

US Program Briefer

Keeping Guns Away from Protests

REGULATORY OPTIONS TO PROTECT PEACEFUL ASSEMBLY FROM THE THREAT
POSED BY FIREARMS

The right to peacefully assemble is enshrined in the First Amendment and has driven political progress in the United States since its founding. While the overwhelming majority of recent protests in the U.S. have been [peaceful](#) and [have not involved weapons](#), a growing number have included individuals with firearms—whether participating as protesters, counter-protesting, or [claiming](#) to provide security.

Armed individuals undermine protests' core democratic nature: They intimidate and discourage people from exercising their rights to speech and assembly, and they have interfered with basic democratic processes like voting and lawmaking. Amidst unprecedented political polarization and heightened fears of political violence, the presence of firearms at protests today threatens to be a particularly combustible trend.

However, there are reasonable and constitutionally-sound restrictions that can be used to limit firearms at demonstrations. This briefer discusses regulatory options at the federal, state, and local level to keep guns away from protests.

The Growing Problem of Guns at Protests

Since January 2020, the U.S. has witnessed [over 600 armed protests](#). Individuals other than law enforcement have openly carried firearms while [demonstrating](#) against COVID measures, counter-protesting racial justice demonstrations, advocating for Second Amendment rights, and contesting results of the 2020 presidential election, among other causes. In many cases, individuals bearing guns have [claimed](#) to be providing security, either for protesters or for property owners nearby.

Allowing firearms to mix with protests chills the right to peacefully demonstrate. In a recent [study](#), individuals who were told that firearms would be present at a protest were less likely to attend the protest—regardless of the person's political ideology or whether they personally owned a gun. They were also less likely to carry a sign, express their views, or bring children to the protest. The growing prevalence of guns at protests has also forced demonstrators to spend more time and resources on [security planning](#). Allowing firearms at protests privileges those who carry them at the expense of others

in the public sphere, such that even a handful of armed individuals can effectively intimidate or silence those who want to exercise their right to demonstrate and be heard.¹

Guns at protests also present a very real threat to public safety. Recent research shows that when visibly armed individuals other than law enforcement join protests or confront protesters, violence is more likely to result. A 2021 study found that demonstrations that included firearms were about six times more likely to experience violent or destructive activity. In many cases, armed individuals have intentionally fired their weapons, injuring and killing protesters, including in Austin, Albuquerque, and Kenosha. Individuals have also been injured by accidental gunfire at protests, with armed protesters shooting themselves or others while inspecting their weapons or reaching into their pockets. Such incidents present a special risk at demonstrations, as more people are present who can be injured and because an accidental discharge also risks spurring others in a crowd to reflexively fire their weapons.

The heightened risk of violence generated by guns at protests creates a serious challenge for law enforcement and the rule of law. Authorities seeking to protect public safety and deter illegal activity may find themselves unable to enforce the law if they are outgunned. After police failed to intervene when protesters and counter protesters clashed at the 2017 Unite the Right rally in Charlottesville, for instance, the Virginia governor defended their lack of action on grounds that “80 percent of the people here had automatic weapons.” When armed protesters entered the Idaho statehouse in 2020, a police spokeswoman later said that the police “determined they could not have made arrests on the spot without elevating the potential for violence.” Allowing guns to be present around public protests makes it harder for police to do their job and can lead to lawless conduct.

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Armed protests have also undermined core democratic processes. Over the past two years, protesters with firearms have intimidated lawmakers and stopped proceedings at numerous state capitols. In September 2020, Michigan lawmakers cancelled a legislative session when hundreds of pro-gun demonstrators surrounded the capitol building, many brandishing AR-15s. Weeks after gun-wielding protesters broke into the Oregon statehouse, lawmakers postponed the state’s 2021 legislative session out of concerns about another armed protest. Washington DC’s firearms restrictions meant that those who attacked the U.S. Capitol on January 6 had few guns with them, but the day might have been significantly more violent if more guns had been involved. During

the 2020 election, armed protesters also showed up at [polling places and vote counting facilities](#), intimidating voters as they cast ballots and election workers who were counting them. The presence of armed protesters around lawmaking and voting endangers the operation of our democratic institutions.

Regulatory Options to Keep Guns Away from Protests

There is currently no federal ban on firearms at protests. Instead, firearms at demonstrations are regulated by a patchwork of federal, state, and local restrictions. Many states have [permissive laws](#) around bearing and using guns, including laws allowing guns to be openly carried in most public locations. Many also have “[stand your ground](#)” laws, which allow people to use deadly force in self-defense rather than retreating or using nonlethal force. Nevertheless, policymakers seeking to enact reasonable restrictions on guns at protests have a number of options that do not infringe constitutional rights and are grounded in historical precedent.

Some people claim they have a right to be armed at protests, yet the Second Amendment has historically not been understood to provide for such a broad right. The Supreme Court has addressed the scope of the Second Amendment only twice in recent years, and while it has recognized an individual right to self-defense as “the central component” of the Second Amendment right,² the Court has been careful to note that the right is “not unlimited.”³ Moreover, it has affirmed the authority of government to impose a number of “longstanding prohibitions” on firearms, including the “prohibition of private paramilitary organizations” or the banning of guns in “sensitive places” such as schools and government buildings.⁴

Nor does the First Amendment provide constitutional protection to those who seek to carry guns at protests. The First Amendment protects the “right of the people peaceably to assemble,” subject to the government’s reasonable “time, place and manner” restrictions. Restricting guns at protests serves an important interest in protecting the public’s and law enforcement’s physical safety, as well as limiting the ability of those with firearms to intimidate peaceful protesters. A recent legal analysis could not find “a single published opinion to date that has ruled in favor of a plaintiff who brought a First Amendment claim alleging a right to carry a firearm. Instead, courts have recognized that the common and likely reaction of reasonable citizens and law enforcement who see someone openly carrying a firearm is alarm and concern.”⁵

There are strong historical precedents in the U.S. for restricting guns at protests. In the early Republic, under the English common law at the time, “going armed” in public with a visible, dangerous weapon was considered “terrifying” to the people and could be prosecuted as an “affray”—a type of disturbance of the public peace.⁶ Following this, several states adopted statutes that banned “going armed to the terror of the public.”⁷ Early U.S. common law also recognized that a public “show of arms” by a group of

individuals could be sufficient grounds for declaring a riot.⁸ Similar restrictions on firearms continued after the Civil War, when armed gatherings were seen as a direct threat to the unity of the country and often formed to intimidate or inflict violence on Black Americans. During this period, it was common for states to ban the public carrying of weapons unless they could be shown to be needed for personal self-defense against an imminent threat.⁹ In parts of the West, open carrying of firearms were banned altogether in an attempt to crack down on vigilantism.¹⁰

Today, many states and localities, as well as the federal government, have enacted various laws that can be used to restrict firearms at demonstrations. A handful of states, including California, Florida, and Illinois, have far-reaching bans on the open carry of firearms in public—bans that effectively prohibit the public display of firearms at protests. While blanket bans on the public display of firearms can be effective at addressing the problem of guns at protests, most states do not have such prohibitions, and they have been the subject of increased litigation.

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Four Categories of Restrictions

The following sections detail four categories of alternative or supplemental restrictions: (1) Banning firearms at protests; (2) Banning firearms at certain locations where protests often occur; (3) Banning protests by armed groups; and (4) Alternative approaches to mitigate the harms caused by guns at protests. Each section includes recommendations for policymakers.

1. BAN FIREARMS AT AND NEAR PROTESTS.

Policymakers at all levels of government should consider specifically banning firearms at or near protests in public places. Several states and the District of Columbia have adopted this approach. While there have been few direct constitutional challenges to these laws, such restrictions would seem to fall within the broad ambit traditionally provided to government to regulate firearms, including in "sensitive places" where firearms might pose additional risks. They also align with the historical understanding that laws are needed to prevent people from carrying firearms in crowded places. Given the safety concerns raised by guns at protests, as well as their chilling effect, a prohibition on firearms at protests would be a reasonable restriction, as long as it applied to all protests equally.

In Washington, DC, openly carried and concealed firearms are banned at all public gatherings or special events, including permitted protests. Authorities may also ban firearms from a designated area that is within 1,000 feet from a public "demonstration."

The demonstration need not have a permit, and can comprise as few as one person who is picketing, speechmaking, marching, or engaging in “any other similar conduct that involves the communication or expression of views.” In all cases, law enforcement must provide notice of the ban and the area covered, and armed individuals cannot be prosecuted unless they have been ordered to leave the area and refused to do so. [Maryland](#) and [Alabama](#) have similar prohibitions on firearm possession within 1,000 feet of a public demonstration, while North Carolina [bans](#) anyone present at a demonstration from having a “dangerous weapon.”

Municipalities have also banned firearms at protests, whether as a condition of granting a protest permit or as a generally applicable condition for protest attendants. [Richmond, Virginia](#), for instance, recently barred firearms at permitted and unpermitted protests. Municipal and county bans may run into preemption challenges, as more than [forty states](#) have laws that prohibit local governments from adopting at least certain gun regulations. However, protests are often an exception. Cities in Mississippi, for example, may regulate the carrying of a gun at a “political rally, parade or official political meeting,” as an [exception](#) to a state law that bars local governments from regulating firearms. Mississippi cities including [Biloxi, Greenville, and Jackson](#) have adopted such ordinances. [Columbia, South Carolina](#), likewise recently banned the open carrying of guns at protests under an exception to the state’s open carry law.

Bottom line: Banning firearms near protests is a straightforward way to address the problems posed by armed individuals at protests. To provide the greatest protection for protesters, a ban on guns should extend to individuals in the vicinity of a protest, not just to those participating in the protest. The ban should also apply to permitted protests as well as protests where no permit has been obtained, allowing law enforcement to declare a gun-free zone for public assemblies that occur spontaneously.

2. BAN FIREARMS AT COMMON PROTEST LOCATIONS

Policymakers should consider banning firearms at locations where protests tend to occur, including statehouses, courthouses, and schools. In *District of Columbia v. Heller*, the Supreme Court affirmed the constitutionality of banning firearms in “sensitive places” such as “schools and government buildings,” and all states have restrictions on carrying firearms in [certain public locations](#).

The grounds around statehouses are a prominent venue for protestors seeking change. While [most states](#) outlaw guns inside statehouses, a [majority](#) allow for the open carrying of long guns on statehouse grounds. This regulatory gap has recently become conspicuous, as protesters have alarmed lawmakers by surrounding and even entering state capitols while openly armed. Indeed, more than [one-third](#) of all armed protests that occurred in 2021 took place on the grounds around statehouses. Policymakers

should consider a straightforward ban on the open carry of firearms on statehouse grounds, such as that enacted by [Washington](#) state in 2021.

Similarly, federal, state, and local governments can restrict firearms at courthouses and other government buildings, as well as the grounds around those buildings where protests are more likely to occur. The federal government already bans firearms at [federal buildings](#). The overwhelming majority of states also prohibit firearms inside [courthouses](#), and many prohibit firearms in state and local government buildings, meetings of government officials, places of worship, and law enforcement stations. However, these bans rarely extend to the grounds of government facilities, such as the plaza outside a courthouse. Expanding restrictions to include the grounds of these buildings would significantly limit the number of places armed protests can legally occur.

Many states and the federal government have restrictions on firearms at or near educational institutions that can be used to ban firearms at certain protests. Federal law prohibits firearms within 1,000 feet of a [public or private school](#) that provides elementary or secondary education unless the armed individual has a state-issued concealed carry permit. [Some states](#) ban the open carry of firearms on college campuses; a majority of the other states allow universities to decide whether they want to ban firearms on campus, and it is common for many universities to do so. Such laws can be used to effectively ban firearms at the many protests that occur on school and university campuses.

Finally, some states have taken measures to address the threat of armed protesters at polling locations. For example, six states and Washington DC [prohibit](#) firearms at polling locations altogether. In other states, firearms are banned only at certain polling locations, such as schools, where they are already prohibited. States and localities can also take steps to ban firearms at or near vote counting facilities, where armed protesters gathered when votes were being tallied in 2020.

Bottom line: Policymakers should consider banning firearms at certain "sensitive places" where protests frequently occur. This should include banning firearms both inside and in the immediate area surrounding statehouses, courthouses, university campuses, polling locations and vote counting centers, and government buildings more generally.

3. BAN PROTESTS BY GROUPS OF ARMED INDIVIDUALS

Another way for policymakers and law enforcement to address the problem of guns at protests is to enforce laws already on the books in many states that prohibit parading or marching by groups carrying firearms. Most of these laws were designed to outlaw private militia activity, which is [not protected](#) by the Second Amendment.¹¹ The laws either ban armed marches by organized private militias or by armed individuals who

independently assemble together. In either case, these laws can be used to ban firearms at protests where there is more than one armed protester at a demonstration or where an organized armed militia takes part in a protest or counter-protest.

Eleven states ban the marching or parading of an armed group.¹² For example, Texas prohibits an unauthorized “body of persons” from “associat[ing] as a military company or organization or parad[ing] in public with firearms in a municipality of the state.” The Texas law effectively bans more than one armed individual at a protest if they publicly parade with firearms.

Given the presence of militias as armed actors at some protests, laws that target organized militias can also be used to limit firearms at demonstrations. Beyond the eleven states that ban the parading of an armed group of persons, an additional thirteen ban the public marching of any unauthorized military unit, company, or organization.¹³ These laws can not only be used to ban private militias from carrying firearms at a demonstration, but they may also be interpreted to prohibit any armed group from protesting, as such a group would arguably mimic an unauthorized military unit.

Bottom line: While bans on firearms at protests or at the locations where protests tend to occur are a more straightforward approach to removing firearms from demonstrations, states should enforce preexisting laws at protests that ban armed groups from parading either as a set of armed individuals coming together or as part of an armed militia.

4. RESTRICT HOW FIREARMS ARE CARRIED NEAR PROTESTS TO MITIGATE SAFETY AND CHILLING CONCERNS

Beyond bans on firearms and armed groups, policymakers can consider alternative measures—many already on the books—to address core concerns raised by guns at protests. If enforced in a targeted and appropriate manner, the following measures could be useful where broader restrictions are unavailable.

Restrictions on the use of guns to intimidate or threaten. Nearly all fifty states have laws barring individuals from using guns to intimidate or harass others. In at least seventeen states, the law explicitly prohibits brandishing or displaying a firearm with the intent to cause fear or alarm. Ten states prohibit pointing a gun at another person; other states’ statutes on assault or criminal threats prohibit using a gun to threaten or intimidate. Such statutes could be used to restrict armed individuals from displaying their guns to intimidate protesters, voters, poll workers, lawmakers, and others.

Prohibition on “going armed to the terror of the public.” At least four states—Alabama, North Carolina, Tennessee and Virginia—have codified versions of this centuries-old offense, rooted in English common law, that recognizes the inherently terrifying effect of brandishing a gun in crowded public places. These statutes have recently been used to disarm gun-bearing protesters.

Ban on the use of guns in connection with a “civil disorder.” Federal law prohibits the transport of firearms knowing or intending that they will be used to further a “civil disorder”—defined broadly to include a public disturbance that involves acts of violence by assemblages of three or more people, which causes an immediate danger of or results in injury or damage to property. Many states similarly prohibit transporting firearms or assembling to train with firearms knowing or intending to further a civil disorder. These laws are defined in such a way that they can often capture the conduct of armed protesters.

Prohibitions on voter intimidation. Federal law and the laws of all fifty states criminalize voter intimidation, which can include brandishing a firearm or otherwise intimidating voters with a weapon. These prohibitions can be used to ban armed demonstrators at polling locations in certain cases.

Conclusion

Armed individuals at protests increase the risk of violent confrontations and harm the public sphere by interfering with democratic processes and discouraging people from exercising their First Amendment rights. To safeguard American’s right to peacefully assemble, policymakers should consider reasonable and constitutionally-sound restrictions to keep firearms away from public protests.

FOR ADDITIONAL READING, SEE:

- Armed Conflict Location & Event Data Project (ACLED) and Everytown for Gun Safety, [Armed Assembly: Guns, Demonstrations, and Political Violence in America](#)
- Giffords Law Center to Prevent Gun Violence, [Database of State Gun Laws](#)
- Georgetown Institute for Constitutional Advocacy and Protection, [Addressing the Rise of Unauthorized Private Militias](#)

Notes

¹ Joseph Blocher and Reva Siegel, *Guns and Democracy*, Brennan Center 4 (2021).

² District of Columbia v. Heller, 554 US 570, 662 (2008) (Scalia, J.).

³ Heller at 626 (2008).

⁴ Heller at 626 (2008).

⁵ Eric Tirschwell & Alla Lefkowitz, *Prohibiting Guns at Demonstrations: Debunking First and Second Amendment Myths After Charlottesville*, 65 UCLA L. Rev. 172, 187 (2018).

⁶ Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 Law and Contemporary Problems 11, 21-22 (2017).

⁷ Michael Dorf, *When Two Rights Make a Wrong: Armed Assembly Under the First and Second Amendments*, 116(1) Nw. U. L. Rev. 111, 117-118 (2021).

⁸ Cornell, *supra* note 6 at 39.

⁹ Dorf, *supra* note 7 at 120; Cornell, *supra* note 6 at 39-42.

¹⁰ Cornell, *supra* note 6 at 42.

¹¹ In *Heller* the Court found that the Second Amendment “does not prevent the prohibition of private paramilitary organizations.” District of Columbia v. Heller, 554 U.S. 570, 621 (2008).

¹² GA. CODE ANN. § 38-2-277, IDAHO CODE § 46-802 (2017), 20 ILL. COMP. STAT. 1805/94, KY. REV. STAT. ANN. § 38.440, ME. STAT. tit. 37-B, § 342, MASS. GEN. LAWS ch. 33, §130; N.Y. MIL. LAW § 240; N.D. CENT. CODE § 37-01-21; R.I. GEN. LAWS § 30-12-7; TEX. GOV'T CODE § 437.208; WYO. STAT. ANN. § 19-8-104.

¹³ ALA. CODE § 31-2-125; FLA. STAT. § 870.06; LA. STAT. ANN. § 29:31; KAN. STAT. ANN. § 48-2; Md. Code Ann., Pub. Safety § 13-214; MINN. STAT. § 624.61 (2016), MISS. CODE ANN. § 33-1-31; NEV. REV. STAT. § 203.080; N.H. REV. STAT. ANN. § 111:15; N.C. GEN. STAT. § 127A-151; OKLA. STAT. ANN. tit. 44, § 23; WASH. REV. CODE § 38.40.120 (“organized body”); W. VA. CODE § 15-1F-7. An additional five states ban militias from existing or carrying arms more generally. Okla. Stat. tit. 44, § 23; Ariz. Rev. Stat. Ann. § 26-123; Iowa Code § 29A.31; Ind. Code § 10-16-2-3; Conn. Gen. Stat. §§ 27-101.