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GUNS AND GAY SEX: SOME NOTES ON FIREARMS, THE SECOND AMENDMENT, AND "REASONABLE REGULATION"

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Professor Adam Winkler has published an interesting article on judicial review and the Second Amendment.[1] Winkler's analysis is useful, and his central point is sound. Winkler observes that even if the individual rights "Standard Model" of Second Amendment interpretation[2] is widely adopted by federal courts, most firearms regulations will withstand judicial scrutiny.[3] In fact, the outcome that he predicts is virtually inevitable for political reasons, regardless of constitutional doctrine. Even without factoring in political pressure, Winkler correctly observes that the individual rights interpretation, conscientiously applied, will permit the vast majority of gun control laws to withstand constitutional scrutiny.[4]

Nonetheless, Winkler's analysis of decisions, mostly under state constitutional rights to arms, omits a key line of state cases. These cases date from the nineteenth to the twenty-first century and shed considerable light on how courts might, and perhaps should, interpret an individual right to arms under the federal Constitution's Second Amendment.

In this short Essay, I will describe this line of cases, their influence on the United States Supreme Court's only twentieth century decision on the Second Amendment,[5] and how they affect Winkler's analysis. I will then suggest some approaches that courts may use when applying the individual right to arms. The result is not entirely inconsistent with Winkler's conclusions, but it provides a more nuanced view. I will conclude with a few thoughts regarding the District of Columbia Circuit's recent individual-rights decision in the Second Amendment case of *Parker v. District of Columbia*[6] and the importance of institutional trust in constitutional interpretation.

I. AN INDIVIDUAL RIGHT TO ARMS

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1 Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007).

2 *See generally* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995) (explaining that the Standard Model portrays the Second Amendment as conveying upon the people an individual right to own arms).

3 Winkler, *supra* note 1, at 687.

4 Winkler, *supra* note 1, at 733.

5 United States v. Miller, 307 U.S. 174 (1939).

6 478 F.3d 370 (D.C. Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3083 (U.S. Sept. 4, 2007) (No. 07-290); *see also* Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/2007/07/second_amendmen.html (July 16, 2007, 10:57 EDT) (reporting upon the appeal).

After Winkler's article addresses a wide variety of state right-to-arms cases, it concludes:

> Forty-two states have constitutional provisions guaranteeing an individual right to bear arms and, tellingly, the courts of every state to consider the question apply a deferential "reasonable regulation" standard in arms rights cases. No state's courts apply strict scrutiny or any other type of heightened review to gun laws. Under the standard uniformly applied by the states, any law that is a "reasonable regulation" of the arms right is constitutionally permissible.[7]

This statement, while not exactly inaccurate, is incomplete. One of the best known and most important lines of state right-to-arms cases does not comfortably fit this characterization.[8] What is more, this line of cases influenced the United States Supreme Court's decision in *United States v. Miller*,[9] the Court's only modern Second Amendment decision to date. These cases come from my home state of Tennessee. I have discussed them at greater length elsewhere,[10] but a short summary will suffice for the purposes of this Essay.

The first case is *Aymette v. State*,[11] a right to arms case that actually does not involve guns at all. Aymette was the proud owner of an "Arkansas toothpick," a large and scary knife, which he claimed the right to carry on his person anywhere he chose to go.[12] At the time, the Tennessee constitution provided "[t]hat the free white men of this State have a right to keep and to bear arms for their common defence."[13] According to the court, Mr. Aymette interpreted this provision to give:

> to every man the right to arm himself in any manner he may choose, however unusual or dangerous the weapons he may employ, and, thus armed, to appear wherever he may think proper, without molestation or hindrance, and that any law regulating his social conduct, by restraining the use of any weapon or regulating the manner in which it shall be carried, is beyond the legislative competency to enact, and is void.[14]

The Tennessee Supreme Court disagreed. After a review of English and American history and case law,[15] it held that the purpose of the right to arms was to enable the people to resist government tyranny and "to keep in awe those who are in power."[16] The court found that weapons like the Arkansas toothpick did not promote this

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7. Winkler, *supra* note 1, at 686–87.

8 Andrews v. State, 50 Tenn. 141 (3 Heisk. 165) (1871); Aymette v. State, 21 Tenn. 152 (2 Hum. 154) (1840).

9 307 U.S. at 178 (citing *Aymette*, 21 Tenn. at 156 (2 Hum. at 158)).

10 Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647 (1994).

11 21 Tenn. at 152 (2 Hum. at 154).

12 *Id.* at 152–53 (2 Hum. at 155–56).

13 TENN. CONST. of 1834, art. I, § 26.

14 *Aymette*, 21 Tenn. at 153 (2 Hum. at 156).

15 *Id.* at 154–56 (2 Hum. at 156–58).

16 *Id.* at 156 (2 Hum. at 158).

end.[17] Thus, it held:

> The object, then, for which the right of keeping and bearing arms is secured is the defence of the public. The free white men may keep arms to protect the public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws and the constitution. The words "bear arms," too, have reference to their military use, and were not employed to mean wearing them about the person as part of the dress. As the object for which the right to keep and bear arms is secured is of general and public nature, to be exercised by the people in a body, for their common defence, so the arms the right to keep which is secured are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment. If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights by those in authority. They need not, for such a purpose, the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin. These weapons would be useless in war. They could not be employed advantageously in the common defence of the citizens. The right to keep and bear them is not, therefore, secured by the constitution.
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> . . . .
>
> The Legislature, therefore, have a right to prohibit the wearing or keeping [of] weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defence.[18]

Through this decision in *Aymette*, the Tennessee Supreme Court established: (1) the Tennessee constitution did protect an individual right to arms; (2) that right was intended largely as a protection against tyranny and to effectuate the right of revolution contained elsewhere in the Tennessee constitution; and (3) the arms protected were those of "the ordinary military equipment" and not such weapons as were useful only for crimes and brawling.[19] It also held that the *wearing or carrying* of arms was different from the *keeping and bearing* of arms, with the former being subject to more regulation than the latter.[20]

After the Civil War, the Tennessee constitution was amended to make this point clear. That language remains in the Tennessee constitution today: "[T]he citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime."[21] Conveniently for our purposes, this produced a new case almost immediately.

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17 *Id.* at 159 (2 Hum. at 161).

18. *Id.* at 156–57 (2 Hum. at 158–59).

19 *Id.*

20 *Id.*

21 TENN. CONST. art. I, § 26.

In the 1871 case of *Andrews v. State*,[22] the defendants challenged a Tennessee gun control law as unconstitutional under the Tennessee constitution's right-to-arms clause.[23] Although the language in the Tennessee constitution had changed, the court's interpretation remained consistent.

The defendants in *Andrews* were charged with violating a statute making it illegal "for any person to publicly or privately carry a dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver."[24] In this case, the defendants had a revolver. The *Andrews* court, citing *Aymette*, once again held that the right to keep and bear arms protected such weapons as were part of the ordinary military equipment.[25] The court held that if the defendants' revolver were determined to be the kind ordinarily used by the military, the statute would be unconstitutional as applied to them.[26]

At the same time, the Tennessee Supreme Court rejected the Attorney General's argument that the right to keep and bear arms is a mere "political right" existing for the benefit of the state, and thus, arms are subject to unlimited regulation by the state.[27] The court stated:

> In this we think [the Attorney General] fails to distinguish between the nature of the right to keep, and its necessary incidents, and the right to bear arms for the common defense. Bearing arms for the common defense may well be held to be a political right, or for protection and maintenance of such rights, intended to be guaranteed; but the right to keep them, with all that is implied fairly as an incident to this right, is a private individual right, guaranteed to the citizen, not the soldier.[28]

Yet the court pointed out that the right to keep and bear arms was distinct from the right to carry them:

> It is insisted, however, by the Attorney General, that, if we hold the

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22. 50 Tenn. 141 (3 Heisk. 165) (1871).

23 *Id.* at 143 (3 Heisk. at 167).

24 *Id.* at 146–47 (3 Heisk. at 171) (quoting Act of June 11, 1870, Tenn. Pub. Acts 28).

25 *Andrews*, 50 Tenn. at 153–54 (3 Heisk. at 179–80).

26 *Id.* at 159–60 (3 Heisk. at 186–87). The Tennessee Supreme Court remanded the case to the trial court for "evidence as to what character of weapon is included in the designation 'revolver.'" *Id.*

27 *Id.* at 154–55 (3 Heisk. at 180–81).

28 *Id.* at 156 (3 Heisk. at 182). The court also found certain penumbral aspects to the right to keep and bear arms:

> The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this clause of the Constitution.
>
> But farther than this, it must be held, that the right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace; that in such use, he shall not use them for violation of the rights of others, or the paramount rights of the community of which he makes a part.

Id. at 153 (3 Heisk. at 178–79).

> Legislature has no power to prohibit the wearing of arms absolutely, and hold that the right secured by the Constitution is a private right, and not a public political one, then the citizen may carry them at all times and under all circumstances. This does not follow by any means, as we think.
>
> While the private right to keep and use such weapons as we have indicated as arms, is given as a private right, its exercise is limited by the duties and proprieties of social life, and such arms are to be used in the ordinary mode in which used in the country, and at the usual times and places. Such restrictions are implied upon their use as are thus indicated.
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> . . . .
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> . . . If the citizen is possessed of a horse, under the Constitution it is protected and his right guaranteed, but he could not, by virtue of this guaranteed title, claim that he had the right to take his horse into a church to the disturbance of the people; nor into a public assemblage in the streets of a town or city, if the Legislature chose to prohibit the latter and make it a high misdemeanor.
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> The principle on which all right to regulate the use in public of these articles of property, is, that no man can so use his own as to violate the rights of others, or of the community of which he is a member.
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> So we may say, with reference to such arms, as we have held, he may keep and use in the ordinary mode known to the country, no law can punish him for so doing, while he uses such arms at home or on his own premises; he may do with his own as he will, while doing no wrong to others. Yet, when he carries his property abroad, goes among the people in public assemblages where others are to be affected by his conduct, then he brings himself within the pale of public regulation, and must submit to such restriction on the mode of using or carrying his property as the people through their Legislature, shall see fit to impose for the general good.[29]

Andrews suggests that the carrying of weapons in public is subject to "reasonable regulation," but regulation of the ownership, normal repair, practice with, and transport of weapons, as well as the purchase of ammunition, is subject to a higher degree of scrutiny.[30] The *Andrews* court found that the purpose of arming the citizenry against a potentially tyrannical federal government underlay both the Tennessee constitution's right-to-arms provision and the Second Amendment to the United States Constitution.[31] Regulation must not unreasonably chill this purpose. The court's analysis is generally in accordance with the maxim, popular among nineteenth century courts, of *sic utere tuo ut alienum non laedas* ("you should use what is yours so as not to harm what is others").[32]

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29 *Id.* at 155–56, 158–59 (3 Heisk. at 181–82, 185–86).

30 *Id.* at 153 (3 Heisk. at 178–79).

31 *Id.* at 151–53 (3 Heisk. at 177–78).

32 *See* Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations for a*

Even the reasonable regulation of weapons *carrying* has some limitations:

> It is insisted by the Attorney General, as we understand his argument, that this clause confers power on the Legislature to prohibit absolutely the wearing of all and every kind of arms, under all circumstances. To this we can not give our assent. *The power to regulate, does not fairly mean the power to prohibit; on the contrary, to regulate, necessarily involves the existence of the thing or act to be regulated*. . . .
>
> But the power is given to regulate, with a view to prevent crime. The enactment of the Legislature on this subject, must be guided by, and restrained to this end, and bear some well defined relation to the prevention of crime, or else it is unauthorized by this clause of the Constitution.[33]

In other words, prohibition is not regulation. In addition, regulation based solely on the legislature's (or even a substantial sector of the public's) general dislike of guns and gun owners would not be justified. Regulation must be supported by a "well defined relation to the prevention of crime," not simply by some voting bloc's prejudice.[34]

These are old cases, but they remain good law. Indeed, the language from *Aymette* about "the ordinary military equipment"[35] was quoted by the United States Supreme Court in *United States v. Miller*,[36] which suggests that the Supreme Court found this line of cases to be at least relevant to analysis under the federal Constitution's Second Amendment.

A twenty-first century case in this line, *Stillwell v. Stillwell*,[37] illustrates how courts apply these cases today. This case also sheds further light on the reasonable regulation of firearms and its proper sphere. *Stillwell v. Stillwell*, as the name suggests, involved a divorced couple.[38] The former wife sought and received an order from the family court that barred her ex-husband from carrying a gun, or from having any firearms in the house that were not locked up, when their child was visiting.[39] Many would regard this order as a reasonable regulation.

The Tennessee Court of Appeals, though, found that *both* Tennessee's right to arms and its right to privacy granted the ex-husband a fundamental right to possess

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New Century, 27 HASTINGS CONST. L.Q. 511, 511–12 (2000); ERNST FREUND, THE POLICE POWER 6 (Arno Press 1976) (1904); *see also id.* at 60–61 ("Effective judicial limitations of the police power would be impossible, if the legislature were the sole judge of the necessity of the measures it enacted. . . . The question of reasonableness usually resolves itself into this: [I]s regulation carried to the point where it becomes prohibition, destruction, or confiscation?").

33 *Id.* at 154–55 (3 Heisk. at 180–81) (emphasis added).

34 *Id.* at 155 (3 Heisk. at 181).

35 Aymette v. State, 21 Tenn. 152, 156 (2 Hum. 154, 158) (1840).

36 307 U.S. 174, 178 (1939).

37 No. E2001-00245-COA-R3-CV, 2001 WL 862620, at *1 (Tenn. Ct. App. July 30, 2001).

38 *Id.* at *1.

39 *Id.* at *2.

arms.[40] This is significant given that the right to privacy undoubtedly constitutes a fundamental right under Tennessee law.[41] The court stated:

> We certainly cannot overemphasize the need for extreme caution with firearms at all times, especially when children are or may be present. Nevertheless, absent a showing of risk of substantial harm to the child, we conclude that the portion of the Trial Court's order restricting Father's possession of a firearm in the presence of his child was in error, and vacate that portion of the Trial Court's order. Absent a risk of substantial harm to the child, the wisdom of Father's decision is not for the Trial Court or this Court to determine. The Trial Court made no finding of risk of substantial harm, and neither can we based upon the record before us.[42]

The key point is that "absent a risk of substantial harm to the child," the "wisdom" of a father's decision is "not for the Trial Court or this Court to determine."[43] While this standard may certainly be characterized as a "reasonable regulation" standard, it is hardly deferential to the regulation of firearms.[44]

Further, the *Stillwell* court's linkage of the right of privacy and the right to bear arms[45] is interesting for reasons that go beyond the facts of this case. *Stillwell* suggests that the standards that Tennessee courts have applied to regulation in privacy cases likely also would provide useful standards for courts puzzling over the nature of "reasonable regulation" in the firearms context.

II. THE TENNESSEE PRIVACY CASES AND REASONABLE REGULATION

Although both appear to protect a fundamental right, the Tennessee right to arms and the Tennessee right of privacy differ in one respect: The right to arms has a clear textual basis,[46] while the right of privacy is a judicial construct, based on penumbral reasoning.[47] Tennessee's right of privacy has its roots in several clauses, most notably article I, section 8 of the Tennessee constitution[48]—which does the work of the federal Due Process Clause—and article I, sections 1 and 2. These two sections of Tennessee's Declaration of Rights provide that all governmental power stems from the people and that the people have the right (perhaps even the duty) to rebel against a government that is

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40 *Id.* at *4.

41 *See infra* Part II.

42 *Stillwell*, 2001 WL 862620, at *4.

43 *Id.*

44 And, again, it is consistent with the *sic utere* principle that reasonable regulation requires harm to others. *See supra* note 32 and accompanying text.

45 *Id.* ("[W]e believe the constitutional rights under the Second Amendment of the United States Constitution as well as Article I, Section 26 of the Tennessee Constitution are worthy of the same protection as is the constitutional right to privacy . . . .").

46 TENN. CONST. art. I, § 26.

47 *See generally* Brannon P. Denning & Glenn Harlan Reynolds, Essay, *Comfortably Penumbral*, 77 B.U. L. REV. 1089 (1997) (discussing the concept of penumbral reasoning and its role in constitutional jurisprudence); Glenn Harlan Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333 (1992) (arguing that penumbral reasoning is not a strictly liberal doctrine and frequently has been used by conservative judges).

48 This is often referred to as the "law of the land" clause.

arbitrary and oppressive:[49]

> Sec. 1. All power inherent in the people—Government under their control. That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends they have at all times, an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper.[50]
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> Sec. 2. Doctrine of nonresistance condemned. That government being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.[51]

A series of cases not involving arms have highlighted the absurdity of interpreting the Tennessee constitution as empowering the passage of arbitrary and oppressive laws, given that these provisions establish a right of revolt against arbitrary power and oppression.[52] Both the Tennessee right of privacy and the right to arms are grounded in the right of revolution.[53] It would be a strange constitution indeed that empowered the government to behave in ways that would justify a revolution.[54]

Perhaps the clearest example of this formulation came in *Campbell v. Sundquist*,[55] a case striking down Tennessee's law against homosexual sodomy as a violation of the Tennessee privacy right.[56] Essentially, the state contended that the sodomy statute constituted a reasonable regulation of sexual behavior:

> First, the [Homosexual Practices] Act discourages activities which cannot lead to procreation. Second, the Act discourages citizens from choosing a

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[49] This right is rather explicit, but in case there are any doubts, the Tennessee Supreme Court has made clear that it interprets the Declaration of Rights this way. *See* Davis v. Davis, 842 S.W.2d 588, 599 (Tenn. 1992) ("Indeed, the notion of individual liberty is so deeply embedded in the Tennessee Constitution that it, alone among American constitutions, gives the people, in the face of governmental oppression and interference with liberty, the right to resist that oppression even to the extent of overthrowing the government."); *see also* Otis H. Stephens, Jr., *The Tennessee Constitution and the Dynamics of American Federalism*, 61 TENN. L. REV. 707, 710 (1994) (stating that these provisions "clearly assert the right of revolution"); *cf.* Cravens v. State, 256 S.W. 431, 432 (Tenn. 1923) (emphasizing the importance of retaining a spirit of resistance against despotism).

[50] TENN. CONST. art. I, § 1.

[51] TENN. CONST. art. I, § 2.

[52] *See, e.g., Davis*, 842 S.W.2d at 599; *see also, e.g.*, Stillwell v. Stillwell, No. E2001-00245-COA-R3-CV, 2001 WL 862620, at *4 (Tenn. Ct. App. July 30, 2001).

[53] *Compare Davis*, 842 S.W.2d at 599 ("in the face of governmental oppression and interference with liberty, [the Tennessee constitution gives] the right to resist that oppression even to the extent of overthrowing the government"), *with* Aymette v. State, 21 Tenn. 152, 156 (2 Hum. 154, 158) (1840) ("The free white men may keep arms to protect the public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws and the constitution.").

[54] While this notion may seem odd today, it seemed less so during the first century of the nation's existence. *See* Reynolds & Kopel, *supra* note 32.

[55] 926 S.W.2d 250 (Tenn. Ct. App. 1996).

[56] *Id.* at 266. This case was decided before the U.S. Supreme Court held in *Lawrence v. Texas*, 539 U.S. 558 (2003), that sodomy laws are unconstitutional.

> lifestyle which is socially stigmatized and leads to higher rates of suicide, depression, and drug and alcohol abuse. Third, the Act discourages homosexual relationships which are "short lived," shallow, and initiated for the purpose of sexual gratification. Fourth, the Act prevents the spread of infectious disease, and fifth, the Act promotes the moral values of Tennesseans.[57]

The court found these justifications for the regulation unpersuasive, suggesting that they not only failed to constitute the kind of compelling interest needed to satisfy strict scrutiny, but they in fact failed even to satisfy the more relaxed rational basis test.[58] Absent a showing of any substantial risk of harm to others, the court concluded that mere public disapproval of homosexual activities, culture, or lifestyle could not justify the ban:

> It may be asked whether a majority, believing its own happiness will be enhanced by another's conformity, may not enforce its moral code upon all. . . .[59]

> The threshold question in determining whether the statute in question is a valid exercise of the police power is to decide whether it benefits the public generally. The state clearly has a proper role to perform in protecting the public from inadvertent offensive displays of sexual behavior, in preventing people from being forced against their will to submit to sexual contact, in protecting minors from being sexually used by adults, and in eliminating cruelty to animals. To assure these protections, a broad range of criminal statutes constitute valid police power exercises, including proscriptions of indecent exposure, open lewdness, rape, involuntary deviate sexual intercourse, indecent assault, statutory rape, corruption of minors, and cruelty to animals. The statute in question serves none of the foregoing purposes and it is nugatory to suggest that it promotes a state interest in the institution of marriage.[60]

As in *Stillwell,* the absence of a substantial, as opposed to a theoretical, risk of harm to others seems to have been the key failing in the statute.[61] This same reasoning could apply to gun control laws. Winkler seems to think that almost any gun control law could be characterized as preventing harm,[62] but upon closer inspection, this is not so clear.

III. RETHINKING WINKLER'S "REASONABLE REGULATION"

The cases above, both gun-related and otherwise, have a common thread: a sort of

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57 *Campbell*, 926 S.W.2d at 262.

58 *See id.* at 262–65.

59 *Id.* at 265 (quoting Commonwealth v. Wasson, 842 S.W.2d 487, 502–03 (Ky. 1992) (Combs, J., concurring)).

60 *Id.* at 265 (quoting Commonwealth v. Bonadio, 415 A.2d 47, 49–50 (Pa. 1980)).

61 *Id.* at 263; *see* Stillwell v. Stillwell, No. E2001-00245-COA-R3-CV, 2001 WL 862620, at *4 (Tenn. Ct. App. July 30, 2001).

62 "[G]un laws are generally motivated by legitimate public safety concerns rather than invidious purposes . . . ." Winkler, *supra* note 1, at 727.

cost-benefit analysis where courts presume the benefits of the rights, while they look skeptically upon the purported costs that provide the underlying justification for regulation. The mere presence of guns in *Stillwell* was not evidence of enough risk to outweigh the right to bear arms and to raise children without state interference.[63] Likewise, in *Campbell*, claims that homosexual sodomy posed a risk of AIDS and other infectious disease received no particular deference:

> We agree that the State certainly has a compelling interest in preventing the spread of infectious disease among its citizens, however, the Homosexual Practices Act is not narrowly tailored to advance this interest. The statute prohibits all sexual contact between people of the same gender even if the people involved are disease free, practicing "safe sex," or engaging in sexual contact which does not contribute to the spread of disease.[64]

Factoring these important cases into Winkler's analysis, "reasonable regulation" analysis must protect against the tendency of legislatures to seek *un*reasonable regulation for reasons of political prejudice or irrational fear.[65] Courts must distinguish between the reasonable and the unreasonable, as the Tennessee courts have done.[66]

The divergence between the holdings in the cases discussed in this Essay and those discussed by Winkler illustrates the comments of Judge Alex Kozinski in *Silveira v. Lockyer*: "Judges know very well how to read the Constitution broadly when they are sympathetic to the right being asserted."[67] One might add that judges are demonstrably less willing to read the Constitution broadly when they are unsympathetic to the right being suppressed, which might include interpretation of the right to arms. While this brief Essay cannot conclusively settle the issue, below are some thoughts on how a "reasonable regulation" approach might work in the context of more thorough Second Amendment analysis.

First, "reasonable regulation" often can be used to cover the true intentions of regulators who actually intend to extinguish or seriously undermine the right at issue. Courts are rightly suspicious of such possibilities in the context of other rights, such as free speech, abortion, sodomy, birth control, or the dormant commerce clause. To ensure that hostile authorities cannot bypass constitutional protections merely by asserting a public safety justification, the courts have employed various presumptions, tests, and

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63 *Stillwell*, 2001 WL 862620, at *4.

64 *Campbell*, 926 S.W.2d at 263.

65 As this analysis suggests, Robert Bork's notorious "equal gratifications" argument is insufficient to support regulation of contraceptive use absent some tangible harm. *See generally* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (discussing his theory in detail). Tennessee courts, at least, do not see Bork's argument as having more force where firearms are concerned. *See also* Glenn Harlan Reynolds, *Sex, Lies and Jurisprudence: Robert Bork,* Griswold*, and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045, 1069–70 (1990) (discussing Bork and regulations based on aesthetics or morality rather than tangible harm).

66 *See* Andrews v. State, 50 Tenn. 141 (3 Heisk. 165) (1871); Aymette v. State, 21 Tenn. 152 (2 Hum. 154) (1840); *Stillwell*, 2001 WL 862620, at *1.

67 Silveira v. Lockyer, 328 F.3d 567, 568 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc).

simple judicial skepticism. Judicial review of laws and regulations governing the right to keep and bear arms should invoke the same degree of skepticism, rather than allowing judges to credulously accept that any law regulating guns is inherently a law intended to promote "public safety." Other rights—such as free speech, the right against self-incrimination, or the right to privacy, to name a few—have costs as well as benefits. Likewise, the right to arms may have costs, in terms of limiting how far some "public safety" regulations can go, along with its benefits. As seen in the Tennessee cases described above, courts must second-guess safety justifications where such second-guessing is necessary to protect a textually secured right.[68]

Second, if properly interpreted, the right to arms is less individualistic than some other rights. It is not less individualistic in the sense of the individual versus the collective, but rather, it is less individualistic in the sense that it is more instrumental than expressive. At both the federal and state levels, the right to arms stems from concerns about self defense and the defense of public liberty.[69] Thus, while regulations of speech that turn on questions of style and aesthetics may still violate the First Amendment's free speech guarantee, which in modern conception is about individual expression, the Second Amendment's right to arms is about capabilities more than expression. For example, a ban on characteristics of guns that make them look "too military" without impairing their actual function might not violate the Second Amendment, but similar limitations on expressive characteristics in the area of film or television might violate the First Amendment.

Finally, judicial latitude may prove costly if over-exercised. The public is aware of the truism, noted above, that was articulated by Judge Kozinski when he stated that judges are more likely to read the Constitution broadly when they agree with the ultimate conclusion.[70] Americans rightly expect their courts to treat constitutional rights with a degree of respect. Since the Second Amendment has a clear textual basis and a broad base of popular support, cavalier treatment of this right would likely prove costly to the public image of the judicial system as a whole. Though the term "reasonable regulation" might be stretched to encompass a wide array of intrusive limitations on that right, this stretching should not exceed limits that might be thought reasonable by the public, even if those limits do not command the sympathies of judges and politicians.

When comparing the holdings in cases where judges are sympathetic to the right in question to the holdings in cases where they are not, the inequality becomes apparent. Courts will face difficulty in justifying a more sympathetic treatment of rights that lack textual support in the Constitution than of the right to arms, which is specifically enumerated in the Bill of Rights. Professor Mike O'Shea makes that point with regard to the case of *Parker v. District of Columbia*:[71]

It's not often that the Supreme Court takes up the core meaning of an

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[68] *See Andrews*, 50 Tenn. at 158–59 (3 Heisk. at 185–86); *Stillwell*, 2001 WL 862620, at *4.

[69] Indeed, as Don Kates has demonstrated, the Framers saw these two functions as one and the same. Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87, 92 (1992).

[70] *Silveira*, 328 F.3d at 568 (Kozinski, J., dissenting from denial of rehearing en banc).

[71] 478 F.3d 370 (D.C. Cir. 2007).

> entire Amendment of the Bill of Rights, in a context where it writes on a mostly clean slate from the standpoint of prior holdings. If the Court takes the case, then October Term 2007 becomes The Second Amendment Term. *Parker* would swiftly overshadow, for example, the Court's important recent cert grant in the Guantanamo cases.
>
> How many Americans would view *District of Columbia v. Parker* as the most important court case of the last thirty years? The answer must run into seven figures. The decision would have far-reaching effects, particularly in the event of a reversal.
>
> . . . .
>
> . . . [T]here is a way more straightforward comparison that a whole lot of average Americans would be making. That's a comparison between the Court's handling of the *enumerated* rights claim at issue in *Parker*, and its demonstrated willingness to embrace even *non*-enumerated individual rights that are congenial to the political left, in cases like *Roe* and *Lawrence*. "So the Constitution says *Roe,* but it doesn't say I have the right to keep a gun to defend my home, huh?"[72]

This difficulty is troubling and potentially politically explosive. The faith of the public is especially important to the federal judiciary because it is a branch of government that possesses neither the sword nor the purse. If federal courts are to retain this faith, the public must see them as faithfully obeying the commands of the Constitution. Though the public generally pays limited attention to most legal issues, Professor O'Shea is correct that cases like *Parker* will receive considerably more scrutiny.[73] Once the courts fall under the public eye, the way they handle the reasonableness portion of "reasonable regulation" will be particularly important.

We should expect courts to treat the regulation of gun ownership with the same skepticism previously applied to the regulation of gay sex[74] and communist propaganda.[75] In some sense, this proposition may seem unnerving to both gun rights supporters and opponents. Still, if Judge Kozinski's comment is not to become an epitaph for the legitimacy of judicial review, such an expectation is necessary.

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[72] Posting of Mike O'Shea to Concurring Opinions, http://www.concurringopinions.com/archives/2007/07/the_second_amen_1.html (July 16, 2007, 19:10 EDT).

[73] *Id.*

[74] *See, e.g.*, Campbell v. Sundquist, 926 S.W.2d 250, 263 (Tenn. Ct. App. 1996); *see also, e.g.*, Lawrence v. Texas, 539 U.S. 558, 577–78 (2003).

[75] *See* Lamont v. Postmaster General, 381 U.S. 301, 308–09 (1965) (Brennan, J., concurring); *see also id.* at 305–07 (majority opinion).