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BITING THE BULLET: TWO PROPOSALS TO STEM THE TIDE OF GUN VIOLENCE

Firearms have accounted for a disturbingly high rate of violent crime, injury, and death in the United States. Nearly two-thirds of all murders in recent years have been committed with firearms. In addition, experts attribute approximately 16,000 suicides and 2,000 accidental deaths per year to firearms. While these facts alone might be sufficient to convince public officials to act, too often the resulting debates over gun control proposals elicit more heated controversy than enlightened solutions. Even those states and municipalities that have enacted some form of gun control legislation have witnessed few positive results from their labors.

The reasons for this futility are widely debated. Some commentators note that localities have little chance of stopping the proliferation of firearms when neighboring and distant localities

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3 See Boser, supra note 1, at 316 (citing The Gun Control Debate, Introduction, at 12). In all, in Senator Moynihan's estimate, firearms cause nearly 175,000 casualties each year. 139 CONG. REC. S612 (daily ed. Jan. 21, 1993) (statement of Sen. Moynihan) [hereinafter Moynihan]. But see Paul Cotton, Gun Associated Violence Viewed Increasingly as Public Health Challenge, 26 JAMA 1171, 1172 (1992) (estimating 70,000 people hospitalized during 1988 as result of gun-related injuries); Scott D. Dillard, The Role of Ammunition in a Balanced Program of Gun Control: A Critique of the Moynihan Bullet Bills, J. LEGIS. 19, 20 (1994). With regard to total gun-related deaths, Dillard notes that "[m]ore than 60,000 Americans lost their lives to guns during the past two years alone—more than the number of casualties sustained by American forces during the Vietnam War." Id.
4 See Andrew J. McClurg, The Rhetoric of Gun Control, 42 AM. U. L. REV. 53, 63 (1992) (characterizing gun control debate as "unproductive"). The author argues: "The rules of intellectually honest debate are ignored" when the issue is gun control. Id. Further, the author blames both gun control advocates and opponents alike for the lack of informed debate on the issue. Id.
5 See Craig Wolff, In New York, the Brazenness of Illegal Gun Dealers Grows, N.Y. TIMES, Nov. 6, 1990, at B1 (noting New York City, with its stringent gun control laws, has one of highest rates of firearms-related violence).
6 See infra notes 7-9 (describing shortcomings of gun control measures).
have lax regulatory laws. Others blame the federal government's failure to enact comprehensive national gun control legislation. Regardless of the cause, it seems that no amount of gun control legislation has worked, or will work in the foreseeable future, due to the high volume of guns already in circulation, and their extreme durability. As a result, it seems that measures aimed at firearms themselves can have only a cumulative, longterm impact. Proposals affecting ammunition, however, may have a much greater immediate impact, since bullets are not reusable and only a short term supply currently exists.

To that end, United States Senator Daniel Patrick Moynihan has sought to radically alter the terms of debate on one of the major issues of the day. Senator Moynihan has consistently sought to inject new, unconventional perspectives into public policy matters. Moynihan is known for such innovative proposals as the "negative income tax," welfare reform, and Social Security re-

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7 Boser, supra note 1, at 313. The author states: "Of the 8500 handguns police recovered in [Washington, D.C.] between January 1988 and December 1990, seventy percent came from neighboring Maryland and Virginia." Id. (citing Rene Sanchez & Barry Silent, House Skeptical Over D.C. Gun-Liability Bill, WASH. POST, Dec. 13, 1990, at C1); see also GERALD D. ROBIN, VIoLENT CRrME AND GUN CONTROL 22-23 (1991). Robin attributes New York City's firearm crime rate to "leakage" from Southern states. Id. Robin also noted that studies have found, in tracing a sample of handguns, that only 5% were originally purchased in New York and 25% came from South Carolina alone. Id. The problem of "leakage" is not unique to New York. Id. Other states with tough gun control laws, such as Massachusetts and Michigan, have experienced similar difficulties. Id. at 21.

8 See Dailard, supra note 3, at 19. The author, after describing the harm caused by firearms, notes "although these statistics should kindle outrage in a stone, they have failed to rescue the issue of firearm violence from legislative inertia. Congress has not intervened with comprehensive gun control legislation for over 25 years." Id. at 21.

9 See Dailard, supra note 3, at 21. "Weapon-based strategies which seek to remove certain problematic firearms from the marketplace are . . . futile given the vast inventory of arms already currently deployed in the society at large. . . ." Id. "There are some 200 million firearms in circulation. The pistol is a simple machine, and with minimal care it remains working for centuries." Moynihan, supra note 3, at S613. It is estimated that, by the year 2000, there will be 100 million handguns in the United States. Windle Turley, Manufacturers' & Suppliers' Liability to Handgun Victims, 10 N. Ky. L. REV. 41, 41 (1982).

10 See Moynihan, supra note 3, at S613 (regarding bullet supply).

11 See Michael Barone & Grant Ujifusa, ALMANAC OF AMERICAN POLITICS 1992, at 836 (1991). Moynihan, a Democrat from New York, was first elected in 1976. Id.

12 See infra notes 13-15 (describing Moynihan's positions on other major issues).

13 See DANIEL P. MOYNIHAN, THE POLITICS OF A GUARANTEED INCOME 124 (1973) (hereinafter GUARANTEED INCOME). As an ideological alternative to the welfare programs of the time, the "negative income tax" was a measure touted by conservatives. Id. at 50. It was intended to replace many (if not all) of the federal bureaucratic regulations involved in the receipt of welfare benefits and sought to provide a guaranteed minimum income for all needy American families. See M. Kenneth Bowler, The Nixon Guaranteed Income Proposal: Substance and Process in Policy Change 2-3 (1974). Moynihan was considered one of "the welfare experts" in the country, id. at 62, and favored a system for providing cash benefits to the poor. Id. at 49. The Nixon Administration's proposal, known as the
form. His latest proposal concerns one of today's most contentious issues—gun control.

While advocates from both conventional perspectives, particularly those who favor or oppose limits on firearms, have focused on controls on the firearms themselves, Senator Moynihan has proposed regulating the most deadly part of the firearm—the ammunition. In statements on the Senate floor, Senator Moynihan

Family Assistance Plan, also included a related initiative, called the Supplemental Security Income ("SSI") program. Id. at 1. Ultimately, the Family Assistance Plan was defeated in the United States Senate, though the SSI was enacted. Id. at 147.

See Guaranteed Income, supra note 13, at 543. In 1988, Moynihan argued that there had been no serious attempt on the part of the nation's political leaders to address what he considered "a crisis in welfare." Id.; see also Daniel P. Moynihan, The Crisis in Welfare, The Public Interest 4 (1968). Moynihan stressed the need for "a thorough reassessment of public welfare," proposing instead a guaranteed annual income to replace the public assistance programs of the time, including Aid to Families with Dependent Children ("AFDC"). Id.


See infra notes 23-27 (describing Moynihan's proposal).

See Joyce Lee Malcolm, That Every Man Be Armed: The Evolution of a Constitutional Right by Stephen P. Halbrook, 54 Geo. Wash. L. Rev. 452, 454 (1986) (book review) (recognizing that "collection of armed individuals or an entire armed population pose a clear threat to a ruler ... a threat more potent ... than any posed by the freedom of speech, assembly, or the press"). But see Paul Weiss, Why Do They Shoot, N.Y. Times, Sept. 11, 1994, § 6 (Magazine), at 86 (quoting Tanya K. Metaksa, Executive Director of National Rifle Association's Institute for Legislative Action). "The person who wants to get a gun ... is going to get [it] one way or another ... so if you make [firearms] illegal, he'll figure out another way." Weiss, supra, at 86. The NRA argues that guns are an established right under the Second Amendment to the Constitution and that the government has failed to go after the real problem — criminals. Id. at 66. Such conventional perspectives generally confront bans on assault weapons. See Robert Dowlut, Federal and State Constitutional Guarantees to Arms, 15 U. Dayton L. Rev. 59, 77-79 (1989). "Legislation banning or severely restricting the possession and sale of semiautomatic firearms is unconstitutional." Id. at 78. The author argues that semiautomatic legislation is appealing to many because it uses the "misnomers 'assault weapon' or 'assault rifle.'" Id. He proposes that a clear distinction should be made between assault rifles, which are fully automatic, and semiautomatic weapons. Id. The failure to do so, according to Dowlut, creates a debate where "misinformation ... can only lead to bad policy." Id. Other debates on gun bans have focused upon "Saturday Night Specials." See Hattie Ruttenberg, The Limited Promise of Public Health Methodologies to Prevent Youth Violence, 103 Yale L.J. 1885, 1905 (1994) (arguing that if such guns, which cost approximately forty dollars, were generally less available, children would have less access to them or more expensive guns, due to their lower income). Still others argue for limitations on the ability to obtain most weapons, such as those imposed by the Brady Handgun Violence Prevention Act, which mandates a five to seven day waiting period for all purchases of firearms. See 18 U.S.C. § 922(s) (1) (1993).

See, e.g., United States v. Miller, 307 U.S. 174, 178 (1939) (deciding that purpose of amendment, to assure effectiveness of militia, must be considered); Stevens v. United States, 440 F.2d 144, 149 (6th Cir. 1971) (holding Second Amendment applies only to militia, not to individual right to bear arms); State v. Owenby, 826 P.2d 51, 52-53 (Or. 1992) (finding that right to bear arms is not absolute; state legislature may limit firearms within auspices of its police power).

has noted that the nation has a 200-year supply of firearms, but that with current inventories, gun owners have only a four-year supply of ammunition.

The Moynihan proposal seeks to tax specific deadly forms of ammunition at a rate that would make them prohibitively expensive. Since a firearm without ammunition is nearly useless as a weapon, the tax proposal would effectively disarm persons who would otherwise possess these particularly heinous bullets.

This Note will address two unique proposals intended to reduce gun violence. Echoing the concerns of Senator Moynihan, these proposals will focus on the regulation of ammunition. With ballistic “improvements” of new ammunition outpacing society’s ability to pay for consequential damage inflicted by these bullets, it is clear that something must be done to properly apportion the burdens ammunition places on society.

Part One will address the Moynihan proposal which would impose, inter alia, a 10,000 percent tax rate on certain forms of ammunition. This Part will include an historical overview of the federal government’s attempts to tax items out of existence, the

20 139 Cong. Rec. S16,931-01, S16,932 (daily ed. Nov. 3, 1993) (statement of Sen. Moynihan). Implicitly, any curb on the production of weapons likely would prove fruitless as a short-term solution to the supply of guns on the street, since a properly maintained firearm will outlive its owner and perhaps much longer. Id. Moynihan argues that “the life of a handgun seems to be measured in decades, generations, even centuries.” Id. So, too, a ban on the possession of weapons may have a limited impact, since searching out and seizing concealable (and even nonconcealable) weapons would stretch law enforcement capabilities to the breaking point and prove nearly impossible. Id. Moynihan then distinguished between guns and ammunition. Ammunition is easier to regulate because there are few manufacturers and a shorter supply whereas there are 200 million guns in the United States. Id. at S16,932.


22 Id. Moynihan noted that ammunition is consumed at a rate of two billion rounds per year. Id. Therefore, assuming no further production, and no change in the rate of usage, the current supply would be depleted within approximately four years. Id.


24 See Tax & Tax & Tax: Make Killer Ammo Impossible to Buy, Star Tribune (Minneapolis-St. Paul), Nov. 8, 1993, at 10A. Moynihan proposes taxes on ammunition that would range from eleven to fifty percent, except on killer bullets such as the 9mm Black Talon, which would have a 10,000% tax raising the price per box to as much as $150,000. Id.

25 See 139 Cong. Rec. S16,931-01 (daily ed. Nov. 3, 1993) (statement by Sen. Moynihan). Although an unloaded gun may still impel a victim’s compliance to a criminal’s act, it can only harm a potential victim to the extent that it can be used as a blunt object. See Dailard, supra note 3, at 24. “Gun owners will surely realize, as the Senator [Moynihan] does, that their weapons are only useful so long as they are loaded.” Id.
judiciary's reaction to such attempts, and the potential Fifth Amendment takings ramifications of such excessive taxes.

Part Two will explore the possible expansion of strict liability in tort to manufacturers and sellers of particular forms of ammunition. It will discuss the variety of ways the federal and state courts, as well as the federal and state governments, may impose strict liability upon the manufacturers and sellers of ammunition. This Note will conclude that by expanding the areas of strict liability in tort, combined with the enacting of restrictive tax measures, public officials can successfully address the need for gun control and the desire to make the innocent victims of gun-related crime whole.

I. THE MOYNIHAN PROPOSAL

Senator Moynihan's proposal, entitled the "Real Cost of Handgun Ammunition Act" (the "Handgun Ammunition Act"),\textsuperscript{26} seeks to raise the manufacturers' tax, with limited exceptions, on the sale of all handgun ammunition from the current rate of eleven percent to fifty percent.\textsuperscript{27} In addition, for certain forms of ammunition designed for greater destructive capability, the tax rate would be amended from eleven percent to 10,000 percent.\textsuperscript{28} The stated purposes of the Handgun Ammunition Act are: 1) to increase revenues earmarked for the funding of a health care plan;\textsuperscript{29} 2) to redistribute the cost of health care for gunshot wounds to the

\textsuperscript{26} S. 1616, 103d Cong., 1st Sess. (1993). Moynihan also proposed companion legislation that would ban the same ammunition this bill seeks to tax. 139 Cong. Rec. S19,5612-02 (daily ed. Jan. 21, 1993).

\textsuperscript{27} 139 Cong. Rec. S14,958-102 (daily ed. Nov. 3, 1993). The most frequently used ammunition for target shooting and sporting competitions is the .22 caliber rimfire, which would be exempt from the tax increase. \textit{Id.} In addition, the proposed Act makes no attempt to alter the tax rate on rifle ammunition. \textit{Id.} Nor does it apply to ammunition purchased for police or military purposes. \textit{Id.} at S14,959. The current manufacturer tax was first enacted in 1918 and has withstood judicial inquiry. \textit{Id.} at S14,958.

\textsuperscript{28} \textit{Id.} The particular bullets at issue in the Moynihan proposal are the 9mm Talon and the .50 caliber Desert Eagle. \textit{Id.} The Talon is a recently designed bullet, developed to expand \textit{d} to expose razor-sharp reinforced jacket petals. These cut tissue in the wake of the penetrating core. Toward the end of the bullet travel, the Talon bullet typically turns sideways. From this point on, it penetrates soft tissue like a throwing star—very nasty; very effective; a real improvement in handgun ammo. \textit{Id.} at S14,958-S14,959 (citation omitted) (quoting \textit{Handguns for Sport \\& Defense Magazine}, Nov. 1993.

\textsuperscript{29} \textit{See} Moynihan Proposal, supra note 23, at S14,958. At the time, Moynihan expected to produce revenues for the Universal Health Care Plan submitted by President Bill Clinton. \textit{Id.} As to which of the many proposals in Congress, if any, that will be enacted and funded by this or any other tax scheme, it is far too early to determine. \textit{See} Adam Clymer, \textit{Moynihan Asks Big Tax Increase on Ammunition, N.Y. Times}, Nov. 4, 1993, at A1.
industry and the taxpayers “responsible” for such wounds, 30 and 3) to effectively prohibit the manufacture and sale of certain types of ammunition to the general public. 31 Finally, the proposal would also raise the fees for licensing of handgun ammunition manufacturers and importers from $10 per year to $10,000 per year. 32

The proposal drew a terse response when it was presented in a Senate Finance Committee hearing to Treasury Secretary Lloyd Bentsen. 33 The National Rifle Association was far less reserved in

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31 See Clymer, supra note 29, at A1. Moynihan also sponsored a bill that banned armor piercing ammunition in 1988. 18 U.S.C. § 922(a)(7) (1993); Moynihan Proposal, supra note 23, at $14,959. The three goals of the legislation would seem, at least in relation to the 10,000% tax scheme, in conflict. Id. Presumably, a de facto ban on some forms of ammunition would tender little, if any, revenues for health care, or any other program for that matter. See Smothers, supra note 30, at 22. This does not mean, however, that the 50% tax would not increase revenues substantially. A 50% tax, without a dramatic drop in consumption, would provide much, in the way of new revenue. See Clymer, supra note 29 at A1 (quoting Treasury Secretary Lloyd Bentsen). In all, Senator Moynihan estimates that his proposal would generate about $200 million per year for the health program. New Tune in Health Plan Debate: Raise the Funds and Tax the Ammunition, Star Tribune (Minneapolis-St. Paul), Nov. 4, 1993, at 7A. However, Senator Moynihan also noted: “I’m not sure that I really care” how much money the tax raises, as long as it helps get weapons off the streets. Id.

32 See Moynihan Proposal, supra note 23, at $14,959. The license requirement was established in 1938 and the annual fee (or “occupational tax”) imposed at that time was $10. Id. This tax has never been increased. Id. A similar “occupational tax” of $10,000 has been imposed on the manufacturers and importers of machine guns, sawed-off shotguns, and similar weapons. Id. Neither the current tax mentioned above nor the proposed tax would apply to manufacturers who deal exclusively with police departments, the military, and other government entities. Id.

33 See Clymer, supra note 29, at A1. The proposal was presented to Treasury Secretary Bentsen on Nov. 3, 1993 during Finance Committee hearings on the President’s Health Care Plan. Id. Bentsen unenthusiastically responded: “Obviously that is a source of revenue that could be examined, and we will consider it.” Id. at B20. By all accounts, the Clinton Administration was reluctant to antagonize yet another interest group in its efforts to enact a comprehensive health care plan. See id. at A1. Historically, gun and ammunition control measures have been met with staunch and usually effective opposition from the National Rifle Association and other pro-gun groups. See Moynihan Proposal, supra note 23, at $14,959. Coupled with the multimillion dollar lobbying effort employed by groups opposing elements of the Clinton health plan, the Administration did not wish to seek out another target. See generally Clinton Rejects Linking Bullet Tax, Health Reform, Phila. Inquirer, Nov. 11, 1993, at A16 (describing President Clinton’s concern that revenues from such tax would be limited); Adam Clymer, National Health Program, President’s Greatest Goal, Declared Dead in Congress, N.Y. Times, Sept. 27, 1994, at A1 (discussing, in series of articles, wide scope of interests involved in formulating national health care plan).
their reply, calling the proposal “laughable.” Nevertheless, when such a proposal is made by the Chairman of the Senate Finance Committee, it warrants attention.

A. Excessive Taxation

As Chief Justice John Marshall noted in the landmark case of *McCulloch v. Maryland*, “the power to tax involves...the power to destroy.” Nevertheless, the congressional power to tax, as described in the Constitution, contains few limitations. Perhaps wary of Marshall’s concerns, Congress exercised its taxing power infrequently through the 1880’s. Indeed, when Congress first sought to institute an income tax in 1894, the Supreme Court held that the act violated the Apportionment Clause of the Constitution. Until 1937, however, Congress frequently sought to regu-
late certain economic activities through its taxing power when the activity otherwise fit within the commerce power.  

1. Historical View of Taxing Power

One of the clearest examples of the Supreme Court’s interpretation of the congressional taxing power was in McCray v. United States, which also serves to illustrate Congress’s propensity for regulatory taxes. In McCray, Congress imposed a high tax on all licensed retailers of artificially colored oleomargarine, effectively rendering the retail sale of the product too expensive to compete with natural butter. The plaintiff in the case, a licensed retail dealer of yellow oleomargarine, also objected to the fact that Congress could tax such items "without regard to any census or enumeration." See generally Posin, supra note 41, at 36-37.

See generally Hammer v. Dagenhart, 247 U.S. 251 (1918), overruled by United States v. Darby, 312 U.S. 100, 117 (1941). Congressional authorization for economic regulations under the Commerce Clause of the Constitution, U.S. Const., art. I, § 8, cl. 3, had been undermined by numerous Supreme Court rulings throughout the early part of the Twentieth Century. See Posin, supra note 41, at 1-8 (explaining cases holding that direct taxes were unconstitutional if not apportioned). But see Darby, 312 U.S. at 118-19. The power of Congress under the Commerce Clause was not confined to regulation among the states. Id. The Court stated that this power extended to intrastate activities that affect interstate commerce, making regulation the appropriate means to a legitimate end. Id. at 115.

195 U.S. 27 (1904). For an early decision laying out the Congressional power to tax, see Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 540 (1869) (holding that Congress had power to tax state bank notes, even if act "taxed oppressively"). The Court stated that while Congress might be inclined to "tax oppressively," it is responsible to the people, and not the courts, for such actions. Id. at 548. This judicial philosophy pervades nearly all of the tax litigation that has appeared before the Court. See infra notes 45-52, 56-59. But see infra note 54.

The Court did, however, state that Congress’s power to tax would be abused "if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution." 75 U.S. (8 Wall.) at 541. The Moynihan proposal arguably could be attacked as inconsistent with the limitations placed on the government under the Second Amendment. See Dowlin, supra note 17, at 59. As this Note does not seek to entertain an all-encompassing discussion of the Court’s interpretation of the Second Amendment, this Note will only comment on this perspective by noting that the Court has previously upheld other federal, as well as state, limitations of an individual’s right to obtain and possess guns. See United States v. Miller, 307 U.S. 174, 178 (1939).

See R. Alton Lee, A HISTORY OF REGULATORY TAXATION 215 (1973). The author notes that the imposition of taxes for the purposes of regulating or abolishing products or activities was part of a "tremendous increase in national governmental powers." Id. "By the latter part of the nineteenth century the power to tax had been established and used in a broad manner to raise revenue, to assist in carrying out other powers, and regulate activities or commodities." Id. at 8.

McCray, 195 U.S. at 29. According to the Court record, only butter made in the spring has a naturally deep yellow color. Id. Even natural butter produced at other times of the year is pale in its coloration. Id. As a result of consumer demand, all natural butter produced was supplemented eventually with a coloring ingredient to mirror the natural color of spring butter. Id. This coloration did not change the taste of the product, nor was it injurious to the consumers' health. Id.
gress "arbitrarily" chose to impose a far lower tax on noncolored oleomargarine while colored natural butter was not taxed at all.\textsuperscript{47} The Supreme Court, in upholding the constitutionality of the tax, stated that statutes, which on their face impose excise taxes, are so obviously within congressional power "as to require only [their] statement."\textsuperscript{48} Operating on the assumption that the primary objective of the statute was to raise revenue, the Court held that when Congress exercises its power within the limits of the Constitution,\textsuperscript{49} it is not for the Court to determine whether the act is unwise or injurious.\textsuperscript{50} In addition, the Court expressed its reluctance to examine a "wrongful purpose or motive" on the part of Congress in implementing the taxing power.\textsuperscript{51} The Court, however, did leave open the possibility of critically examining future tax schemes.\textsuperscript{52}

While the Court scrutinized federal and state economic regulations during the early twentieth century,\textsuperscript{53} particularly those in

\textsuperscript{47}Id. at 28-29. Neither type of natural butter was taxed. \textit{Id.} However, noncolored oleomargarine, that did not resemble butter, was taxed at a low rate of 1/4 of a cent per pound and artificially colored oleomargarine, which served as a butter substitute, was taxed at a rate of ten cents per pound. \textit{Id.}

\textsuperscript{48}Id. at 50 (citing Patton v. Brady, 184 U.S. 608, 619 (1902); Knowlton v. Moore, 178 U.S. 41, 92 (1900); Nicol v. Ames, 173 U.S. 509, 515 (1899); In re Kollock, 165 U.S. 526, 536 (1897)).

\textsuperscript{49}McCray v. United States, 195 U.S. 27, 54-56 (1904); \textit{see also} U.S. CONST. art. I, § 8, cl. 1; U.S. CONST. art. I, § 9, cl. 4 (discussing limitations on power to tax).

\textsuperscript{50}McCray v. United States, 195 U.S. 27, 54-56 (1904) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824)). "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse . . . ." 195 U.S. at 56.

\textsuperscript{51}McCray, 195 U.S. at 56. The Court stated that the judiciary may not interfere with the lawful exercise of power on the assumption that there is a wrongful underlying motive. \textit{Id.} Quoting from Spencer v. Merchant, 126 U.S. 345 (1888), the Court stated that, "[t]he judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers." \textit{McCray}, 195 U.S. at 58 (quoting \textit{Spencer}, 126 U.S. at 355).

\textsuperscript{52}McCray, 195 U.S. at 64. The Court conceded:

[If a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play, not for revenue, but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such . . . was the exercise of an authority not conferred.] \textit{Id.}

\textsuperscript{53}See, \textit{e.g.}, Lochner v. New York, 198 U.S. 45, 64 (1905) (striking down statute limiting number of hours bakers could work per week as illegitimate exercise of federal government in conflict with Constitution). \textit{Lochner} is seen by many commentators as the ushering in of a laissez-faire era of the Court regarding economic regulations. See Derrick Bell, \textit{Race and Class, Law and Politics: We Are Not Saved}, 69 B.U. L. REV. 457, 462 n.9 (1989); John Wal-
Bailey v. Drexel Furniture Co., otherwise known as the "Child Labor Tax Case,"54 and Hill v. Wallace,55 some commentators have noted that there are numerous extra-judicial factors involved in these decisions, which limit the true impact of their holdings.56

2. Modern Trends

Other cases, such as United States v. Doremus in 1919,57 Sonzinsky v. United States58 in 1937, and United States v. Sanchez59
in 1950, essentially upheld and extended the discretion of congres-
sional taxing power asserted in *McCray*. Following this line of
cases, congressional taxing activities are immune from judicial re-
view, even if the tax scheme is intended to be regulatory, rather
than revenue producing.\footnote{60}

Presently, Congress's power to tax whatever it chooses, at
whatever rate it chooses, is nearly unlimited.\footnote{61} In essence, there
need be only a "rational relation" between the tax scheme and the
reasons for imposing the tax in order to pass constitutional mus-
ter.\footnote{62} With regard to the Moynihan proposal, Congress's legiti-
mate end would presumably be the right to regulate interstate
commerce for the purposes of protecting the health and safety of
United States citizens, and the means of providing such protec-
tion, by imposing prohibitively high tax rates, would be rationally
related to that end.\footnote{63} The likelihood that the proposal would col-
lect little in the way of revenue, or that its intention is not, in fact,
to raise revenue, are issues that the courts have held to be beyond
their purview and not to be questioned.\footnote{64} Therefore, it seems
likely that the courts would uphold the Moynihan proposal if
enacted.

513 (citing *Veazie Bank*, 75 U.S. (8 Wall.) at 548 and *McCray*, 195 U.S. at 60-61). The Court
stated further: "[W]e will not undertake, by collateral inquiry as to the measure of the
regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to
exercise another power denied by the Federal Constitution." 300 U.S. at 514.
\footnote{60} 340 U.S. 42, 44 (1950) (upholding Federal Marihuana Tax Act, which imposed tax of
$100 per ounce on transfers of marihuana unless special tax of $1 to $24 per ounce was
paid). Citing *Sonzinsky*, the Court noted that a tax will still be valid in spite of the fact that
it "regulates, discourages or even definitely deters the activity taxed." *Sanchez*, 340 U.S. at
44. The Court noted that the validity of the tax did not depend on whether the revenue
obtained was negligible (citing *Sonzinsky*, 300 U.S. at 513) or whether its revenue purpose
was secondary. 340 U.S. at 44 (citing Hampton & Co. v. United States, 276 U.S. 394
(1928)).

\footnote{61} See *Sanchez*, 340 U.S. at 44; *Sonzinsky*, 300 U.S. at 513; *Doremus*, 249 U.S. at 93. It is
important to realize, however, that none of the cases above dealt with a 10,000% tax. How-
ever, whether such a rate would make a difference, based on the analysis offered in this
Note, is open to speculation.

that the challenged law bear a reasonable relationship to the attainment of some legitimate
governmental objective. *Id.*; see also Robert J. Glennon, *Taxation and Equal Protection*, 58
*GEO. WASH. L. REV.* 261, 281 (1990) (noting that, without evidence suggesting discrimina-
tory purpose, courts should examine tax practices using rational basis test).

\footnote{63} See 139 CONG. REC. S195-02, S612 (daily ed. Jan. 21, 1993) (statement of Sen. Moyni-
han). Moynihan noted: "These bills represent new approaches for protecting U.S. citizens
from gun violence." *Id.*

\footnote{64} See *supra* note 59 (describing Supreme Court's willingness to uphold regulatory
taxes).
B. Fifth Amendment Takings

Also intriguing is the issue of whether excessive taxation may constitute a “taking” under the Fifth Amendment, thus requiring just compensation.\(^{65}\) Assuming that the tax itself is constitutional, does it deprive ammunition manufacturers of their private property for a public use, and thereby require just compensation? Historical analysis indicates that this is a particularly unsettled area of the law, requiring case-by-case analysis\(^{66}\) and often “result[ing] in confusion.”\(^{67}\)

Under the Fifth Amendment to the Constitution,\(^{68}\) private property cannot be taken from a person by the government for the benefit of the public unless that person receives “just compensation.”\(^{69}\) The Takings Clause illustrates the deference to private property rights that exists throughout the Constitution.\(^{70}\) The Supreme Court has frequently held that government may execute laws or programs that adversely affect recognized economic values without resulting in a taking.\(^{71}\) A taking results when three elements are present: 1) private property is taken;\(^{72}\) 2) it is done by the government and involves an otherwise constitutional pur-

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\(^{68}\) U.S. CONST. amend. V. The Fifth Amendment provides, in pertinent part: “nor shall private property be taken for public use, without just compensation.” *Id.*

\(^{69}\) See Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

\(^{70}\) See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.11, at 424 (4th ed. 1991). The authors describe the Just Compensation Clause as “built upon this concept of a moral obligation to pay for government interference with private property.” *Id.*

\(^{71}\) See, e.g., *Penn Central*, 438 U.S. at 130 (holding that landmark restrictions preventing construction of 50-story office building atop historic landmark does not constitute taking); Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962) (upholding restrictions effectively prohibiting sand and gravel mine); Gorieb v. Fox, 274 U.S. 603, 608-09 (1927) (upholding limits on setback development of land); Welch v. Swasey, 214 U.S. 91, 107 (1909) (upholding limits on development of air rights). The Court noted that it had “been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government . . . .” *Id.* at 124.

\(^{72}\) See generally Public Use Test, supra note 65, at 226-27.
pose; and 3) a public use is intended. If any element is not satisfied, then no compensable governmental taking has occurred. Furthermore, these would be no requisite state action if a private third party, and not government, appropriated the property.

Caselaw and scholarly works have rarely discussed the possibility of whether, as noted in McCray, the taxing power could be so extreme as to be beyond the power conferred by the taxation power. But because property rights include a reasonable return on investment, and extreme taxation interferes with such a return, even on a particular product, one may argue that a taking could occur in this manner.

1. Appropriations of Private Property

In order for private property to be "taken," the government must physically appropriate property through possession or confiscation. Alternatively, a taking can occur when the government regulates the use of the property such that the property is significantly reduced in value to the private owner or the government.

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73 See Public Use Test, supra note 65, at 224. The Takings Clause, while applying to the federal government, does not directly apply to the states. See Glynn S. Lunney, Jr., A Critical Reexamination of the Takings Jurisprudence, 90 Mich. L. Rev. 1892, 1892 n.1 (1992). Takings jurisprudence is applied to the states through the Due Process Clause of the Fourteenth Amendment. Id. (citing Chicago, B. & Q. Ry. v. Chicago, 166 U.S. 226, 241 (1897); Missouri Pac. Ry. v. Nebraska, 164 U.S. 403, 417 (1896)).

74 See, e.g., Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 230-31 (1984) (upholding use of Hawaii's eminent domain power to reduce concentration of private property ownership as valid "public use"); Berman v. Parker, 348 U.S. 26, 31-33 (1954) (upholding District of Columbia Redevelopment Act as valid "public use"); Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 251-52 (1905). "It is fundamental in American jurisprudence that private property cannot be taken by the Government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner." Id.

75 See McCray v. United States, 195 U.S. 27, 64 (1904).

76 See Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 142-43 (1978) (Rehnquist, J., dissenting). Justice Rehnquist argued that valuable property rights of the appellant were destroyed and that the term "property" addresses a "group of rights inhering in [ownership] . . . ." Id. at 142 (quoting United States v. General Motors Corp., 323 U.S. 373 (1945)). This group of rights, according to Justice Rehnquist, "denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it . . . the constitutional provision is addressed to every sort of interest the citizen may possess." Penn Central, 438 U.S. at 142-43 (quoting General Motors, 323 U.S. at 377-78). In Penn Central, the "air rights" of the owner were deemed property rights. 438 U.S. at 143 n.5.

77 Cf. Epstein, supra note 65, at 436 (describing taxation and regulation as partial takings and focusing on degree of confiscation in order to determine compensation).

78 See supra notes 65-66 (discussing possessory or confiscatory takings).
tual activity interferes with distinct, investment-backed expectations.\textsuperscript{79}

A possessory taking occurs when government declares an act of appropriation to be “in the public interest” and then physically takes control of the property.\textsuperscript{80} Title to the property changes hands or, at the least, physical possession is transferred from one to the other.\textsuperscript{81} In the matter of taxation, no possessory taking is alleged, since the tax is regulatory in nature.\textsuperscript{82}

Regulatory takings require no physical appropriation of property.\textsuperscript{83} The manner of taking depends on the reasonable, quantifiable value of the private property at issue, before and after government regulation,\textsuperscript{84} or what the owner could reasonably expect as a return on their investment.\textsuperscript{85} In this context, the concept of

\textsuperscript{79} See Penn Central, 438 U.S. at 124. The Court noted that: “[A] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” Id. For a further discussion of possessory takings, see Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994) (striking down city ordinance requiring dedication of public greenway and bicycle path without showing of “essential nexus” between legitimate state interest and ordinance); Penn Central, 438 U.S. at 124. For more on regulatory takings, see also Pennsylvania Coal v. Mahon, 260 U.S. 393, 414 (1922).

\textsuperscript{80} See Public Use Test, supra note 65, at 233; see also Dolan, 114 S. Ct. at 2319-20. In determining the appropriate relationship between state interest and state action, the Court stated:

[A] term such as “rough proportionality” best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the [imposing authority] must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the [proposal] . . . .

Id.

\textsuperscript{81} See Public Use Test, supra note 65, at 226; see also Fred Bosselman et al., The Taking Issue 51 (1973) (describing requirement of change of physical possession).

\textsuperscript{82} See Lee, supra note 45, at 4.


\textsuperscript{84} See Public Use Test, supra note 65, at 228. There has never been a Supreme Court holding that a finding of “diminution in value” was sufficient to warrant a taking claim. Id. Therefore, it is unclear what threshold is required to trigger a valid claim. Id. at 246. The only guidance from the Court was offered by Justice Holmes, who stated: “[W]here property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Further, the Court later noted that it did not “embrace the proposition that a ‘taking’ can never occur unless government has transferred physical control over a portion of a parcel.” Id. at 222 n.25; see also Public Use Test, supra note 65, at 229. The Note combines the “Physical Invasion Test,” the “Diminution in Value Test,” the “Noxious Use Test,” and the “Police Power Test” into one all-encompassing test, “The Public Use Test.” Id.

\textsuperscript{85} Penn Central, 438 U.S. at 149 (Rehnquist, J., dissenting). Rehnquist noted that: “[T]he Court has frequently held that, even where a destruction of property rights would not otherwise constitute a taking, the inability of the owner to make a reasonable return on his property requires compensation under the Fifth Amendment.” Id. (citing United States
takings applies equally to personal property, as well as real property.  

2. Public Use Requirements

Assuming the government action element of a takings inquiry has been satisfied, the public use element then must be considered. Because government regulations are usually established upon the finding of a public need, they are frequently given a presumption of constitutionality, even if the regulations affect the value of private property. When there is no valid public interest supporting the statute, however, the act is illegal on its face.

3. Application of Supreme Court Tests to Moynihan Proposal

The Supreme Court has applied the three elements of takings by utilizing four different tests. They are: 1) the "Physical Invasion Test," which would involve the government appropriating private property and physically taking possession of the property; 2) the "Police Power Test," in which the legislature would have to announce a finding that the action of appropriating the property would further the "health, morals and safety of the people"; 3) the "Diminution in Value Test," which raises the possibility that an otherwise legitimate regulation could become so onerous as to

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v. Lynah, 188 U.S. at 470). Rehnquist also argued that merely allowing a reasonable use of property did not preclude a taking. Penn Central, 438 U.S. at 149.

See Quilici v. Village of Morton Grove, 522 F. Supp. 1169, 1183-84 (N.D. Ill. 1981) (upholding village ordinance statute which banned possession of firearms, with limited exceptions, within village limits), aff'd, 695 F.2d 261 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983). Because this Note is concerned with taxation, no physical appropriation is discussed.

See Penn Central, 438 U.S. at 125 (stating that land use regulations which "destroyed or adversely affected recognized property interests" would be upheld if "health, safety, morals, or general welfare" were promoted by such governmental action); see also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). Justice Holmes noted: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Id.

See Mugler v. Kansas, 123 U.S. 623, 668 (1887) (upholding state's power to prohibit manufacture or sale of alcoholic beverages without requirement of compensation to brewery owner); see also Public Use Test, supra note 65, at 231. In state actions, the legal exercise of the police power does not constitute a compensable taking. Id. at 230. While Congress has no police power to exercise, Congress may enact laws pursuant to its enumerated powers through its taxing power which resemble the police power of the states. Id. at 239.
lessen the value of the property and require just compensation;\(^{92}\) and 4) the "Noxious Use Test," which, coupled with the "Police Power Test," allows the government to abate public nuisances.\(^{93}\)

In analyzing the Moynihan proposal in the context of each of the tests above, it would seem that the "Physical Invasion Test" would not apply, since the ammunition companies cannot claim that the federal government has taken over their factories. In addition, under the "Police Power Test," it would seem that no taking would occur, unless, as stated above, the rate of taxation is so extreme as to exceed Congress's taxation authority.\(^{94}\)

Assuming that the diminution of value can be proved, however, as a result of the 10,000 percent tax rate on certain types of bullets, then it is possible that a compensable taking could occur. Even then, it would be an open question whether the diminution in value of the means of production could not be recouped by converting to the manufacture of other less taxable forms of ammunition.\(^{95}\) For these reasons, it seems unlikely that a taking would occur under this standard.

Finally, under the "Noxious Use Test," the question would focus on whether these deadly forms of ammunition constitute a public nuisance.\(^{96}\) It would seem that such bullets are indeed nuisances due to their killing capacity.\(^{97}\)


\(^{93}\) See Public Use Test, supra note 65, at 233. This test is usually used in connection with the "Police Power Test." Id. These so-called evil avoidance measures are closely aligned with the idea of public nuisance. See Adams v. Milwaukee, 228 U.S. 572, 576 (1913) (holding that destruction of potentially unwholesome milk abated public nuisance and did not require compensation).

\(^{94}\) See generally supra note 59 (discussing Supreme Court's general inclination to support regulatory taxes).

\(^{95}\) See Penn Central, 438 U.S. at 136. The Court held that New York City law permitted Penn Central "not only to profit from the [current use] but also to obtain a 'reasonable return' on its investment" and did not "interfere with Penn Central's primary expectation concerning the use of the parcel." Id. In addition, the Court held that the return Penn Central could realize from the sale of their "transferable development-rights" helped mitigate the financial burden of such landmark restrictions. Id. at 137.

Generally, a regulation is a taking only if it "denies an owner economically viable use" of the property. See Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). In all likelihood, a conversion from producing one form of ammunition to another would still render a reasonable return on distinct investment-backed expectations.

\(^{96}\) See LEE, supra note 45, at 5 (noting it is within government's power to regulate general welfare).

\(^{97}\) See supra note 28 (discussing Talon's deadly capacity).
The Moynihan proposal is legally sufficient on its face. The Moynihan proposal may require, however, too much in the way of ad hoc analysis of which bullets are currently popular and, therefore, used in gun-related violence.\textsuperscript{98} Some authorities argue that more analysis of ballistics is necessary to address the longterm needs of ammunition control.\textsuperscript{99} As a result, the Moynihan proposal may only be the first step towards what is really needed: a comprehensive ban on civilian sales of all handguns and handgun ammunition.\textsuperscript{100}

II. STRICT LIABILITY FOR AMMUNITION

The assertion that manufacturers of firearms and ammunition should be held strictly liable for the injuries that result from the use of their products has been a recent and innovative trend in the areas of gun control and products liability.\textsuperscript{101} Such assertions, while generally unsuccessful in the courts,\textsuperscript{102} nevertheless have appeal on many levels\textsuperscript{103} and should be considered as viable steps toward reducing gun-related violence. Most caselaw and commentary in this area consider strict liability for firearms,\textsuperscript{104} while ammunition is addressed only in passing, if at all.\textsuperscript{105} Arguments for

\textsuperscript{98} See Dailard, supra note 3, at 33-35.
\textsuperscript{99} Id.
\textsuperscript{100} Id. at 37.
\textsuperscript{103} See supra note 101 (discussing benefits of strict liability for handgun manufacturers and suppliers).
\textsuperscript{104} See supra note 101 (discussing merits of strict liability of handgun manufacturers and suppliers).
\textsuperscript{105} See Dailard, supra note 3, at 19. The author notes: "Since the birth of national firearms policy in 1934, Congress has neither adopted nor proposed any primary gun control strategy based on the regulation of ammunition. Id. Courts have only addressed strict liability for ammunition while in the process of rejecting strict liability for firearms. See Addison v. Williams, 546 So. 2d 220, 225 (La. Ct. App. 1989). Similarly, commentators have not focused upon ammunition in their discussions of strict liability. See supra note 101 (dis-
and against strict liability for ammunition, however, can be analogized to those addressing firearm liability.\textsuperscript{106}

 Strict liability has evolved in the United States in an effort to spread the costs of injuries caused by certain activities among those who are best able to internalize and bear such costs.\textsuperscript{107} Over the years, the courts have slowly expanded the activities which trigger strict liability in tort for injuries to others.\textsuperscript{108} In addition to the expansive judicial view of common-law strict liability, Congress and many state legislatures have enacted statutes applying strict liability in many situations.\textsuperscript{109}

 There are two primary theories that give legal foundation to the imposition of strict liability.\textsuperscript{110} The first is strict products liability,\textsuperscript{111} which requires a prima facie showing of "design defect"\textsuperscript{112} discussing merits of strict liability of handgun manufacturers and suppliers, without discussion of ammunition manufacturers and suppliers).

\textsuperscript{106} Cf. McClurg, supra note 101, at 611-16 (discussing handgun strict liability).

\textsuperscript{107} See Challoner v. Day & Zimmerman, Inc., 512 F.2d 77, 84 (5th Cir.) (holding that defectively made howitzer round may allow for strict products liability cause of action, even if production is under government's control), vacated on other grounds, 423 U.S. 3 (1975). The court noted "[t]he purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." 512 F.2d at 84 (quoting Greenbaum v. Yuba Power Prod., Inc., 377 P.2d 897, 900 (Cal. 1963)); see also Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1206 (7th Cir. 1984) (Cudahy, J., concurring) (asserting that, under Illinois law, sale of handguns to public did not constitute ultrahazardous activity giving rise to strict liability). Judge Cudahy noted:  
Strict liability for the manufacturer or marketer of handguns . . . places the costs of injury on a party who is able to spread those costs widely among all users through higher prices. An argument can be made for thus internalizing the costs in the price of handguns and thereby distributing them to all users rather than imposing them on shooting victims, which is the alternative.

\textit{Id.}

\textsuperscript{108} See infra notes 156-58 (discussing court-imposed extensions of strict liability).

\textsuperscript{109} See Boser, supra note 1, at 328. The author cites as examples U.C.C. § 3-420 (1977), which makes a bank strictly liable for cashing fraudulent checks on the accounts of customers. Boser, supra, at 328. In addition, the author discusses federal statutes holding the creators of pollution absolutely liable for their waste, no matter who is responsible for its spillage. See Trans-Alaska Pipeline Act, 43 U.S.C. § 1653 (1986).

\textsuperscript{110} See RESTATEMENT (SECOND) OF TORTS § 402A (1977) (product liability); RESTATEMENT (SECOND) OF TORTS §§ 519-520 (1977) (ultrahazardous activity). For further discussion of each, see infra notes 111, 114.

\textsuperscript{111} RESTATEMENT (SECOND) OF TORTS § 402A (1977). This section states, in pertinent part:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

\textit{Id.}
and the application of a "risk/utility test." The second theory imposes liability for injuries resulting from "ultrahazardous activities," requiring a balancing between the cost of the injury and the utility of the activity to the community. In the context of gun control, neither approach has proven successful to any significant degree in federal or state court, despite their acclaim in academic circles. Either the ultrahazardous activity or the products liability approaches, however, can be enacted by state legislatures or adopted by courts.

A. Products Liability Doctrine

Under the doctrine of strict products liability, courts and commentators alike have been generally unwilling to impose liability by declaring a firearm, as designed, defective without proof of an actual defect. The difficulties arise in the courts' initial analysis of the common-law definition of products liability. The courts have held uniformly that in order to apply a "risk/utility" analy-

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112 See id. § 402A(1).
113 Addison v. Williams, 546 So. 2d 220, 223-224 (La. Ct. App. 1989) (holding no strict products liability without product "defect"). The court noted "[t]here must be 'something wrong' with a product before the risk/utility analysis may be applied in determining whether the product is unreasonably dangerous or defective." Id.
114 RESTATEMENT (SECOND) OF TORTS §§ 519-520 (1977). "Abnormally dangerous activity" is a term of art employed in the 1977 version of the Restatement. Id. § 519. Since then, the term "ultrahazardous activity" has come to be used to describe the threshold question of the activity's risk. See Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1213 (7th Cir. 1984). A risk/benefit balance is then addressed. See infra note 115; RESTATEMENT (SECOND) OF TORTS §§ 519-520 (1977). For the purposes of this Note, the two are synonymous, though this Note will utilize the phrase "ultrahazardous activity" wherever necessary. See infra note 137 (quoting text of § 520).
117 See Smith, supra note 101, at 370. The author makes the case for applying § 402A of the Restatement of Torts to handgun manufacturers. Id.; see also McClurg, supra note 101, at 611-16. The author argues application of § 402A leads inevitably to the classification of guns as unreasonably dangerous per se. Id.
118 See Boser, supra note 1, at 323 n.97.
119 See Boser, supra note 1, at 325 n.93. The Restatement requires the product to be sold in a "defective condition unreasonably dangerous . . . ." See RESTATEMENT (SECOND) OF TORTS § 402A(1) (1977).
sis, the courts must first find that the product is, in fact, defective. Plaintiffs normally respond by alleging a design defect in order to reach the "risk/utility" threshold, but courts consistently have rejected this approach, ruling that unless the firearm or ammunition misfires in some way, they are deemed to have functioned properly, exactly as designed. Accordingly, it is unlikely that strict products liability would afford protection to the victims of gun-related violence on any level.

B. Ultrahazardous Activity Doctrine

After determining whether an activity may be deemed ultrahazardous, courts apply a balancing test in determining whether injuries resulting from the activity merit the imposition of strict liability. Generally, courts analyze six criteria in such a balance. The first criterion is whether there is a high risk of harm to the plaintiff. A logical conclusion would be that handgun ammunition, which, like the handgun itself is easily hidden and extremely lethal, certainly creates a high probability of harm. Second, there should be a likelihood that the resulting harm will be great. In the case of handgun ammunition, the

120 See Oliver, supra note 30, at 3 (noting principles of product liability law require defect before liability is imposed); John W. Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 830 (1973) (describing implication that something be wrong with product in order to apply strict product liability).

121 See Smith, supra note 101, at 375. There are three forms of defects the courts generally recognize: (1) Manufacturing defects of the type not characteristic of other products like it; (2) failure of a duty to warn; and (3) unsafe design defect. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 99, at 695 (5th ed. 1984).

122 See Boser, supra note 1, at 328 n.93 (describing plaintiffs' attempts to reach "risk/utility" balancing test).


124 See Restatement (Second) of Torts § 520 cmt. f (1977).

125 Id. § 520. That section provides the following six criteria:

(a) Existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) Likelihood that the harm that results from it will be great;
(c) Inability to eliminate the risk by the exercise of reasonable care;
(d) Extent to which the activity is not a matter of common usage;
(e) Inappropriateness of the activity to the place where it is carried on; and
(f) Extent to which its value to the community is outweighed by its dangerous attributes.

126 Restatement (Second) of Torts § 520(a) (1977).

127 See Smith, supra note 101, at 393-94; Turley, supra note 9, at 43 (describing probability of harm).

128 Restatement (Second) of Torts § 520(b) (1977).
typical harm tends to be death or grave physical injury.\textsuperscript{129} Third, the activity must be one in which the actor is unable to eliminate the risk, even if due care were employed.\textsuperscript{130} Such is clearly the case with handgun ammunition due to its strong potential to do harm.\textsuperscript{131} The fourth criterion questions whether the activity is commonly used.\textsuperscript{132} The focus is whether the manufacture and distribution of ammunition is a common practice or whether these activities would seem to be relatively uncommon, since few companies are in the business of ammunition manufacturing.\textsuperscript{133} Next, it must be determined whether the particular usage is inappropriate to the place where it is conducted.\textsuperscript{134} Arguably, this criterion deals more with relative context than with physical location.\textsuperscript{135} As a result, the totality of the circumstances, including such factors as whether ammunition is used at a firing range or on the street, would indicate whether the activity is appropriate.\textsuperscript{136} It would seem that the use of ammunition is never an appropriate community activity among the general public, even when justifiable in self-defense or police actions. Finally, the courts analyze whether the activity's value to the community is outweighed by the danger it presents.\textsuperscript{137} The danger posed by handgun ammunition far outweighs its purported value.\textsuperscript{138} It should be noted that not all six criteria must be satisfied in order to impose strict liability.\textsuperscript{139}

\textsuperscript{129} See Smith, supra note 101, at 394. The author argues that the consequence of imposing strict liability on high-risk activities is to reduce the level of that activity, thereby reducing the social cost of the activity. Id.

\textsuperscript{130} Restatement (Second) of Torts § 520(c) (1977).

\textsuperscript{131} See Smith, supra note 101, at 394. Comment h in the Restatement describes how most ordinary activities can be made entirely safe by the taking of all reasonable precautions. Restatement (Second) of Torts § 520 cmt. h (1977). A handgun, Smith argues, can never be made entirely safe, since it is intended to fire ammunition at great velocity at its target. Smith, supra, at 394.

\textsuperscript{132} Restatement (Second) of Torts § 520(d) (1977).

\textsuperscript{133} See Smith, supra note 101, at 394-95. The author notes that, in 1979, 16 handgun manufacturers accounted for 96.5% of all nonmilitary handgun production. Id. at 370.

\textsuperscript{134} Restatement (Second) of Torts § 520(e) (1977).

\textsuperscript{135} See Smith, supra note 101, at 397 n.130. According to the author, location itself does not have to be a factor in determining the context of the activity. "The reasons for imposing [strict] liability on those who have created a grave risk of harm . . . are largely independent of considerations of locational appropriateness." Id. (citing Yukon Equip. v. Fireman's Fund Ins. Co., 585 P.2d 1206, 1211 (Alaska 1978)).

\textsuperscript{136} Restatement (Second) of Torts § 520(f) (1977).

\textsuperscript{137} See Smith, supra note 101, at 397.

\textsuperscript{138} See Smith, supra note 101, at 398. The author argues that "[w]hile some handguns such as police revolvers may have external [third party] benefits, by and large guns sold to the general public benefit only their owners." Id.

\textsuperscript{139} Id. at 398. The Restatement of Torts notes:
Courts have been reluctant to extend the ultrahazardous activity doctrine to the manufacture and sale of guns and ammunition. Some courts have reasoned that the doctrine has only been applied to matters involving land use. In addition, courts have distinguished the "marketing" of a handgun from its "use," while still others refuse to extend the doctrine to "common usage" activities.

Moreover, a number of courts have objected to the application of the ultrahazardous activity liability to handgun and ammunition manufacturers on the ground that if it were applied to such manufacturers, it may also apply to manufacturers of other potentially dangerous products, such as alcohol, tobacco, kitchen knives, and automobiles. In addition, the courts have appeared unwilling to extend the theory into areas where the federal and state legislatures generally have not ventured.

The argument has been made, however, that courts' refusal to extend the ultrahazardous activities doctrine to the manufacture and sale of handguns is a clear mistake. Factors such as location in land use matters, distinctions among manufacturing,
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sale and use,\textsuperscript{148} and common usage\textsuperscript{149} do not support an outright refusal to extend the doctrine.\textsuperscript{150} Further, there are several distinguishing characteristics between guns and other products,\textsuperscript{151} and it is exactly because many legislatures have failed to address such a theory that the courts should intervene.\textsuperscript{152}

A strong case can be made for applying the ultrahazardous activity doctrine of strict liability to the manufacture and sale of handguns.\textsuperscript{153} While handguns in general would be subject to strict liability under such an argument, ammunition, particularly the types which are intended to inflict injuries beyond the injuries created by “normal” bullets,\textsuperscript{154} should also require strict liability for damages under the doctrine of ultrahazardous activities.

The standards for determining the particular forms of ammunition warranting such strict liability should be flexible. Such standards should include: the manner in which the ammunition is marketed, medical testimony as to the potential dangers of this form of ammunition as opposed to others, and the availability of the ammunition outside the realm of law enforcement and military fields.\textsuperscript{155}

\textsuperscript{148} See id. at 388. Smith describes the distinction as “one without a difference.” Id. While it is true that the use of pesticides, gasoline, and other products have been held in strict liability, the manufacture and distribution can also be held to be an ultrahazardous activity. See Chapman Chemical Co. v. Taylor, 222 S.W.2d 820, 827 (Ark. 1949) (holding manufacturer of pesticide strictly liable for selling the product). The author argues that in essence, “the court held the manufacturer responsible for ‘casting into the air’ this harmful pesticide because it had sold the dangerous product.” Id.

\textsuperscript{149} See Smith, supra note 101, at 384.

\textsuperscript{150} Id.

\textsuperscript{151} Id. at 400. For example, the author argues that strict liability should only be extended to innocent third parties injured by handguns, so the tobacco analogy does not apply, since a smoker only harms himself, absent further evidence of “second-hand smoke.” Id. As to the alcohol, automobile, and knife analogies, the author argues that both are “common usage” items and their value to the community far outweighs the risk they create. Id. See also Paul R. Bonney, Note, Manufacturers' Strict Liability for Handgun Injuries: An Economic Analysis, 73 Geo. L.J. 1437, 1460 (1985) (noting handguns' unusual characteristics as distinguished from other products).

\textsuperscript{152} Smith, supra note 101, at 389.

\textsuperscript{153} See id. at 379-405.

\textsuperscript{154} See Smothers, supra note 30, at 22. Whereas the “normal” .22 caliber bullet slug penetrates the body relatively straight and clean, the Talon, for example, is intended to create a wider hole and its jagged edges are intended to cut tissue and inflict more damage. Id.; see also Dailard, supra note 3, at 27. The author discusses the Law Enforcement Officers' Protection Act, Pub. L. No. 99-408, 100 Stat. 920 (1986), which banned the manufacture, importation, and sale of armor-piercing bullets. Dailard, supra, at 26. Such bullets as the Talon, and the recently outlawed armor-piercing bullets clearly seem to be intended to mutilate and cause profound injury and trauma to the human body. See supra note 28.

\textsuperscript{155} See Dailard, supra note 3, at 34-35.
Courts have seen fit to expand the theory of ultrahazardous activities to include the storage and use of explosives, cropdusting, and many other activities. It would seem logical, therefore, that the manufacturers and sellers of certain bullets should have imposed upon them, by either the courts or the legislature, higher costs commensurate to the burdens imposed upon victims of gun violence in terms of increased health expenses and other costs.

C. Court-Imposed “Saturday Night Special” Liability

An additional means of imposing strict liability upon ammunition manufacturers and sellers is available. Court-imposed extensions of strict liability, on the basis of evolving common law, would address the more egregious examples of ammunition specifically intended to maim and kill, without expanding either the ultrahazardous activity or strict products liability doctrines. In *Kelley v. R. G. Industries, Inc.*, the Maryland Court of Appeals rejected both of these doctrines and instead applied strict liability in tort on the grounds that “Saturday Night Special” handguns were not covered in prior legislative policy matters and had no legitimate societal purpose. The court reasoned that public policy would not be served by extending Maryland’s statutory right to bear arms so broadly. The Maryland Court of Appeals effectively created a new, albeit narrow and ambiguous, area of strict liability. The Maryland Legislature, however, enacted legisla-

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158 See Siegler v. Kuhlman, 502 P.2d 1181, 1187 (Wash. 1972) (transporting and storage of gasoline is abnormally dangerous activity requiring strict liability). This Note does not address the myriad of criminal strict liability statutes enacted by the legislatures and upheld by the courts.
159 Smith, supra note 101, at 393. Smith estimates the costs of handgun death and injuries to be approximately $20 billion (citing Turley, supra note 9, at 43).
160 See supra note 28 (describing lethal effects of Talon ammunition).
162 497 A.2d 1143 (Md. 1985).
163 Id. at 1154-58. Due to the general lack of worth of the “Saturday Night Special,” the court held that the manufacturers “know or ought to know” that their products were being used primarily for criminal activity. Id. at 1158-59.
164 Id. at 1159.
165 Id. at 1159-60. The court noted that “[t]here is no clear-cut, established definition of a Saturday Night Special . . . “ Id. at 1159. The court then proceeded to include a list of factors which should enter into a jury determination of whether the handgun qualified as a
tion five years later which essentially overruled the holding in *Kelley*.\(^{166}\)

One of the main criticisms of the *Kelley* holding centered around the fact that the court offered little in the way of solid criteria for what constituted a "Saturday Night Special."\(^{167}\) Instead, the court left the decision of whether a gun was a "Saturday Night Special" to the jury for a case-by-case determination.\(^{168}\)

Perhaps as a result of *Kelley*’s arguable shortcomings, no court since has attempted to expand strict liability in this area. The United States District Court for Washington, D.C. specifically rejected the "Saturday Night Special" theory in *Delahanty v. Hinckley*,\(^{169}\) a case arising out of the attempted assassination of President Ronald Reagan.\(^{170}\) In spite of the holding in *Delahanty*, the rationale of *Kelley* could be viewed as an alternative form of strict liability, particularly for forms of ammunition deemed to have no "legitimate societal purpose."\(^{171}\) As applied to more damaging forms of ammunition,\(^{172}\) it seems such a holding would be legally plausible.

**D. Statutory Strict Liability**

Finally, another alternative would be the enactment of statutes declaring the public policy of the state or municipality to be favoring holding manufacturers of certain weapons and ammunition strictly liable for the use of their products.\(^{173}\) In the case of Washington, D.C.’s Assault Weapon Manufacturing Strict Liability Act of 1990 (the "Act"),\(^{174}\) the City Council enacted legislation making the manufacturers and dealers of nine military-style weapons strictly liable for the use of their firearms resulting in bodily in-

*Saturday Night Special.* These factors included barrel length, concealability, cost, quality of materials and manufacture, accuracy, and reliability. *Id.* at 1159-60.

\(^{166}\) See WINDLE TURLLEY & JAMES E. ROOKS, JR., FIREARMS LITIGATION: LAW, SCIENCE AND PRACTICE 320 (1988).


\(^{168}\) *Id.*


\(^{170}\) *Id.* at 928.

\(^{171}\) See Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1159 (Md. 1985).

\(^{172}\) See supra note 28 (describing Talon ammunition).

\(^{173}\) See Boser, supra note 1, at 341-44. The author argues that legislation imposing strict liability is good public policy, allowing effective enforcement of gun laws, saving lives, and making the innocent victims of crime whole. *Id.*

\(^{174}\) D.C. CODE ANN. §§ 6-2391 to 6-2393 (Supp. 1994).
jury or death to innocent third parties.\textsuperscript{175} After the City Council repealed the bill,\textsuperscript{176} a referendum was held and the law was reinstated.\textsuperscript{177}

Although Washington, D.C. has enacted a statute to create strict liability, several states have enacted legislation which expressly prohibits such strict liability.\textsuperscript{178} The general intent of these laws seems to be to deprive the courts of the power to expand strict liability to firearms or ammunition, whether under the theories of ultrahazardous activities, strict products liability, or a Kelley-type holding.\textsuperscript{179} There appears to be, however, few limitations on a legislature's ability to carve out new areas of strict liability concerning firearms and ammunition. The federal government, exercising its power under the Commerce Clause,\textsuperscript{180} also would be able to expand strict liability, just as it has on other issues.\textsuperscript{181}

\textbf{Conclusion}

The courts have given Congress broad latitude in its ability to tax whatever it wishes, at whatever rate it desires. The courts also have allowed state and federal governments freedom to determine the proper use of their regulatory powers. Therefore, the Moynihan proposal to tax certain forms of ammunition out of

\textsuperscript{175} \textit{Id.} § 6-2392. The Act also held strictly liable the manufacturers of each of the listed assault weapons for the injuries resulting from their weapons. \textit{Id.}


\textsuperscript{177} \textit{See} Boser, \textit{ supra} note 1, at 315, n.17. "Seventy percent of those voting approved the referendum to stop the repeal of the Assault Weapon Manufacturing Strict Liability Act of 1990." \textit{Id.} (citing Staff of the House Comm. on the District of Columbia, 102d Cong., 1st Sess., Council Act 8-289 and Acts to Repeal (Comm. Print) (Nov. 21, 1991)).

\textsuperscript{178} \textit{See Cal. Civ. Code} § 1714.4 (West 1985). The statute states in pertinent part:

(a) ... [N]o firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage or death. . . .

(b) for purposes of this statute: (1) The potential of a firearm to cause serious physical injury, damage, or death . . . does not make the product defective in design.

(2) Injuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious physical injury, damage, or death, but are proximately caused by the actual discharge of the product. . . .


\textsuperscript{180} \textit{U.S. Const.} art. I, § 8, cl. 3.

\textsuperscript{181} \textit{See supra} notes 156-58.
existence is constitutionally and legally sound. Senator Moynihan's intention to tax certain forms of ammunition at one rate and others at another rate, however, may not prove effective in addressing the problem of gun-related violence.

Coupling the Moynihan proposal with some form of legislative expansion of strict liability, particularly on similarly dangerous forms of ammunition, would effectively serve two interests. On the one hand, the innocent victims of gun-related violence would be made whole by those who profit from the sale of ammunition, the manufacturers and sellers, both on a personal level through tort liability and on a national level through increased tax revenues. An additional benefit of the combined proposals would be the elimination of certain types of ammunition which serve only as a more efficient means of killing. Supplementing legislation, or in lieu of legislation, courts should step in and impose a broader definition of strict liability, particularly one that incorporates the ultrahazardous activity doctrine. By allowing flexibility in dealing with ammunition, the United States can begin to stem the tide of gun-related violence.

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