

THE TOOLS OF POLITICAL DISSENT: A FIRST AMENDMENT GUIDE TO GUN REGISTRIES

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INTRODUCTION

On December 23, 2012, a newspaper in upstate New York published a provocative map.¹ On it appeared the names and addresses of thousands of gun owners in nearby counties, all precisely pinpointed for the world to browse. The source of this information: publicly available data drawn from the state's gun registry. Legislators were quick to respond. Within a month, a new law offered gun owners the chance to permanently remove their identities from the registry with a simple call to their county clerk.

The map raised interesting questions about broadcasting personal information, but a more fundamental question remains: Are these gun registries even constitutional? The mass “exposure” of gun owners—used as a form of public shaming—is particularly troubling because it would have been impossible without the government's registration requirement. The map confirmed a fear held by many opponents of registries: compilation of personal information could lead to reprisals, either by the media or through the state itself. This, they claim, implicates their Second Amendment rights.

In states that insist on registration, opponents have had to mold constitutional arguments to challenge registries in the courts. One such argument grows from the First Amendment. Gun ownership, like speech, is a tool of political dissent.² Both guns and speech empower individuals to resist governmental oppression, at least in theory. Yet both become blunt tools if the government imposes registration requirements that numb the right. So, the argument goes, these tools of political dissent must remain

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1. See generally Christine Haughney, *Legislature Restricts Access to Permit Data*, N.Y. TIMES, Jan. 16, 2013, at A15, available at <http://www.nytimes.com/2013/01/16/nyregion/new-yorks-new-gun-law-restricts-public-access-to-permit-data.html>.

2. David Kopel, *Trust the People: The Case Against Gun Control*, 109 POL'Y ANALYSIS 1, 25 (1988) (“[T]he tools of political dissent should be privately owned and unregistered.”).

unregistered if they are to provide the robust protection against tyranny that the Framers sought.

This Essay argues that the First Amendment can be a powerful analogue in Second Amendment challenges to gun registries. Part I explores the notion of guns as a tool of political dissent through the lens of history. Part II examines three First Amendment cases that could shape the analogue to challenge gun registries. Finally, Part III uses these three decisions to sketch out a blueprint that legislators and litigants can use to analyze gun registries.

I. A TOOL OF POLITICAL DISSENT

“A well regulated Militia, *being necessary to the security of a free State*, the right of the people to keep and bear Arms, shall not be infringed.”³ Upon this constitutional canvas, the Supreme Court in *District of Columbia v. Heller* concluded that the right was “necessary” because it helped make citizens “better able to resist tyranny.”⁴

Two of the Framers—James Madison and Alexander Hamilton—championed the vision of guns as a tool of political dissent. Chiefly, both saw an armed populace as an essential deterrent to tyrannical government. Madison focused on a despotic federal government: if such a government ever “accumulate[d] a military force for the projects of ambition,” the people “would be able to repel the danger.”⁵ Americans would have “the advantage of being armed” so as to form “a barrier against the enterprises of ambition.”⁶ For his part, Hamilton feared that either a state or the federal government could become tyrannical. “If the representatives of the people betray their constituents,” he warned, “there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government The citizens must rush tumultuously to arms, without concert, without system, without resource; except in their courage and despair.”⁷

Others have framed the Second Amendment as the *ultimate* right—the protector of all others. Justice Story, for one, remarked that “the right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic.”⁸ On this view, guns are not merely a tool of political dissent but the very foundation of every individual right that the

3. U.S. CONST. amend. II (emphasis added).

4. *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008).

5. THE FEDERALIST NO. 46 (James Madison) (1788).

6. *Id.*

7. THE FEDERALIST NO. 28 (Alexander Hamilton) (1787).

8. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1890 (1833).

Constitution guarantees. Although that claim is perhaps hyperbolic, a moderate iteration endures: “leaving legislatures free to engage in whimsical infringements on fundamental rights prepares the way for more serious assaults on individual liberty.”⁹ Registries thus offend the Second Amendment’s core because, by stifling anonymous gun ownership, two forces blunt the use of guns as tools of political dissent: first, citizens may be deterred from acquiring firearms for fear that they will be targeted as a name on the government’s registration list; and second, registries make it easier for a tyrant to locate and seize the citizens’ guns.

These fears may seem farcical—merely the ranting of “gun nuts” who fan fake flames to protect their precious firearms. But opponents of registries are quick to invoke history as their friend. One oft-cited example of a mass-confiscation regime is the firearm registry in Nazi Germany. Hitler’s registration laws enabled authorities to identify gun owners quickly and easily, to disarm en masse, and to perpetrate wicked deeds without fear of retaliation.

The civil rights movement also stars in the antiregistry storyline. Jim Crow laws sought to disarm former slaves and their descendants through finicky registration requirements. Later, bands of civil rights activists often relied on guns to guard their streets and fend off vigilantism. And California took concerted measures to disarm the Black Panthers after the group protested by invading the statehouse in 1967. Guns served as a buffer against state tyranny for those most vocal in their dissent against racist laws, although the states often fought back.

These historical bedrocks have retained their rhetorical resonance today. Charlton Heston, the former president of the National Rifle Association, often parroted the slogan: “First comes registration, then confiscation.”¹⁰ Some groups have taken more dramatic steps to propel their message; Jews for the Preservation of Firearms Ownership, for example, boasts this

9. Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1, 71 (1996).

10. *No Freedom Without Right to Own Guns, Actor Charlton Heston Says*, CANADIAN PRESS NEWSWIRE, Apr. 13, 2000.

poster as a bestseller¹¹:



The comparisons to this embodiment of evil are overblown and disingenuous, but they have been a potent rallying cry for those seeking to undermine registration. Ultimately, a more measured point suffices: opponents view registries as a system to enable “any rogue government—aided by its ultrahigh-speed, ultrahigh-storage-capacity computers—to quickly confiscate the people’s firearms”¹² and quash resistance. That system is antithetical to one of careful Madisonian balances: it stands in fierce contrast to the notion of guns as tools of political dissent and a check on tyranny.

II. REGISTRIES AND THE FIRST AMENDMENT

When the Supreme Court unveiled its Second Amendment tabula rasa, lower courts scrambled to carve the contours of the right to keep and bear arms. Litigants and commentators have increasingly looked to free-speech jurisprudence when reading the tea leaves left by *Heller*.¹³ Although some have reasonably questioned the wisdom of blindly blending doctrines, the analogy between the First and Second Amendments does carry logical force.

Both amendments thrive on proud exceptionalism: although other nations certainly protect speech and gun rights, the American tradition does

11. *Raise Your Right Hand Poster*, JPFO ONLINE STORE, available at http://shop.jpfo.org/cart.php?m=product_detail&p=78 (last visited Feb. 16, 2014).

12. GREGG LEE CARTER, GUNS IN AMERICAN SOCIETY 362 (2012).

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

so in a way that is scarcely matched, if at all. Both feature prominently in America's political and legal culture and in its national identity. Both sit atop the Bill of Rights—the first two amendments that added individual liberties to the Constitution's structural skeleton. Both secure rights that can cause harm but that we nonetheless accept. And crucially, both could plausibly be read as furnishing unlimited rights, but the Supreme Court has shunned absolutist interpretation.

Three First Amendment cases have parsed the interaction of registration and speech. Each could offer guidance to judges and parties grappling with the constitutionality of gun registries. Although the analogue may not be seamless, a common core of both rights—as tools of political dissent—can sculpt these legal challenges and help courts fill the gaps left by *Heller*.

A. *Lamont v. Postmaster General*

In *Lamont v. Postmaster General*,¹⁴ the Court scrutinized a statute mandating that the postmaster general detain any mail deemed to be “communist political propaganda.”¹⁵ The government then notified the addressee of the mail's detention and would destroy the mail unless the addressee requested delivery by returning a reply card. The Court struck down the Act. Justice Douglas reasoned that requiring the addressees to take an affirmative act as a condition of receiving speech violated the First Amendment.

Significantly for our purposes, the Court censured the deterrent effect that the requirement would create. Certain citizens “might think they would invite disaster if they read what the Federal Government says contains the seeds of treason.”¹⁶ Thus, the Act was inimical to the First Amendment's pledge to ensure “‘uninhibited, robust, and wide-open’ debate and discussion.”¹⁷

B. *Denver Area Educational Telecommunications Consortium v. FCC*

Like *Lamont*, *Denver Area Educational Telecommunications Consortium v. FCC*¹⁸ presented a federal statute that screened speech in a constitutionally suspect manner. The statute required network operators to segregate and block sex channels on cable television and unblock them only upon a

14. 381 U.S. 301 (1965).

15. *Id.* at 302 (quoting 39 U.S.C. § 4008(a)).

16. *Id.* at 307.

17. *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

18. 518 U.S. 727 (1996).

subscriber's written request. The plaintiffs claimed that the law was hostile to their First Amendment rights.

The Court agreed, holding that the "obvious restrictive effects" for viewers stemmed from the statute's "written notice" requirement.¹⁹ Subscribers would reasonably "fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel."²⁰ This fear amounted to a real First Amendment injury.

C. *NAACP v. Alabama*

*NAACP v. Alabama*²¹ presents a more nuanced analogy. Alabama sought to compel the NAACP to disclose the names and addresses of all its members, and the trial court held the group in contempt when it refused. Justice Harlan, writing for a unanimous Court, held that Alabama's actions *effectively* suppressed the NAACP's First Amendment rights, even though the state did not *directly* do so.

Importantly, it is not dispositive if a government takes no express action to inhibit these rights; rather, "[i]n the domain of these indispensable liberties, . . . abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action."²² The Court scorned legislation that, while neutral on its face, had "the practical effect 'of discouraging' the exercise of constitutionally protected political rights."²³ Finally, the Court stressed, the "[i]nviolability of privacy" is particularly indispensable to the right "where a group espouses dissident beliefs."²⁴

The Court invalidated the production order because it "entail[ed] the likelihood of a substantial restraint."²⁵ Compelled disclosure of the membership lists—which in effect would create a government registry of possible dissidents—would impinge on the individuals' right to advocate for their cause. And, as in *Lamont* and *Denver*, the threat may "induce members to withdraw from the Association and dissuade others from joining it . . ."²⁶ Speech cannot function as a tool of political dissent when the specter of government reprisal looms in the shadows.

19. *Id.* at 754.

20. *Id.* (citing *Lamont*, 381 U.S. at 307).

21. 357 U.S. 449 (1958).

22. *Id.* at 461.

23. *Id.* (quoting *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 393 (1950)).

24. *Id.* at 462.

25. *Id.*

26. *Id.* at 463.

III. PROTECTING THE CORE: STRICT SCRUTINY OF GUN REGISTRIES

Courts have already begun to apply First Amendment doctrine to Second Amendment problems. Although *Heller* emphatically dispensed with an absolute handgun ban, it clarified that “the right secured by the Second Amendment is not unlimited.”²⁷ Grasping for guidance, an array of courts have now employed traditional free-speech tiers of scrutiny to analyze regulations that burden the right to keep and bear arms.²⁸

Specifically, courts have gauged the rigor of their judicial review according to “how close the law comes to the *core* of the Second Amendment right and the severity of the law’s burden on the right.”²⁹ This analysis explicitly involves “[b]orrowing from the Court’s First Amendment doctrine.”³⁰ Regulations that threaten the core of the Second Amendment and severely burden the right trigger strict scrutiny; those that do not “encroach on the core”³¹ and impose only modest burdens are less perilous and therefore warrant intermediate scrutiny.

The lessons of *Lamont*, *Denver*, and *NAACP* teach that laws establishing gun registries merit strict scrutiny. The role of guns as tools of political dissent lies at the core of the Second Amendment, alongside the right to self-defense. Registry laws not only invade that core but also substantially burden the right. True, the burden is fairly indirect, but recourse to our First Amendment analogues shows that not to be dispositive. The burden is nonetheless “substantial” because government registries might deter gun ownership and undermine the right’s vigor as a bulwark against tyranny. The laws invalidated in *Lamont* and *Denver* compelled citizens to identify themselves to the government, and this condition was enough of a threat to effectively chill the expressive right. Similarly, the trial court’s order in *NAACP* forced the group to disclose its members’ personal information in a manner that effectively abridged the right to free association, even though the order did not directly smother that right. The worry of indirect suffocation is particularly acute when the law implicates dissident groups. These factors tip the Second Amendment scales in favor of strict scrutiny.

Moreover, *Lamont* and *Denver* caution against viewing a burden as “incidental” merely because the condition is easy to fulfill *as a practical matter*. Undoubtedly, neither mailing a reply card nor submitting a written

27. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

28. E.g., Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011).

29. *Id.* (emphasis added).

30. *Id.*

31. Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 700 F.3d 185, 195 (5th Cir. 2012).

request was an unreasonably cumbersome chore. Proponents of registries similarly urge that filling out a gun registration form is only a mild inconvenience. But the more salient query is whether the *effect* of the condition threatens the right—whether it materially dilutes the right’s power. If it does, the burden is substantial, and strict scrutiny should apply.

There is a certain contradiction that underlies the notion of guns as a protector of political liberty. Opponents of registries frame gun ownership as a private matter, but repelling government tyranny is a dramatically public act. Some might suggest, therefore, that the two positions are incompatible: that the right to keep guns as a tool of political dissent and the right to keep ownership private inevitably butt heads. Yet the very nature of the dissent rationale is that it functions only if the state cannot easily quash the dissenters. Both Mr. Lamont’s right to freely receive communist literature and the NAACP members’ rights to freely associate in fighting segregation depended on a shroud of secrecy. Anonymity is crucial to the public’s ability to challenge a government gone rogue. This narrative might seem melodramatic, but if the political-dissent core is to mean anything, it must entertain the improbable.

Although strict scrutiny is often called “strict in theory, but fatal in fact,”³² those in favor of registries need not despair. Public safety can clearly be a compelling governmental interest.³³ What strict scrutiny ensures, though, is that the government actually demonstrates the connection between registration and safety and that it narrowly tailors the registration law to serve that interest. There is no use speculating as to how these scales would ultimately tip—it is impossible to conduct a true means–ends analysis on an imaginary law—but the analogies in this Essay should provide guidance to both drafters and challengers. Ultimately, though, the analogy cannot carry this issue all the way over the finish line: the question remains as to whether registration is the kind of “longstanding” regulation preserved by *Heller*.³⁴ That complex inquiry deserves its own Essay and must wait for another day.

CONCLUSION

If we take seriously the role of guns as tools of political dissent, registration laws must first survive the rigors of close judicial scrutiny. The

32. Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Many have disputed whether it is truly “fatal in fact.” E.g., Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

33. E.g., *United States v. Salerno*, 481 U.S. 739, 745 (1987).

34. *Heller*, 554 U.S. at 626–27 & n.26.

right's liberty-protecting role lies at the core of the Second Amendment, envisioned by the Framers and enshrined in the Constitution. By looking at the Court's treatment of one fundamental right, we see how the absence of anonymity may create a severe burden on another. The fears entangled with registration could deter gun ownership and undermine the right's strength as a fortress against tyranny.

The conclusions reached in this Essay have at times been tough to stomach.³⁵ It is unpleasant to discover common ground with those who equate proponents of gun control with the perpetrator of the Holocaust. These inflammatory comparisons are unhelpful—they distract from the more temperate support that history provides. For many, though, gun registries are the *least* we can do to prevent crime and avoid senseless bloodshed. The epidemic of gun violence in America could easily tempt us to adopt a cavalier attitude toward the Second Amendment. But the protections embedded in the Constitution and the Court's guidance in analogous First Amendment cases compelled my conclusions. As Justice Scalia proclaimed in *Heller*, “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.”³⁶ Gun registries may well be one such choice that we simply cannot make.

35. I am not the first to feel discomfort after diving into the Second Amendment. Before *Heller*, a wave of liberal law professors began to advocate for a broad reading of the individual right to keep and bear arms. “My conclusion came as something of a surprise to me, and an unwelcome surprise,” reported Professor Tribe. “I have always supported as a matter of policy very comprehensive gun control.” Adam Liptak, *A Liberal Case for Gun Rights Sways Judiciary*, N.Y. TIMES, May 7, 2007, at A18, available at http://www.nytimes.com/2007/05/06/us/06firearms.html?pagewanted=all&_r=1&.

36. *Heller*, 554 U.S. at 636.