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Treating the Pen and the Sword as Constitutional Equals: How and Why the Supreme Court Should Apply Its First Amendment Expertise to the Great Second Amendment Debate

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NOTES

TREATING THE PEN AND THE SWORD AS CONSTITUTIONAL EQUALS: HOW AND WHY THE SUPREME COURT SHOULD APPLY ITS FIRST AMENDMENT EXPERTISE TO THE GREAT SECOND AMENDMENT DEBATE

INTRODUCTION

The First Amendment has received probably more treatment from both the courts and the legal academy than any other amendment. The Second Amendment, by contrast, has received virtually no consideration in the courts and scant attention from legal scholars up until roughly the last fifteen years.¹ “[W]hat was true of the First Amendment as of 1904 remains true of the Second Amendment even now.”² Professor Sanford Levinson suggests that legal academics’ failure to address Second Amendment issues stems from a legitimate fear of the legal conclusions that might be reached if the amendment were given greater, and intellectually honest, attention by courts and legal scholars.³ Perhaps it is time to give the Second Amendment a dose of First Amendment analysis.

Although a few modern scholars have drawn parallels between the First and Second Amendments⁴ along with at least one during

1. See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) (describing the lack of scholarship on the Second Amendment, its sparse appearances in leading casebooks, and the very limited case law in the area).

2. William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1239 (1994).

3. Levinson, *supra* note 1, at 642.

4. See, e.g., L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311 (1997); see also Sanford Levinson, *The Right to Bear Arms*, PHILADELPHIA INQUIRER, May 1, 1991, at 13.

the nineteenth century,⁵ practical applications of these parallels have yet to be described in any comprehensive detail. Given that the United States now has more than 20,000 firearms laws (including federal, state, and local laws),⁶ such a practical application seems long overdue. Much of the existing scholarship that addresses the meaning of the Second Amendment examines the Amendment from a single perspective, as though in a vacuum. Some focus on textual analysis,⁷ others on "original meaning" (the Framers' understanding and historical context);⁸ few, however, view the Amendment through analyses that are more applicable to, and derived from, modern times and current legal standards. As one scholar points out, "Second Amendment scholars feel most comfortable discussing history. They claim that the Amendment's history is known and that it freezes the Amendment's meaning. To the best of my knowledge, no First Amendment scholar believes that the First Amendment's history is dispositive of its meaning."⁹ Nor should the Second Amendment's history be dispositive of, or limit, its meaning today.

Setting aside the many possible explanations for the disparate treatment of the First and Second Amendments, it is clear that technological advances since their ratification in 1791 have resulted in a great deal of development and evolution of the law with respect to freedom of speech and freedom of the press, particularly in the twentieth century, while the right to keep and bear arms has languished as a nebulous concept, despite our current age of

5. JOHN NORTON DOMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES § 239 (1868) ("The [Second Amendment] is analogous to the one securing freedom of speech and of the press. Freedom, not license, is secured; the Fair Use not the libelous abuse, is protected.").

6. See Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 110 (1987); see also *Pending Firearms Legislation and the Administration's Enforcement of Current Gun Laws: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong. 158-79 (1999) (statement of John R. Lott, Jr.) (discussing the large number of firearm regulations).

7. See, e.g., Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

8. See, e.g., STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984).

9. Powe, *supra* note 4, at 1340-41 (footnote omitted).

automatic firearms and aircraft carriers.¹⁰ Although the Supreme Court and the legal commentators have written about and debated the implications of technology with respect to the rights of free speech and press, they have all but ignored as a matter of constitutional law the technological developments since 1791 in the field of firearms.¹¹

The Court and the legal academy can and should apply much of what has been learned and established in the realms of free speech and free press to the Second Amendment. Although the First and Second Amendments are different in both construction and purpose, the well-established standards and tests applicable to the regulation of speech and press are valuable tools with which to understand the practical aspects of firearms regulation vis-à-vis the Second Amendment.

This Note will assume that the Second Amendment, as a “right of the people,” is an individual right, and argue from that perspective that standards of review analogous to those applied to the First Amendment (which, in contrast, is a restraint on Congress) can and should be applied to cases involving the right to keep and bear arms. Applying the so-called “standard model,”¹² this Note will

10. Prominent free speech and free press decisions arising from technological developments include *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down portions of Congress' attempt to regulate the Internet via the Communications Decency Act), and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (holding that the First Amendment applies to radio broadcasters, but that the medium, by its nature, must be subject to different standards than other media).

11. Advocates both within and outside of the legal profession have made the point that we cannot leave Second Amendment law lingering in the age of muskets while acknowledging the changing times with respect to the First Amendment. See, e.g., Harold J. Krent, *All Amendments Were Created Equal*, CHI. DAILY L. BULL., Apr. 25, 1998, at 6, available at WL 42/25/98 CHIDLB 6.

12. The “standard model” posits that the Second Amendment guarantees an individual right to keep and bear arms and was intended to preserve the might of “the people” vis-à-vis an always potentially tyrannical government. See *infra* Part I.A. For further discussion and an overview of the “standard model,” see Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995). The idea of a “standard model” of the Second Amendment probably began with Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983), and has developed into a substantial body of literature that is still growing. The “collective rights” interpretation views the Second Amendment as a means for states to maintain militias in order deter abuses by the federal government. See Keith A. Ehrman & Dennis A. Henigam, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989).

explore some practical limits on the government's power to regulate firearms under the Second Amendment by using basic and widely understood First Amendment standards and examples to illuminate the unconstitutionality of recent legislation regulating firearms, including the National Firearms Act of 1934¹³ and the federal "assault weapons" ban.¹⁴

I. REASONS TO APPLY FIRST AMENDMENT STANDARDS TO THE SECOND AMENDMENT

A. Construction of the Amendments: Rights of "The People"

The First and Second Amendments differ in both their construction and in the nature of the rights that they secure; it seems that the text of the Second supports a more expansive reading than that given to the First.¹⁵ Despite (or perhaps because of) these differences, legal scholars and philosophers have recently started to wonder

what justifies giving the Second Amendment a narrow construction at the same time one gives an expansive interpretation to the First? ... [The] text cannot help, since both amendments are equally susceptible to either narrow or broad constructions. Reliance on precedent also cannot solve the problem since the narrow interpretation of the Second Amendment is not so settled by a series of Supreme Court decisions that it could not be revisited.¹⁶

One plausible approach is to apply analogous First Amendment standards to Second Amendment issues. This approach would

13. National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (codified as amended at 26 U.S.C. §§ 5801-5850 (2000)) (providing for registration, taxation, and other regulation of fully automatic firearms, short-barreled shotguns and rifles, and other "destructive devices").

14. 18 U.S.C. §§ 921-922 (2000) (prohibiting, inter alia, the manufacture and import of so-called "assault weapons," defined in this law as semiautomatic firearms with two or more defined features such as bayonet mounts and folding stocks). The assault weapons ban was passed as part of the Violent Crime and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

15. See *infra* notes 16-24 and accompanying text.

16. Edward B. Foley, *Interpretation and Philosophy: Dworkin's Constitution*, 14 CONST. COMMENT. 151, 170 (1997).

clearly be neither perfect nor universally applicable, but there are some broad principles that would serve as valuable tools in this developing area of the law.

To justify the application of First Amendment standards to the (very different) Second Amendment, one must begin by noting the fact that the First Amendment's guarantees of free speech and free press, as well as the Establishment Clause, incorporated via the Fourteenth Amendment,¹⁷ are constructed as a restraint on federal and state governments. The Second Amendment, by contrast, is a "right of the people," one that secures a specific and individual liberty.¹⁸ This difference in construction is significant because, as the Second Circuit has noted, "[t]he Establishment Clause, unlike the Fourth Amendment, contains no limiting language. Indeed, the basic structure of the Establishment Clause, which imposes a restriction on Congress, differs markedly from that of the Fourth Amendment, which confers a right on the people."¹⁹

This construction is also significant because, as Justice Rehnquist recently noted:

"[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people."²⁰

If the phrase "the people" refers to individuals (as it does when used in the Fourth Amendment) universally, such that individuals' *rights* are implicated, then courts and lawmakers should, at the very least, approach restrictions and infringements on the right to keep and bear arms with the same caution they show towards such infringements on the right of free speech and the freedom of the press. To

17. *Gitlow v. New York*, 268 U.S. 652 (1925). The Court has not explicitly addressed the issue of incorporation with respect to the Second Amendment. See STEPHEN P. HALBROOK, *FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS* vii-xiii (1998).

18. See U.S. CONST. amend. II.

19. *Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991).

20. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

do otherwise would be both unconstitutional and intellectually dishonest.

When deciding Second Amendment cases, at *minimum* courts should adopt the varying levels of scrutiny applied in First Amendment cases in order to afford appropriate deference to the individual's right to keep and bear arms. Given the fact that such a fine-tuned construction is applied to a restraint on Congress in the First Amendment context, surely the Second Amendment which provides for a more intimate right of "the people" should be offered the same protection.

B. Legal Scholarship

Legal scholars have arrived at similar conclusions. In dismissing assertions that the Second Amendment refers to a "collective right," Sanford Levinson notes that "[s]uch an argument founders ... upon examination of the text of the federal Bill of Rights itself and the usage there of the term 'the people' in the First, Fourth, Ninth, and Tenth Amendments."²¹ Another scholar compares the right guaranteed by the Second Amendment to that of the people to choose members of Congress.²² "The significance of guaranteeing the right to keep and bear arms to 'the people' becomes clear when one reads the Second Amendment in context with the entire document."²³

Leading First Amendment scholars also have recognized the incongruity of the treatment of the two rights by courts thus far. Professor William Van Alstyne succinctly summarizes the disparate treatment:

The Second Amendment of course does not assume that the right of the people to keep and bear arms will not be abused To put the matter most simply, the governing principle here, in the Second Amendment, is not different from the same principle

21. Levinson, *supra* note 1, at 645.

22. Kevin J. Worthen, *The Right to Keep and Bear Arms in Light of Thornton: The People and Essential Attributes of Sovereignty*, 1998 B.Y.U. L. REV. 137, 146; see U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII.

23. T. Markus Funk, *Is the True Meaning of the Second Amendment Really Such a Riddle? Tracing the Historical "Origins of an Anglo-American Right,"* 39 HOWARD L.J. 411, 430 (1995) (reviewing JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994)).

governing the First Amendment's provisions on freedom of speech and the freedom of the press. A person may be held to account for an abuse of that freedom (for example, by being held liable for using it to publish false claims with respect to the nutritional value of the food offered for public sale and consumption). Yet, no one today contends that just because the publication of such false statements is a danger one might in some measure reduce if, say, *licenses* also could be required as a condition of owning a newspaper or even a mimeograph machine, that therefore licensing can be made a requirement of owning either a newspaper or a mimeograph machine.²⁴

It seems clear that the Second Amendment, because it is a fundamental right of "the people," ought to be consistent with and analogous to established First Amendment jurisprudence in the twenty-first century. As the most celebrated and perhaps the most extensively developed collection of constitutional rights, the First Amendment offers numerous, well-developed standards that can be applied analogously to firearms regulation. In effect, the First Amendment jurisprudence can serve as a compass to the Court through the too long uncharted sea of firearms law.

C. The Importance of an Armed Populace in a Free Republic—The Fundamental Purpose of the Second Amendment and the Miller Standard

The primary (though not exclusive) purpose of the Second Amendment's individual right to keep and bear arms, according to the "standard model," is to ensure an abundance of military power within the general population on the theory that, although the government may become tyrannical, the people as a whole never will. The people must, therefore, retain the ultimate power of the sword.²⁵ Such an understanding must underlie any decision that implicates the Second Amendment. Laws that might otherwise be deemed constitutional must be struck down if they serve to create

24. Van Alstyne, *supra* note 2, at 1250 (footnote omitted).

25. See generally Brian J. McIntosh, *The Revolutionary Second Amendment*, 51 ALA. L. REV. 673 (2000).

a populous that no longer has the power to control its government, whether such laws relate to firearms or any other matter.

*United States v. Miller*²⁶ is the only Supreme Court case to deal directly and exclusively with the Second Amendment. *Miller*, due to both its age and lack of a clear holding, is, however, of limited utility. As Levinson points out, “it is insulting to treat *Miller* as the ‘last word’ in interpreting a part of the Bill of Rights, given the conceptual revolutions that have occurred relative to almost all other parts of the Bill of Rights since 1939.”²⁷ The *Miller* Court established the nebulous standard for determining whether a firearm falls within the scope of the Second Amendment’s protection:

[Unless an arm bears] some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that [a sawed-off shotgun] is any part of the ordinary military equipment or that its use could contribute to the common defense.²⁸

This standard is consistent with the “standard model” and the revolutionary concept in that it requires constitutionally protected arms to be of military utility.²⁹

The implication of the Court’s holding in *Miller*—that arms of military utility *are* protected even if the Court did not consider a short-barreled shotgun such a weapon—is ironic by modern standards given the recent focus on regulating so-called “assault weapons,” and in light of the severe restrictions that operate on fully automatic firearms at both the federal and state level.³⁰ The Court in *Miller* was forced to infer that a short-barreled shotgun was not

26. 307 U.S. 174 (1939).

27. Sanford Levinson, *Is the Second Amendment Finally Becoming Recognized as Part of the Constitution? Voices from the Courts*, 1998 B.Y.U. L. REV. 127, 128.

28. *Id.* at 178 (citation omitted).

29. *Kates*, *supra* note 12, at 250 (analyzing the holding in *Miller* and stating that “[s]uch arms must be both of the kind in ‘common use’ at the present time and provably ‘part of the ordinary military equipment’”) (footnote omitted).

30. Van Alstyne, *supra* note 2, at 1239 n.10 (opining that the *Miller* standard would protect the right to keep and bear heavy duty automatic rifles).

a firearm of military utility because the Court had no independent knowledge of the guns and because by the time the case was heard, Miller had died, and so it only heard the government's argument. Had Miller been present, he might have presented substantial evidence that compact and even pistol-sized shotguns were used in combat as far back as the seventeenth century,³¹ and that shotguns were used extensively in the trenches during World War I by the United States—maneuvering in which required a short barrel.³²

Bearing in mind the ultimate goal of the Second Amendment and the standard set forth in *Miller*, the Court must, *at the very least*, interpret the amendment to allow citizens to keep and bear small arms of military utility, such as those commonly employed by the current military.³³ Both current and historical trends in firearms regulation have focused on exactly this type of firearm because of the widely held, though empirically false, perception that criminals prefer such arms.³⁴

31. THOMAS F. SWEARENGEN, *THE WORLD'S FIGHTING SHOTGUNS 2* (1978).

32. *See id.* at 9 (describing the U.S. War Department's adoption of short-barreled shotguns as "being most suitable for trench warfare"); *see also* W. Hay Parks, *Joint Service Combat Shotgun Program*, 1997 *ARMY LAW* 16, 17 (summarizing the history of the shotgun in warfare). For examples of pistol-sized shotguns from the colonial era, *see* CHRISTOPHER CHANT, *ILLUSTRATED HISTORY OF SMALL ARMS 10-11* (1996). The fact that Miller did not appear before the Court to argue this (or any other) point has been noted elsewhere. *See, e.g.*, Frank Espohl, *The Right to Carry Concealed Weapons For Self-Defense*, 22 *S. ILL. U. L.J.* 151, 156 (1997); Andrew J. McClurg, *The Rhetoric of Gun Control*, 42 *AM. U. L. REV.* 53, 100 n.209 (1992).

33. Examples might include the M-16A2 rifle and Beretta M9 pistol, currently issued to U.S. military personnel. Whether the Second Amendment protects ownership of larger arms, such as mortars, entails a separate and more difficult analysis that is outside the scope of this Note.

34. Substantial data indicate that armed criminals overwhelmingly prefer handguns, generally those that are concealable. *See* JAMES D. WRIGHT & PETER H. ROSSI, *U.S. DEPARTMENT OF JUSTICE, THE ARMED CRIMINAL IN AMERICA: A SURVEY OF INCARCERATED FELONS 10-11* (1985). It is the very rare criminal indeed who will draw attention to himself by carrying any type of rifle or shotgun. Military caliber rifles accounted for only 0.8% of weapons used in homicides in 1990. DAVID KOPEL, *GUNS: WHO SHOULD HAVE THEM 181* (1995). Such data run contrary to statements by lawmakers, such as Senator Dianne Feinstein, indicating that criminals favor such firearms. *See* 139 *CONG. REC.* S9778 (daily ed. July 29, 1993) (statement of Sen. Feinstein).

II. THE FIRST AMENDMENT EVOLVES WITH TECHNOLOGY

A. *History and Foundation*

Although ratified in 1791 along with the rest of the Bill of Rights, the First Amendment's guarantees of free speech and a free press were largely ignored by the Supreme Court until the early twentieth century.³⁵ The first significant case to announce a clear standard was *Schenck v. United States*,³⁶ in which Justice Holmes posited that even the most expansive reading of the First Amendment's guarantee of free speech

would not protect a man in falsely shouting fire in a theatre and causing a panic.... The question in every [free speech] case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.³⁷

This "clear and present danger" doctrine is one of the cornerstones of the limitations on the right of free speech, and one that is most certainly applicable to the regulation of *any* activity characterized as a fundamental right in the Constitution that might be exercised in a manner that could cause public harm.

*Near v. Minnesota*³⁸ established the prohibition on "prior restraints" with respect to the press in 1931. In that case Justice Hughes, writing for the majority, made the same point that "it has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's free press provision] to prevent previous restraints upon publication."³⁹ The Court further noted that this guarantee does "not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."⁴⁰ Even

35. See *Patterson v. Colorado*, 205 U.S. 454 (1907) (Harlan, J., dissenting). Although decided on Fourteenth Amendment grounds, *Patterson* began the expansion of free speech rights. *Id.*

36. 249 U.S. 47 (1919).

37. *Id.* at 52.

38. 283 U.S. 697 (1931).

39. *Id.* at 713.

40. *Id.* at 714.

Justice Butler, writing in dissent, stated that "liberty of the press means simply the absence of restraint upon publication in advance as distinguished from liability, civil or criminal, for libelous or improper matter so published."⁴¹

The technological developments of the twentieth century caught up with the Court when Congress passed the Radio Act of 1927.⁴² The Act required that radio broadcasters obtain licenses, ostensibly to serve the public interest by rationing the scarce resource of frequencies and preventing their monopolization, in the same way that government regulates utilities.⁴³ Lower courts at the time, interpreting the Act, routinely upheld retaliatory license revocations that followed the broadcast of material deemed inappropriate by the Federal Radio Commission⁴⁴ on the theory that an explicit anti-censorship provision in the Act only prohibited prior restraints. These courts held that content-based license revocations or failure to renew were permissible because they were in the public interest.⁴⁵

The Supreme Court held in 1943 that the very nature of radio, as a limited resource of expression, made it subject to regulation of the sort lower courts had upheld.⁴⁶ The same principle was later upheld in *Red Lion Broadcasting v. FCC*.⁴⁷ Yet radio is not unique in its scarcity, and this rationale for regulation began to fall out of favor in the 1980s.⁴⁸ The Court offered to extend greater freedoms to broadcasters if the Court received sufficient indications from Congress or the FCC that new broadcast technologies would make the "scarcity doctrine" no longer viable as a justification for any content-based regulations.⁴⁹ In 1987, in *Syracuse Peace Council*,⁵⁰

41. *Id.* at 735 (Butler, J., dissenting).

42. Radio Act of 1927, ch. 169, 44 Stat. 1162 (repealed 1934).

43. See JONATHAN W. EMORD, FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT 167-71 (1991).

44. *Id.* at 175-83.

45. *Id.*

46. See *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943).

47. 395 U.S. 367 (1969).

48. See *Telecomm. Research & Action Ctr. v. FCC*, 801 F.2d 501 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987) (holding that using scarcity alone as a distinguishing factor in determining whether a medium may be regulated is analytically unsound, as the equipment needed for virtually all forms of speech and dissemination thereof is scarce).

49. *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

50. 2 F.C.C.R. 5043 (1987).

the FCC effectively reversed the “scarcity doctrine” by acknowledging that “[d]espite the physical differences between the electronic and print media, their roles in our society are identical, and we believe that the same First Amendment principles should be equally applicable to both.”⁵¹ Similarly, despite the physical differences that have developed in the realm of firearms, their normative roles with respect to the purpose of the Second Amendment are identical, and remain unchanged since 1791.⁵²

Lower courts have applied a similar rationale to the issue of cable television outbidding broadcasters for rights to various events and programs, finding that competition in this arena is no different constitutionally than that found in newspapers and print media and so should not be regulated differently.⁵³ The Supreme Court made extensive use of technological analogy in a more recent case. In *Reno v. ACLU*,⁵⁴ the Court compared webpage addresses to telephone numbers,⁵⁵ and the entire Internet to a “vast library,”⁵⁶ ultimately overturning portions of the Communications Decency Act (CDA) of 1996⁵⁷ because the Act too broadly regulated speech.⁵⁸ The Court held that the internet, as a medium, had none of the characteristics that have been used to justify stricter regulation of other forms of media, namely invasiveness and scarcity,⁵⁹ and therefore applied basic First Amendment law to the “indecent” speech the “vague” CDA contemplated, denying Congress the power to prohibit the publication of this sort of “content.”⁶⁰ Mere ownership and peaceful carriage of firearms are actions that, if analyzed in a similar fashion, lack the invasiveness necessary to justify many of the infringements on the fundamental right to keep and bear arms that we see today. Just as the Court has found that modern media is functionally equivalent to traditional print media of the founding

51. *Id.* at 5058.

52. *See supra* Part I.C.

53. *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).

54. 521 U.S. 844 (1996).

55. *Id.* at 852.

56. *Id.* at 853.

57. The Communications Decency Act of 1996, 47 U.S.C. § 223 (2000).

58. *Reno*, 521 U.S. at 885.

59. *Id.* at 868-70.

60. *Id.* at 864-66.

era, so too should it find with respect to modern small arms of military utility.

The Court clearly is capable of drawing technological analogies and distinctions and applying or adapting standards from diverse areas of the law. Even more revealing is the fact that the Court has analogized new communication technologies to old ones, accepting that the new technologies serve the same role in society as the oldest and deserve analogous protection. So too must the Court recognize that modern military firearms serve the same role with respect to the Second Amendment that the muskets of 1791 served at that time. The Court has all but ignored the evolution of small arms from the time of the musket to time of the today's machine gun, while carefully continuing to protect speech even as communication has become more and more technologically accomplished. This is troublesome both practically and ideologically.

III. A BRIEF HISTORY OF THE DEVELOPMENT OF SMALL ARMS

Almost all adherents to the "standard model" of the Second Amendment agree that the model protects owning those arms that may be both carried and employed (i.e., fired) by an individual.⁶¹ For the purposes of this Note, such arms will be defined as "small arms." The purpose of this Part is to provide some background and historical reference on the development of small arms to demonstrate that the Court has had ample time and opportunity to contemplate and deal with the development of these firearm technologies, and to show that most "modern" firearms are, in fact, a century old.

Various forms of what could be considered small arms have existed since at least 1000 A.D.⁶² when the Chinese developed gunpowder, although the existence of weapons of military design utilizing such a propellant was not documented until the early fourteenth century.⁶³ The fifteenth century witnessed the introduction

61. See *Kates*, *supra* note 12, at 219-20. Whether the Second Amendment secures a right to keep and bear larger arms is a contentious issue and one that is beyond the scope of this Note.

62. CHANT, *supra* note 32, at 6.

63. *Id.* at 7.

of the rifled barrel in Europe⁶⁴ allowing for far greater accuracy than the existing matchlock firearms of the era.⁶⁵ After the matchlock came the more familiar flintlock firearm (employing a flint striker to generate sparks rather than a “match”) that became the standard small arm of the late 1600s.⁶⁶ This era also witnessed some of the first attempts to develop repeating arms, including the revolver⁶⁷ and the “Puckle Gun,” the forerunner to the Civil War-era “Gatling Gun,”⁶⁸ patented by James Puckle in 1718.⁶⁹

Although both manufacturing techniques and military tactics evolved during the period, the colonial era saw relatively few technological advancements worth noting.⁷⁰ It was not until the invention of an effective percussion cap in the early 1800s that small arms technology began to accelerate.⁷¹ The year 1836 saw the introduction of the revolver rifle, a percussion cap rifle that could fire five shots in rapid succession via five revolving, individually capped chambers, which led to the famous and more successful Colt revolver pistol of late-nineteenth-century fame.⁷² The percussion cap also paved the way for modern self-contained metallic cartridges, as it allowed bullet, powder, and priming charge to become one unit.

The Civil War Era saw the introduction of the metallic cartridges that remain, from a basic technological perspective, essentially unchanged today.⁷³ These cartridges, however, were not widely used until after the Civil War. They allowed for both load consistency and

64. *Id.* at 9.

65. *Id.* at 8-9. The “matchlock” was a method of igniting the gunpowder propellant. A slow-burning piece of hemp cord soaked in chemicals would be mounted to a springloaded arm, and activation of the trigger would swing the arm and the “match” onto a small pile of powder above a hole, charging the powder within the gun’s barrel.

66. *Id.* at 10.

67. *Id.* at 11 (describing John Daste’s snaphaunce revolver, circa 1680).

68. See *infra* note 82.

69. For a description and history of the Puckle Gun, see *Quick-Firing Revolver Gun*, at <http://dld.mk.dmu.ac.uk/Heritage/htm/tour/revolverinfo.htm> (last visited Apr. 2, 2003).

70. CHANT, *supra* note 32, at 10-12.

71. A percussion cap is a small container (shaped like a thimble, but one-third to one-half the size) that contains a compound that will detonate when violently struck. Alexander Forsyth of Scotland is widely credited with creating the first “percussion cap” made of paper. Although the metal caps were developed later are still used today by reenactors and hobbyists. See CHANT, *supra* note 32, at 13.

72. *Id.* at 16.

73. Cartridges analogous to modern shotgun ammunition were developed in France in 1857, and those analogous to modern centerfire rifle and pistol cartridges in 1861. *Id.* at 20.

the development of more sophisticated repeating firearms, the first of which were simple “breech loading” (rear loading, as opposed to “muzzle loading”) firearms in the 1870s, followed soon after by bolt action rifles.⁷⁴ The box magazine, a now familiar ammunition feeding device, was introduced in 1879 by James Lee to create a repeating bolt action rifle.⁷⁵

Blackpowder was a final technological hurdle to be overcome. Such powder created enormous clouds of smoke on the battlefield when discharged from a firearm, immediately revealing the position of an otherwise hidden soldier. It was also difficult to use in longer barrels due to its fast burn rate.⁷⁶ A Frenchman named Paul Vieille finally solved these problems by creating modern smokeless powder in 1884, used universally today in modern firearm cartridges.⁷⁷

American Hiram Maxim was the pioneer of automatic firearms. As early as 1884 he had a functional, though clumsy and unreliable, semiautomatic rifle that operated by using some of the rifle’s recoil energy to operate a system of springs and levers.⁷⁸ Maxim went on to develop the first true machine gun in 1885⁷⁹ and developed a gas-operated semiautomatic rifle by 1891.⁸⁰ Legendary gunmaker John

74. *Small Arms*, at <http://www.historychannel.com> (last visited Apr. 2, 2003).

75. CHANT, *supra* note 32, at 26. The box magazine was simply a spring-loaded container that sat beneath the bolt of the rifle and fed metallic cartridges one at a time as one operated the rifle. Modern bolt action rifles often employ the same mechanism, while autoloading firearms often used a detachable box magazine that can be quickly replaced with a fully loaded one. Such magazines have become the subject of numerous regulations, including the 1994 federal “assault weapons” ban, 18 U.S.C. §§ 921-922 (2000), which restricts the possession of magazines holding more than ten cartridges (that were manufactured or imported after its effective date) to law enforcement and military users.

76. See CHANT, *supra* note 32, at 36. Blackpowder burns faster than modern smokeless powder designed for longer barrels, and excessive pressure from the powder can lead to an explosive failure of the musket, resulting in injury, burns, and even death of the operator.

77. *Id.*

78. *Id.* at 40. “Semiautomatic” refers to a firearm that fires a single shot, then reloads the firing chamber automatically (but does not fire an additional shot until the trigger is released and pressed again), unlike a “fully automatic” firearm or machine gun that will continue to fire repeatedly as long as the trigger is held back.

79. John H. Lienhard, *Engines of our Ingenuity, No. 694: Hiram Maxim* (NPR radio broadcast), transcript available at <http://www.uh.edu/engines/epi694.htm> (last visited Jan. 7, 2003).

80. CHANT, *supra* note 32, at 40. “Gas-operated” firearms function by siphoning a small amount of the tremendous gas pressure generated inside the barrel during firing and using this pressure to open and close the bolt of the gun (thereby ejecting the fired metallic cartridge case and loading a new one from a spring-loaded magazine). This is the same type of mechanism used by modern military firearms, including the M-16 and AK-47 rifles. *Id.* at 132-34.

Browning developed a gas-operated machine gun around the same time.⁸¹ Although small arms in effect capable of automatic fire were developed and briefly used during the Civil War,⁸² Maxim's machine guns were the first to employ a single barrel and a truly self-loading mechanism.⁸³ Today, most machine guns and military rifles, depending on their caliber and role, employ either gas operation, some form of recoil operation, or a motorized "Gatling Gun" mechanism.⁸⁴

The application of self-loading mechanisms to handguns was proposed as early as 1864,⁸⁵ but cleaner smokeless powder and metallic cartridges allowed such firearms to truly develop in the 1890s. Perhaps the best known, though not the first, design of the era is that of John Browning, whose 1898 model would lead to the development of the famous M1911 .45 caliber pistol adopted by and used extensively by the U.S. Army from 1911 until 1985,⁸⁶ and still widely used today, essentially unchanged in ninety years, by military and law enforcement personnel as well as private citizens. Browning also patented the first semi-automatic shotgun in 1900.⁸⁷

Today, almost all military and many sporting small arms use the gas or recoil operated auto-loading mechanisms developed more than a century ago.⁸⁸ The current trend in military small arms is

81. *John Moses Browning (1855-1926)*, at http://www.m1911.org/full_browning.htm (last visited Apr. 2, 2003).

82. Dr. Richard J. Gatling is famous for inventing and marketing his "Gatling Gun" during the Civil War. See *Gatling Gun*, at <http://www.historychannel.com> (last visited Apr. 2, 2003).

83. Maxim's guns relied on the energy of the firing cartridge to cycle the action of the gun, rather than on an operator manually turning a lever as with the Gatling guns. Maxim's development enabled the operator to aim and fire the weapon more effectively at the same time while making the system more compact, both essential for the use of such an action in a rifle carried by a single person. See *Hiram Maxim*, at <http://www.spartacus.schoolnet.co.uk> (last visited Apr. 2, 2003).

84. See CHANT, *supra* note 32, at 59-87.

85. *Id.* at 53.

86. *Id.* at 55. Colt produced this pistol for the military, creating the "Colt .45," the name often associated with this Browning design.

87. *Browning's Historical Timeline 1855-2002*, at <http://www.browning.com/services/compinfo/timeline.htm> (last visited Apr. 2, 2003).

88. For examples of military firearms, see CHANT, *supra* note 32, at 96-135. Semiautomatic sporting and hunting guns of all kinds have been marketed since John Browning developed his shotgun in 1900 and they remain popular today. For examples of such guns, see the Remington website, at <http://www.remington.com> (last visited Jan. 7, 2003) and the Ruger website, at <http://www.ruger.com> (last visited Apr. 2, 2003).

toward weapons that use lighter ammunition, enable a single soldier to carry more cartridges, have greater effective accuracy, and have the ability to defeat enemies hiding behind cover.⁸⁹

Given the evolution of firearm technology since 1791 and the lack of Supreme Court guidance in interpreting the Second Amendment, First Amendment standards announced by the Court and applied to rapidly advancing media and communications technologies are the most logical place to look to begin to interpret the right to keep and bear arms of modern design.

IV. APPLICATION OF FIRST AMENDMENT STANDARDS TO THE SECOND AMENDMENT

This Note has shown the capacity of law to develop along with technology in the First Amendment context,⁹⁰ and illustrated that Second Amendment jurisprudence has not matched the advancement in small arms technology since the days of the musket or even the short-barreled shotgun in *Miller*.⁹¹ The next step is to detail First Amendment doctrines that are appropriate and available for application to Second Amendment issues. The Note will apply these concepts to the 1994 federal "assault weapons" ban,⁹² and the National Firearms Act of 1934,⁹³ with reference to other common

89. See *Memorandum of Law-Review of Weapons in the Advanced Combat Rifle Program*, 1990 ARMY LAW. 18 (describing the military's desire to field a rifle capable of a one hundred percent hit rate at three hundred meters and some of the technology being considered to achieve this goal); Paul Eng, *A Smarter Rifle: Advanced Technology May Give Foot Soldiers a Fighting Edge*, ABC NEWS.COM, Sept. 28, 2001, at <http://abcnews.go.com/sections/scitech/CuttingEdge/smartrifle010926.html> (last visited Apr. 2, 2003) (describing the "Objective Individual Combat Weapon," scheduled to be in use by 2010, which uses a plethora of new technologies to increase accuracy and place grenade rounds with pinpoint accuracy).

90. See *supra* Part II.

91. Compare *supra* Part III (providing history of small arms), with Part I.C (discussing *Miller* and the dearth of Second Amendment review since 1939). The Supreme Court has, however, had ample opportunity to decide Second Amendment cases. See *U.S. v. Emerson*, 270 F.3d 203, 218-36 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002) (reviewing two "collective rights" models from other circuits and adhering instead to the "standard mode," thus creating a three-way circuit split); see also *Love v. Peppersack*, 47 F.3d 120 (4th Cir. 1995), *cert. denied*, 516 U.S. 813 (1995); *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983). See generally Ronald Beason, *Printz Punts on the Palladium of Rights: It is Time to Protect the Right of the Individual to Keep and Bear Arms*, 50 ALA. L. REV. 561, 580-81 (1999).

92. 18 U.S.C. §§ 921-922 (2000).

93. National Firearms Act of 1934, 26 U.S.C. § 5801-5850 (2000).

methods of regulation. These particular federal laws, and their ever-changing state-level counterparts, are of particular interest in light of the *Miller* standard discussed earlier.

The Court has announced various sorts of limitations on the government's power to limit speech and the press. The First Amendment doctrines that seem to be most applicable to the realm of firearms regulation are those of: (1) prior restraints; (2) time, place, and manner restrictions; (3) protection of minors; (4) "secondary effects"; and (5) national security.

A. *Prior Restraints*

The Court has held that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."⁹⁴ The concept established in the *Near* case⁹⁵ is one of the oldest in First Amendment jurisprudence, and stems from law as old as Blackstone's *Commentaries*.⁹⁶

Perhaps more relevant to the issue at hand is the portion of Justice Hughes' opinion in *Near* in which he states: "The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."⁹⁷ Simply put, the presumption against prior restraints is "deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand."⁹⁸

The prohibition of prior restraints, a prohibition that the Court has upheld zealously in First Amendment cases in all but the most dire circumstances,⁹⁹ is perhaps the most important principle that Second Amendment law should take from First Amendment law. Many forms of firearms regulation would be found facially

94. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (citations omitted).

95. *Near v. Minnesota*, 283 U.S. 697 (1931).

96. *See id.* at 713-14 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *151-52).

97. *Id.* at 720.

98. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (emphasis omitted). For a general treatment of the law of prior restraints, see Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955).

99. *See infra* Part IV.E (discussing national security matters).

unconstitutional if this standard were applied. It is curious that the Court has not analyzed a myriad of state and federal laws amounting to prior restraints on the exercise of the right to keep and bear arms, though they have treated free speech and press so extensively.

If one applies the prior restraint reasoning of *Near*¹⁰⁰ to the plethora of modern firearms laws, it becomes clear that an entire class of firearms laws, both state and federal, criminalize behavior that is, in and of itself, harmless and thus such prohibitions are unconstitutional prior restraints.¹⁰¹ Such laws are based on the theory that the proscribed act is done in preparation for the commission of another crime, such as armed robbery or murder,¹⁰² or that certain classes of firearms have no "legitimate" purpose.¹⁰³ Laws prohibiting or severely restricting the possession of fully-automatic and semiautomatic firearms, or any other category of militarily useful small arm, are prime examples of laws that ought to be viewed as presumptively unconstitutional. Such laws act as "prior restraints" on citizens' exercise of the right to keep and bear arms. This right should certainly protect the ownership and carriage of such firearms because (1) the right is applicable to individuals and (2) the right exists today for the same purposes that the Framers envisioned.¹⁰⁴

100. *Near v. Minnesota*, 283 U.S. 697 (1931).

101. Mere possession or peaceful carrying of firearms, for example, regardless of their type, seems harmless. In fact, there is significant empirical evidence indicating that carriage of firearms by the general public may deter crime. See, e.g., JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME* (1998) (finding that states that enacted laws allowing law-abiding citizens to carry concealed handguns experienced significant reductions in crime).

102. One example, New York's "Sullivan Law," requiring a license to purchase or own a handgun and prohibiting carry of such firearms, has been in place since 1911. Sullivan Law, ch. 195, 1911 N.Y. Laws 422 (1911) (cited in Robert J. Cottrol & Raymond T. Diamond, "Never Intended to be Applied to the White Population": *Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI. KENT L. REV. 1307, 1334 n.170 (1995)).

103. So-called "assault weapons" and fully automatic firearms have been referred to by lawmakers as having no "legitimate purpose," despite their clear military utility of the sort due protection under the Second Amendment in accordance with the *Miller* principle. For example, then Congressman Charles Schumer stated in 1995 that "assault weapons have no legitimate purpose." *Schumer, Brewster Disagree on Amendment, Assault Rifles* (CNN television broadcast, Jan. 27, 1995).

104. See *supra* Part I.C (discussing the standard model).

Faced with such doctrines, the Court should reason that persons who, for example, own machine guns or "assault weapons," are still liable, criminally and civilly, for both their willful and negligently harmful acts arising from the ownership and carriage of such firearms. These doctrines, however, also dictate that the Court conclude that laws that deny entirely or substantially interfere with the mere ownership and carriage of such firearms violate the Second Amendment's guarantee of the right to keep and bear arms of military utility.

B. Time, Place, and Manner Restrictions

Historically, the Court has recognized that, although the exercise of the right of free speech is a fundamental right, certain regulation of the time, place, and manner of such exercise may be constitutional, provided that the restrictions are not motivated by the content of the speech itself and the regulations are narrowly tailored to effect the government's compelling interest.¹⁰⁵

In general, the government may control the manner in which speech is conducted only so long as there is some compelling governmental interest.¹⁰⁶ The Court has held, for example, that government may prohibit broadcasting via loudspeakers on trucks due to the disruptive nature of the noise, but may *not* regulate because of the content of the speech.¹⁰⁷ The mere *possibility* of disruption or eyesore, however, is not sufficient reason to prohibit

105. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (holding that a city may regulate demonstrations outside of schools to minimize the impact of noise on the schools, provided that such regulations are narrowly tailored to serve the government's interest of avoiding disruption of education); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) ("The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (holding that the government may decline to give a marching permit in order to prevent more than one parade from marching on a street at the same time).

106. *Grayned*, 408 U.S. at 116-17.

107. See *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding a Trenton, New Jersey law prohibiting the use of "speaker trucks" on public roads). *But see Saia v. New York*, 334 U.S. 558 (1948) (striking down a similar Lockport, New York law because it left the decision as to whether to allow the use of such trucks to the discretion of the police chief).

otherwise protected speech.¹⁰⁸ Time, place, and manner restrictions are subjected to less than strict scrutiny precisely because they ultimately allow the speech.

How might these cases be applied to the Second Amendment? Both state and federal laws already proscribe the possession and carriage of firearms in numerous places and often the manner in which they may be carried.¹⁰⁹ Application of First Amendment standards, however, would likely result in the overturning of numerous laws of this type, particularly if the Court were to apply the *Cohen* standard:¹¹⁰ The government would have to show that the damage to the rights of others resulting from mere possession is so intolerable that the restriction is justified.¹¹¹ To prohibit the mere possession or the peaceful carriage of modern firearms is to tell Paul Robert Cohen that merely displaying his four letter word is unconstitutional.¹¹² "While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not 'directed to the person of the hearer.'"¹¹³ The analogy to firearms is clear: firearms are frequently used in a provocative fashion, yet like words, guns are often harmless. Still, many jurisdictions would not

108. The Court has held:

The purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.

Schneider v. State, 308 U.S. 147, 162 (1939).

109. For example, federal law prohibits the carry of firearms in or on the property of schools, and prescribes the manner in which they must be carried near such areas. 18 U.S.C. § 922(q) (2000). The Gun Free School Zones Act of 1990, 20 U.S.C. § 922(q)(1)(A) (1988) was overturned by the Supreme Court in *United States v. Lopez*, 514 U.S. 549 (1995), because of Congress' insufficient factual findings. It was subsequently reenacted by Congress with accompanying findings of fact. Act of Sept. 30, 1996, Pub. L. No. 104-208, 110 Stat. 3009-369 (codified as amended 18 U.S.C. 922(q) (2000)). Every state has laws regulating the carriage of firearms, particularly handguns, in public. *See, e.g.*, VA. CODE ANN. §§ 18.2-308 to -311 (Michie 2001). Many states require that one produce evidence of a compelling reason (e.g., death threats or dangerous occupation) to be permitted to carry a firearm in public, and some require permits merely to purchase firearms. *See, e.g.*, N.J. STAT. ANN. § 2C:58-3 (West 1995).

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

111. *Id.*

112. *Id.* at 21.

113. *Id.* at 20 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940)).

allow Cohen to wear a gun in the same way that he may wear his dirty word. Members of the public might be alarmed by the sight of a gun in public, yet the Court in *Cohen* was quite clear. The presence of “unwitting listeners or viewers” is simply not a good enough reason to proscribe a constitutionally protected activity.¹¹⁴

C. *The Protection of Minors*

Governments have a compelling interest in protecting minors,¹¹⁵ and the Court has recognized that “the power of the state to control the conduct of children reaches beyond the scope of its authority over adults”¹¹⁶ Furthermore, considering restrictions on the access of minors to indecent materials, the Court has applied a rational basis standard to determine whether those restrictions are constitutional, rather than the usual strict scrutiny reserved for the fundamental right of free speech.¹¹⁷ Indeed, the state has broad powers in protecting minors, but these powers are not unlimited despite the “rational basis” standard that the Court typically applies.

Despite giving great deference to the judgments of lawmakers regarding laws protecting minors, the Court has ruled that such laws must be tailored so as not to, in effect, place the same restrictions on the adult population when the justification for the law is to protect minors.¹¹⁸ Such laws must be constructed so as to achieve the state’s goal of protecting minors from the evil in question without effectively infringing on the rights of adults.¹¹⁹

The state interest in protecting the welfare of minors is quite clear. Both state and federal restrictions on the sale of firearms to minors and the possession of firearms by minors¹²⁰ are, thus, consistent with the Second Amendment as a fundamental right,

114. *Id.* at 21.

115. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).

116. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

117. *Ginsberg v. New York*, 390 U.S. 629, 641-43 (1968).

118. *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (holding that laws aimed at protecting children from objectionable materials may not “reduce the adult population ... to reading only what is fit for children”).

119. *Id.* at 383.

120. *See, e.g.*, 18 U.S.C. § 922(b) (2000) (prohibiting the sale of firearms to minors under the age of eighteen and prohibiting the sale of handguns to those under twenty-one).

even if one employs the strictest scrutiny applied to some classes of speech and media expression protected by the First Amendment. There is most certainly a rational basis for such laws given the potential dangers of allowing minors to buy firearms of any type, and such laws would likely survive more strict scrutiny as well.

The rights of minors with respect to free speech are not equivalent to those of adults.¹²¹ Yet key to the government's relatively broad powers to protect minors is that such laws, though due great deference, must not "burn the house to roast the pig."¹²² Many firearms laws that apply to adults are ostensibly meant, in part, to protect minors from the dangers of firearms.¹²³ Bans on "assault weapons," for example, though often more concerned with the military appearance of certain firearms, are partially motivated by the desire to protect children.¹²⁴ Such laws, however, are not in line with the reasoning in *Butler* as applied to the Second Amendment. In *Butler*, the state of Michigan attempted to justify its anti-obscenity law—ban the sale of obscene materials to persons of *any* age—by citing the material's tendency to corrupt the morals of the youth,¹²⁵ but the Court stated that "[w]e have before us legislation not reasonably restricted to the evil with which it is said to deal."¹²⁶

Similarly, attempts to restrict the access of adults to constitutionally protected firearms under the guise of protecting minors should be struck down as overly broad as well. Abuse of the right to keep and bear arms that results in harm to children is legally indistinguishable from the harm resulting from otherwise protected speech, or from categories of speech that may be regulated

121. *Ginsberg*, 390 U.S. at 638.

122. *Butler*, 352 U.S. at 383.

123. The Brady Campaign, for example, one of the leading gun control lobbying groups, highlights the impact of irresponsible gun ownership on children as a justification for further regulation of adult ownership of firearms. See *The Brady Campaign, Kids and Guns Issue Brief America*, at <http://www.bradiycampaign.org/facts> (last visited Apr. 2, 2003).

124. The first "assault weapons" ban passed in the United States, California's "Roberti-Roos" Law, was motivated by a schoolyard shooting in Stockton, California. The California state legislature passed and signed the law within a few months of the incident. See *California Leads the Way*, L.A. TIMES, May 20, 1989, at Metro 8.

125. *Butler*, 352 U.S. at 380-81.

126. *Id.* at 383; see also *Reno*, 521 U.S. at 875 ("[W]e have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults.") (citations omitted).

narrowly as to prevent minors' exposure to it. An adult who harms a child by displaying pornographic material may be punished, just as he may be punished if the harm is inflicted with a firearm, but mere possibilities do not justify an entirely prohibitive law. There is, of course, a significant difference between the extent of the harm that may befall a child in each case, but the greater harm that may be inflicted by abuse of the right to keep and bear arms should be, and already is, reflected in the greater penalties imposed by the criminal law to punish and deter such acts.

D. Secondary Effects

States and municipalities have successfully regulated communication that might otherwise be afforded protection under the First Amendment by regulating the "secondary effects" of some speech or its method of conveyance (such as traffic problems, urban decay, or the moral character of neighborhoods).¹²⁷ The justification for such regulations stems from their ostensible purposes, such as alleviating problems of urban decay. Such laws have survived the scrutiny of the courts by not completely prohibiting the speech itself, but rather regulating the speech by way of content-neutral time, place, and manner restrictions.

The Court has generally been fairly deferential to the judgments of governments in their attempts to regulate "secondary effects," requiring only minimal cause and effect evidence and demonstrations that the regulation will alleviate the problem(s).¹²⁸ The

127. See, e.g., *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976) (upholding a Detroit "skid row" ordinance prohibiting adult theaters from operating within 1000 feet of one another, ostensibly to control crime and other undesirable activities that occur in proximity to these theaters). But see *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (striking down a Jacksonville, Florida ordinance that prohibited the display of films containing nudity at drive-in movie screens visible from roadways. The Court reasoned that the film itself, not the nudity, distracted motorists and that the law therefore was unconstitutional, as it was aimed at content directly rather than media secondary effects.).

128. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding a Renton, Washington ordinance regulating the location of adult business, despite very little study of the effects of such businesses within the city); *Young*, 427 U.S. at 71 & n.34 (upholding a Detroit zoning regulation with only reference to the "Common Council's" finding of deterioration). But see *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000) (holding that the city did not meet its factual burden in establishing a nexus between adult businesses and the secondary effects that it sought to abate).

Court in *Renton* developed, and the Ninth Circuit has clarified, a three step test for analyzing such regulations:

We first must determine whether the ordinance is a “time, place, and manner regulation[.]” If it is, we must then determine whether it is content-neutral or content-based. If we decide that the ordinance is content-neutral, we must then determine whether the proposed ordinance “is designed to serve a substantial government interest and allows for reasonable alternative avenues of communication.”¹²⁹

The requirement that “reasonable alternative avenues of communication” remain available despite regulation reflects the fundamental purposes of the free speech right. This consideration will be important, perhaps decisive, in applying the “secondary effects” rationale to firearms regulation. If a law proscribes the keeping and bearing of suitable arms, whether entirely through *de facto* prohibition or effectively through cumbersome regulation and restriction, it will not satisfy the reasoning of *Renton* insofar as such a law does not allow for reasonable alternatives through which the right may be exercised.

Although states and municipalities have tried and failed to regulate adults’ access to obscenity by using their power to protect minors, they have succeeded in many of their attempts to control and reduce the display of obscenity by targeting the purveyors of obscenity based on the “secondary effects” of the businesses. The regulation of obscenity has become of even greater legal significance in the age of television and the Internet. Might such a “secondary effects” justification validate regulations on firearms, and more specifically, “assault weapons” and those firearms affected by the National Firearms Act of 1934?

First, the “secondary effects” justification, despite the relatively small burden that the government must bear in showing a nexus between the regulated activity and the “secondary effect(s),” cannot serve as a basis to prohibit entirely certain speech.¹³⁰ If one characterizes the “assault weapons” ban and the National Firearms

129. *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1332 (9th Cir. 1987) (quoting *Renton*, 475 U.S. at 41) (additional citation omitted).

130. *Id.* at 1329.

Act of 1934 as based on the “secondary effects”—the criminal misuse of the firearms, or the illicit activities purportedly associated with them such as robbery, gang activity, and drug trade—both laws in their current form should fall under scrutiny similar to that applied in *Tollis*.¹³¹

The “assault weapons” ban completely prohibits the manufacture and import of an entire category of constitutionally protected firearms and ammunition feeding devices, and cannot be characterized as a reasonable time, place, and manner restriction that allows for an alternative exercise of the right to keep and bear arms of military utility. Although continued possession and (in most states) transfer of existing “assault weapons” remains legal, the long term effect of the law is to allow such firearms to “die off” gradually, resulting in a loss of the power of the sword within the general population—exactly the scenario the Framers feared.

The “assault weapons” ban has been widely, and correctly, characterized as “cosmetic” because it does not actually ban firearms because of their semi-automatic function (as most semi-automatic firearms are left unaffected) but rather because of certain features that do not affect the firearm’s accuracy, rate of fire, or lethality, but have utility in military service.¹³² The construction of the law appears to do little of practical value to curb the “firepower” of criminals, making it all the more troublesome given its goal of restricting public access to precisely those types of firearms protected by the Second Amendment and the *Miller* standard.¹³³

The construction of the federal “assault weapons” ban falls neatly within the reasoning in *Erznoznik v. City of Jacksonville*.¹³⁴ The Court in *Erznoznik* reasoned that display of *any* film on a screen near roadways might distract drivers, and that the prohibition of displaying films containing nudity at such venues was clearly a content-based restriction.¹³⁵ The Assault Weapons Ban allows the

131. *See id.*

132. For a discussion of the “cosmetic” nature of “assault weapon” bans, see David B. Kopel, *Rational Basis Analysis of “Assault Weapon” Prohibition*, 20 J. CONTEMP. L. 381 (1994). Banned features such as flash suppressors would have little or no effect on a firearm’s propensity to be misused criminally, but would have great utility on a constitutionally protected military arm.

133. *See supra* Part I.C.

134. 422 U.S. 205 (1975).

135. *Id.* at 211.

continued manufacture and import of firearms that are functionally identical with respect to their capability of being misused by criminals and minors to those that are banned. A ban on “assault weapons” that attacks only design features that are purely of military utility (such as flash suppressors and bayonet mounts) and are not substantially relevant in any way to the ability of such firearms to be misused by criminals, would run afoul of the Second Amendment if a standard analogous to the First Amendment standard was applied.

The National Firearms Act of 1934 began as a simple taxation scheme on fully automatic firearms and rifles, and shotguns with short barrels, that may very well have been constitutional to begin with.¹³⁶ It was amended in 1986, however, to completely ban the further manufacture and import of fully automatic firearms for consumption by the public. Only the military and law enforcement may purchase newly manufactured fully automatic firearms.¹³⁷ Applying the *Tollis* standard to the National Firearms Act, it is quite clear that there is no alternative method of exercising the right to keep and bear arms of military utility (in this case, fully automatic small arms similar to those in current military service). Though it might be argued that firearms substantially similar to “assault weapons” remain legal for civilian consumption,¹³⁸ there is no such argument to be made in the case of the National Firearms Act. Military and law enforcement agencies may purchase fully automatic firearms and carry them with few restrictions, while the private citizen may not.¹³⁹ The effective prohibition on the ownership and carriage of small arms of military utility that has

136. National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (1934).

137. Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) (amending 18 U.S.C. § 921 (1968)) (prohibiting the further manufacture and import of fully automatic firearms, except for use by military and law enforcement).

138. So-called “post-ban” firearms remain in legal production, as the offending features (usually flash suppressor, bayonet mount, and collapsible stock) may be removed, resulting in a similar firearm that retains the semiautomatic operation of the banned firearms. *See, e.g.*, PCR/AR Kits, available at <http://www.olyarms.com/pcrkits.html> (last visited Apr. 2, 2003) (offering a selection of “Politically Correct Rifles”).

139. It remains legal at the federal level to purchase and possess fully automatic firearms imported or manufactured before 1986. *See* 18 U.S.C. § 922 (2000). The process required to obtain one is lengthy and expensive, and due to the relatively small number of “grandfathered” firearms remaining in circulation, prices often reach five figures for a used firearm that the military or law enforcement agencies could purchase new for less than \$1000.

emerged as a result of the “assault weapons” ban and the National Firearms Act of 1934 “throws the baby out with the bathwater.” In their ostensible attempts to reduce the firepower of a very small percentage of criminals,¹⁴⁰ and to prevent a statistically insignificant number of deaths of children,¹⁴¹ our government has simply created a necessary condition of tyranny. Congress, through these laws, has largely monopolized the power of the sword by creating a substantial disparity between the arms that may be carried by the government and those that may be held by private citizens; this state of affairs directly violates the Second Amendment because it directly frustrates one of its primary purposes.

E. National Security

The Court has not often ruled on the manners in which the government may engage in censorship to protect national security nor on the burden the government must meet to justify these regulations. The doctrine of separation of powers is the focus of much of the case law dealing with national security, rather than individual rights.¹⁴² Nonetheless, the related First Amendment law that has developed in this area may prove useful in establishing whether and to what degree a government may use national security as a justification to regulate firearms. This justification has been suggested in the context of firearms regulation in the United States after the terrorist attacks of September 11, 2001,¹⁴³ and

140. See Kopel, *supra* note 132. Kopel found that in 1990, only 0.8% of homicides involved military caliber rifles, and “assault weapons” are an even smaller subset of all rifles of these calibers. *Id.* at 410. Kopel also looked at FBI and local police data and found that, of the 1534 police officers killed by firearms between 1975 and 1992, only sixteen (or about one percent) were killed by firearms that meet the California state law definition of an “assault weapon.” *Id.* at 410-11. Whether the use of an “assault weapon” was a decisive factor in any of these incidents is also unclear, because the vast majority of shootings involved only a few shots. See GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 79 (1991).

141. See NATIONAL SAFETY COUNCIL, *ACCIDENT FACTBOOK* (1997) (finding that in 1997 accidental gunfire killed 142 children nationwide under the age of fourteen).

142. See generally DYCUS ET AL., *NATIONAL SECURITY LAW* (3d ed. 2002).

143. See, e.g., Press Release, Sen. Dianne Feinstein, Senate Approves Feinstein Provisions That Make it More Difficult for Terrorists to Obtain Weapons from the United States (Dec. 21, 2001), available at <http://www.senate.gov/~feinstein/releases01/weapons.htm> (last visited Apr. 2, 2003).

world leaders and organizations such as the U.N. have cited national security as a justification for small arms control.¹⁴⁴

The Court in *Near* noted an exception to the prohibition on prior restraints, stating that “[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.”¹⁴⁵ In upholding an indictment for distributing anti-draft materials during World War I, the Court applied the “clear and present danger” doctrine, noting:

When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced.¹⁴⁶

Speech that has the actual and direct effect of compromising or undermining national security does not enjoy the same broad protection as other forms of speech. Still, as the Court noted in *New York Times Co. v. United States*,¹⁴⁷ the government’s case for an injunction on the publication of sensitive materials in the press must not rest upon “surmise or conjecture that untoward consequences may result.”¹⁴⁸ There must be more than a mere, or even strong, possibility that national security will be compromised, before a prior restraint on speech is justified. “Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.”¹⁴⁹

144. JACQUELINE SECK, WEST AFRICA SMALL ARMS MORATORIUM: HIGH-LEVEL CONSULTATIONS ON THE MODALITIES FOR THE IMPLEMENTATION OF PCASED, SUMMARY (2000), available at <http://www.unidir.ch/pdf/ouvrages/pdf-1-92-9045-000-1-en.pdf> (last visited Apr. 2, 2003); see also ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL 142-53 (2d ed. 1998).

145. *Near v. Minnesota*, 283 U.S. 697, 716 (footnote omitted).

146. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

147. *New York Times Co. v. United States*, 403 U.S. 713, 725-26 (1971).

148. *Id.*

149. *Id.* at 726-27.

The high burden that the government must meet often is very important, particularly as one moves from the abstract application of these elements to the Second Amendment to an examination of empirical data related to gun control and the misuse of firearms.

The Court in *New York Times* repeated its admonition in *Near* that although the government may not place prior restraints on the press, the press is still liable criminally and civilly for the harmful results and content of their publications.¹⁵⁰ Among the paramount purposes of the First Amendment, according to the Court in *New York Times*, is to keep the government honest; this sometimes requires unfettered publication of damaging documents.¹⁵¹ "The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic."¹⁵²

Keeping the government "honest" is *one* important function of the First Amendment; it is the *most* important purpose of the Second. The government might argue that a reduction in arms held by private parties is a compelling national security interest, an ironic position in light of the very purpose of the Second Amendment.¹⁵³ The security of the nation and the Constitution are precisely what the Amendment addresses, and the security of a *tyrannical* government is not a compelling interest. Indeed, the prevention of tyranny is a fundamental purpose embedded in the structure of our federal government. In order for the Amendment to function as the Framers intended in such a scenario, a very large percentage of the armed population (and probably the active military as well) would have to arrive at a consensus that the government is no longer acting legitimately.¹⁵⁴

150. *Id.* at 734-37 (White, J., concurring).

151. *Id.* at 717 (Black, J., concurring).

152. *Id.* at 719.

153. McIntosh, *supra* note 25, at 710-11.

154. See generally David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 *YALE L.J.* 551, 614 (1991) (suggesting that the right to keep and bear arms is individual in nature, but necessarily collective in its function, as both the armed citizenry and the National Guard would have to act in modern times).

CONCLUSION

The foundation and analysis presented in this Note are merely a beginning, a concept upon which to build further analogies in order to bring sound reason to the Second Amendment in the age of modern weaponry. The Second Amendment, as a right of "the people" and one that preserves a right that is at the very foundation of a free nation, deserves the same nuanced analysis as the First Amendment and the same attention of the courts. It must be read with its true purpose in mind, just as the First Amendment is.

Restrictions on the exercise of the right to bear arms must be narrowly tailored, use the least restrictive means possible, and be justified by a compelling state interest. Restrictions relevant to minors and time, place, and manner might be constitutional provided that they are crafted to meet these standards already in place with respect to the First Amendment. The regulations must also preserve reasonable alternative methods of exercise of the Second Amendment right and not erode the power of revolutionary deterrence that the right preserves.

The exercise of the right to keep and bear arms, like the exercise of the right to free speech and press, is not unlimited and, by its very nature, may cause great harm. Libel, slander, obscenity, and release of national secrets can also do so, and the latter may result in many deaths. Yet the Court has rightly been careful to preserve the free exercise of the rights of speech and press despite these hazards. These are the costs that a free society must bear, costs that are ultimately outweighed by both the greater security and the intrinsic good that each of these rights provides. Courts must thus review laws restricting the right to keep and bear arms with the same level of scrutiny afforded analogous intrusions upon other individual rights. Viewed in this light, many existing firearm laws would not pass constitutional muster. The federal "assault weapons" ban and the National Firearms Act of 1934 are excellent examples of legislation that the Supreme Court must address and strike down by applying the same levels of scrutiny as it does in First Amendment cases.

The First Amendment provides a well-developed and readily adaptable framework for examining the Second Amendment as an individual constitutional right. If one accepts that the Second

Amendment protects an individual right to keep and bear arms of military utility, then the Second Amendment deserves treatment parallel to that the First receives. Laws that constructively (through manufacturing bans) or directly prohibit the possession and peaceful carrying of arms of military utility run afoul of the Second Amendment unless they are justified and limited by doctrines at least as carefully drawn as those of the First Amendment. It is time for the Court to direct its attention to this long neglected stepchild of the Bill of Rights and apply its well-reasoned First Amendment standards to the Second Amendment.

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