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WHEN TWO RIGHTS MAKE A WRONG: ARMED ASSEMBLY UNDER THE FIRST AND SECOND AMENDMENTS

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ABSTRACT—This Essay argues on textual, historical, doctrinal, and normative grounds that there is no constitutional right of armed assembly. It rejects the proposition that the First Amendment right to assemble and the putative Second Amendment right to public carriage of firearms in nonsensitive places combine to create a right to armed assembly. While acknowledging that in some circumstances the courts recognize a hybrid right that is greater than the sum of its parts, this Essay finds no basis for concluding that the First and Second Amendments add up to a right to armed assembly.

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INTRODUCTION

Because the insurrectionists who stormed the Capitol on January 6, 2021 were clearly acting unlawfully, virtually no one has suggested that they were acting within their constitutional rights by assembling armed with guns.[1] Yet other recent armed assemblies are more difficult to classify as simple lawbreaking. For example, on April 30, 2020, protesters carrying rifles entered the Michigan statehouse to register their displeasure with Governor Gretchen Whitmer's order that nonessential workers temporarily stay home to combat the COVID-19 pandemic.[2] Fortunately, no violence occurred on that date,[3] nor later in the year, when federal agents charged like-minded, armed anti-government activists in a plot to kidnap Governor Whitmer.[4] The same cannot be said with respect to another 2020 assembly. Following an August 2020 confrontation in Kenosha, Wisconsin between Black Lives Matter protesters and counterprotesters, Kyle Rittenhouse was charged with the fatal shooting of two unarmed individuals.[5] Likewise, death resulted from a clash at an assembly of armed protesters at a "Unite the Right" rally in Charlottesville, Virginia in August 2017,[6] where white supremacist James Alex Fields Jr. murdered Heather Heyer, an unarmed counterprotester.[7] Although Fields happened to use a car rather than a firearm

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[1] *See* Brad Heath & Sarah N. Lynch, *Arrested Capitol Rioters Had Guns and Bombs, Everyday Careers and Olympic Medals*, REUTERS (Jan. 14, 2021, 4:07 PM), https://www.reuters.com/article/us-usa-trump-protest-cases-insight/arrested-capitol-rioters-had-guns-and-bombs-everyday-careers-and-olympic-medals-idUSKBN29J2V8 [https://perma.cc/73MG-E66R].

[2] *See* Jacey Fortin, *Michigan Governor Reinstates State of Emergency as Protests Ramp Up*, N.Y. TIMES (May 1, 2020), https://www.nytimes.com/2020/05/01/us/michigan-protests-capitol-virus-armed.html [https://perma.cc/CV7B-XU5Q].

[3] Lois Beckett, *Armed Protestors Demonstrate Against Covid-19 Lockdown at Michigan Capitol*, GUARDIAN (Apr. 30, 2020, 6:54 PM), https://www.theguardian.com/us-news/2020/apr/30/michigan-protests-coronavirus-lockdown-armed-capitol [https://perma.cc/5Z44-EQRP].

[4] *See* Nicholas Bogel-Burroughs, *What We Know About the Alleged Plot to Kidnap Michigan's Governor*, N.Y. TIMES (Oct. 9, 2020), https://www.nytimes.com/2020/10/09/us/michigan-militia-whitmer.html [https://perma.cc/SUB4-XZMH].

[5] *See* Julie Bosman, *Some Conservatives Rally Behind Teenager Charged in Protesters' Deaths*, N.Y. TIMES (Oct. 9, 2020), https://www.nytimes.com/2020/10/09/us/kyle-rittenhouse-kenosha.html [https://perma.cc/5BMD-NY4H]; Neil MacFarquhar, *Suspect in Kenosha Killings Lionized the Police*, N.Y. TIMES (Oct. 16, 2020), https://www.nytimes.com/2020/08/27/us/kyle-rittenhouse-kenosha.html [https://perma.cc/ME47-7NEB].

[6] Sheryl Gay Stolberg, *Hurt and Angry, Charlottesville Tries to Regroup from Violence*, N.Y. TIMES (Aug. 13, 2017), https://www.nytimes.com/2017/08/13/us/charlottesville-protests-white-nationalists.html [https://perma.cc/3HX6-EHQK].

[7] Joe Heim & Kristine Phillips, *Self-Professed Neo-Nazi James A. Fields Jr. Convicted of First-Degree Murder in Car-Ramming That Killed One, Injured Dozens*, WASH. POST (Dec. 7, 2018), https://www.washingtonpost.com/local/public-safety/jury-set-to-begin-deliberations-in-james-a-fields-jr-car-ramming-trial/2018/12/06/65d38748-f9b3-11e8-8c9a-860ce2a8148f_story.html [https://perma.cc/AFR8-846F].

as his weapon,[8] the Lansing, Kenosha, and Charlottesville incidents all raise the same urgent constitutional question: Does the First Amendment, the Second Amendment, or the two provisions in combination protect a right of armed assembly?

If the Second Amendment does not include a right to public carriage—as some lower courts have held it does not[9]—then there is no right to armed assembly. A law banning or restricting public carriage would not violate the Second Amendment, and so long as the government evenhandedly applied that general prohibition—rather than singling out protesters for exercising their right of expressive association while permitting other sorts of armed gatherings—there would be no First Amendment violation either.[10]

Yet there is reason to worry that the Supreme Court will hold that the Second Amendment protects a right of public carriage.[11] Indeed, such a ruling seems to follow from the Court's statement in *District of Columbia v. Heller* that the Second Amendment does not protect a right to carry firearms in "sensitive places."[12] If there were no general right to public carriage, then every place outside the home would be sensitive, and there would have been no reason to identify "schools and government buildings"[13] as examples of an exception to the general right.

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[8] *See* Sheryl Gay Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 12, 2017), https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html [https://perma.cc/MUH9-4NJE].

[9] *See, e.g.*, Gould v. Morgan, 907 F.3d 659, 662 (1st Cir. 2018) (holding that a Massachusetts firearms-licensing statute limiting the right to carry firearms does not violate the Second Amendment); Drake v. Filko, 724 F.3d 426, 429–30 (3d Cir. 2013) (upholding the statutory requirement to show a "justifiable need" to publicly carry a handgun under the Second Amendment); Kachalsky v. County of Westchester, 701 F.3d 81, 96–101 (2d Cir. 2012) (upholding law restricting public carriage to persons showing a special need for firearms under intermediate scrutiny).

[10] State and local regulations would be evaluated under the Fourteenth Amendment, which incorporates both the First and Second Amendments. *See, e.g.*, De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (assembly); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (plurality opinion) (arms bearing).

[11] *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (Apr. 26, 2021), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-843.html [https://perma.cc/V2JA-ME2E] (granting petition for writ of certiorari to consider "[w]hether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment"); *cf.* N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1540–41 (2020) (Alito, J., dissenting) (contending that the city's restrictions on transporting firearms to a shooting range violate the Second Amendment); Rogers v. Grewal, 140 S. Ct. 1865, 1865–75 (2020) (Thomas, J., dissenting from the denial of certiorari) (urging the Court to grant review on the question whether the Second Amendment protects a right to public carriage and strongly indicating that, in his view, it does).

[12] District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

[13] *Id.*

To be sure, one can make a plausible argument that the right recognized in *Heller* should be restricted to the home.[14] For purposes of this Essay, however, I assume that there is a Second Amendment right to some form of public carriage. Even so, that assumption does not answer the question whether there is a right of public carriage by *armed groups*.

Hold on. If there is a Second Amendment right to carry a firearm in public (in a nonsensitive place) and a First Amendment right to expressive assembly (absent a content-neutral time, place, or manner restriction, or a strict-scrutiny-satisfying justification for limiting gatherings), then does it not follow as a matter of simple arithmetic that there is a right of armed assembly?

It does not. This Essay argues that there is no constitutional right of armed groups to assemble, even assuming a constitutional right of individuals to carry weapons in public.

I do not contend that the Constitution places no limits on the regulation of armed gatherings. If the government restricted armed assemblies of anti-vaccination protesters but not vaccination proponents, that would be an impermissible viewpoint-based restriction on speech.[15] If the government permitted armed protests by white people but not African Americans,[16] that would violate equal protection. But evenhanded restrictions on armed gatherings evenhandedly applied to armed protesters should not run afoul of the First, Second, or both Amendments.

The balance of this Essay proceeds in three further Parts. Part I examines the original understanding of the First, Second, and Fourteenth Amendments. I find little historical support for a private right of armed assembly. Part II turns to judicial precedent and related normative considerations. I conclude that there is no sound basis for a right of armed

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[14] *See* Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1303–04 (2009); Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 231–33 (2008).

[15] *See* Reed v. Town of Gilbert, 576 U.S. 155, 168 (2015) (describing viewpoint discrimination as a "'more blatant' and 'egregious form of content discrimination'" than other forms of still-presumptively-impermissible content discrimination (quoting Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995))).

[16] The police response to protests by *unarmed* demonstrators of all races following the murder of George Floyd suggests that armed African-American protesters often elicit a different police response from armed white protesters. *See, e.g.*, Allison McCann, Blacki Migliozzi, Andy Newman, Larry Buchanan & Aaron Byrd, *N.Y.P.D. Says It Used Restraint During Protests. Here's What the Videos Show.*, N.Y. TIMES (July 14, 2020), https://www.nytimes.com/interactive/2020/07/14/nyregion/nypd-george-floyd-protests.html [https://perma.cc/AHY2-S638] (reflecting videos of police using force on protesters during demonstrations following the death of George Floyd); Samantha Schmidt, *Teens Have Been Gassed and Hit with Rubber Bullets at Protests. They Keep Coming Back.*, WASH. POST (June 6, 2020, 6:30 AM), https://www.washingtonpost.com/dc-md-va/2020/06/05/teens-protests-george-floyd-tear-gas/ [https://perma.cc/RYS8-5MBC] (reporting protesters being gassed and hit with rubber bullets).

assembly. The First Amendment protects "the right of the people *peaceably* to assemble";[17] although it is possible to assemble peaceably while armed, large gatherings of armed individuals inherently create a substantial risk of violence—either by themselves or in a confrontation with the police or counterprotesters. That inherent risk justifies a ban on armed assembly. Meanwhile, in most circumstances, armed assembly is far removed from self-defense, which the *Heller* Court identified as "the core lawful purpose" of firearms.[18] Part III looks beyond armed assembly. In some circumstances, the courts recognize a hybrid right that is greater than the sum of its parts. However, there must be some special reason why two or more unsuccessful constitutional claims add up to a successful one. No such reason exists for armed assembly.

I. ORIGINAL UNDERSTANDING

The original understanding of the First, Second, and Fourteenth Amendments provides little support for a private right of armed assembly. On the contrary, historical evidence from the Early Republic tends to negate a constitutional right of armed protest. Meanwhile, to the extent that views about arms bearing changed during the nineteenth century, they evolved *away* from notions of a collective right, thereby undermining any possibility that the First and Second Amendments might provide greater protection for a private right of armed assembly as incorporated against the states under the Fourteenth Amendment. Finally, to the extent that so-called semantic originalism allows for a divergence between the original meaning of constitutional language and the original concrete expectations of the ratifying public, the former provides no grounds for a private right of armed assembly beyond the normative and doctrinal considerations addressed below in Part II.

A. Founding Era Evidence

It would be surprising to discover that the original understanding of the First or Second Amendment protected armed assembly in the modern sense because current views of those Amendments are anachronistic as applied to the Early Republic. There are no Founding Era Second Amendment cases; at least according to the Justices in the majority, *Heller* in 2008 was a case of first impression.[19] To be sure, the *Heller* majority purported to apply the

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[17] U.S. CONST. amend. I (emphasis added).

[18] *Heller*, 554 U.S. at 630.

[19] *See id.* at 619–21 (distinguishing *United States v. Cruikshank*, 92 U.S. 542 (1876), and *Presser v. Illinois*, 116 U.S. 252 (1886)); *id.* at 621–25 (rejecting the argument that *United States v. Miller*, 307 U.S. 174 (1939), foreclosed a private right to possess firearms).

original understanding, but its views of that understanding were hotly contested by the dissenters,[20] and the emergence of armed self-defense as the right protected by the Second Amendment was a late-twentieth-century phenomenon.[21] Meanwhile, Professor Jud Campbell has recently argued forcefully that, beyond forbidding what we now call prior restraints, at the Founding and in the Early Republic, the implications of the First Amendment's Speech and Press Clauses were indeterminate and contested.[22]

What about "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"?[23] Was this language originally understood to include mass gatherings of armed protesters? In short, no.

Consider a 1794 incident during the Whiskey Rebellion in western Pennsylvania, when a group of armed protesters sought to erect a "liberty pole" to symbolize their opposition to a tax they considered oppressive. Despite their earlier association with the American Revolution,[24] "[b]y the time of the Whiskey Rebellion, the use of liberty poles as a prop in public rituals" had a "radical plebeian" cast that both Federalists and Jeffersonian Republicans—who agreed on little else—rejected.[25]

Unsurprisingly, elite disdain for the erection of liberty poles was shared by judges. Thus, when a justice of the peace was prosecuted for failing to intervene against the protesters, the Supreme Court of Pennsylvania allowed the case to proceed and unanimously declared that "[t]he setting up of a pole at any time, in a tumultuous manner, *with arms*, is a riot."[26]

To defend a right to armed protest on historical grounds, one might try to cabin that statement by emphasizing "tumultuous manner." Would armed protesters acting civilly rather than tumultuously have had their rights recognized?

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[20] *See id.* at 652–70 (Stevens, J., dissenting) (emphasizing the militia as the focus of the Founding generation).

[21] *See* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 239 (2008) (showing that the Court's opinion echoed late-twentieth-century conservative activists and politicians who claimed that "the Second Amendment protects rights of the 'law-abiding' and invoke[d] the distinction between citizens and criminals").

[22] *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 286, 304–13 (2017) (describing a range of views in the Early Republic, including that these Clauses referred exclusively to either natural rights or "more determinate customary rules").

[23] U.S. CONST. amend. I.

[24] *See* Saul Cornell, *"To Assemble Together for Their Common Good": History, Ethnography, and the Original Meanings of the Rights of Assembly and Speech*, 84 FORDHAM L. REV. 915, 922–26 (2015) (describing the liberty pole's long history and its adaptation by American revolutionaries).

[25] *Id.* at 925 & n.98.

[26] Respublica v. Montgomery, 1 Yeates 419, 422 (Pa. 1795) (emphasis added).

Again, no. The Pennsylvania supreme court opinion indicates that it was the fact of armed assembly for purposes of expression that rendered the group riotous. The court states that "at any time" the setting up of a liberty pole is dangerous, only then adding that it was especially so during a time of insurrection.[27] This episode suggests an extremely narrow conception of what constituted "peaceable assembly" in the Early Republic, one that certainly did not include armed assemblies.

Likewise, the suppression of the Whiskey Rebellion undercuts any notion of the Second Amendment as an early protector of armed protest. As Professor Saul Cornell observes, "Federalists employed the well-regulated militia protected by the Second Amendment as an agent of repression, not a final check on federal tyranny as some Anti-Federalists had hoped."[28]

Other evidence from the Founding and Early Republic confirms that there was little support for a constitutional right of armed protest. Dahlia Lithwick and Olivia Li note that the statute books of some states retain an offense of "going armed to the terror of the public," which they either adopted in the nineteenth century or inherited as the descendant of an English law long predating—and thus likely informing the original public understanding of—the U.S. Constitution.[29] Even Professor Timothy Zick, who thinks it is possible for people to assemble peaceably notwithstanding being armed (about which I say more below), acknowledges that such laws have "historical lineage" "going for them," which matters a great deal under *Heller*.[30] Thus, Zick concludes that "[e]ven assuming there is a statutory or constitutional right to open carry in a particular state, laws prohibiting 'going armed to the terror of the public' may validly limit that right."[31]

That is an understatement. At least judged by the laws deemed acceptable at the Founding, a prohibition on any substantial assembly of armed persons would be clearly valid. Consider a 1701 English court's explication of the scope of the offense of going armed to the terror of the public:

> If a number of men assemble with arms, *in terrorem populi*, though no act is done, it is a riot. If *three* come out of an ale-house and go armed, it is a riot.

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[27] *See id.* ("[S]uch an erection, when the army were known to have been on their march in support of the constitution and the laws, could only be attributed to an avowed design of giving aid to the insurgents . . . .").

[28] Cornell, *supra* note 24, at 930 (describing how the rebellion "quickly collapsed in the face of federal power").

[29] *See* Olivia Li & Dahlia Lithwick, *When Does Openly Carrying a Gun at a Protest Become a Criminal Act?*, TRACE (Oct. 17, 2017), https://www.thetrace.org/2017/10/open-carry-protest-gun-crime-terror-public [https://perma.cc/YRK6-CR7X].

[30] Timothy Zick, *Arming Public Protests*, 104 IOWA L. REV. 223, 258 (2018).

[31] *Id.*

> Though a man may ride with arms, yet he cannot take two with him to defend himself, even though his life is threatened.[32]

To similar effect, an eighteenth-century treatise that was nearly as widely known in the colonies as Blackstone's *Commentaries* stated that English law deemed an armed public assembly unlawful even though it consists "of a man's friends for the defence of his person against those who threaten to beat him."[33] Surveying the relevant English and colonial cases and treatises, Mark Anthony Frassetto observes that going armed to the terror of the public and similar "crimes sometimes involved the carrying of weapons, and when they did, they were deemed to automatically incite public terror."[34]

Taken as a whole, the historical evidence points strongly away from any original public understanding of the First and Second Amendments (either individually or in combination) as protecting a private right of armed assembly.

B. Fourteenth Amendment Incorporation

That conclusion should sound the death knell for any such right under the Fourteenth Amendment as well, given recent Supreme Court opinions holding that when the Fourteenth Amendment incorporates a provision of the Bill of Rights, it has the same content as applied to the states as it does against the federal government, thereby rejecting a "dual-track incorporation" theory of the Fourteenth Amendment.[35] Nonetheless, let us consider a variation on that theory, i.e., the possibility that, as incorporated against the states, the First and Second Amendments provide greater protection for armed assembly than they provide against the federal government.

In favor of such a view, we might observe that the cases rejecting dual-track incorporation reject the application to the states of a "watered-down"

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[32] Queen v. Soley, 88 Eng. Rep. 935, 936–37 (Q.B. 1701) (footnotes omitted).

[33] 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 516 (John Curwood ed., London 1824) (1721). Hawkins based his analysis on cases construing the Statute of Northampton, first enacted in 1328; it forbade all but those in the service of the King "to go nor ride armed by night nor by day" in most public places. *Id.* at 488; *see also* Mark Anthony Frassetto, *To the Terror of the People: Public Disorder Crimes and the Original Public Understanding of the Second Amendment*, 43 S. ILL. U. L.J . 61, 67 (2018) (noting that the Statute of Northampton was reenacted at least twice in the fourteenth century). Blackstone also recognized the offense of going armed to the terror of the people, although he did not elaborate on its scope. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *149.

[34] Frassetto, *supra* note 33, at 65.

[35] *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1398 & n.32 (2020) (citing, *inter alia*, Timbs v. Indiana, 139 S. Ct. 682, 687 (2019)) (noting repeated rejections of "dual-track" incorporation).

version of a Bill of Rights provision.[36] Perhaps some provision of the Bill of Rights provides *greater* protection against state and local action via Fourteenth Amendment incorporation than it provides against federal action directly. A "watered-up" version of a Bill of Rights provision applicable to the states and their subdivisions via incorporation is at least a conceptual possibility.[37]

So how about it? Perhaps the First and Second Amendments as understood by the public in 1791 did not include a right of private armed assembly, but by 1868 the public understanding of those provisions had shifted, and thus when the People ratified the Fourteenth Amendment, they incorporated the changed understanding. Is that what happened?

In principle, the Supreme Court's opinion in *McDonald v. City of Chicago* leaves open the possibility of a right that is broader against the states than against the federal government.[38] In addition to considering the question whether the Fourteenth Amendment incorporates the Second,[39] it also considers the question of how Americans understood the meaning of a right to keep and bear arms in the period leading up to the 1868 ratification.[40] We can imagine that the result of that inquiry might have been a discovery of a right of armed assembly.

The result is more nearly the opposite, however. Justice Alito, writing for the *McDonald* majority, describes a nineteenth-century evolution *away from* a collective understanding of armed citizens:

> By the 1850's, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights—the fear that the National Government would disarm the universal militia—had largely faded as a popular

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[36] *Ramos*, 140 S. Ct. at 1398 (internal quotation marks omitted); *see* Johnson v. Louisiana, 406 U.S. 356, 384 (1972) (Douglas, J., dissenting) (describing the Court's rejection of the "watered-down" view in favor of the view that constitutional protections enshrined in the Bill of Rights will be enforced against state governments through the Fourteenth Amendment "according to the same standards" as they are enforced against the federal government (quoting Malloy v. Hogan, 378 U.S. 1, 10–11 (1964))).

[37] *See* Clayton E. Cramer, Nicholas J. Johnson & George A. Mocsary, *"This Right Is Not Allowed by Governments that Are Afraid of the People": The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified*, 17 GEO. MASON L. REV. 823, 824–25 (2010) (stating that "the core applications and central meanings of the right to keep and bear arms and other key rights were very different in 1866 than in 1789" and ultimately concluding that, whatever was understood at the Founding, by Reconstruction arms bearing was understood as an individual right (quoting AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 216 (1998))).

[38] 561 U.S. 742, 785–86 (2010) (plurality opinion) (discussing the Court's rejection of a "watered-down" version of the Fourteenth Amendment).

[39] *See id.* at 767–70 (majority opinion) (describing the fundamentality of the Second Amendment right).

[40] *See id.* at 770–77.

> concern, but the right to keep and bear arms was highly valued for purposes of self-defense.[41]

Moreover, there is no indication in Justice Alito's opinion, the sources he cites, or, so far as I am aware, other relevant sources, that the right of self-defense was a right that could be exercised collectively by private armed groups. On the contrary, the adoption in the middle of the nineteenth century of state laws banning public carriage of weapons except for personal or familial self-defense indicates a strengthening, rather than a weakening, of the English and colonial tradition of treating armed assembly as illicit.[42]

Indeed, it is nearly impossible to imagine that, in the aftermath of the Civil War, the Reconstruction Congress or the ratifying public would have understood the Fourteenth Amendment to protect armed groups.[43] The *Heller* Court acknowledged that the Second Amendment "does not prevent the prohibition of private paramilitary organizations."[44] The *McDonald* Court described the right of individual firearms ownership chiefly as valuable for their defense *against* threats from such outlaw groups, especially for the African Americans who had recently been freed from bondage.[45]

So much for a "watered-up" Fourteenth Amendment right of armed assembly.

C. Semantic Originalism

Notwithstanding the compelling evidence against a historically grounded right of armed assembly, it might be argued that the original meanings of the First, Second, and Fourteenth Amendments nonetheless combine to produce a constitutional right of armed assembly, even though such a right was not widely expected or intended by the Framers or ratifiers

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[41] *Id.* at 770 (first citing MICHAEL D. DOUBLER, CIVILIAN IN PEACE, SOLDIER IN WAR 87–90 (2003); and then citing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 258–59 (2000)).

[42] *See* Frassetto, *supra* note 33, at 75 & nn.87–88 (citing mid-nineteenth-century statutory additions in seven states).

[43] *See* Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI-KENT L. REV. 291, 321 (2000) (arguing that the "bloody conflagration" of the Civil War taught that both private and state-organized armed groups pose an unacceptable threat to civil peace).

[44] District of Columbia v. Heller, 554 U.S. 570, 621 (2008) (characterizing the holding of *Presser v. Illinois*, 116 U.S. 252 (1886)); *see also id.* at 620 (stating that "no one supporting" the individual right "interpretation" of the Second Amendment "has contended that States may not ban" paramilitary groups).

[45] *See* 561 U.S. at 772 (quoting Senator Henry Wilson's account of how, in Mississippi, "men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages upon them; and the same things are done in other sections of the country").

of any of those provisions. *Semantic*[46] or *new* originalism[47] allows for a divergence between the original public meaning of the words of the Constitution and the intentions and expectations of the Framers and ratifiers of those words. To give an example that figures prominently in debates over how to describe original meaning, the Framers and ratifiers of the Fourteenth Amendment may have thought that it would allow continued de jure racial segregation, but they did not write that allowance into the text.[48]

Yet the substantial underdeterminacy of semantic or new originalism relative to (the claims for determinacy of) intentions-and-expectations originalism means that historical evidence will end up disposing of contested constitutional questions with no greater frequency for semantic/new originalists than it will for avowed living constitutionalists.[49] Accordingly, with one minor exception to which I now turn, I shall not consider semantic-originalist arguments for a right to armed assembly except insofar as they bear on doctrinal arguments, which the next Part of this Essay addresses.

The exception concerns the word "militia." In contemporary English, we sometimes use that term to refer to private armed groups.[50] Might the inclusion of the word "militia" in the Second Amendment connote protection

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[46] *See* Lawrence B. Solum, *Semantic Originalism* 1, 2 (Univ. of Ill. Coll. of L., Illinois Public Law and Legal Theory Research Papers Series No. 07-24, 2008), http://papers.ssrn.com/a=1120244 [https://perma.cc/MH74-SHEA].

[47] *See* James E. Fleming, *The New Originalist Manifesto*, 28 CONST. COMMENT. 539, 546 (2013) (reviewing LAWRENCE B. SOLUM & ROBERT W. BENNETT, CONSTITUTIONAL ORIGINALISM: A DEBATE (2011)) (comparing and contrasting Solum and Bennett's version of new originalism with that of Keith Whittington).

[48] An early example of originalists' turn away from intentions and expectations is found in ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 169 (1990), in which Judge Bork argued that *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), was consistent with the abstract principles adopted by the Fourtheenth Amendment, regardless of what its Framers and ratifiers thought about racial segregation itself. For a critique of this approach as "arbitrary and ad hoc" in its selection of a level of generality, see RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 271 (1996).

[49] *See* Fleming, *supra* note 47, at 542 ("If we define originalism inclusively enough . . . it may not be very useful to say that we are all originalists now."); DAVID A. STRAUSS, THE LIVING CONSTITUTION 10–11 (2010) ("Some professed originalists . . . define 'original meaning' in a way that ends up making originalism indistinguishable from a form of living constitutionalism."); Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 633 (2021) (observing that even self-described originalists acknowledge that constitutional "meaning is often indeterminate").

[50] *See, e.g.*, David D. Kirkpatrick & Mike McIntire, *'Its Own Domestic Army': How the G.O.P. Allied Itself with Militants*, N.Y. TIMES (Feb. 8, 2021), https://www.nytimes.com/2021/02/08/us/militias-republicans-michigan.html [https://perma.cc/BN7M-EAK6] (repeatedly describing private armed groups in Michigan as "militia" and their members as "militiamen"); *see also Militia*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/militia [https://perma.cc/AG9K-ZN73] (providing as one definition a "body of citizens organized for military service").

for such groups notwithstanding the Framers' concrete intentions and expectations regarding armed assemblies?

The short answer is no. Jurists disagree over whether at the Founding militia meant "all males physically capable of acting in concert for the common defense,"[51] or organized state militias.[52] Crucially, no one in this debate argues that the term "militia" as used in the Second Amendment referred to private armed groups. True, under the former view, which prevailed in *Heller*, *members* of the militia—that is, adult (white) males—might try to join together while armed, but in doing so they would not *be* a militia; they would be *a proper subset of the militia* constituting themselves a private armed group.[53] Any rights they might have would have to derive from some source other than the protection that the Second Amendment affords to the militia as such. As we have seen throughout this Part, however, from the Founding through Reconstruction, there was no private right of substantial numbers of armed persons to assemble in public.

II. PRECEDENT AND NORMATIVE CONSIDERATIONS

Professor Zick observed in 2018 that "[n]o reported judicial decisions have specifically addressed the intersection between First Amendment and Second Amendment rights at public protests."[54] Yet that does not mean that constitutional case law has nothing to say about the constitutionality of restrictions on armed protests. We can parse the First and Second Amendment case law more broadly to derive lessons about how the two rights interact.[55]

A. First Amendment: Time, Place, and Manner Restrictions on Armed Assembly

First Amendment doctrine permits governments to impose reasonable, content-neutral time, place, and manner (TPM) restrictions on expression,

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[51] District of Columbia v. Heller, 554 U.S. 570, 595 (2008) (internal quotation marks omitted) (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

[52] *See id.* at 640–43 (Stevens, J., dissenting).

[53] *Id.* at 580 (majority opinion).

[54] Zick, *supra* note 30, at 227.

[55] Much writing about the relation between the First and Second Amendments concerns the use of First Amendment doctrine to inform Second Amendment doctrine. *Compare, e.g.*, *id.* at 268–74 (acknowledging overlapping concerns but cautioning that the two "rights are obviously distinct in many descriptive and other respects"), *with* John O. McGinnis, *Gun Rights Delayed Can Be Gun Rights Denied*, 2020 U. ILL. L. REV. ONLINE 302, 303, 308–10 (arguing, based partly on an essay by James Madison, that the First Amendment provides a fitting analogy for the Second, "both in general and in the specific context of civil disorder"). I view such analogies as potentially useful, *see* Dorf, *supra* note 14, at 231 (analogizing firearms possession to obscenity possession), but they are not the focus of this Essay.

including assemblies such as marches and rallies, so long as "they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[56] In this context, narrow tailoring does not require that the law employ the least restrictive means.[57] A content-neutral TPM restriction satisfies the test if it is "not substantially broader than necessary to achieve the government's interest."[58]

A carefully crafted restriction on armed assembly should satisfy those principles. To be sure, if the government were to restrict an armed assembly because of the message that the carrying of arms conveys, the restriction would be invalid because it would be content based.[59] In most instances, however, restrictions will not aim at the symbolic message, if any, that carrying firearms conveys. Most restrictions will instead aim at the risk of violence. If the relevant government officials, using sufficiently specific guidelines, issue permits for rallies and marches that forbid the carrying of firearms regardless of whether the firearms communicate a message and regardless of the expressive aims of the rallies and marches, then the core requirement for a TPM restriction—content neutrality—will be satisfied.

Would a prohibition of mass gatherings of armed persons be narrowly tailored to a significant government interest? The government undoubtedly has a significant—indeed compelling—interest in preventing violence, so this question reduces to one of narrow tailoring.

One can surely imagine circumstances in which a ban on the carrying of firearms by an assembled group would be unnecessary to ensure the public safety. For example, suppose that a group of octogenarian Korean War veterans wished to participate in a memorial parade carrying their sidearms or rifles. Forbidding them from carrying arms would not be necessary to prevent violence. Nonetheless, application of a general ban would likely satisfy TPM narrow tailoring for two reasons.

First, the requirement of narrow tailoring forbids government from restricting substantially more *speech* than necessary. As applied to our hypothetical group of veterans, a ban on armed gatherings does not restrict much, if any, speech, because the veterans remain free to gather and march

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[56] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (internal quotation marks omitted) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[57] *See id.* at 797–800.

[58] *Id.* at 800.

[59] *See id.* at 791–94 (treating content-neutrality and the guidance of discretion as the core criteria for a valid TPM regulation and finding them satisfied by requirement that outdoor concerts in New York City's Central Park use the city's sound engineer to limit volume).

together.[60] Put differently, the ban on armed gatherings leaves open an adequate alternative avenue of communication—namely the exact same event but without the carrying of firearms—and for that reason is narrowly tailored.

Second, carving out exceptions to a general ban on armed gatherings for harmless groups would itself create a risk of illicit content-based or speaker-based[61] censorship. Individualized assessments of whether an armed group or counterprotesters[62] are likely to engage in violence would be difficult to separate from the identity and message of the group. Complying with the doctrinal requirement of narrow tailoring should not require government to violate the requirement of content neutrality. Here, more is less.

The foregoing analysis might seem to dovetail awkwardly with the text of the First Amendment, which protects "the right of the people peaceably to assemble." If our hypothetical group of veterans intend no threat by carrying arms, might the First Amendment be said to expressly protect them in doing so? Professor Zick makes this suggestion in noting that the mere fact of being armed does not make protesters *inherently* violent or intimidating.[63]

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[60] *See id.* at 799 (describing the narrow tailoring requirement in time, place, and manner cases as a rule that "[g]overnment may not *regulate expression* in such a manner that a substantial portion of the *burden on speech* does not serve to advance its goals" (emphasis added)).

[61] *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115–16 (1992) (treating a speaker-based limit on speech as content-based); Citizens United v. FEC, 558 U.S. 310, 340 (2010) ("The Government may also commit a constitutional wrong when by law it identifies certain preferred speakers.").

[62] In *Forsyth County v. Nationalist Movement*, the Court invalidated a licensing ordinance on the ground that permit fees varied in part based on an administrator's assessment of the police protection required to protect speakers from the audience reaction, which was inevitably content based. 505 U.S. 123, 134–35 (1992). Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 102 (2009), speculated that carrying firearms might enhance speech by "assuring minority speakers that they can protect themselves against violent suppression." Although Professor Volokh did not make that suggestion specifically with respect to armed groups as opposed to armed individuals, Professor Zick did. *See* Zick, *supra* note 30, at 240 (quoting Volokh, *supra*, and prefacing the quotation above with a reference to "arms at public protests"). Yet the fact that unpopular speakers might feel safer if armed does not undercut the government's interest in forbidding armed gatherings. On the contrary, it underscores the government interest. Unpopular speakers tend to inspire counterprotesters. Knowledge that the unpopular speakers are armed will lead counterprotesters to arm themselves as well, thus increasing the risk of a violent clash. To be sure, *Forsyth County* precludes subjecting unpopular speakers to firearms restrictions that do not apply to popular speakers, but neither that case nor any other principle of law requires the state to run a substantial risk of armed conflict in the streets as the price of remaining neutral among speakers and their messages. An evenhanded ban on armed gatherings evenhandedly applied protects the peace while avoiding the heckler's veto risk that concerned the Court in *Forsyth County*.

[63] *See* Zick, *supra* note 30, at 238–40. In a book published roughly contemporaneously with the article just cited, Zick states, in the same vein, that "[t]he argument that we *cannot* have both First

Yet the fact that it is *possible* to assemble peaceably while armed does not mean that a restriction on so doing that otherwise satisfies the TPM doctrine is *ipso facto* unconstitutional. If it did, then numerous uncontroversially permissible TPM restrictions would be invalid.

Suppose that fans of a city's championship-winning sports team wish to hold a ticker-tape parade to celebrate and honor the players. The city issues a permit for a parade but, pursuant to a general policy, denies permission for the dropping of ticker tape or other confetti for reasons of waste management, even though the team's owner had offered to pay any extra cleanup costs. The application of the no-ticker-tape rule undoubtedly impedes the fans' ability to exercise their right to assemble peaceably *in exactly the way they most prefer*, but it hardly follows that the rule thereby violates their right to peaceable expressive assembly. Because it is content-neutral, reasonable, and leaves open adequate alternative channels of communication (here the exact same parade minus the ticker tape), the rule's application satisfies the TPM requirements and thus the First Amendment.

The same reasoning supports the application of a no-armed-gatherings rule to protesters who wish to assemble armed. Yes, a prohibition on armed protest impedes the protesters' ability to assemble peaceably *in exactly the way they most prefer*, but it does not follow that the rule's application thereby violates their right to peaceable expressive assembly. So long as the restriction serves a substantial government interest—whether in waste management, preventing a breach of the peace, or something else—the application of the rule to any assembly will be constitutional if it satisfies the TPM requirements, even if the rule could be said to be overinclusive with respect to some particular assembly.

In short, the evenhanded application of content-neutral TPM restrictions to armed assemblies would not violate the First Amendment.

B. Second Amendment: Traditional Restrictions and the Self-Defense Rationale

Second Amendment doctrine is considerably less developed than First Amendment doctrine. The Court's cases—and thus far there are only two that resulted from plenary consideration, *Heller* and *McDonald*—identify the

Amendment and Second Amendment rights at protests is factually incorrect." TIMOTHY ZICK, THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS 218 (2018); *see also id.* at 229 ("[I]t is *possible* to have both free speech and firearms at public protests."). He nonetheless concludes that "authorities are far from powerless" to impose various limits on the carrying of arms in public protests. *Id.* (On the assumption that most readers will have easier access to Zick's article than to his book, I generally refer to the former.)

kinds of arms the right covers[64] and validate "such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.'"[65] Neither *Heller* nor *McDonald* nor any other case directly indicates whether laws restricting gatherings of armed individuals (for expressive or other purposes) violate the Second Amendment.

Nonetheless, there is substantial *indirect* support in the existing case law for the permissibility of restrictions on armed gatherings. That support takes two primary forms.

First, as discussed in Part I, both the pre- and post-enactment history belie any suggestion that the individual right to carry arms included the right to gather in public with others bearing arms. At least one current Supreme Court Justice believes that *Heller* and *McDonald* require evaluation of laws claimed to infringe the right "based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."[66] If that view were to prevail, the longstanding history and tradition of criminalization would dispose of any claimed right of private armed gatherings.

Second, armed gatherings of protesters or other private groups do not serve the purposes of the Second Amendment. According to Justice Scalia's opinion in *Heller*, the prefatory clause does not limit the operative clause but announces a purpose, which may be used to resolve ambiguity.[67] The opinion goes on to argue that the operative clause protects the individual right to firearms possession principally for self-defense, which serves the purpose of the right's codification by ensuring that when called to militia service (to resist federal tyranny or otherwise), citizens will have arms.[68]

To see why the Second Amendment's militia purpose is not served by a right of private armed *gatherings*, it may be helpful to note what the Court

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[64] *See* District of Columbia v. Heller, 554 U.S. 570, 625 (2008) (protecting firearms "typically possessed by law-abiding citizens for lawful purposes").

[65] McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (plurality opinion) (quoting *Heller*, 554 U.S. at 626–27).

[66] Heller v. District of Columbia, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); *see also id.* at 1273 (observing that the *Heller* Court did not ask whether the challenged law was "necessary to serve a compelling government interest in preventing death and crime" (citing Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1463 (2009))); Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 380 (2009) (describing but criticizing "*Heller*'s endorsement of categoricalism").

[67] *Heller*, 554 U.S. at 577–78.

[68] *See id.* at 599 (stating that even if "self-defense had little to do with the right's *codification*[,] it was the *central component* of the right itself").

did and did not mean by holding that the provision protects an individual right. *Heller* clearly rejects what has sometimes been called the "collective right" view of the Second Amendment, under which "the people" to whom it refers are a collective entity rather than individuals.[69] Of course, individuals can gather, so the mere rejection of the collective right view does not necessarily entail rejection of a right to armed gatherings. Free speech is an individual right, yet it protects a right of individuals to join together to mutually amplify their respective individual voices, and it would be sensibly understood to protect such group speech even if the First Amendment did not independently contain a right of assembly. So why doesn't the right of individuals to possess and carry firearms likewise imply a right to gather together to do so?

The answer is that while *Heller* rejected the collective-right view, it did not reject what we might call the federalism-focused view. Although the *Heller* Court concluded that the term "free [s]tate" in the Second Amendment does not refer to each State of the Union,[70] it nonetheless recognized that the chief reason that the Framers and ratifiers codified the right to keep and bear arms was "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms."[71] Moreover, the Court cited Colonial and Early Republic Era state provisions protecting a right to bear arms that specifically identified protecting the state among their purposes.[72] Perhaps most importantly, the central insurrectionist text—Madison's *Federalist* No. 46—is through and through an argument for arms as a means of protecting the states against the federal government, not as a means for organizing private armed violence against state governments or other targets.[73]

Could it nonetheless be argued that while the Second Amendment itself therefore provides no right of private armed gatherings, the Fourteenth Amendment's incorporation of the right against the states does? It *could* be so argued, but Justice Alito's majority opinion in *McDonald* does not deem the Second Amendment incorporated on that basis. He cites self-defense as

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[69] *See id.* at 579–80. For additional discussion of the collective versus individual rights interpretation of the Second Amendment, see Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 46–50 (1989).

[70] *See Heller*, 554 U.S. at 597.

[71] *Id.* at 599.

[72] *See id.* at 601–03.

[73] *See* THE FEDERALIST NO. 46, at 243 (James Madison) (Ian Shapiro ed., 2009) (imagining a military contest between a federal "standing army" and "State governments" defended by "a militia" comprising "citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence").

the right that the Fourteenth Amendment incorporated,[74] and to the extent that he discusses private armed groups, it is, as noted above in Part I, in the context of condemning the private armed groups that were terrorizing newly freed African Americans in the post-Civil War South.[75]

To be sure, the insurrectionist Second Amendment lives on in extremist thought. Chillingly, nominally mainstream politicians like Sarah Palin, Donald Trump, and others sometimes invoke the Second Amendment as guarantor of a right to engage in political violence.[76] However, the more staid and sober judicial wing of the conservative movement abandoned insurrectionism in *Heller* because domestic terrorism in the 1990s had tarnished its brand.[77] In so doing, the *Heller* Court thereby abandoned a conception of the right that might encompass armed assembly. One day popular constitutionalism might produce a judicially recognized Second Amendment right to armed insurrection and thus to armed assembly, but that day has not yet arrived.

What about the supposed core of the Second Amendment: the right to armed self-defense? Might there not be occasions in which gathering with other armed individuals facilitates self-defense? In the same way that international law recognizes "the inherent right of individual or collective self-defence" in response to "an armed attack,"[78] might the right of self-defense against private violence include a right of collective self-defense?

Neither *Heller* nor *McDonald* directly answers that question. Both cases invoke the image of an individual using firearms to fight off an attacker. Yet given the proverbial wisdom that there is safety in numbers, it seems but a small step from that scenario to one in which, say, two or three women walking home late at night might choose to travel together. If each one has a constitutional right to carry a handgun in her purse, can the state put them to the difficult choice between walking alone and carrying a firearm?

Even if the answer to that question is no, that would not establish a right of a substantial group to armed assembly. At most, it might mean that laws

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[74] *See McDonald*, 561 U.S. at 767 ("Self-defense is a basic right, recognized by many legal systems from ancient times to the present day.").

[75] *See* Frassetto, *supra* note 33, at 75; *see also supra* note 45 and accompanying text.

[76] *See* Tierney Sneed, *Trump Just the Latest on Hard Right to Call for "2nd Amendment Remedies,"* TALKING POINTS MEMO (Aug. 11, 2016, 6:00 AM), https://talkingpointsmemo.com/dc/trump-second-amendment-people-context [https://perma.cc/7XJW-TLMA] (describing comments by Palin, Trump, and three other Republican politicians).

[77] *See* Siegel, *supra* note 21, at 243 (explaining how the *Heller* Court accepted arguments made by Americans who "appeal[ed] to the law-and-order Second Amendment as the founders' Second Amendment and [made] claims on others outside their normative community through it—as they could not if they were to embrace a republican Second Amendment that authorized violent insurrection and the forms of originalism the militias practiced in the 1990s").

[78] U.N. Charter art. 51.

like those forbidding going armed to the terror of the public would be vulnerable to as-applied challenges by small groups of vulnerable individuals arming themselves for self-defense. That result would not threaten the facial validity of such laws or their application to more dangerous armed groups, either under the look-directly-to-text-history-and-tradition approach or some other standard.

Thus, while a handful of individuals clothed in a presumptive right of public carriage might have a plausible claim to Second Amendment protection when appearing together in public, the same cannot be said for a large group of armed individuals gathering for the purpose of protesting. If holding a rally or march that is lawful because it complies with state or local TPM requirements, such a group should receive police protection against possible violence from counterprotesters.[79] If authorities charged with protecting the public safety have a genuine concern that clashes might erupt between protesters and counterprotesters,[80] that very concern would warrant the application of a general prohibition on armed assembly to both groups in order to reduce the risk of lethal violence.

III. CONSTITUTIONAL ARITHMETIC

We have seen that neither history nor doctrine supports a right to armed assembly under either the First or Second Amendment. Might the two provisions nonetheless combine to produce such a right?

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[79] In an article published before *Heller*, I suggested (but did not endorse) the possibility that the Second Amendment and/or due process could be construed to guarantee a right of armed self-defense for individuals and communities that receive little or no protection against private violence from the police. *See* Dorf, *supra* note 43, at 337–38, 341–42. In the wake of *Heller* and *McDonald*, that suggestion could be adapted to entail a right to carry firearms that might otherwise be constitutionally forbidden if police protection were grossly inadequate. Such an exception to *Heller*'s exceptions could then include a limited right of armed assembly for inadequately protected groups, despite the general permissibility of forbidding armed gatherings. I do not endorse this possibility, however, partly because of the danger to public safety that would arise from the inevitable uncertainties attending the question of when police protection qualifies as adequate.

[80] Here and elsewhere in this Essay, I focus on preventing violence as the chief interest government aims to promote in limiting armed gatherings. In so doing, I do not mean to deny that restrictions on armed gatherings (and other public carriage) may promote other interests, such as the broader interests in security and liberty that may be jeopardized by the mere threat firearms possession poses. *See* Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under* Heller, 116 NW. U. L. REV. 139, 188–89 (2021) ("In various contexts, the threat of gun violence undoubtedly chills the exercise of rights, depriving Americans of the security to speak, protest, learn, shop, pray, and vote.").

The short answer is no. Consider an analogy. There is a substantive due process right of adults to have consensual sex in private.[81] There is also a substantive due process right to freedom from physical restraint that includes the right to appear in public.[82] Do these rights combine to produce a right of consenting adults to have sex in public? Of course not. A right to sex in private, by definition, does not include a right to sex in public. A right to appear in public may include various ways of appearing in public (such as wearing a tutu or a MAGA hat), but *naked and in flagrante delicto* is not among those ways. Thus, neither right by itself encompasses a right to have sex in public, and so a law forbidding public sexual acts violates neither right. There is no reason to think that combining them produces a result different from considering each right separately.

That would end the matter, except that the Supreme Court has sometimes held that two or more constitutional provisions that are not separately sufficient to establish some right produce that right when combined. *Plyler v. Doe* seemed to generate a right to free public education from principles of federal supremacy and equal protection that do not individually require it.[83] *Employment Division v. Smith* stated that free exercise and either expressive freedom or parental rights (via substantive due process) can combine to create a "hybrid" right to religious exceptions from religiously neutral laws.[84] *United States v. Windsor* combined principles of equal protection and federalism to invalidate a provision of the federal Defense of Marriage Act before the Court was prepared to say that there was a constitutional right to same-sex marriage.[85]

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[81] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (invalidating Texas's prohibition on same-sex sodomy); *id.* at 564 ("The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual."). A federal appeals court declined to read *Lawrence* as establishing a substantive due process right to private consensual sex, *see* Williams v. Att'y Gen., 378 F.3d 1232, 1238, 1250 (11th Cir. 2004) (upholding ban on the sale of sex toys and "declin[ing] to extrapolate from *Lawrence* and its *dicta* a right to sexual privacy"), but that view is highly dubious, *see* Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1917 (2004) (taking note both of the Court's bottom line and "passage after passage in which the Court's opinion indeed invoked the talismanic verbal formula of substantive due process but did so by putting the key words in one unusual sequence or another"). In any event, nothing in my analysis turns on there actually being such a fundamental right. We may assume one *arguendo* for present purposes.

[82] *See* Doe v. Bolton, 410 U.S. 179, 213 (1973) (Douglas, J., concurring) (describing the "freedom to walk, stroll, or loaf"). To say that there is a right to be out and about in public is not to deny that the government may restrict that right based on sufficient reasons, such as to control the spread of a deadly disease. *Cf.* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) ("Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" (quoting Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905))).

[83] 457 U.S. 202, 221–26 (1982).

[84] 494 U.S. 872, 881–82 (1990).

[85] 570 U.S. 744, 769, 775 (2013).

Plyler, *Smith*, and *Windsor* do not stand alone. As Section III.A shows, the list of synergistic constitutional cases is substantial. But as Section III.B explains, the sex-in-public case exemplifies the more general pattern. There must be some special reason to conclude that the whole is greater than the sum of the parts. And there is no such reason when it comes to armed assembly.

A. Hybrid Rights and Synergy

In daily life, we often encounter circumstances in which two or more considerations that are not individually sufficient to produce an outcome combine to do so. Perhaps neither low cost nor fuel efficiency by itself suffices to persuade you to buy a particular car, but you might purchase one that is both inexpensive and fuel efficient. You might choose to live in a neighborhood with good but not the best public schools, good but not the best access to public transportation, and good but not the best community organizations, because no other neighborhood provides as good a combination of the factors you value. We routinely make all-things-considered judgments of this sort.

So too in law, including constitutional law, we sometimes find totality-of-the-circumstances tests.[86] They typically involve various factors that go into evaluating some particular set of facts *under* a constitutional provision,[87] but various constitutional provisions and doctrines can also combine to form some new totality.[88]

Plyler and *Windsor*, each of which combines individual rights with federalism, seem easiest to justify. Education, the Court says in *Plyler*, is not a fundamental right for equal protection purposes,[89] but it is sufficiently close

[86] Examples commonly arise in the Fourth Amendment context. Consider the test for probable cause to arrest, which the Supreme Court has described as a "fluid concept" that turns on an "assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." Illinois v. Gates, 462 U.S. 213, 232 (1983). Likewise, a "seizure" occurs when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554 (1980).

[87] For example, the totality-of-the-circumstances standard for probable cause calls for consideration of an informant's reliability, veracity, and basis of knowledge. *Gates*, 462 U.S. at 230–33. The following circumstances indicate a seizure: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554.

[88] For a thoughtful typology, see Michael Coenen, *Four Responses to Constitutional Overlap*, 28 WM. & MARY BILL RTS. J. 347, 350–51 (2019), which explains that when faced with circumstances implicating more than one constitutional provision or doctrine, the courts variously "separate," "combine," "consolidate," or "displace." This Section discusses cases that Coenen classifies as combining or consolidating, albeit substantially more critically than Coenen, whose approach is largely descriptive.

[89] Plyler v. Doe, 457 U.S. 202, 223 (1982) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28–39 (1973)).

to one to call for some special solicitude, at least where the state completely denies some class of persons a free public education.[90] In some contexts, laws that come close to violating the Constitution might trigger prophylactic rules.[91] In others, they might call for a clear statement rule.[92] In *Plyler*, the state law's proximity to a fundamental right triggers an institutional response rooted in federalism: perhaps a state or local government can deny public education to undocumented immigrant children, but only if the federal Congress authorizes that drastic step.[93]

Windsor likewise combines federalism with equal protection. In Section 3 of the Defense of Marriage Act, Congress departed from the longstanding tradition of incorporating and thus deferring to state family law with respect to marriages.[94] The Court hints but does not hold that this departure violates the Tenth Amendment;[95] however, the departure suffices to show that the law reflected impermissible animus in violation of "equal protection principles applicable to the Federal Government."[96] The fact that Congress came close to the line of one constitutional limit leads to a special sensitivity with respect to another constitutional limit.

What makes *Windsor* plausible as a constitutional combo meal is not the particular à la carte items combined but the mechanism for combining them. A close call as a matter of federalism makes the Justices suspicious about congressional motivation, which is an equal protection concern. Note, however, that there is no distinctively *constitutional* combinatorial logic at play. It happens in *Windsor* that the departure from constitutionally infused principles of deference to state family law triggers the Court's heightened sensitivity to an equal protection violation, but some other, *sub-constitutional* factor might have been the trigger instead. For example, in the

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[90] *See id.* at 221–24.

[91] For example, in *Miranda v. Arizona*, 384 U.S. 436, 467 (1966), the Court articulated prophylactic safeguards that are "not themselves rights protected by the Constitution but were instead measures to insure" the protection of the Fifth Amendment privilege against compelled self-incrimination. Michigan v. Tucker, 417 U.S. 433, 444 (1974). *But see* Dickerson v. United States, 530 U.S. 428, 439 (2000) (characterizing *Miranda* as "announcing a constitutional rule").

[92] *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 55 (1996) (citing Blatchford v. Native Village of Noatak, 501 U.S. 775, 786 (1991) (stating that congressional intent to abrogate state sovereign immunity "must be obvious from 'a clear legislative statement'")); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (holding that Congress may impose conditions on states per the Spending Clause only if it states the conditions "unambiguously").

[93] *See Plyler*, 457 U.S. at 224–25.

[94] *See* United States v. Windsor, 570 U.S. 744, 768 (2013).

[95] *Id.*

[96] *See id.* at 769–70 (concluding that the Defense of Marriage Act violates basic due process principles).

Shaw v. Reno[97] line of cases, departures from traditional districting principles may alert the Court to the possibility that race was impermissibly used as a predominant factor in drawing boundaries, even though the traditional districting principles are not themselves constitutional requirements.[98]

While the combinatorial logic of *Windsor* works, there are other cases in which the Court seems to simply count up the number of constitutional near-violations to find that the whole is greater than any part. The most notorious example is *Griswold v. Connecticut*'s inference of a constitutionally protected zone of privacy that encompasses the right of married couples to use contraception in their homes from the First, Third, Fourth, Fifth, and Ninth Amendments, as well as their various penumbras and emanations.[99] The result is not wrong. One could readily say, as Justice Harlan did in his concurrence, that the Due Process Clause itself is the source of the right.[100] In so saying, one might even invoke the same enumerated rights on which the *Griswold* majority relied, but for a different reason: instead of engaging in a somewhat mysterious constitutional alchemy, Justice Harlan's approach interpolated and extrapolated an unenumerated right of privacy.[101] The majority opinion by Justice Douglas, by contrast, seems to suggest that even though the Connecticut contraceptive-use law does not violate or even come very close to violating any of the constitutional provisions invoked, the sheer number of provisions that have something to say about something related to privacy means they add up to a distinctive constitutional right.[102]

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[97] 509 U.S. 630, 649 (1993).

[98] *See* Miller v. Johnson, 515 U.S. 900, 916 (1995) (requiring that a plaintiff bringing an equal protection challenge against a state's districting plan "must prove that the legislature subordinated traditional race-neutral districting principles" such as compactness and contiguity).

[99] 381 U.S. 479, 484–85 (1965).

[100] *See id.* at 500 (Harlan, J., concurring).

[101] *See* Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (explaining that the "liberty" in the Fourteenth Amendment's Due Process Clause "is not a series of isolated points pricked out in terms of" particular constitutional guarantees but rather "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints").

[102] On the *Griswold* majority's explicit logic, there is no violation of any of the enumerated rights, but one could write a persuasive opinion in which the Connecticut law would violate the Fourth Amendment itself, given the mechanisms needed to enforce it in the home. *See* Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment 'Reasonableness,'* 98 COLUM. L. REV. 1642, 1695–97 (1998) (describing the *Griswold* opinion's logic as apparently "flawed," but explaining that a search could be deemed reasonable under the Fourth Amendment if and only if the seriousness of the offense for which the police seek evidence justifies the intrusiveness of the search). Professor Colb's proposal also makes sense of *Stanley v. Georgia*, 394 U.S. 557 (1969), which engages in seemingly unpersuasive constitutional addition to find First Amendment protection for possessing obscenity in the home. *See id.* at 1700–04 (reconceptualizing *Stanley* as a Fourth Amendment case in which, under the Fourth Amendment, the slight government interest fails to justify a home search).

The *Smith* Court likewise described a category of "hybrid" rights combining free exercise with "communicative activity or parental right[s],"[103] but it did not offer any account of why the combination should be greater than the sum of the parts. Rather, the hybrid category seems more like a *post hoc* rationalization for cases decided on other grounds; its principal purpose was to enable Justice Scalia, speaking for the *Smith* majority, to claim that the Court had not previously recognized exceptions to generally applicable laws purely as a matter of free exercise.[104]

Whereas *Griswold* and *Smith* employ hybridity without adequate justification or explanation, sometimes the Court fails to recognize an appropriate instance of hybridity.[105] Consider *Zurcher v. Stanford Daily*, in which the Court held that the police need not satisfy a heightened need requirement to obtain and execute a warrant to search the premises of a newspaper for evidence of third-party crime.[106] Although the Court arguably reached the wrong result,[107] at least it considered the possibility that the First Amendment might lead to the application of the Fourth Amendment to the press with special sensitivity.[108]

B. Amendment One Plus Amendment Two

How should the Court decide whether the combination of two provisions or doctrines that do not individually invalidate some government action nonetheless do so in combination? Various scholars have proposed criteria, backed by thoughtful arguments.[109] I have little to add to their

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[103] Emp. Div. v. Smith, 494 U.S. 872, 882 (1990).

[104] *Id.* at 881–82.

[105] For additional examples of appropriate judicial recognition of hybridity, see Coenen, *supra* note 88, at 359–60, which discusses the extra force given to vagueness doctrine in free-speech cases, the connection between free speech and assembly, and the equal protection implications of impecuniousness on court access.

[106] 436 U.S. 547, 560 (1978).

[107] *See id.* at 571–72 (Stewart, J., dissenting) (pointing to disruption of news operations and the potential to compromise sources).

[108] *See id.* at 563–67 (majority opinion) (acknowledging the shared historical origins of the First and Fourth Amendments but concluding that no special solicitude should result).

[109] My own views come closest to those expressed in Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1314 (2017) (rejecting hybrid rights because "two half violations do not make a whole" but endorsing "intersectional rights" of the sort championed by Justice Kennedy in *Obergefell v. Hodges*, 576 U.S. 644 (2015), "which reads equal protection and due process as mutually reinforcing"); *see* Michael C. Dorf, *Symposium: In Defense of Justice Kennedy's Soaring Language*, SCOTUSBLOG (June 27, 2015, 5:08 PM), https://www.scotusblog.com/2015/06/symposium-in-defense-of-justice-kennedys-soaring-language/ [https://perma.cc/G2PD-WULY] (arguing that equal protection concerns provide a limiting principle on the scope of the due process marriage right). For additional thoughtful proposals regarding how to combine constitutional provisions,

proposals, so I shall instead emphasize that they all address *unusual* circumstances.

However, in the *usual* circumstances, a different default applies: if the application of a law or policy violates neither constitutional provision or doctrine C_1 nor C_2, there is no *general* reason to think that it violates the combination of C_1 and C_2. To be sure, there may be some *special* reason to think that some particular C_1 and C_2 combine synergistically in some contexts, but absent such a special reason, the government may defeat constitutional claims one at a time.

Put differently, the key characteristics of the example of sex in public are quite typical of the sorts of circumstances that might be thought to implicate more than one constitutional provision or doctrine. Consider as another example of such putative combinations the federal statute that forbids "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded."[110] It could be unsuccessfully challenged as beyond Congress's power under the Commerce Clause, perhaps on the once-prevailing-but-now-discredited theory that Congress may regulate goods while they are *in* interstate commerce but not before or after.[111] The same law could be unsuccessfully challenged as a violation of the supposed First Amendment rights of the seller of a product to label that product any way the seller chooses.[112] We could *imagine* that the failed Commerce Clause and First Amendment challenges might combine to yield a successful challenge, but we need some special reason for thinking so. After all, every valid law can be *unsuccessfully* challenged under virtually every constitutional provision. For instance, one could also bring an unsuccessful challenge to the misbranding prohibition on the ground that it violates constitutional provisions that plainly have no relevance. For example, one might

see Coenen, *supra* note 88, which distinguishes among separation, combination, consolidation, and displacement of rights; Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1070 (2016), which explains that the Court's cases sometimes recognize that "multiple rights-based provisions of the Constitution might sometimes require the invalidation of government action that would be permitted if each provision were considered in isolation"; and Deborah Hellman, *The Epistemic Function of Fusing Equal Protection and Due Process*, 28 WM. & MARY BILL RTS. J. 383, 392 (2019), which suggests an "[e]pistemic rational[e] for fusing equal protection and due process [in which] the values of equality and liberty are related in a manner that allows each to guide us as to the meaning of the other."

[110] 21 U.S.C. § 331.

[111] *See* United States v. Darby, 312 U.S. 100, 115–17, 121–23 (1941) (disavowing the theory described in the text).

[112] *See* Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563–64 (1980) (protecting commercial speech but acknowledging government authority to regulate "misleading" commercial speech).

unsuccessfully argue that the law is a bill of attainder or violates the Guarantee Clause. The mere accumulation of unsuccessful challenges should not bring us any closer to a successful one.[113]

To be sure, the bill of attainder and Guarantee Clause challenges to the misbranding statute are veritable non sequiturs, whereas the Commerce Clause and First Amendment challenges are at least in the ballpark of a successful challenge. And we can concede that being in the ballpark is a necessary condition for a successful synergy claim (as in *Windsor*). But constitutional law is not horseshoes or hand grenades. Being close to a violation of two or more constitutional provisions or doctrines does not produce a constitutional violation, absent some reason for thinking that there is something special about the combination. Being in the same ballpark as two or more constitutional provisions or doctrines is a necessary but not a sufficient condition for synergy.

Neither the First Amendment right to expressive assembly nor the (putative) Second Amendment right of individuals to carry firearms in public protects a right of armed assembly. Is there some special reason to think that the two rights in combination do? It is hard to see why that would be so. The same considerations of public safety that warrant rejecting each claim of right separately apply to their combination.

Indeed, those considerations more plausibly point to constitutional subtraction rather than addition or synergy. Even though it is *possible* to assemble peaceably while carrying firearms, the carrying of arms by protesters increases the likelihood that their assembly will lead to a breach of the peace. Meanwhile, the larger the private group, the less need they have to be armed for self-defense and the greater the threat they pose to the militia purpose of the Second Amendment.

Sometimes the whole is greater than the sum of the parts, but there must be some special reason why. With respect to the First and Second Amendments, there is no such reason. The right to peaceably assemble plus the presumed right of individuals to carry firearms do not add up to a right of armed assembly.

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[113] Criticizing the "curious doctrine" of hybrid rights employed in *Smith*, Justice Alito recently made a similar point. He wrote that the idea of a hybrid right in *Smith*

> seems to be that if two independently insufficient constitutional claims join forces they may merge into a single valid hybrid claim, but surely the rule cannot be that asserting two invalid claims, no matter how weak, is always enough. So perhaps the doctrine requires the assignment of a numerical score to each claim. If a passing grade is 70 and a party advances a free-speech claim that earns a grade of 40 and a free-exercise claim that merits a grade of 31, the result would be a (barely) sufficient hybrid claim. Such a scheme is obviously unworkable and has never been recognized outside of *Smith*.

Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1915 (2021) (Alito, J., concurring).

CONCLUSION

The superficial appeal of a right to armed assembly, constructed from the First Amendment right to assemble and the Second Amendment right to bear arms, does not survive careful analysis. Text, history, precedent, and simple common sense all yield the same conclusion: the First and Second Amendments do not protect a right of armed assembly, either individually or in combination.