes-policy-on-defending-hate-groups-protesting-with-firearms-1503010167>.

¹⁸ Ruth Igielnik & Anna Brown, *Key Takeaways on Americans' Views of Guns and Gun Ownership*, PEW RES. CTR. (June 22, 2017), <http://www.pewresearch.org/fact-tank/2017/06/22/key-takeaways-on-americans-views-of-guns-and-gun-ownership/>.

¹⁹ *Id.*

well.²⁰ Lastly, 91% of gun owning Republicans and Republican-leaning independents view owning a gun as being essential to their freedom, compared to 43% of their Democratic counterparts.²¹ Moreover, voters are clearly very concerned with gun policy; whereas, 72% of voters considered gun policy as a “very important” topic for them in the 2016 presidential election.²²

Furthermore, gun control ranked higher than education, treatment of racial and ethnic minorities, trade policy, and abortion.²³ The focus on gun policy is not one sided because 71% of Trump supporters and 74% of Clinton supporters viewed gun policy as very important to their vote.²⁴ For context, when considering issues that more than 70% of both sides viewed as “very important,” no other issue was this similar.²⁵ Social security was the second closest but only 66% and 68% viewed it as very important.²⁶

Politico reports, following the “Las-Vegas Shooting,”²⁷ 64% of Americans support stricter gun laws.²⁸ Stricter gun laws are not the only method of limiting gun ownership, there is a movement to repeal the Second Amendment. According to a 2015 Congressional Research Service report, from 1993—2015 there have been 317 mass shootings.²⁹ Also, 39% feel anxious in large crowds because of past mass shootings.³⁰ Unfortunately, this section of the note is being drafted days after the Parkland, Florida school shooting.³¹

²⁰ *Id.*

²¹ *Id.*

²² *Top Voting Issues in 2016 Election*, PEW RES. CTR. (July. 7, 2016), <http://www.people-press.org/2016/07/07/4-top-voting-issues-in-2016-election/>.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See ATF: Las Vegas Shooter Had 12 Guns Modified to Mimic Automatics*, CBS NEWS (Oct. 3, 2017), <https://www.cbsnews.com/news/victims-of-las-vegas-shooting-list-names-latest-update/>.

²⁸ Steven Shepard, *Majority Backs Stricter Gun Control Laws After Vegas Shooting*, POLITICO, (Oct. 11, 2017), <https://www.politico.com/story/2017/10/11/gun-control-vegas-polls-243647> (this study is complicated because it was conducted directly after a mass shooting).

²⁹ William J. Krouse, Congressional Search Service, *Mass Murder with Firearms: Incidents and Victims, 1999-2013* (July 30, 2015), <https://fas.org/sgp/crs/misc/R44126.pdf>.

³⁰ RJ Reinhart, *Terrorism Fears Drive More in U.S. to Avoid Crowds*, GALLUP (June 20, 2017), <http://news.gallup.com/poll/212654/terrorism-fears-drive-avoid-crowds.aspx>.

³¹ Lisa Marie Segarra et al., *Sheriff's Office Had Received About 20 Calls*

Since the shooting, there is a rise in articles written that support either repealing the second amendment or stricter firearm regulation, one of which referred to supporters of the second amendment as ‘members of a cult.’³² Furthermore, a peaceful rally was held outside the White House in support of stricter firearm regulation. Also, news stations are providing commentary in favor of this as well.³³ Finally, retired Associate Justice Stevens, in his op-ed for the New York Times, argues in favor of a repeal of the Second Amendment.³⁴

Fear of mass shootings, divisiveness on gun ownership, and political affiliation indicate the government needs to act on gun control.

WHY GUN OWNERS AFFECT THIS ANALYSIS

Statistical evidence of the complexity and divisiveness of this issue have been laid out. Still, the reasons for gun ownership; mainly personal reasons and the connection to United States tradition, truly exhibit how complex this topic is. For gun owners, this is not a topic of politics, this is a topic of livelihood and freedom.

The focus becomes the gun owners who will be subjected to a First Amendment analysis of their armed speech. This genuine passion for gun ownership is illustrated where 91% of Republican or Conservative gun owners state owning a gun is essential to their freedom, while only 42% of Democrat or Liberal gun owners agree.

Think about this statistic, a large majority of gun owners feel disarming them will infringe on their freedom; inherently, this will create extreme tensions between a group of armed protestors and their gun control leaning viewers. Furthermore, a 2013 Pew study shows 48% of gun owners use guns for self-defense and 32% claim

Regarding Suspect: The Latest on the Florida School Shooting, TIME (Feb. 18, 2018), <http://time.com/5158678/what-to-know-about-the-active-shooter-situation-at-florida-high-school/>.

³² See, e.g., Jay Parini, *America’s Cult of Guns*, CNN, <http://time.com/5158678/what-to-know-about-the-active-shooter-situation-at-florida-high-school/> (last updated April 22, 2018).

³³ Vanessa Romo, *Teens ‘Lie In’ At White House to Push For Stronger Gun Control*, N.P.R (Feb. 19, 2018), <https://www.npr.org/sections/thetwo-way/2018/02/19/587089773/teens-lie-in-at-white-house-to-protest-for-stronger-gun-control>.

³⁴ John Paul Stevens, *Repeal the Second Amendment*, N.Y. TIMES, <https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html>.

hunting is their main reason; therefore, 80% of gun owners rely on their guns for their livelihood.³⁵ Gun ownership is more than a topic of political discussion to gun owners, disarming them, in their eyes, will take away their freedom and livelihood. Regardless, this dependence on firearm ownership makes this topic far more complex than it seems to some. Self-defense is the strongest argument for gun ownership and the largest reason for ownership amongst gun owners.³⁶

Therefore, the average American fears mass shootings and the average gun owner views ownership essential to their freedom and the government needs to consider both sides of the argument.

GOVERNMENT REGULATION ANALYSIS

Linguistically, the phrase “armed protest” can be broken up into “armed” and “protest.” Ironically, the methods the government can theoretically use to regulate armed protests seem to fit into this same characterization. Thus, I propose that the government can regulate armed protests by regulating either the “armed” or the “protest.” Clearly, the “armed” represents the guns at the protest and this has already been analyzed in two well written law review articles that I will discuss. The “protest” part, however, represents the protests with its message effected by the gun ownership; this does change the message and these guns do alter the protections. This argument has not been thoroughly fleshed out by any prior writings and will be analyzed with fundamental First Amendment principles.

REGULATION OF THE ARMED

The “armed” part of the armed protest represents the guns. An analysis of gun possession at a protest seems to require both a Second Amendment and a First Amendment analysis on the question. Therefore, the government will need to ensure these rights are not violated.

³⁵ *Why Own a Gun? Protection Is Now Top Reason*, PEW RES. CTR. (Mar. 12, 2013), <http://www.people-press.org/2013/03/12/why-own-a-gun-protection-is-now-top-reason/>.

³⁶ *See Kim Parker et al., America’s Complex Relationship With Guns*, PEW RES. CTR. (June 22, 2017), <http://www.pewsocialtrends.org/2017/06/22/americas-complex-relationship-with-guns/>.

SECOND AMENDMENT ANALYSIS OF THE “ARMED”

In 2008, with Associate Justice Antonin Scalia writing the majority opinion, the Supreme Court of the United States decided the landmark gun case *District of Columbia v. Heller*.³⁷ The facts of the case are simple: a D.C. law criminalized possession of an unregistered firearm and prohibited the registration of handguns.³⁸ The D.C. law also required the police chief to issue one-year licenses and required D.C. residents to keep lawfully owned firearms unloaded and disassembled, or bound by a trigger lock or similar device. Heller, a D.C. special policeman failed to acquire a license, and had his suit dismissed by the District Court, but the D.C. Circuit Court upheld Heller’s right to obtain a firearm.³⁹ The issue was then presented to the Supreme Court of the United States, where the Court held two key rulings. First, that the right to possess a firearm in the United States, like speech, is not unlimited, but the only guaranteed protection under the second amendment is the right to possess a handgun in one’s home.⁴⁰ Second, that because the right is not unlimited, the government may prohibit firearm possession by felons and the mentally ill and may prohibit the possession of a firearm by anyone in “sensitive places such as schools and government buildings.”⁴¹ Two years later, in *McDonald v. City of Chicago*, the Supreme Court applied this standard to state laws via the Fourteenth Amendment.⁴²

With this, we now have, generally, the constitutional regulations imposed on the government’s ability to prohibit the ownership of guns: it cannot be on home-based handgun possession, or it must be imposed on a special person, or protect sensitive places. Since the regulation of an armed protest will result in the regulation of guns, it is necessary for us to know these constitutional protections.

Given that the armed protest is likely to occur outside of the home, *Heller*’s first ruling is inapplicable. Next, *Heller*’s holding that felons and the mentally ill may be precluded from fire-arm possession might be applicable in this context. Therefore, any

³⁷ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

³⁸ *Id.* at 574.

³⁹ *Id.* at 635.

⁴⁰ *Id.*

⁴¹ *Id.* at 626.

⁴² *See McDonald v. City of Chicago*, 561 U.S. 3025 (2010).

protestors who are mentally ill or a former felon may be precluded from engaging in a protest while armed. Lastly, and the key here, is *Heller's sensitive places* doctrine. Kendall Burchard, writing for the Virginia Law Review⁴³ on this topic, argues that current jurisprudence holds

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[The] “well established . . . right to receive information and ideas” supersedes another’s right to bear arms in public when such places 1) provide or should provide the proper security necessary to diminish the need for defense of self and others and/or 2) serve as a place for expressive activity. Although under current jurisprudence these two elements may be independently sufficient to justify a sensitive place, together they justify a protest’s classification as a sensitive place because the preservation of the protest’s expressive activity is greatly constrained or empowered depending on the state’s failed or proper exercise of its police power, respectively.⁴⁴

Moreover, Burchard writes lower courts interpret sensitive places to include:

[C]ounty property, national parks, post office parking lots, university campuses, and airplanes. Schools, government buildings, and the additional examples lower courts have recognized as sensitive places have in common a particular obligation for the locations to provide security for their inhabitants and a “regular presence of the police or other state provided security.” Similarly, lower courts have found sensitive places encompass locations that, “unlike homes, . . . are public properties where large numbers of people, often strangers (and including children), congregate for recreational, educational, and *expressive activities*.⁴⁵

I agree with Burchard’s conclusion and findings of fact; he correctly analyzed that protest sites should be considered sensitive places.

Essentially, the government seemingly does have the power to regulate firearms in an armed protest because of the sensitive

⁴³ See Kendall Burchard, *Your ‘Little Friend’ Doesn’t Say ‘Hello’: Putting the First Amendment Before the Second in Public Protests*, 104 VA. L. REV. ONLINE 30 (2018).

⁴⁴ *Id.* at 42–43.

⁴⁵ *Id.* at 42.

places doctrine or through a general gun-regulation so long as the regulation allows for a home-based handgun license. However, all this section proves is a government regulation of an armed protest, seemingly, does not violate the Second Amendment. There still needs to be an in-depth analysis on the First Amendment protections guaranteed to the armed protestors. Therefore, simply because the Second Amendment allows for the regulation of an armed protest, doesn't mean the First Amendment will.

FIRST AMENDMENT ANALYSIS OF THE "ARMED" REGULATION

The next issue to be analyzed is whether the First Amendment allows for the regulation of guns at protests, this raises the question on what if any first amendment protections can be afforded to guns. Daniel Horwitz, in his article *Open-Carry: Open-Conversation or Open-Threat*⁴⁶ argues that guns are not considered speech for First Amendment purposes. Horwitz argues "[s]imply put . . . guns are not speech."⁴⁷ Horwitz continues by writing:

The First Amendment protects speech, but it may also protect conduct, if that conduct is "sufficiently imbued with elements of communication." Expressive conduct, or symbolic speech, is not without limit. The Supreme Court has "rejected 'the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.'" In order for expressive conduct to qualify as speech for First Amendment purposes, "the court must determine that (1) there was intent to convey a particularized message at the time of the conduct; and (2) there was a great likelihood that 'the message would be understood by those who viewed it.'" Additionally, the "context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol."⁴⁸

Horwitz then takes this rule and analyzes *Deffert v. Moe*,⁴⁹ *Chesney v. City of Jackson*,⁵⁰ *Burgess v. Wallingford*,⁵¹ and *Nordyke*

⁴⁶ See Daniel Horwitz, *Open-Carry: Open-Conversation Or Open-Threat?*, 15 FIRST AMEND. L. REV. 96 (2017).

⁴⁷ *Id.* at 112.

⁴⁸ *Id.*

⁴⁹ *Deffert v. Moe*, 111 F. Supp. 3d 797 (W.D. Mich. 2015).

⁵⁰ *Chesney v. City of Jackson*, 171 F. Supp. 3d 605 (E.D. Mich. 2016).

⁵¹ *Burgess v. Wallingford*, No. 11-cv-1129, 2013 WL 4494481 (D. Conn. 2013), *aff'd*, 569 F. App'x 21 (2d Cir. 2014).

v. King,⁵² and concludes that guns lack first amendment protection in most scenarios.⁵³ I agree with Horwitz that guns lack symbolic speech protections. Furthermore, Kendall Burchard in her article *Your ‘Little Friend’ Doesn’t Say ‘Hello’: Putting the First Amendment Before the Second in Public Protests*⁵⁴ writes:

To determine whether conduct constitutes speech for First Amendment purposes under *Spence v. Washington*, the guiding case on the issue, we must ask whether “[a]n intent to convey a particularized message was present” and whether “in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.” As the Court implied in *Texas v. Johnson* and *Tinker v. Des Moines Independent Community School District*, “[s]omeone has to do something with the symbol before it can be speech.” Items themselves are not expressive; although a flag or an armband may be associated with particular nations or causes, it takes the addition of a person’s action and intention for the item to become classified as symbolic speech.⁵⁵

Burchard cites *Nordyke v. King*, which states “[t]ypically a person possessing a gun has no intent to convey a particular message, nor is any particular message likely to be understood by those who view it.”⁵⁶ Furthermore, Burchard cites *Northrup v. City of Toledo Police Division*,⁵⁷ which states that Northrup, who had to explain the message he intended to convey, was not protected conduct under *Spence*.⁵⁸ Essentially, Burchard, like Horwitz, concludes that open carry gun possession in most situations lacks any first amendment protections, and therefore the First Amendment can ban all guns at all protests. While I do agree with their conclusions, both authors, in my opinion, either barely address or fail to address the best argument the government can make to regulate guns at a protest. As argued by these two writers, guns have no first amendment protections, however, protests do. Since the issue is the regulation of guns at protests, the

⁵² *Nordyke v. King*, 319 F.3d 1185, 1190 (9th Cir. 2003).

⁵³ Horwitz, *supra* note 46, at 97.

⁵⁴ Burchard, *supra* note 43.

⁵⁵ *Id.* at 32.

⁵⁶ *Id.* at 33 (citing *Nordyke v. King*, 319 F.3d 1185, 1190 (9th Cir. 2003)).

⁵⁷ *Northrup v. City of Toledo Police Div.*, 58 F. Supp. 3d 842, 848 (N.D. Ohio 2014), *aff’d in part, rev’d in part on other grounds*, 785 F.3d 1128 (6th Cir. 2015).

⁵⁸ *Id.*

government needs to address the underlying First Amendment protections granted to that protest. Thus, there appears to be a non-communicative aspect of the protest in the form of the gun, and a communicative aspect of the protest being the speech. In *United States v. O'Brien*,⁵⁹ the Supreme Court answered the question of regulating non-communicative conduct that has impacts on communicative conduct. In *O'Brien* we saw David O'Brien and three companions burn their Selective Service registration certificates in front of the South Boston Courthouse.⁶⁰ This was also done in front of a sizeable crowd, who attacked the four men.⁶¹ After this, the men were arrested, indicted, and eventually charged with violating parts of the Universal Military Training and Service Act of 1948.⁶² The Act states, an offense is committed by any person “who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate.”⁶³ Eventually, this case reached the Supreme Court where O'Brien argued that the 1965 Amendment was unconstitutional in its application to him because the burning of his selective service registration was meant to convey a message and is unconstitutional because Congress had an illicit motive to suppress the freedom of speech.⁶⁴ On the first issue, O'Brien argued his speech was “symbolic” and therefore deserving of First Amendment protections.⁶⁵ The Court, rejecting this idea, held symbolic speech's protections go as far:

[W]hen “speech” and “nonspeech” elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . we think it clear that a government regulation is sufficiently justified . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. ⁶⁶

Therefore, I argue the government needs to satisfy *O'Brien's* test

⁵⁹ U.S. v. O'Brien, 391 U.S. 367 (1968).

⁶⁰ *Id.* at 369.

⁶¹ *Id.*

⁶² *Id.* at 369–370.

⁶³ *Id.* at 370.

⁶⁴ *Id.* at 376.

⁶⁵ U.S. v. O'Brien, 391 U.S. at 376.

⁶⁶ *Id.* at 376–377.

and the best way to do this is to analyze each element.

NONSPEECH ELEMENT

The first element of *O'Brien* requires that the nonspeech element be subject to the regulation.⁶⁷ Simply put, I argue that Horwitz and Burchard got the question right and that guns have no first amendment protections and should therefore be considered the nonspeech element subject to regulation.

SUBSTANTIAL GOVERNMENT INTEREST ELEMENT

The second element of *O'Brien* requires that this nonspeech regulation be required by a substantial government interest.⁶⁸ Thus, any regulation of the arms at a protest needs to be required by a substantial government interest. In *O'Brien* the substantial government interest was congress' ability to raise and organize the military and the challenged law was deemed essential to that goal.⁶⁹ Therefore, raising and organizing the military is deemed a substantial enough government interest to regulate conduct such as this. So, one argument the government can make is that the proposed statute that regulates armed protests is essential to the organization of the military; I am not sure how the government can do this. Another method could be to cite some substantial government interest in public safety. This method is likely to fail because the cases which cite a substantial government interest in public safety usually entail some regulation on a public nudity, adult entertainment, or some other related act.⁷⁰ However, the Supreme Court has held that crime prevention is a *compelling and legitimate state interest*,⁷¹ which is more stringent than that of the substantial government interest requirement.⁷² Therefore, it seems the government will meet this requirement if it can cite

⁶⁷ *Id.*

⁶⁸ *Id.* at 377.

⁶⁹ *Id.*

⁷⁰ See *Egolf v. Witmer*, 526 F.3d 104 (3d Cir. 2008); *King v. Christie*, 981 F. Supp. 2d 296 (D.N.J. 2013), *aff'd*, 767 F.3d 216 (3d Cir. 2014); *Recreational Devs. of Phx., Inc. v. City of Phx.*, 83 F. Supp. 2d 1072 (D. Ariz. 1999); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546 (5th Cir. 2006); *84 Video/Newsstand, Inc. v. Sartini*, 455 Fed. Appx. 541 (6th Cir. 2011).

⁷¹ See *U.S. v. Salerno*, 481 U.S. 739, 749 (1987).

⁷² See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010).

public safety as a substantial government interest.

UNRELATED TO THE SUPPRESSION OF FREE EXPRESSION

The third element of *O'Brien* requires the government interest be unrelated to the suppression of free expression.⁷³ Therefore, any government regulation of armed protests needs to be backed by an interest unrelated to the suppression of free expression. Generally, if the government enacts a rule that suppresses only one ideology or one message, it becomes a content-based regulation and is therefore subject to “the most exacting scrutiny.”⁷⁴ If we presume the government interest is public safety, this interest cannot be used to suppress certain ideas. Frankly, I fear this public safety interest might be a pretext to the suppression of hate speech, controversial political opinions, or any conservative political view, while allowing similar armed protests for liberal leaning viewpoints. A situation where a seemingly substantial government interest was related to the suppression of ideas occurred in *Texas v. Johnson*.⁷⁵ In *Johnson*, the government enacted a flag burning ban and justified it by citing the substantial government interest of “preserving the flag as a symbol of nationhood and national unity.”⁷⁶ The Court held this interest is “related to the suppression of expression.”⁷⁷ Whereas, “the government may not prohibit expression simply because it disagrees with its message.”⁷⁸ Additionally, the Court rationalized by writing:

If we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag’s symbolic role, but allow it wherever burning a flag promotes that role. . . . [w]e would be permitting a State to “prescribe what shall be orthodox” by saying that one may burn the flag to convey one’s attitude toward it and its referents only if one does not endanger the flag’s representation of nationhood and national unity.”⁷⁹

It is effortless to imagine the suppression of a conservative

⁷³ U.S. v. O’Brien, 391 U.S. at 377.

⁷⁴ Texas v. Johnson, 491 U.S. 397, 412 (1989).

⁷⁵ Texas v. Johnson, 491 U.S. 397 (1989).

⁷⁶ *Id.* at 407.

⁷⁷ *Id.*

⁷⁸ *Id.* at 416.

⁷⁹ *Id.* at 416–417.

armed protest with the government citing public safety as its reason but refusing to suppress an armed liberal counter protest. Essentially, the government cannot use this public safety interest as a pretext to suppress a certain message. If the government truly wishes to protect the public, it would need to regulate all forms of armed protest, not just the ones that promote the messages as seen in Charlottesville. This means the regulation would include generally acceptable means of armed protest such as a group of open carry demonstrators protesting gun control. I argue this constitutional catch-22 highlights how difficult and generally sweeping armed protest regulation will be. Whereas, “[it] is a bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of . . . idea[s] simply because society finds the idea itself offensive or disagreeable.”⁸⁰ Thus, there may be issues with the government when it cites public safety as its substantial government interests because it will either suppress all armed protests or be a pretext for the suppression of a particular ideology.

NARROWLY TAILORED REQUIREMENT

The last element of *O'Brien* requires the government act regulate only what is necessary to fulfill the substantial government interest.⁸¹ Essentially, the rule must be narrowly tailored to the accomplishment of the substantial government interest. A potential template for the regulation of armed protests to accomplish this government interest is seen in *Grider v. Abramson*.⁸² In *Grider*, the local chapter of the Ku Klux Klan scheduled a rally in downtown Louisville, Kentucky.⁸³ The police learned of several counter protest groups with a propensity for violence such as the Anti-Racist Action group and National Women’s Rights Organizing Coalition, who planned to counter protest the KKK rally.⁸⁴ Moreover, the Victory Park Players, a local gang, required new inductees to commit crimes at the rallies.⁸⁵ As a result of this, the local police, citing public safety as

⁸⁰ *Id.* at 414.

⁸¹ *U.S. v. O'Brien*, 391 U.S. at 376–377.

⁸² *Grider v. Abramson*, 994 F. Supp. 840 (W.D. Ky. 1998).

⁸³ *Id.* at 841.

⁸⁴ *Id.* at 842.

⁸⁵ *Id.* (the gang viewed killing a cop as honorable).

the government interest, enacted regulations on the rallies.⁸⁶ The District Court held that these regulations were narrowly tailored to this government interest. These regulations included crowd control methods used by police during both rallies, which included a separation of the rallies, setting up magnetometers to check for weapons, and enforcing a buffer zone between the KKK rally attendees and speakers.⁸⁷ The police also only allowed statements made by “organized speakers.”⁸⁸ While this case involved an unarmed rally and not an armed protest the similarities are notable. First, the KKK, like any controversial and offensive group will draw counter protestors. Second, the counter protestors can very well be as potentially violent. Third, there will likely need to be a police presence to ensure no one is injured. Moreover, this is all amplified if there are armed protestors because this will have affects on the counter protestors, which will absolutely create an awful and perilous situation. Furthermore, the level of interest demanded by the District Court was that of a compelling government interest; *O'Brien* demands only a substantial government interest. Thus, this is unlikely to be an issue. While any act on armed protests need not be identical to *Grider*, this case does show what a court might look for. This case also highlights how the government applied the rules to both protestors and counter protestors, which would be needed in a similar armed situation. I do not know what acts would be considered narrowly tailored, but *Grider* gives some guidance. Therefore, because these regulations of an unarmed rally were deemed narrowly tailored to a compelling government interest, similar ones will likely be deemed narrowly tailored to the substantial government interest.

However, it must be stated that a governmental rule enforced via *O'Brien* will likely require all guns removed from all protests. I argue the government not take this route because of the chilling effect the regulation will have on gun owners. Regardless, if the government can successfully meet these requirements, they will be able to regulate all guns out of all protests.

REGULATION OF THE SPEECH

Alternatively, the question turns to how the government can regulate the speech components of the armed protest. Logically,

⁸⁶ *Id.* at 842–843, 846.

⁸⁷ *Id.* at 841–842.

⁸⁸ *Grider v. Abramson*, 994 F. Supp. 840, 847 (W.D. Ky. 1998).

that means the government will have to regulate the armed statement or armed message of the protest. This is different from what Horwitz and Burchard proposed, and in my opinion, completely answers the question and better balances the interest of the government and the rights of the people. I argue this because my method of analysis requires the government to consider the armed speech as one entity; essentially, it needs to consider the statement bolstered by a gun. To do this, the government rule should specifically target only actual physical violence or incitement of violence. This better serves the public because this would not regulate all forms of armed protests. Arms at a protest change the protest because the gun drastically changes what is said; and in certain instances, as seen in Charlottesville, chaos can occur. However, not every instance of an armed protest will lead to a situation like Charlottesville because the context of the protest matters. Just because the protestors openly display lawfully owned guns does not mean they will cause Charlottesville-like chaos and destruction. Additionally, I agree, conduct such as Charlottesville needs to be regulated and it's best done with a regulation of the violence and incitement thereof. Furthermore, Charlottesville has become a justification for a seemingly large support for armed protest bans, even though guns were neither carried by the protestors nor the cause of any deaths.⁸⁹ Additionally, the methods called for by Horwitz and Buchard will enact wide sweeping armed protest bans. This will have a chilling effect on the National Rifle Association's fourteen-million-person support base,⁹⁰ the 91% of Republicans who view owning a gun as essential to their freedom, the 42% of Democrats who view owning a gun as essential to their freedom,⁹¹ and the 80% of gun owners who view gun ownership as essential to their livelihood.⁹² One can easily imagine a lawful protest where the protestors are openly carrying handguns to peacefully protest a newly enacted firearm

⁸⁹ See Matt Pearce et al., *Three Dead, Dozens Hurt After Virginia White Nationalist Rally is Dispersed; Trump Blames 'Many Sides'*, L.A. TIMES (Aug. 12, 2017), <http://www.latimes.com/nation/nationnow/la-na-charlottesville-white-nationalists-rally-20170812-story.html>.

⁹⁰ *Remarkable Finding from Pew Survey*, NAT'L RIFLE ASS'N (July 7, 2017), <https://www.nrila.org/articles/20170707/remarkable-finding-from-pew-survey>.

⁹¹ Parker et al., *supra* note 36.

⁹² See PEW RES. CTR., *supra* note 35 (concluding that about 80% of gun owners consider gun ownership essential to their livelihood as 48% of gun owners cited self-defense as their main reason for gun ownership and 32% of gun owners cited hunting as their main reason for gun ownership).

regulation. Regardless of one's political beliefs on guns, this protest would be protected under the First Amendment given the protest will have a clearly understood message. Moreover, an example of this occurred in the 1960's when the California State legislature enacted gun laws to prevent the Black Panther Party from engaging in Armed Protests.⁹³ I argue that if the government wishes to enact armed protest regulation it should specifically only regulate incitements of violence because this eliminates regulation of protected armed protests. Regardless, the government, if it does this, will still have to ensure the law survives an overbreadth challenge to not regulate any protected area of speech.

SUBSTANTIAL OVERBREADTH DOCTRINE

If the government wishes to take my proposed method of regulation, it will need to only regulate unlawful activity since, the government cannot "suppress lawful speech as the means to suppress unlawful speech."⁹⁴ Furthermore, when government regulations regulate lawful speech, the "law must be held invalid."⁹⁵ These issues arise when challengers raise the First Amendment doctrine of substantial overbreadth. This doctrine states "a clear and precise enactment may nevertheless be 'overbroad' if . . . [the statute] prohibits constitutionally protected conduct."⁹⁶ Furthermore, this doctrine requires that when the government pursues an important interest, the government "cannot choose means that unnecessarily burden constitutionally protected activity."⁹⁷ Moreover, the doctrine requires the government action be tailored to serve the government's legitimate objectives.⁹⁸ Lastly, this doctrine requires that if the government's goal can be met by lessening the burden on constitutionally protected activity, the government must choose that method.⁹⁹ Under the First Amendment doctrine of substantial overbreadth, a plaintiff may either challenge the law's constitutionality as applied to his actions or as applied to others.¹⁰⁰ The former is

⁹³ See Cynthia Deitle Leonardatos, *California's Attempt to Disarm the Black Panthers*, 36 SAN DIEGO L. REV. 947, 948 (1999).

⁹⁴ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

⁹⁵ *Packingham v. North Carolina*, 137 S.Ct. 1730, 1738 (2017).

⁹⁶ *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972).

⁹⁷ *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See Alfred Hill, *The Puzzling First Amendment Overbreadth Doctrine*, 25

referred to as an “as applied” challenge, which can result in the Court holding that part of the statute is unconstitutional as applied to him, but it does not result in a nullification of the valid parts.¹⁰¹ The latter is a facial challenge, which can result in the invalidation of the entire statute. In *United States v. Williams*, the Court, on this issue, stated “[i]nvalidation for overbreadth is ‘strong medicine’ that is not to be ‘casually employed.’”¹⁰² While facial challenges “are especially to be discouraged.”¹⁰³ The Court has recognized “the validity of . . . [the overbreadth doctrine] in relatively few settings, and, generally, on the strength of specific reasons.”¹⁰⁴ One of these cases includes free speech.¹⁰⁵ Thus, if the government does not narrowly tailor its rule to only regulate what is necessary to fulfill the substantial government interest it will fail the substantial overbreadth doctrine.¹⁰⁶ Additionally, “the first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.”¹⁰⁷ The question of what is covered by the statute is essential because “invalidating a law that in some of its applications is perfectly constitutional – particularly a law directed at conduct so antisocial that it has been made criminal – has obvious harmful effects.”¹⁰⁸

Therefore, to properly discuss whether a government regulation of armed protests will fall victim to a substantial overbreadth challenge it is necessary to know if the government can characterize it as unprotected First Amendment conduct.

INCITEMENT OF VIOLENCE

To do this, we need to know what armed protest conduct can be classified as unprotected conduct under the First Amendment. The best pathway to a constitutional regulation is to regulate violence and the incitement of violence.

Firstly, the government can attempt to categorize certain armed

HOFSTRA L. REV. 1064, 1064 (1997).

¹⁰¹ *Id.* at 1064, 1072.

¹⁰² *U.S. v. Williams*, 553 U.S. 285, 293 (2008).

¹⁰³ *Sabri v. U.S.*, 124 S.Ct. 1941, 1948 (2004).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *United States v. Williams*, 553 U.S. 285, 293 (2008).

¹⁰⁸ *Id.* at 292.

protest conduct as an incitement of violence under *Brandenburg v. Ohio*,¹⁰⁹ and thus immune to first amendment protections. In *Brandenburg*, the Supreme Court held “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹¹⁰ Furthermore, “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”¹¹¹ Lastly, just to be clear “[a] statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.”¹¹² In *NAACP. v. Claiborne Hardware Co.*, the Court held that “emotionally charged rhetoric of . . . speeches d[oes] not transcend the bounds of protected speech set forth in *Brandenburg*.”¹¹³ Such emotionally charged rhetoric must incite lawless actions, and if it does not, then the rhetoric “must be regarded as protected speech.”¹¹⁴ Lastly, “to rule otherwise would ignore the ‘profound national commitment’ that ‘debate on public issues should be uninhibited, robust, and wide-open.’”¹¹⁵

The government, under this method, would have to narrowly tailor the regulation to cover acts which could be considered an incitement of violence. Furthermore, mere advocacy without an incitement of lawless action is not enough.¹¹⁶ For example, a protest on a firearm regulation where the protestors openly display firearms is unlikely to be perceived as an incitement of lawless action. However, there is armed protest conduct that can be considered an incitement of violence, thus subject to regulation without an encroachment on protected conduct. First, as stated earlier, firearms at a protest will inherently change, amplify, and bolster whatever is said. Such that an armed hate group’s protest conduct of spreading hate speech might rise to the level of an

¹⁰⁹ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹¹⁰ *Id.* at 447.

¹¹¹ *Id.* at 448.

¹¹² *Id.* at 448.

¹¹³ *NAACP. v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

incitement of violence because of the presence of guns. For example, the armed protest leader who calls for the removal of a certain group of people changes when that group is armed. Armed protestors might perceive the situation as more than just a protest; inflamed armed protestors in a hate group rally might just view the protest as a call for lawless action. Furthermore, this will inflame any counter protestors or observers who are targets of the hateful rhetoric, which will create an awful and perilous environment for everyone involved. However, this does raise a question on if the incitement of lawless action needs to be intended, or if there can be some incidental incitement. In *United States v. Freeman*,¹¹⁷ the Ninth Circuit held on this issue “expression [is] protected unless both the intent of the speaker and the tendency of his words w[as] to produce or incite an imminent lawless act, one likely to occur.”¹¹⁸ Thus, the government will have to deal with the issue of when a speaker intended to only protest, but the armed protestors were so inflamed by the speaker they committed violence. Regardless, the government must regulate armed protest akin to this example; armed protest conduct that expressly calls for incitement of violence, or the actual violence.

Lastly, on the issue of unprotected conduct, the only other recognized categorical exceptions to first amendment protections are fighting words, obscenity, true threats, defamation, fraud, incitement, and speech integral to criminal conduct.¹¹⁹ Defamation, fraud, and obscenity are not relevant to this discussion and incitement was discussed earlier in this note. On the issue of speech integral to criminal conduct, the best examples are fighting words or true threats. *Cohen v. California*, held that fighting words only apply when language is directed at another singular person and likely to produce a violent response.¹²⁰ Therefore, an armed protest can only be regulated under the fighting words doctrine when it specifically targets another singular person. This will result in an arduous task by the government. Additionally, *Virginia v. Black*¹²¹ expressly holds that the First Amendment permits the government to ban true

¹¹⁷ *United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985).

¹¹⁸ *Id.* at 552.

¹¹⁹ *See United States v. Stevens* 559 U.S. 460, 468 (2010).

¹²⁰ *Cohen v. California*, 403 U.S. 15, 20 (1971).

¹²¹ *Virginia v. Black*, 538 U.S. 343 (2003).

threats.¹²² The Supreme Court defined a true threat as:

[T]hose statements where the speaker means to communicate serious expression of intent to commit act of unlawful violence to a particular individual or group of individuals. . . . [t]he speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protects individuals from fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur."¹²³

Under this definition of true threat I can safely say an armed protest led by a speaker who makes threatening remarks to any group of people, is likely to be construed as regulatable, given the inflammatory nature of the situation. If read literally, this definition of true threat can also apply to each individual armed protestor who threatens a certain group of people. Therefore, it appears that the government can regulate armed protest conduct if they draft their rule to cover only acts than can be characterized as either incitements of violence or true threats, or possibly, fighting words.

Example of Proposed Armed Protest Regulation

The best way to complete my argument it to demonstrate how *O'Brien* may create a statute that regulates all guns at all protests. As stated, this will undoubtedly have a chilling effect on lawful gun owners and will do more harm than good. A statute that hones in on expression unprotected by the First Amendment will pose little to no burden on the lawful gun owners and will better enforce public safety. Kaitlyn E. DeBoer, in her article *Clash of the First and Second Amendments: Proposed Regulation of Armed Protests*,¹²⁴ proposes a statute that is demonstrative of what an *O'Brien* statute would look like, and is exactly why a similar regulation must be avoided. DeBoer proposed the following:

Prohibition of Armed Protests:¹²⁵ It is unlawful to parade, stand, or

¹²² *Id.* at 359.

¹²³ *Id.* at 360.

¹²⁴ Kaitlyn E. DeBoer, *Clash of The First and Second Amendments: Proposed Regulation of Armed Protests*, 45 HASTINGS CONST. L. Q. 333 (2018).

¹²⁵ *Id.* at 341 ("This definition of a protest is adapted from Title 40, Section 6135 of the United States Code, a statute that prohibits parades, assemblages,

move in procession to bring into public notice a party, organization, movement, or ideology while openly displaying a firearm.¹²⁶

DeBoer mainly relies on the *O'Brien* test to argue for the proposed statute's constitutionality.¹²⁷ To do so, DeBoer cites public safety as her substantial government interest,¹²⁸ which is one I agree with. DeBoer accurately concludes that the proposed statute satisfies *O'Brien*'s first requirement that the regulation further a substantial government interest.¹²⁹ Subsequently, DeBoer correctly concludes her proposed statute satisfies *O'Brien*'s second requirement, that the rule be unrelated to the suppression of free expression, because it proscribes all ideologies.¹³⁰ However, I raise objections to DeBoer's application of *O'Brien*'s third requirement, that the law be narrowly tailored to a substantial government interest, to her proposed statute.¹³¹ Whereas, the law cannot be narrowly tailored because it regulates expression protected by the First Amendment. DeBoer agrees, as she admits her proposed regulation will also proscribe:

[T]hose rare circumstances where open carry during a protest is vital to the protest itself . . . [such as] a protest against gun regulations where law-abiding citizens wish to showcase their rights to carry a firearm in a peaceful way. [This proposed regulation] would prohibit [this].¹³²

In DeBoer's attempt to rationalize this, she said:

The reality of an *O'Brien* regulation is that it naturally will regulate some forms of expression that society may deem valuable; in *O'Brien* itself, the law restricted a political protest that would normally be found at the heart of the First Amendment.¹³³

I argue that the regulation is either not narrowly tailored enough, or is a perfect example of why the government must not

and displays of flags in the Supreme Court building and grounds.”).

¹²⁶ *Id.*

¹²⁷ *See id.* at 350.

¹²⁸ *See id.* at 334.

¹²⁹ *Id.* at 351–352.

¹³⁰ *Id.* at 352.

¹³¹ *Id.* at 352–353.

¹³² *Id.* at 354–355.

¹³³ *Id.* at 355.

adopt a similar regulation. DeBoer proposes the government ban all guns from all protests in order to maintain public safety; while this law does just that, it also regulates peaceful armed protests on gun control. Furthermore, DeBoer claims this ban is necessary because there “would be no way to effectively eliminate the public threat of violence and crime from open carry protests without prohibiting them altogether.”¹³⁴ I disagree. The government can simply draft a rule that specifically targets forms of expression unprotected from the First Amendment such as incitement of violence. My objections do not mean the proposed regulation will fail a constitutional challenge, actually, whether or not DeBoer’s proposed regulation survives a constitutional challenge does not alter my conclusion that a statute under *O’Brien* is not as effective as my proposed method. If this law is struck down under *O’Brien* for not being narrowly tailored enough then the government is left powerless to regulate the dangers of a violent armed protest, however, if the regulation survives, it will proscribe armed protests of gun control. Either result bolsters my argument.

Alternatively, I argue this proposed regulation may be challenged using the substantial overbreadth doctrine. Here, a challenger may either argue an as-applied challenge or a facially invalid challenge. The former is done by a plaintiff whose actions are constitutionally protected but banned by the act, and this challenge will force the court to amend the law to allow this initially proscribed conduct.¹³⁵ The latter can be done by a plaintiff whose conduct is not proscribed by the regulation but argues the law is unconstitutional as applied to others; this can result in the entire law being held unconstitutional.¹³⁶ The basis for the analysis by a court would be to see whether the law unconstitutionally bans protected speech for the sake of proscribing unprotected speech.¹³⁷ DeBoer’s statute does just that. The statute regulates all forms of armed protests, not just armed protests that can be characterized as unprotected speech via incitement, fighting words, and true threats. Furthermore, as already stated, DeBoer concedes this act will regulate armed protests of gun control which is protected expression under the

¹³⁴ *Id.* at 354.

¹³⁵ Hill, *supra* note 100.

¹³⁶ See *United States v. Williams*, 553 U.S. 285, 292 (2008).

¹³⁷ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002); *United States v. Williams*, 553 U.S. 285 at 293.

First Amendment. Moreover, I have already demonstrated these armed protests of gun control will either occur more frequently than accounted for, or should be considered far more important than DeBoer admits.

Therefore, this proposed regulation is unquestionably vulnerable to a substantial overbreadth doctrine challenge. Under an as applied challenge, a plaintiff who participates in an armed protest on gun regulation will likely have his conduct allowed, but the law will still stand. Alternatively, a plaintiff can challenge the law as facially invalid because it will proscribe too much protected speech; this will result in the law being struck down.

CONCLUSION

Government regulation can be done with *U.S. v. O'Brien*, or with a law specifically targeting unprotected areas of speech. I do argue the latter is more effective because it avoids proscribing regulation of armed protests of gun control and is more likely to balance the government interest with the rights of the people. Therefore, the government can regulate armed protests.