

COMMENTARY

Guns, Speech, Charlottesville: The Semiotics of Semiautomatics

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A gun wielded by a marching white supremacist leads a complicated double life, for it is at once deadly and expressive. Displayed in the context of the August 2017 marches in Charlottesville, the protesters' firearms expressed something—something too diffuse to call a proposition but still recognizable as a cluster of themes and ideologies: anger, suspicion of the government, white supremacy, a fear of being replaced, admiration of the Confederacy, “*sic semper tyrannis*,” nativism, and other associated emotions and ideas. In Charlottesville, these and other strands of meaning came together in the glint of muzzles in the mid-morning sun.

This coalescence of meanings is what the gun signifies—what the gun “says.” The gun’s message may interact with and reinforce the protesters’ other forms of expression—swastikas, signs, “MAGA” hats, shouted slogans. As part of the Charlottesville protest, the firearm has been embedded in the fabric of a message, acquiring a communicative dimension that it lacks when discharged at a range or stored in a gun safe.

This commentary explores how state and local officials in open-carry states might regulate the display of guns at protests without ignoring the expressive function of these deadly devices. The semiotic function that an openly displayed gun may have at some protests does not diminish its lethality. In the context of a rancorous protest, that lethality heightens the risks of violence and threatens to chill the speech of counter-protesters.

I propose a solution to the guns-at-protests problem based on “free speech zones,” an idea that has been used to manage protesters—unarmed ones, that is—in the past.¹ Open-carry states should consider “open-carry zones” at protests for the subset of demonstrators who wish to display firearms while protesting.

The expression of the white supremacist marchers at Charlottesville—the chants, the signs, the guns, all of it—was worthless under any normal conception of value. But First Amendment “value” is not a normal conception of value; it is shorthand for the idea that the censorship of certain types of speech poses a threat to expressive freedom. The government

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1. On free speech zones, see Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 591–606 (2006).

should not be in the business of deciding what people can say on matters of public concern, including questions of race, politics, and equality. And so, the valueless sputtering of the Charlottesville white supremacists and Nazis have First Amendment “value.”

The guns they brought with them had First Amendment value, too. Because of their semiotic content, the firearms displayed in Charlottesville, along with the marcher’s collection of other symbols, constitute speech within the meaning of the First Amendment. According to the Supreme Court, “The protected expression that inheres in a parade is not limited to its banners and songs . . . for the Constitution looks beyond written or spoken words as mediums of expression [A] narrow, succinctly articulable message is not a condition of constitutional protection.”² Consequently, a protester’s gun wielded in a political march, whether in Charlottesville or elsewhere, may be a form of speech because guns can carry meaning. As the scholarship notes:

Guns, historians and sociologists tell us, are not just ‘weapons, [or] pieces of sporting equipment’; they are also symbols ‘positively or negatively associated with Daniel Boone, the Civil War, the elemental lifestyles [of] the frontier, war in general, crime, masculinity in the abstract, adventure, civic responsibility or irresponsibility, [and] slavery or freedom.’³

But a gun does not lose its original function—lethality—when it acquires an expressive one. Expressive or not, when a gun is wielded in a potentially violent march, the government has a claim to regulate it.

The government’s regulatory authority derives not only from the possibility of violence but also from the threat that the gun will chill the speech of others, such as counter-protesters. The threat of armed marchers may convince many potential counter-protesters to stay home. The armed marchers could win the day by proclaiming their message loudly, while fear of being shot limits their opponents in number, volume, and intensity. From the standpoint of free discourse, this is cheating; for the contest to have any legitimacy, it cannot be won through intimidation. Thus, a protest gun may simultaneously constitute, as well as suppress, expression.

2. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Gp. of Bos.*, 515 U.S. 557, 569 (1995).

3. Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1294 (2003) (quoting WILLIAM R. TONSO, *GUN AND SOCIETY: THE SOCIAL AND EXISTENTIAL ROOTS OF THE AMERICAN ATTACHMENT TO FIREARMS* 38 (1982)).

One need not believe that guns at protests constitute a “true threat” to believe that the government has an interest in regulating them both to prevent violence and to prevent speech from being chilled. An armed robber's statement to a clerk—“empty the cash register or I'll shoot”—is not considered speech at all. But the definition of a “true threat” is narrow. In *Virginia v. Black*, the Supreme Court held that states cannot criminalize all cross burnings, only those where the person burning the cross intends to intimidate others.⁴

It is not hard to imagine white supremacists armed with guns intending to send a threat—“counter-protest and we'll shoot you”—but I doubt that all protesters who carry guns, or even all white supremacist protesters who carry guns, always intend the guns to convey a threat. A marcher with a gun may intend to convey not a threat of violence but a message like “the administrative state is a tyrant,” “white people are racially superior to everyone else,” or “the Second Amendment is important.” Therefore, displaying guns at marches cannot always be dismissed as threatening conduct unprotected by the First Amendment.⁵

Because guns-as-expression cannot be dismissed as mere threats, proper regulation of guns in marches presents a contest between conflicting interests. Armed marchers have a presumptive First Amendment right to the expressive value that firearms add to their march; the government, however, has an interest in both in avoiding violent conflict and preventing counter-protesters' speech from being chilled.

What are the government's options for navigating these interests? Certainly, one option is for state and local governments to repeal open-carry laws altogether. Current Second Amendment law does not recognize any sort of open-carry right.⁶

4. 538 U.S. 343, 363 (2003).

5. In *Virginia v. Black*, the Court stated: “Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” 538 U.S. at 360. Despite this holding, the federal circuits are split on whether a true threat exists when a speaker does not intend to make the listener fear physical harm but a reasonable person hearing the speech would feel intimidated. Compare *United States v. Heineman*, 767 F.3d 970, 975–82 (10th Cir. 2014) (holding that *Black* requires subjective intent), with *United States v. Martinez*, 736 F.3d 981, 984–88 (11th Cir. 2013) (holding that *Black* does not require subjective intent), *vacated*, 135 S. Ct. 2798 (2015). It is a close question whether reasonable counter-protesters would feel physically threatened by marchers with firearms. The answer would likely vary based on the context of particular protests and encounters.

6. Justice Thomas recently dissented from the denial of *certiorari* in a case raising this issue, stating, “I find it extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen.” *Peruta v. California*, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting).

Nor would a complete prohibition on openly carrying firearms violate the First Amendment. Such a regulation would have an incidental effect on armed marchers' ability to express themselves by displaying weapons, but the First Amendment tolerates burdens on expressive conduct so long as the laws further a substantial interest and do not seek to abridge the expressive conduct itself. In *United States v. O'Brien*, the Supreme Court upheld a criminal law banning the destruction of draft cards.⁷ The law surely burdened expressive conduct—burning draft cards—but its central objective was not to prevent draft card burning but to facilitate the functioning of the selective service system. Similarly, a prohibition on openly carrying firearms would be aimed at normally non-expressive conduct—walking with a visible gun—and would, therefore, not run afoul of the First Amendment.

Because open-carry states do not wish to completely eliminate the privilege, state or municipal governments could, alternatively, ban the open display of guns at protests. Although this measure would be narrower than repealing open-carry laws altogether, it could have political traction in an open-carry state hoping to retain open-carry rights but prevent the violence exemplified by Charlottesville.

Banning the open display of guns at protests may *look* suspect because it would prohibit the display of firearms in the very context where guns are most expressive. Such a ban could be viewed as an attempt to suppress the expressive function of openly carried firearms. If the ban was not intended to limit expression, however, the elimination of protesters' open-carry privileges would be arguably content-neutral and valid as a time, place, or manner restriction.⁸ Surely, a valid, content-neutral rationale for the prohibition exists: the prevention of violence and intimidation. Protests can become rancorous and can easily descend into violence; thus, an openly displayed gun arguably poses a greater risk in a protest than in most other contexts.

In the wake of Charlottesville, commentators have proposed eliminating open-carry privileges outright or at least during protests.⁹ However, there is a third possibility that the discussion thus far has overlooked: time, place, or manner restrictions at protests that limit the display of firearms to

7. 391 U.S. 367, 382 (1968).

8. *See* *Ward v. Rock Against Racism*, 491 U.S. 781, 790–91 (1989) (upholding a city's ability to regulate the time, place, and manner of a rock concert but not any musical aspects of the performance). Such a regulation would also be aimed at the "secondary effects" of guns at protests, rather than their expressive function. *See* *Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986).

9. *See* John Feinblatt, *Ban the Open Carry of Firearms*, N.Y. TIMES (Aug. 17, 2017), <https://perma.cc/D8LM-5THZ>; John Culhane, *Should Protesters Be Allowed to Have Guns?*, POLITICO (Aug. 18, 2017), <https://perma.cc/4GTJ-QHDL>.

designated “open-carry zones.” Open-carry zones would enhance safety and minimize the chilling of counter-protester speech without denying protesters the opportunity to display firearms for expressive reasons.

In other words, the principal benefit of open-carry zones would be a compromise between the expressive interests of protesters wishing to display firearms and the protective interests of the government wishing to avoid violence and the chilling of counter-protesters’ speech. This solution would reduce but not eliminate the threat to safety and counter-protest posed by firearms. It would also reduce, but not eliminate, the expressive power of firearms at protests by confining them to specified areas. In contrast to one-sided solutions—the complete elimination of open-carry privileges, and the unrestricted leave to openly carry firearms—open-carry zones would constitute a compromise, giving due regard to the important and conflicting interests at stake.

Limiting open-carry rights to designated zones would not eliminate the dangers of firearms at protests, but it may render the negative effects more tolerable. There would be greater physical separation between armed protesters and unarmed ones who wish to stay away from them, which would reduce the chances of an “in-your-face” exchange escalating into violence. If armed protesters stayed in designated areas, it would be easier for the police to monitor them and preserve order.

To be sure, some risks would remain. Unless the open-carry zone were held far from the protest’s epicenter—say, ten blocks from the town square of a small town—opposing protesters would likely come within range of the protesters’ guns. Situating the open-carry protesters ten blocks away, however, would effectively eliminate their ability to communicate with people; foot traffic near the open-carry zone would be far more limited than at the center of town. The open-carry zones should, therefore, not be banished to the periphery. Protesters with firearms are entitled to decent protest real estate, like everyone else. If the authorities did allow them to occupy space near the center of a protest, however, open-carry zones would not eliminate the danger or chilling effect of guns displayed at protests. The zones would mitigate both harms by creating some distance and separation.

Open-carry zones would also harm the expressive freedom of armed protesters. The idea of an open-carry zone, of course, is based on “free speech zones,” which have served to confine protesters or other speakers (generally, speakers not openly displaying firearms) to specified areas. Free speech zones have been rightly criticized for inhibiting the power of a demonstration, the ability to communicate messages, and the chance to reach a broad audience.¹⁰ “Tactical places,” such as free speech zones, “impact expressive and associative rights in a variety of ways. By design,

10. See Zick, *supra* note 1, at 601–02.

these places mute and even suppress messages, depress participation in social and political protests, and send negative signals to those on the outside regarding those confined within.”¹¹

But the tradeoffs of establishing zones are different for guns and signs. A sign is pure expression and makes a poor weapon. A gun at a protest suffers from a split personality. One minute it is an expressive symbol (just like a sign), but the next it could kill someone. The expressive properties that a protest gun shares with a sign entitle the firearms to some protection as speech. At the same time, the properties that distinguish it from a sign justify greater regulation.

Almost everyone, I suspect, will reject the idea of open-carry zones. Some will accuse the proposal of trivializing a gun’s sign-like characteristics; others will condemn it for minimizing a gun’s deadly features. But while liberals call for an end to open-carry privileges, and gun-rights groups dig in for a slog, dare I say that universal condemnation may be a sign of tolerable compromise?

11. *Id.* at 584.