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I Came, ITAR, I Conquered: The International Traffic in Arms Regulations, 3D-Printed Firearms, and the First Amendment

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I CAME, ITAR, I CONQUERED: THE INTERNATIONAL TRAFFIC IN ARMS REGULATIONS, 3D-PRINTED FIREARMS, AND THE FIRST AMENDMENT

Abstract: The rise of 3D printers presents unique regulatory challenges in many areas, particularly firearm regulations. The Texas non-profit, Defense Distributed, successfully developed a 3D printable lower receiver for the AR-15 assault rifle and a 3D .380 pistol capable of firing eight rounds. Current regulations cannot meaningfully govern the 3D printing of guns without an effective means of controlling and standardizing the distribution of the CAD files online. This Note argues that the existing regulatory scheme, which governs the dissemination of technical data related to firearms, unconstitutionally restricts expression. The regulatory scheme gives broad discretion to licensing officials, and fails to provide the necessary procedural protections for a licensing system that operates as a prior restraint on speech, including prompt judicial review. The International Traffic in Arms Regulations (“ITAR”) and the First Amendment thus create a constitutional catch-22 because courts will likely decline to engage in judicial review of licensing determinations under the political question doctrine.

INTRODUCTION

Since its initial development in the 1980s, three-dimensional (“3D”) printing, or “additive manufacturing,” has steadily become more consumer friendly, as the cost and necessary expertise has diminished.¹ Consumer 3D printing works by utilizing Computer Aided Design (“CAD”) files.² Much like a conventional paper printer, the 3D printer requires “ink” to produce the desired design, except the ink required for 3D printers is typically plastic.³ The 3D printer re-

¹ HOD LIPSON & MELBA KURMAN, FABRICATED: THE NEW WORLD OF 3D PRINTING, THE PROMISE AND PERIL OF A MACHINE THAT CAN MAKE (ALMOST) ANYTHING, 8, 11–12, 85–89 (Mary Beth Wakefield et al. eds., 2013) (stating that 3D printing will give people with “modest bank accounts” manufacturing power previously limited to large scale production); Mark Gibbs, *The End of Gun Control?*, FORBES.COM, July 28, 2013, <http://www.forbes.com/sites/markgibbs/2012/07/28/the-end-of-gun-control/>, archived at <http://perma.cc/KN2E-S7RM> (stating that 3D printers—formerly rare, expensive, and difficult to use products—have become less expensive).

² Ashlee Vance, *The Wow Factor of 3-D Printing*, N.Y. TIMES, Jan. 13, 2011, at B10 (stating that 3D printers work by utilizing designs contained in CAD files); see LIPSON & KURMAN, *supra* note 1, at 11.

³ See LIPSON & KURMAN, *supra* note 1, at 11, 77. 3D printing began with simple widgets, but the technology is now capable of producing complex devices from many materials, albeit often with some assembly required. See *id.* at 13, 71. Many sites where CAD files are available will also have instructions for assembly, such as Defense Distributed’s website, defcad.org, before the State Department

ceives its instructions from the CAD file, and either solidifies or excretes the powder or liquid ink.⁴ Some 3D printers are able to print metal objects, such as hardware, medical instruments, and even firearms.⁵ These metal printers are far more expensive than their plastic-based counterparts, and require more expertise to operate.⁶

Due to the increasing ease of use and decreasing cost, 3D printing has the potential for both significant social benefits and dangers.⁷ In the medical field, for example, “bioprinting” has the potential to fundamentally alter the processes in place for organ donation; provide new, invaluable opportunities for the study of disease; and dramatically increase accessibility to functional prosthetic limbs.⁸ Simultaneously, the greater ease and decreased expense of 3D printing of medical devices could create opportunities for the proliferation of products that have not undergone regulatory scrutiny for safety or effectiveness.⁹

required the files’ removal. See *The Turbo Entabulator—A 3D-Printable, Fully Mechanical Computer*, THINGIVERSE (June 9, 2013), <http://www.thingiverse.com/thing:101105/#instructions>, archived at <http://perma.cc/4VC7-4S3W>.

⁴ See LIPSON & KURMAN, *supra* note 1, at 12. Some have used plastic 3D printers to print mechanical computers and even functional prosthetics. See *Dad Uses 3D Printer to Make His Son a Prosthetic Hand*, HUFFINGTON POST, Nov. 4, 2013, http://www.huffingtonpost.com/2013/11/04/dad-prints-prosthetic-hand-leon-mccarthy_n_4214217.html, archived at <http://perma.cc/3WN-BFC8>; THINGIVERSE, *supra* note 3.

⁵ Doug Gross, *Texas Company Makes Metal Gun with 3-D Printer*, CNN, Nov. 8, 2013, <http://www.cnn.com/2013/11/08/tech/innovation/3d-printed-metal-gun/>, archived at <http://perma.cc/8C5S-JJ75> (discussing the first ever fully 3D-printed metal gun); *Metal 3D Printing*, GPI PROTOTYPE & MFG. SERVS., INC., <http://gpiprototype.com/services/metal-3d-printing.html>, archived at <http://perma.cc/XS7V-AYEN> (last visited Sept. 4, 2014) (providing examples of various products currently printed and sold by a metal 3D printing company).

⁶ See Gross, *supra* note 5 (stating that a 3D metal printer costs more than a private university education and require expert engineers to operate).

⁷ See LIPSON & KURMAN, *supra* note 1, at 3, 223 (discussing the possibility of black markets for 3D-printed organs); Davis Doherty, Note, *Downloading Infringement: Patent Law as a Roadblock to the 3D Printing Revolution*, 26 HARV. J.L. & TECH. 353, 360–62 (2012) (suggesting that a new legal framework is necessary to address the challenges presented by 3D printing to intellectual property law); Peter Jensen-Haxel, Comment, *3D Printers, Obsolete Firearm Supply Controls, and the Right to Build Self-Defense Weapons Under Heller*, 42 GOLDEN GATE U. L. REV. 447, 463–69 (2012) (arguing that 3D printed firearms have the potential to render existing gun regulation ineffective).

⁸ See LIPSON & KURMAN, *supra* note 1, at 7; Seung-Schik Yoo & Samuel Polio, *3D On-Demand Bioprinting for the Creation of Engineered Tissues*, in CELL AND ORGAN PRINTING, 3, 4 (Bradley R. Ringeisen, Barry J. Spargo & Peter K. Wu, eds., 2010); Makoto Nakamura, *Reconstruction of Biological Three-Dimensional Tissues: Bioprinting and Biofabrication Using Inkjet Technology*, in CELL AND ORGAN PRINTING, *supra*, at 23, 23–26.

⁹ See LIPSON & KURMAN, *supra* note 1, at 11 (noting that individuals could use 3D printing to manufacture illegal weapons or toxic drugs and that 3D printers are already capable of printing some medical devices, such as hearing aids); Jensen-Haxel, *supra* note 7, at 451–53, 463–69 (discussing medical applications of 3D printers, and arguing that 3D-printed firearms will render existing gun regulations obsolete).

Similar issues arise with respect to 3D-printed firearms.¹⁰ Defense Distributed, a Texas non-profit, recently designed a lower receiver for an AR-15 rifle, capable of firing over 600 rounds, and placed the CAD file on its website.¹¹ There are also at least two functional models of handguns, printed almost entirely by 3D printers.¹² One of these pistols, the Liberator, is a plastic handgun, capable of firing .380 caliber bullets.¹³ The pistol's design includes a steel chunk, solely to comply with the recently extended Undetectable Firearms Act, which prohibits firearms that do not set off metal detectors.¹⁴

¹⁰ See Jensen-Haxel, *supra* note 7, at 452–53, 463–69. Although consumer 3D printers can currently produce only plastic weapons, the ability to print metal weapons already exists. See Gross, *supra* note 5.

¹¹ Adan Salazar, *3D Printed Lower Receiver Withstands More Than 650 Rounds, Gun Grabbers Panic*, INFOWARS.COM (Mar. 3, 2013), <http://www.infowars.com/3d-printed-lower-receiver-withstands-more-than-650-rounds-gun-grabbers-panic>, archived at <http://perma.cc/JWT7-USLA>; see *About Defense Distributed*, DEFENSE DISTRIBUTED, <http://www.defdist.org/about/>, archived at <http://perma.cc/CYP9-22KP> (last visited Sept. 4, 2014) (stating that Defense Distributed is a pending nonprofit corporation, dedicated to “defend[ing] the human and civil right to keep and bear arms” by producing and freely distributing information enabling the 3D printing of firearms). The lower receiver is technically considered a “firearm,” and is the part of the weapon engraved with a serial number. See Gun Control Act of 1968, 18 U.S.C. § 921(a)(3) (2012) (defining “firearm” as a weapon that fires a projectile from explosive force, the frame or receiver of such a weapon, a muffler or silencer, or a destructive device); 27 C.F.R. § 478.92(a)(1) (2014) (stating that manufacturers of firearms must place all identifying information, including, *inter alia*, the serial number, model, and caliber, on the weapon’s receiver); Deborah Camiel, *3-D Printed AR-15s Aimed at Gun Control*, CNBC.com, Apr. 22, 2013, <http://www.cnbc.com/id/100661606>, archived at <http://perma.cc/49ZX-HESQ> (reporting that the lower receiver is typically the only part of a firearm engraved with a serial number). Federal regulations define the “frame or receiver” to include the part of the weapon containing the “hammer, bolt or breechblock, and firing mechanism.” 27 C.F.R. § 478.11(f).

¹² See Gross, *supra* note 5, (stating that Solid Concepts developed a functional metal, 3D printed pistol); Andy Greenberg, *Meet the ‘Liberator’: Test-Firing the World’s First Fully 3D-Printed Gun*, FORBES.COM, May 5, 2013, <http://www.forbes.com/sites/andygreenberg/2013/05/05/meet-the-liberator-test-firing-the-worlds-first-fully-3d-printed-gun/>, archived at <http://perma.cc/84RG-XT8L> (stating that Defense Distributed designed a functional plastic 3D-printed pistol).

¹³ See Greenberg, *supra* note 12. A .380 caliber bullet is roughly equivalent to a 9 millimeter round. David B. Kopel, *Mexico’s Gun-Control Laws: A Model for the United States?*, 18 TEX. REV. L. & POL. 27, 35 (2013) (noting that .380 inches converts to 9.652 millimeters). The Liberator is comprised of sixteen 3D printed plastic parts and a small metal nail, likely undetectable by metal detectors. See Greenberg, *supra* note 12; Matthew A. Goldstein, *Department of State Confirms Prior Approval Requirement for Electronic Exports to Public Domain in Case of 3D-Printable Gun*, in 2 THOMSON REUTERS PRAC. TRADE & CUSTOMS STRATEGIES 3 (June 15, 2013).

¹⁴ See 18 U.S.C. § 922(p)(1) (stating that it is illegal to “manufacture, import, sell, ship, deliver, possess, transfer, or receive” a firearm that is not detectable by a government designated metal detector); Mark Memmott, *Gun Made with 3-D Printer Is Successfully Fired*, NPR.org, May 6, 2013, <http://www.npr.org/blogs/thetwo-way/2013/05/06/181612663/gun-made-with-3-d-printer-is-successfully-fired>, archived at <http://perma.cc/7SHM-R8RC>. The chunk of steel, however, is not essential to the weapon’s function. See Memmott, *supra*. Individual users could ostensibly print the Liberator and choose not to include the steel component. See *id*.

The second handgun, developed by Solid Concepts, is the world's first metal 3D-printed gun.¹⁵ The 3D printer required to produce the metal gun, however, is far more expensive than a consumer 3D printer that uses plastic, and requires a higher degree of expertise.¹⁶ Still, as 3D printers become more accessible, the ability to print fully functional firearms with relative ease presents an increasing threat to existing gun regulations.¹⁷

In May 2013, the State Department required Defense Distributed to remove from its website the CAD files for the Liberator and other weapon parts.¹⁸ The State Department ordered the CAD files removed pending a determination by the Directorate of Defense Controls ("DDTC") as to whether the blueprints are considered technical data under the International Traffic in Arms Regulations ("ITAR").¹⁹

This Note examines whether the ITAR proscribes posting 3D gun CAD files on the Internet without a license, and, if so, whether such regulations violate the First Amendment.²⁰ Part I outlines the statutory and regulatory framework of the ITAR and the applicable First Amendment principles.²¹ Part II applies First Amendment principles to the regulatory scheme of the ITAR.²² Finally, Part III argues that the ITAR's intersection with the First Amendment creates a constitu-

¹⁵ Gross, *supra* note 5 (noting that the individuals who printed the metal gun were trained engineers). The gun consists of thirty-three 3D-printed metal parts, most of which are stainless steel, and can successfully fire at least 50 rounds. *World's First 3D Printed Metal Gun Manufactured by Solid Concepts*, SOLID CONCEPTS, <http://www.solidconcepts.com/news-releases/worlds-first-3d-printed-metal-gun-manufactured-solid-concepts/>, archived at <http://perma.cc/V674-95QY> (last visited Sept. 4, 2014).

¹⁶ Gross, *supra* note 5; see also Jensen-Haxel, *supra* note 7, at 452 (stating that 3D printers cost between \$150,000 and \$1 million).

¹⁷ See Jensen-Haxel, *supra* note 7, at 452–53, 463–70. Furthermore, the ability to print metal objects would ostensibly allow owners of such devices to also print ammunition. See Alexis Kleinman, *3D-Printed Bullets Exist, and They're Terrifyingly Easy to Make*, HUFFINGTON POST, May 23, 2013, http://www.huffingtonpost.com/2013/05/23/3d-printed-bullets_n_3322370.html, archived at <http://perma.cc/N7T6-LQ59> (stating that CAD files for functional, albeit less effective, plastic ammunition exist).

¹⁸ See Andy Greenberg, *State Department Demands Takedown of 3D-Printable Gun Files for Possible Export Control Violations*, FORBES.COM, May 9, 2013, <http://www.forbes.com/sites/andygreenberg/2013/05/09/state-department-demands-takedown-of-3d-printable-gun-for-possible-export-control-violation>, archived at <http://perma.cc/D72W-C4R4>. By the time the State Department instructed Defense Distributed to remove the Liberator CAD file from its website, approximately 100,000 people had already downloaded it in the preceding forty-eight hours. *Id.* The letter also demanded the removal of nine other 3D printer blueprints, including: (1) .22 electric; (2) 125mm BK-14M high-explosive anti-tank warhead; (3) 5.56/.223 muzzle brake; (4) Springfield XD-40 tactical slide assembly; (5) Sound moderator—slip on; (6) "The Dirty Diane" 1/2-28 to 3/4-16 STP S3600; (7) 12 gauge to .22 CB sub-caliber insert; (8) Voltlock electronic black powder system; and (9) VZ-58 sight. *Id.*

¹⁹ *Id.* The DDTC suggested that Defense Distributed submit an application, called a "Commodity Jurisdiction" request, to determine whether the ITAR regulates the export of 3D CAD files. *Id.* Commodity Jurisdiction is the procedure utilized by the DDTC to determine whether the ITAR governs the export of a particular item. 22 C.F.R. § 120.4(a) (2014).

²⁰ See *infra* notes 24–257 and accompanying text.

²¹ See *infra* notes 24–92 and accompanying text.

²² See *infra* notes 93–165 and accompanying text.

tional catch-22 insofar as courts have declined to determine the ITAR's constitutionality, but without judicial review, the ITAR is an unconstitutional prior restraint on speech.²³

I. THE ITAR AND THE FIRST AMENDMENT

This Part explores the pertinent components of the intersection between the ITAR and the First Amendment.²⁴ Section A illustrates the relevant substance and procedures of the ITAR.²⁵ Section B then explores the applicable First Amendment principles articulated by the Supreme Court.²⁶

A. *The Prohibitions, Exceptions, and Procedures of the ITAR*

Through the Arms Export and Control Act (AECA), the DDTC has the authority to regulate the export of “defense articles and defense services.”²⁷ The AECA states that the purpose of the regulations is to advance world peace and the national security and foreign policy of the United States.²⁸

The United States Munitions List (“USML”) is an extensive list of regulated defense articles, defense services, and technical data, organized into twenty-one categories.²⁹ The DDTC may designate an article as a defense article if it meets the criteria of the USML or has functionally equivalent capabilities.³⁰ Category I of the USML includes all firearms up to .50 caliber designed to fire a projectile resulting from explosive force, and all technical data directly related to

²³ See *infra* notes 166–257 and accompanying text.

²⁴ See *infra* notes 27–92 and accompanying text.

²⁵ See *infra* notes 27–46 and accompanying text.

²⁶ See *infra* notes 47–92 and accompanying text.

²⁷ 22 U.S.C. § 2778(a)(1) (2012); 22 C.F.R. § 120.1(a) (2014). The AECA explicitly grants regulatory power to the President. 22 U.S.C. § 2778(a)(1). The President delegated that authority to the Secretary of State, who in turn delegated it to the Deputy Assistant Secretary of State for Defense Trade Controls, who oversees the DDTC. 22 C.F.R. § 120.1(a). The DDTC implements its authority through the ITAR, which includes the United States Munitions List (“USML”), comprised of the items the DDTC designates as defense articles. 22 U.S.C. § 2778(a)(1); 22 C.F.R. §§ 120.1(a), 121.1(a). Defense article refers to any “item or technical data” contained in the USML. See 22 C.F.R. § 120.6.

²⁸ 22 U.S.C. § 2778(a)(1) (“In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services . . .”).

²⁹ 22 C.F.R. § 121.1(I)–(XXI) (2014). The categories cover a broad range of items, including firearms, above and below .50 caliber (categories I and II); missiles, rocks, torpedoes, bombs, and mines, (category IV); tanks and other “armored combat ground vehicles” (category VI); certain chemical compounds and related equipment (category XIV); spacecraft and related articles (category XV); and “directed energy weapons” such as lasers and particle beam systems (category XVIII). § 121.1(I)–(II), (IV), (VI), (XIV)–(XV), (XVIII).

³⁰ See 22 C.F.R. § 120.3. The initial designation of an item on the USML is based on whether the article is designed for military application, has civil applications, or has significant military or intelligence capability. *Id.*

such firearms.³¹ Technical data includes, among other things, information necessary for the design and manufacture of defense articles.³²

If it is unclear whether the USML covers a particular article, an interested party may submit a Commodity Jurisdiction determination request to the DDTC.³³ The DDTC makes these determinations on a case-by-case basis, evaluating whether the article is already covered by the USML, is functionally equivalent to an article on the USML, or has substantial military or intelligence applications.³⁴ An interested party cannot challenge the DDTC's determination that an article qualifies as a defense article on the USML because the AECA explicitly precludes judicial review of USML designations.³⁵ Nevertheless, the statute does not explicitly preclude constitutional challenges to USML designations.³⁶

Additionally, the ITAR prohibits the export of any defense article, including technical data, without a license.³⁷ The definition of export includes transmitting a defense article outside of the United States in any form.³⁸ One can also export

³¹ 22 C.F.R. § 121.1(I)(a), (i). The Liberator Pistol and the 3D printable lower receiver for the AR-15, both designed by Defense Distributed, would fall under Category I. *See id.*; *see also* Springfield Armory, Inc. v. City of Columbus, 29 F.3d 250, 252 (6th Cir. 1994) (stating that the AR-15 fires .223 caliber bullets); *see* Greenberg, *supra* note 12 (stating that the Liberator Pistol fires .380 caliber bullets).

³² 22 C.F.R. § 120.10(a)(1) (defining technical data as information necessary to “the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles”); § 121.1(i) (stating that “[t]echnical data (as defined in § 120.10 of this subchapter) . . . directly related to defense articles enumerated in [Category I]” is itself included in Category I).

³³ 22 C.F.R. § 120.4(a).

³⁴ 22 C.F.R. § 120.4(d)(1)–(2). The DDTC considers the same criteria in designating defense articles whether the determination is made by the DDTC independently or based on an interested party's submission of a Commodity Jurisdiction request. *See* § 120.3; § 120.4(d)(1)–(3).

³⁵ The Arms Export and Control Act of 1976, 22 U.S.C. § 2778(h) (2012) (“The designation by the President (or by an official to whom the President's functions . . . have been duly delegated), in regulations issued under this section, of items as defense articles or defense services for purposes of this section shall not be subject to judicial review.”).

³⁶ *See id.*; *Karn v. U.S. Dep't of State*, 925 F. Supp. 1, 8–9 (D.D.C. 1996). In *Karn v. United States Department of State*, the government conceded that the AECA does not preclude constitutional challenges. *See* 925 F. Supp. at 9. Whether Congress can, in fact, prevent judicial review of constitutional questions is a controversial issue regarding federal jurisdiction. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (holding that the Court would not infer a prohibition on judicial review of constitutional questions, because Congress's ability to do so presents a complex constitutional issue). Accordingly, a party could not challenge a designation by asserting that, for example, technical data for a .50 caliber handgun lacks significant military or intelligence applications. *See* 22 U.S.C. § 778(h); 22 C.F.R. § 120.3 (2014); § 120.4(d). In theory, however, a party could challenge a designation by asserting the designation violates his or her constitutional rights. *See Karn*, 925 F. Supp. at 9.

³⁷ 22 C.F.R. § 120.6 (defining “defense article” as including technical data); § 120.10 (defining “technical data” as information required for the manufacture of a defense article); § 127.1(a)(1) (stating that it is unlawful to export a defense article without a license); *see also* § 121.1(I)(i) (defining technical data as it applies to firearms up to .50 caliber under Category I).

³⁸ 22 C.F.R. § 120.17(a)(1). The regulations provide an exception for a person traveling outside of the United States who happens to have personal knowledge of technical data. *Id.*

under the ITAR by orally or visually disclosing or transferring a defense article to a foreign entity in the United States (such as an embassy), or to a foreign person, whether in the United States or abroad.³⁹ The ITAR's export restrictions are violated when an individual or company willfully exports, or attempts to export, an article contained in the USML without a license.⁴⁰

Notably, technical data does not include information already in the public domain.⁴¹ As defined in the ITAR, "public domain" includes published information generally available or accessible to the public in a variety of ways, including newsstands and bookstores, public libraries, and some research at accredited universities.⁴² The public domain exception does not automatically include information available on the Internet.⁴³ Furthermore, one cannot attempt to transmit technical data in the public domain if doing so violates the ITAR.⁴⁴

If the DDTTC determines that a CAD file for a 3D firearm is technical data, the file's distributor would need a license to make the file accessible on the Internet.⁴⁵ If the DDTTC further determines that posting the file online is an unauthorized export, the distributors could be subject to huge fines and long-term imprisonment.⁴⁶

B. First Amendment Principles: Regulating for Content and Prior Restraints

The freedom of speech, guaranteed by the First Amendment, protects various forms of expression.⁴⁷ The Supreme Court has espoused several theories of First Amendment protections.⁴⁸ In particular, two types of restrictions on speech

³⁹ § 120.17(a)(3)–(4); *see also* § 120.16 (defining a foreign person as any individual who is not a lawful permanent resident).

⁴⁰ *United States v. Chi Mak*, 683 F.3d 1126, 1131 (9th Cir. 2012).

⁴¹ *See* 22 C.F.R. § 120.10(a)(5). Accordingly, the export controls do not apply to information in the public domain. § 125.1(a).

⁴² 22 C.F.R. § 120.11(a) (2014).

⁴³ *See id.*; Goldstein, *supra* note 13, at 5. Nothing in the regulation indicates that information otherwise in the public domain loses its status by virtue of its presence on the Internet. *See* 22 C.F.R. § 120.11. The government, however, bears the burden to prove that the information is not in the public domain. *See Chi Mak*, 683 F.3d at 1132, 1137 (stating that the trial court correctly instructed the jury that the government must prove articles to not be in the public domain).

⁴⁴ *See* Goldstein, *supra* note 13, at 5 (stating that the DDTTC does not consider the public domain exception applicable to technical data placed into the public domain without authorization).

⁴⁵ 22 C.F.R. §§ 123.1(a), 125.1, 125.2, 127.1(a)(1).

⁴⁶ *See* The Arms Export Control Act, 22 U.S.C. § 2778(c) (2012) (stating that for each violation, an unlicensed exporter could be subject to one million dollars in fines and/or 20 years in prison for each violation); 22 C.F.R. § 127.3.

⁴⁷ *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . ."); *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (holding that the First Amendment protects not only speech, but also expressive conduct such as wearing black armbands to protest the Vietnam War, sit-ins to protest segregation, and burning the American flag as part of a political demonstration).

⁴⁸ *See, e.g., Police Dep't v. Mosley*, 408 U.S. 92, 95–96 (1972) (holding that the primary purpose of the First Amendment is to prevent content-based censorship); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273–74 (1964) (indicating that the "central meaning" of the First Amendment is to protect politi-

are uniformly recognized as the most likely to violate the First Amendment: content-based restrictions and prior restraints.⁴⁹ The protections afforded against even these most egregious restrictions, however, are neither absolute nor uniform.⁵⁰ Subsection 1 explores the Court's treatment of content-neutral and content-based restrictions on speech.⁵¹ Subsection 2 then discusses the prior restraint doctrine as it applies to licensing schemes that restrict speech.⁵²

1. Content-Based vs. Content-Neutral Restrictions

The Supreme Court distinguishes between restrictions of expression that are content-based and content-neutral.⁵³ Content-based restrictions are strongly disfavored, due to the risk of censorship.⁵⁴ A government regulation is content-based if it targets speech due to either the point of view of the speaker or the subject matter of the speech.⁵⁵ For example, a law prohibiting anti-government speech is content-based because it directly targets a particular viewpoint.⁵⁶ Addi-

cal speech); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931) (stating that the "chief purpose" of the First Amendment is to prevent prior restraints upon publication).

⁴⁹ See, e.g., *Simon & Schuster, Inc., v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 123 (1991) (holding that a law targeting publishers and requiring donations of profits based on the subject of a book violated the First Amendment as a content-based restriction on speech); *Near*, 283 U.S. at 713 (stating that a primary objective of the First Amendment is to prevent prior restraints on speech).

⁵⁰ Compare *Johnson*, 491 U.S. at 420 (holding that flag burning as a form of political speech is a protected expression under the First Amendment), with *United States v. O'Brien*, 391 U.S. 367, 376, 382 (1968) (holding that burning a draft card as a form of symbolic speech was not constitutionally protected speech).

⁵¹ See *infra* notes 53–74 and accompanying text.

⁵² See *infra* notes 75–92 and accompanying text.

⁵³ See *Simon & Schuster*, 502 U.S. at 116, 123 (finding a law requiring publishers to forfeit profits based on the topic of a book to be an unconstitutional, content-based restriction); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that the government may restrict speech in certain circumstances when the restriction is made without reference to content).

⁵⁴ See *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (noting that content-based prohibitions, particularly those backed by significant criminal penalties, must be presumed invalid based on their repressive effect on "the lives and thoughts of a free people"); see also *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47 (1986); *Mosley*, 408 U.S. at 95–96; Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 54–57 (1987) (stating that courts strictly scrutinize content-based restrictions because they potentially enable the government to distort public debate, regulate speech based on improper motivations, and more substantially limit the protected and communicative aspects of expression).

⁵⁵ See, e.g., *Johnson*, 491 U.S. at 411 (holding that a law suppressing an individual's expression of dissatisfaction with the government is a content-based restriction); *Mills v. Alabama*, 384 U.S. 214, 215–20 (1966) (deciding that a law prohibiting a newspaper editor from encouraging voters to vote a certain way was a content-based violation of the First Amendment); ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 962–63 (4th ed. 2011) (stating that a law is content neutral only if it is both "viewpoint neutral" and "subject matter neutral").

⁵⁶ See *Johnson*, 491 U.S. at 411 (holding that a law preventing an individual from expressing dissatisfaction with the government was an unconstitutional content-based restriction); Stone, *supra* note 54, at 47 (stating that the prohibition of libel, banning the publication of confidential information,

tionally, a law requiring Internet users to identify themselves prior to accessing pornographic materials online is content-based because it regulates speech premised on subject matter.⁵⁷ Conversely, a law is content neutral when the restriction targets neither the point of view nor the subject matter.⁵⁸

Content-based restrictions are generally subject to strict scrutiny because they present the greatest risk of government actively suppressing ideas.⁵⁹ Not all content, however, is created equal.⁶⁰ Courts engage, to some extent, in a determination of the speech's value.⁶¹ When evaluating content-based restrictions, the Supreme Court first analyzes where the speech falls on a spectrum of First Amendment values.⁶² If the restriction applies to low-value speech, the Court

forbidding the hiring of individuals with particular political views, and outlawing the display of swastikas are all examples of content-based restrictions).

⁵⁷ *Ashcroft*, 542 U.S. at 661–62, 670 (holding that a law requiring individuals to identify themselves when accessing pornographic material on the Internet was an unconstitutional content-based restriction); see also *Burson v. Freeman*, 504 U.S. 191, 197 (1992) (plurality opinion) (stating that restrictions based on the certain topics of speech are content-based restrictions). For example, a law prohibiting all picketing in residential areas, except for labor pickets connected to a place of employment, is an unconstitutional content-based restriction because it makes an exception for labor pickets. *Carey v. Brown*, 447 U.S. 455, 460–61 (1980).

⁵⁸ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994) (holding that a law requiring local cable companies to carry local stations was content neutral because the law required carriers to offer all local stations).

⁵⁹ See *Ashcroft*, 542 U.S. at 660 (noting that content-based restrictions present the greatest threat to free speech); *Mosley*, 408 U.S. at 95–98 (noting the distinct danger in permitting the government to select certain viewpoints to suppress); Stone, *supra* note 54, at 47–48.

⁶⁰ See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978) (holding that there is a “common sense” distinction between commercial speech and other forms of expression); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (noting that some speech is so low value that it does not warrant First Amendment protection); Stone, *supra* note 54, at 47.

⁶¹ See *Ohralik*, 436 U.S. at 455–56 (holding that commercial speech is not entitled to the highest level of First Amendment protection); *Chaplinsky*, 315 U.S. at 571–72 (acknowledging that some speech does not warrant First Amendment protection).

⁶² See *Ohralik*, 436 U.S. at 455–56; Andrea L. Crowley, Note, *R.A.V. v. City of St. Paul: How the Supreme Court Missed the Writing on the Wall*, 34 B.C. L. REV. 771, 778 (1993) (noting that certain types of speech, such as child pornography and fighting words, are not entitled to First Amendment protections). In 1978, in *Ohralik v. Ohio State Bar Ass'n*, the Supreme Court held that commercial speech occupied a low-priority position “in the scale of First Amendment values.” 436 U.S. at 456. Other types of speech low on the spectrum of First Amendment values include incitement, obscenity, and false statements of facts. Stone, *supra* note 54, at 47 n.3. By contrast, political expression and publication by the press are among those with the highest value. See *Johnson*, 491 U.S. at 411 (holding that expressing dissatisfaction with the government is the “core” of First Amendment protection); *Near*, 283 U.S. at 713–14 (stating that freedom of the press is essential to a free state). Furthermore, restrictions on speech that implicate additional substantive rights occupy a high position on the spectrum of First Amendment values. See, e.g., *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 161 (2002) (holding that licensing requirements for door-to-door canvassing was unconstitutional as applied to Jehovah’s witnesses because it limited expression connected to the free exercise of religion); *Emp’t Div. v. Smith*, 494 U.S. 872, 881–82 (1990) (stating that neutral, generally applicable laws violate the First Amendment’s Free Exercise clause when they implicate other constitutional rights, including free expression); *NAACP v. Button*, 371 U.S. 415, 428–30 (1963) (holding that an anti-solicitation rule restricting the NAACP’s ability to find plaintiffs for civil

applies a lower level of scrutiny and determines whether the circumstances justify the law's suppressive effect on expression.⁶³ If the restricted speech occupies a higher position on the value spectrum, the Court applies strict scrutiny.⁶⁴ Accordingly, content-based restrictions on high-value speech are subject to even greater scrutiny than content-based restrictions on lower value speech.⁶⁵

When the purpose of a content-based restriction is not to target the speech itself, but rather to limit undesirable "secondary effects" associated with the speech, the Court treats content-based restrictions as though they are content neutral.⁶⁶ For example, in 1986, in *City of Renton v. Playtime Theatres, Inc.*, the Supreme Court upheld a rule prohibiting adult movie theaters near residential zones.⁶⁷ Though the rule applied exclusively to theatres showing sexually explicit films, the Court distinguished the rule from a typical content-based restriction because the rule's purpose was to eliminate ancillary criminal activity associated with these establishments.⁶⁸ Accordingly, the Court stated the rule did not target the speech, but rather sought to suppress criminal activity commonly associated

rights actions was unconstitutional because it foreclosed expression necessary to secure equal protection under the law).

⁶³ See *Ohralik*, 436 U.S. at 456 (stating that commercial speech receives only limited First Amendment protections because it is of low value); *Miller v. California*, 413 U.S. 15, 23–24 (1973) (stating that the First Amendment does not protect obscene expression, which lacks any "literary, artistic, political, or scientific value").

⁶⁴ *Stone*, *supra* note 54, at 48. The Court has struck down nearly every content-based regulation of speech other than those deemed low value. *Id.*; see, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713, 714–15 (1971) (Black, J., concurring) (holding that a restriction on free speech based solely on national security concerns is not itself substantial justification); *id.* at 726 (Brennan, J., concurring) (holding that national security may justify restrictions on speech during times of war). These opinions demonstrate that freedom of the press, at least as it pertains to disclosure regarding the operation of the government, is high-value speech. See *N.Y. Times Co.*, 403 U.S. at 714–15 (Black, J., concurring); *id.* at 713 (Brennan, J., concurring); see also Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 606 (stating that protecting political speech is a central function of the First Amendment).

⁶⁵ Compare *Johnson*, 491 U.S. at 412 (finding that a content-based restriction on political expression was subject to the strictest scrutiny), with *Renton*, 475 U.S. at 47–48 (holding that a restriction affecting only sexually explicit expression was subject to treatment as a content-neutral regulation); see also *Stone*, *supra* note 54, at 47–48.

⁶⁶ See *Renton*, 475 U.S. at 47–49 (holding that a law restricting only sexually explicit speech was constitutional because the purpose of the law was to eliminate crime commonly associated with institutions facilitating that speech); CHEMERINSKY, *supra* note 55, at 965 (stating that the Supreme Court treats facially content-based restrictions as though they are content-neutral if the restriction's purpose is to address otherwise regulable secondary effects).

⁶⁷ See 475 U.S. at 47–49, 54 (holding that the rule was constitutional because the government interest was substantial and the rule restricted only the time, place, and manner of the expression).

⁶⁸ See *id.* at 47; see also *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 52–55 (1976) (plurality opinion) (holding that a law restricting the location of adult theatres was constitutional because it sought to limit the accumulation of vagrants, increased crime and prostitution, and declining property values).

with adult theatres.⁶⁹ This secondary effects test allows the Court to apply intermediate rather than strict scrutiny to some content-based restrictions.⁷⁰

The constitutionality of content-neutral restrictions depends on the balancing of several factors.⁷¹ When the restriction is narrowly tailored and leaves open other avenues for expression, courts are more likely to uphold the restriction.⁷² Similarly, courts tend to uphold restrictions that further substantial government interests when the regulatory authority otherwise falls within the government's constitutional power.⁷³ The Supreme Court applies varying levels of scrutiny depending on the balance of the interests.⁷⁴

⁶⁹ See *Renton*, 475 U.S. at 47. *But see id.* at 56–57 (Brennan, J., dissenting) (maintaining that secondary effects speak only to the strength of the government interest, but do not convert an explicitly content-based rule into a content-neutral one); Chase J. Sanders, *Bearing the First Amendment's Crosses: An Analysis of State v. Sheldon*, 53 MD. L. REV. 494, 509–10 (1994) (arguing that the secondary effects test allows the government to make an “end run” around First Amendment protections by justifying the regulation on the unrelated, secondary effect of the speech).

⁷⁰ See Stone, *supra* note 54, at 48–54. In *Renton*, however, it is not clear that, even if the Court had treated the rule as content-based, the Court would have struck the restriction down. See 475 U.S. at 47–48; *supra* notes 59–65 and accompanying text (stating that content-based restrictions on low-value speech are not necessarily strictly scrutinized). Some commentators argue that sexually explicit speech is low value, and therefore unlikely to warrant true strict scrutiny. See Sunstein, *supra* note 64, at 606–07. The Court has not invoked the secondary effects doctrine when evaluating restrictions on high-value speech. See *Boos v. Barry*, 485 U.S. 312, 321 (1988) (holding that the secondary effects doctrine did not apply in a case concerning a restriction on political speech).

⁷¹ See *O'Brien*, 391 U.S. at 376–77 (stating that a content-neutral restriction is justified “if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest”). These factors comprise the analysis known as the “*O'Brien* test.” See *Karn*, 925 F. Supp. at 10.

⁷² See *O'Brien*, 391 U.S. at 377, 381 (stating that a law prohibiting the destruction of draft cards was sufficiently narrow and did not preclude meaningful opportunities for expressing dissatisfaction with the government); *Renton*, 475 U.S. at 50–52 (explaining that a constitutional restriction did not prohibit adult theaters outright, but left open other avenues for expression). *O'Brien* did not explicitly state that the speech's value was relevant to the determination, but instead focused on the strength of the government interest. 391 U.S. at 376–77. Nevertheless, the value of the content may still be relevant. Compare *Watchtower*, 536 U.S. at 161 (noting that an ordinance prohibiting handbilling, without respect to content, was high-value speech because it infringed on a traditional method of religious expression), and *Johnson*, 491 U.S. at 408 (holding that restricting a particular form of political expression was unconstitutional even though the law was premised as a way to keep the peace), with *Renton*, 475 U.S. at 52 (holding that limited restrictions on businesses engaged in sexually explicit speech did not violate the First Amendment).

⁷³ Compare *O'Brien*, 391 U.S. at 377 (holding that a content-neutral restriction was constitutional because it fell within the government's authority and the restriction advanced significant government interests), with *Johnson*, 491 U.S. at 408 (holding that the government interest in prosecuting flag burning due to the potential breach of the peace was insufficient to restrict political speech).

⁷⁴ See Stone, *supra* note 54, at 48–54, 57–59 (arguing that the degree of scrutiny applied to content-neutral restrictions depends primarily on the extent to which the law leaves open other means for expression). More exacting scrutiny generally corresponds with a deeper analysis of the government interest and the necessity of the law in furthering that interest. See *id.* at 50–54; see also *Renton*, 475 U.S. at 50–52 (holding that a law was constitutional when the restriction on speech limited only the

2. The Prior Restraint Doctrine

Of the various free speech protections afforded by the First Amendment, perhaps the most significant is the prevention of prior restraints.⁷⁵ Accordingly, prior restraints begin with a strong presumption against their validity.⁷⁶ The government, therefore, faces a heavy burden to prove that the prior restraint is constitutionally tolerable.⁷⁷ Prior restraints occur when a law, regulatory scheme, or court order prevents expression in the first instance.⁷⁸ Generally, to survive constitutional scrutiny, licensing schemes that function as a prior restraint on speech must have (1) an important reason for licensing, (2) clear standards that virtually eliminate government discretion, and (3) certain procedural safeguards to mitigate the danger of censorship.⁷⁹

First, evaluating the significance of a licensing scheme's purpose is analytically similar to examining the government's interest with respect to content-neutral or content-based restrictions on speech.⁸⁰ The more compelling the government's purpose, the more likely the scheme will survive First Amendment scrutiny.⁸¹ Still, the regulatory scheme must be as narrowly tailored as possible,

time, place, and manner of expression and served a "substantial" government interest); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607–11 (1982) (holding that a statute barring the press from a criminal trial violated the First Amendment because it was not "necessary" to further a "compelling government interest").

⁷⁵ See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."); *Near*, 283 U.S. at 713 (noting that the chief purpose of the First Amendment is to prevent prior restraints).

⁷⁶ *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (holding that prior restraints face a "heavy presumption" of invalidity); *Bernstein v. U.S. Dep't of State*, 945 F. Supp. 1279, 1286 (N.D. Cal. 1996) (noting that prior restraints are presumptively invalid).

⁷⁷ See *Keefe*, 402 U.S. at 419 (holding that a party seeking to enjoin speech must meet a heavy burden to justify the use of a court order to restrict speech).

⁷⁸ See *Alexander v. United States*, 509 U.S. 544, 550 (1993); see also CHEMERINSKY, *supra* note 55, at 978–82 (arguing that the Supreme Court has gone out of its way in certain cases to avoid finding prior restraints, due to the heavy presumption of invalidity). For example, in 1994, in *Madsen v. Women's Health Center*, the Court held that an injunction restricting speech around an abortion clinic was not a prior restraint. 512 U.S. 753, 763 n.2 (1994). One scholar has argued that such an injunction is a prototypical prior restraint, but the court declined to treat the restriction as a prior restraint due to the sensitive subject matter. CHEMERINSKY, *supra* note 55, at 981.

⁷⁹ See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988); *Freedman v. Maryland*, 380 U.S. 51, 58–59 (1965); *Bernstein*, 945 F. Supp. at 1287.

⁸⁰ See *Cox v. New Hampshire*, 312 U.S. 569, 574–76 (1941); *supra* notes 66–74 and accompanying text (explaining how the significance of the government interest in considering the validity of content-based and content-neutral restrictions on speech).

⁸¹ See *Cox*, 312 U.S. at 575–76. For example, in *Cox v. New Hampshire*, the Supreme Court held that the local government interests in proper policing, efficiency of scheduling, and public convenience justified implementing a licensing scheme for parades and public demonstrations. *Id.* In contrast, the Court struck down an ordinance that required all door-to-door canvassers, promoting a cause, to first obtain a license from the mayor. *Watchtower*, 536 U.S. at 154, 168–69. The Court held that even legitimate interests, such as crime prevention and limiting solicitation, were not significant enough to overcome the breadth of the infringement on speech. *Id.* at 165, 167–68.

so it does not restrict speech more than necessary to adequately serve the government interest.⁸²

Second, valid licensing schemes must remove virtually all discretion from the licensing authority to eliminate the risk of content-based restrictions.⁸³ Licensing regimes cannot constitutionally regulate speech based on the whim of a government official who may decide to grant or deny a license with no guiding criteria.⁸⁴ Without explicit limitations on licensing authority, an official can censor speech based on biases and ulterior motives.⁸⁵ Therefore, prevent licensing officials from engaging in censorship requires clearly delineated standards.⁸⁶

Finally, in light of the unique dangers of prior restraints in licensing schemes, in 1965, in *Freedman v. Maryland*, the Supreme Court established three generally applicable procedural safeguards.⁸⁷ In order to be valid, a licensing scheme must (1) require the licensing official to grant the license or go to court to enjoin the expression within a fixed period of time, (2) provide for expeditious judicial review, and (3) place the burden of proof on the government to demonstrate that the speech is not protected.⁸⁸

In two recent cases, however, the Supreme Court relaxed this final requirement.⁸⁹ When the speech at issue is considered to be low value and other avenues of expression remain open, the harm caused by the restraint is less sig-

⁸² See *Watchtower*, 536 U.S. at 168–69; *Ward*, 491 U.S. at 798–99.

⁸³ See *Lakewood*, 486 U.S. at 757 (stating that a licensing scheme conferring broad discretion on licensing officials is subject to facial attack, even without actual proof of abuse); *Freedman*, 380 U.S. at 57–58 (holding that prior restraints are particularly dangerous because they give government officials the power to determine permissible forms of speech outside of the judicial process). For example, in *City of Lakewood v. Plain Dealer Publishing Co.*, the Supreme Court struck down a licensing scheme because it gave the mayor unfettered discretion in granting the licenses required to place newspaper kiosks on public property. 486 U.S. at 770. The Court also held that requiring the mayor to state the grounds of denial was, by itself, insufficient to limit the mayor's discretion. *See id.* *But see id.* at 793 n.13 (White, J., dissenting) (maintaining that requiring the mayor to state the reasons for denying a license reduced the potential for censorship).

⁸⁴ See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969); *Bernstein*, 945 F. Supp. at 1289.

⁸⁵ See *Lakewood*, 486 U.S. at 757; *Bernstein*, 945 F. Supp. at 1289

⁸⁶ See *Lakewood*, 486 U.S. at 757; *Shuttlesworth*, 394 U.S. at 150–51; *Bernstein*, 945 F. Supp. at 1289.

⁸⁷ 380 U.S. at 58–59.

⁸⁸ *Id.*; see also *Bernstein*, 945 F. Supp. at 1286–90 (applying the prior restraint analysis to the ITAR).

⁸⁹ See *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 780–81 (2004); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228–30 (1990) (plurality opinion). Because both cases dealt with the free speech rights of businesses partaking in sexually explicit speech, the procedural requirements may be loosened only with respect to low-value speech. See *Littleton*, 541 U.S. at 780–81 (holding that the plurality opinion of the court in *FW/PBS, Inc. v. City of Dallas* makes clear that only the core policy of *Freedman* applies to adult business licensing schemes); see also Sunstein, *supra* note 64, at 606–07 (arguing that sexually explicit speech is low value).

nificant.⁹⁰ Furthermore, the Court has held that the burden of proof does not need to favor speech if the licensing decision is based on a ministerial assessment of the potential licensee's qualifications.⁹¹ When the licensing official makes the decision based on objective criteria, the danger of censorship is substantially reduced.⁹²

II. FIREARM CAD FILES, THE ITAR, AND THE FIRST AMENDMENT

The intersection of the International Traffic in Arms Regulations ("ITAR") and First Amendment principles presents difficult questions, given the significance of the individual's free expression and the government's interest in effective firearm regulation.⁹³ Only a few courts have examined the intersection of First Amendment principles and the ITAR's licensing scheme.⁹⁴ Generally,

⁹⁰ See, e.g., *Hill v. Colorado*, 530 U.S. 703, 725 (2000) (holding that a statute limiting speech around health care facilities left open ample channels of communication because protestors outside of the buffer zone could meaningfully communicate orally at reasonable volumes and visually by using signs); *Ward*, 491 U.S. at 784, 802 (upholding a restriction limiting the volume of public performances because the volume levels below the statutory limit constituted an adequate means of communication); *Renton*, 475 U.S. at 50 (upholding a restriction that left 520 acres available to host adult business).

⁹¹ *FW/PBS*, 493 U.S. at 229 (plurality opinion). It is unclear whether the "ministerial" analysis is distinguishable from the requirement that the scheme remove discretion from the licensing official. See *supra* notes 83–86 and accompanying text.

⁹² *Littleton*, 541 U.S. at 783. If the decision must be made on objective criteria, sufficient limiting principles exist to prevent ulterior motives from guiding the licensor's decision. See *id.*; *Bernstein*, 945 F. Supp. at 1289. The Supreme Court thus evaluates the objectivity of the licensing standards at two points: first, whether the licensing scheme confers such broad discretion that the regulation is unconstitutional, and second, whether the criteria are "ministerial" to determine whether the government bears the burden of proof. See *FW/PBS*, 493 U.S. at 229; *Lakewood*, 486 U.S. at 757, 770. The Court did not indicate if the standards differ, but instead invoked similar reasoning regarding the risk of censorship and arbitrariness. See *FW/PBS*, 493 U.S. at 229; *Lakewood*, 486 U.S. at 757, 770.

⁹³ Compare *United States v. Chi Mak*, 683 F.3d 1126, 1135 (9th Cir. 2012) (holding that the ITAR is constitutional because, among other things, the regulations serve an important government interest), with *Bernstein v. U.S. Dep't of State*, 945 F. Supp. 1279, 1288 (N.D. Cal. 1996) (holding that the government interest in national security alone is insufficient to justify the ITAR, which imposes a content-based prior restraint on speech).

⁹⁴ See *Chi Mak*, 683 F.3d at 1134–36; *United States v. Posey*, 864 F.2d 1487, 1496–97 (9th Cir. 1989); *United States v. Edler Indus., Inc.*, 579 F.2d 516, 519–22 (9th Cir. 1978); *Bernstein*, 945 F. Supp. at 1286–95; *Karn v. U.S. Dep't of State*, 925 F. Supp. 1, 8–13 (D.D.C. 1996). In 1978, in *United States v. Edler Industries, Inc.*, the Circuit Court of Appeals for the Ninth Circuit evaluated the United States Munitions List ("USML") as it existed under the Mutual Security Act, the Arms Export and Control Act's ("AECA") predecessor, and the Ninth Circuit has since explicitly adopted the same reasoning in recent cases involving the ITAR. See *Chi Mak*, 683 F.3d at 1135–36; *Edler*, 579 F.2d at 519. In addition, in 1998, in *Junger v. Daley*, the District Court for the Northern District of Ohio evaluated a First Amendment challenge to the Export Administration Regulations, a regulatory scheme that closely resembles the ITAR. 8 F. Supp. 2d 708, 720 (N.D. Ohio 1998), *rev'd on other grounds*, 209 F.3d 481 (6th Cir. 2000) (stating that the Export Administration Regulations prohibit the export of certain software outside the United States without a license); see The Export Administration Regulations, 22 C.F.R. §§ 730–780 (2014); *supra* notes 27–46 and accompanying text (describing the regulatory framework of the ITAR).

courts have concluded that the ITAR constitutes a content-neutral restriction on speech.⁹⁵ These courts have also upheld the ITAR in the face of First Amendment challenges.⁹⁶

Notably though, the cases present factual circumstances that make them poor analogs to firearm CAD files.⁹⁷ Significantly, none of the courts explicitly examined the value of the speech at issue.⁹⁸ Courts that upheld the ITAR also did not evaluate the sufficiency of the ITAR's procedural protections as a regulatory scheme that restricts free speech.⁹⁹ Only one court ruled on the sufficiency of the ITAR's procedural safeguards against censorship, and it concluded that the ITAR lacked the requisite protections.¹⁰⁰ Still other courts avoided ruling on the Arms Export and Control Act's ("AECA") explicit preclusion of judicial review for

⁹⁵ See *Chi Mak*, 683 F.3d at 1134–36; *Karn*, 925 F. Supp. at 10–11. By contrast, in 1996, in *Bernstein v. U.S. Department of State*, the District Court for the Northern District of California appears to be the only court concluding that the ITAR is an unconstitutional, content-based, prior restraint on speech. See 945 F. Supp. at 1289–90. Although the Circuit Court of Appeals for the Ninth Circuit effectively overruled the district court's conclusion in 2012, in *United States v. Chi Mak*, *Bernstein* is the only case to analyze the procedural requirements for a constitutional licensing regime with respect to free speech in-depth. See *Chi Mak*, 683 F.3d at 1134–36; *Bernstein*, 945 F. Supp. at 1290.

⁹⁶ See *Chi Mak*, 683 F.3d at 1134–36 (holding that the ITAR did not violate the First Amendment); *Karn*, 925 F. Supp. at 10–12 (same).

⁹⁷ See *Chi Mak*, 683 F.3d at 1131, 1134–36 (finding that the ITAR did not violate the First Amendment by prohibiting the accused from exporting data regarding electrical systems about naval ships and submarines); *Karn*, 925 F. Supp. at 3, 10–12 (finding that the ITAR constitutionally regulates the proliferation of cryptographic software). But see *Bernstein*, 945 F. Supp. at 1290 (finding that the ITAR unconstitutionally prohibits the disclosure of cryptography software). *Chi Mak* is a poor analog to 3D CAD files given the extreme nature of the violation in that case, as the information at issue was classified and related to major national security interests. See *Chi Mak*, 683 F.3d at 1131. Additionally, in *Karn v. U.S. Dep't of State* and *Bernstein*, the courts evaluated non-military encryption software, which the ITAR subsequently removed from its scope. See *Bernstein*, 945 F. Supp. at 1290; *Karn*, 925 F. Supp. at 10; *Bernstein v. U.S. Dep't of Commerce*, No. C95-0582 MHP, 2004 WL 838163, at *2 n.2 (N.D. Cal. Apr. 19, 2004) (noting that the Export Administration Regulations, under the Commerce Department's jurisdiction, now regulates non-military encryption software instead of the ITAR). Nevertheless, the two regulatory frameworks still share some similarity. See *supra* note 94 and accompanying text (stating that the Export Administration Regulations are closely related to the ITAR).

⁹⁸ See *Chi Mak*, 683 F.3d at 1134–36; *Posey*, 864 F.2d at 1496–97; *Edler*, 579 F.2d at 519–22; *Bernstein*, 945 F. Supp. at 1286–92; *Karn*, 925 F. Supp. at 10–12.

⁹⁹ See *Chi Mak*, 683 F.3d at 1134–37; *Posey*, 864 F.2d at 1496–97; *Edler*, 579 F.2d at 519–22; *Karn*, 925 F. Supp. at 10–12; see also *supra* notes 87–92 and accompanying text (discussing the procedural safeguards necessary for a licensing scheme that restricts speech to be valid).

¹⁰⁰ *Bernstein*, 945 F. Supp. at 1289–90. The court found that the ITAR grants licensing officials unfettered discretion, in an unlimited time frame, and unconstitutionally precludes judicial review of USML designations. See *id.* at 1289–90. The court also held that, because the ITAR is content-based, the government must still bear the burden to prove the speech is not protected. See *id.* at 1290; *supra* notes 87–92 and accompanying text (discussing the procedures required for a licensing scheme that restricts speech to survive constitutional scrutiny). But cf. *Karn*, 925 F. Supp. at 8–9 (holding that the AECA's preclusion of judicial review does not extend to constitutional challenges).

United States Munitions List (“USML”) designations by invoking the political questions doctrine.¹⁰¹

This Part analyzes the First Amendment consequences of the ITAR’s regulation of technical data as it pertains to 3D firearm CAD files.¹⁰² Section A discusses how courts treat the ITAR as being either a content-neutral or content-based restriction.¹⁰³ Section B applies the principles governing prior restraints on speech to the ITAR’s licensing regime.¹⁰⁴

A. Should the ITAR Be Scrutinized as a Content-Based or Content-Neutral Restriction?

The majority of courts analyzing the ITAR’s effect on speech have concluded that its limitations are content-neutral.¹⁰⁵ For example, the United States Court of Appeals for the Ninth Circuit held that the ITAR is content-neutral because it regulates speech based on its “function,” and not on a point of view.¹⁰⁶ By contrast, in 1996, in *Bernstein v. U.S. Department of State*, the District Court for the Northern District of California indicated that the ITAR is a content-based restriction because it regulates speech based on the substance of the data.¹⁰⁷

Under First Amendment precedent, a rule that restricts speech based on subject matter is content-based, even if it does not directly suppress a point of view.¹⁰⁸ The ITAR potentially restricts speech at two points: first, through the

¹⁰¹ See *United States v. Mandel*, 914 F.2d 1215, 1223 (9th Cir. 1990) (holding that the validity of regulation based on the article’s potential effect on the military capabilities of foreign countries is a political question); *United States v. Martinez*, 904 F.2d 601, 602 (11th Cir. 1990) (holding that the act of designating an article on the USML is itself a political question). The political question doctrine allows courts to defer to the political branches when the Constitution explicitly grants power to the other branches of government and is commonly invoked in areas such as foreign affairs and national security. See *Baker v. Carr*, 369 U.S. 186, 210 (1962) (plurality opinion) (stating that political questions are issues that are more appropriately decided by one of the political branches of government and lack criteria for satisfactory judicial determination); *Bancoult v. McNamara*, 445 F.3d 427, 432–33 (D.C. Cir. 2006) (holding that matters of national security and foreign policy are non-justiciable political questions).

¹⁰² See *infra* notes 105–165 and accompanying text.

¹⁰³ See *infra* notes 105–115 and accompanying text.

¹⁰⁴ See *infra* notes 116–165 and accompanying text.

¹⁰⁵ *Chi Mak*, 683 F.3d at 1134; *Karn* 925 F. Supp. at 10; see also *Junger*, 8 F. Supp. 2d at 720 (holding that the Export Administration Regulations are content-neutral because they regulated encryption software without regard to the views it expressed).

¹⁰⁶ See *Chi Mak*, 683 F.3d at 1134–35; see also *Karn*, 925 F. Supp. at 10–11 (stating that the ITAR is content-neutral because its purpose is to advance foreign policy and national security goals).

¹⁰⁷ See 945 F. Supp. at 1290 (stating that, by specifically targeting cryptographic software, the ITAR is a content-based restriction). The court’s decision, however, related specifically to Category XIII(b) of the USML, which covers, inter alia, cryptographic software. *Id.* at 1288; 22 C.F.R. § 121.1(XIII)(b) (2014).

¹⁰⁸ See *Ashcroft v. ACLU*, 542 U.S. 656, 661, 665 (2004) (holding that a law regulating a particular subject, without reference to a point of view, was content-based); *Burson v. Freeman*, 504 U.S.

initial designation of the article on the USML, and second, through the licensing decision.¹⁰⁹ Once the DDTC decides that a particular item falls within the scope of the USML, one may only export the item if it is licensed under the ITAR.¹¹⁰ In addition to the initial designation of the article on the USML, a licensing decision itself has the potential to be content-based.¹¹¹

Even if the ITAR is content-based, it may nevertheless avoid strict scrutiny under the doctrine of secondary effects.¹¹² For example, in *Bernstein*, the court acknowledged that the purpose of the ITAR could be content-neutral.¹¹³ Additionally, in 1996, in *United States v. Karn*, the District Court for the District of Columbia took special note of the purpose for the regulation in finding the regulations content neutral.¹¹⁴ When a restriction intends not to impair the freedom of

191, 197 (1992) (plurality opinion) (holding that restrictions based on the topic of speech are content-based restrictions); *see also supra* notes 53–65 and accompanying text.

¹⁰⁹ *See* 22 C.F.R. § 120.4(a) (describing the Commodity Jurisdiction procedure, by which the Directorate of Defense Controls (“DDTC”) determines whether an article meets the specifications of a defense article designated on the USML); § 126.7(a) (stating the grounds upon which the DDTC may deny licenses to those seeking to export defense articles); *see also Bernstein*, 945 F. Supp. at 1289–90 (holding that the ITAR is an unconstitutional restriction on free expression).

¹¹⁰ 22 C.F.R. §§ 125.1, 125.2(a). Through the Commodity Jurisdiction process the DDTC determines whether the substance of a file meets the specifications of a defense article contained in the USML, or whether the article has significant military or intelligence applications. § 120.4(d)(2)–(3).

¹¹¹ *See Bernstein*, 945 F. Supp. at 1287 (noting that licensing systems that confer broad discretion on officials create the opportunity for content-based restrictions on speech); 22 C.F.R. § 126.7(a) (stating the grounds for denying applications for export licenses under the ITAR). For example, the DDTC may deny a license when it determines the denial furthers the policy objectives of the AECA. *See* The Arms Export Control Act of 1976, 22 U.S.C. § 2778(a) (2012) (stating that the purpose of the AECA is to further world peace, national security, and foreign policy goals of the United States); 22 C.F.R. § 126.7(a)(1) (stating that the DDTC may deny a license if doing so furthers national security, foreign policy, or world peace). To make this determination, the DDTC evaluates the nature of the technical data to assess its impact on the AECA’s policy goals. *See* 22 U.S.C. § 2778(a) (stating that the AECA grants the Executive Branch the authority to regulate the exportation of defense articles to advance national security, foreign policy, and world peace); 22 C.F.R. § 126.7(a)(1) (stating that the DDTC may deny a license to further the AECA’s policy goals); *see also* 22 C.F.R. § 120.4(d)(2)–(3) (stating that the DDTC makes determinations that an article qualifies as a USML designated defense article on a case-by-case basis). Notably, an applicant’s criminal history, eligibility to contract with the United States, and application accuracy do not implicate the AECA’s policy objectives. *See* 22 C.F.R. § 126.7(a)(2)–(8); *see also* 22 U.S.C. § 2778(a).

¹¹² *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *supra* notes 66–70 and accompanying text. *But see Bernstein*, 945 F. Supp. at 1289 n.7 (declining to apply secondary effects analysis to the ITAR).

¹¹³ *Bernstein*, 945 F. Supp. at 1288. The court did not ultimately determine whether the ITAR’s purpose is, in fact, neutral. *Id.* at 1288–89. Rather, the court stated that the content-neutral nature of encryption software made neutrality of any applicable restrictions unclear. *Id.* Accordingly, the court concluded that even if it treated the ITAR as a content-neutral restriction, it still is an unconstitutional prior restraint. *Id.* at 1289.

¹¹⁴ *See Karn*, 925 F. Supp. at 10; *see also* 22 U.S.C. § 2778(a) (granting the Executive Branch the power to regulate for the purpose of furthering world peace, national security, and foreign policy).

speech, but to address undesirable consequences commonly associated with the speech, courts generally apply intermediate or low scrutiny.¹¹⁵

B. *The Constitutionality of the ITAR as a Prior Restraint*

The only court to apply the prior restraint doctrine to the ITAR's restrictions on speech concluded the licensing scheme violated the First Amendment.¹¹⁶ The court held that the ITAR operates as a prior restraint because the Directorate of Defense Controls ("DDTC") prohibits expression without a license, albeit in limited circumstances.¹¹⁷ This Section applies the prior restraint doctrine to the ITAR's limitations on speech.¹¹⁸ Subsection 1 addresses the strength of the government's reason to regulate.¹¹⁹ Subsection 2 discusses the standards by which the DDTC makes its licensing decisions.¹²⁰ Finally, Subsection 3 examines the sufficiency of the ITAR's procedural safeguards.¹²¹

1. The Government Interest Behind the ITAR's Limitations on Speech

First, to avoid constitutional infirmity, a licensing scheme restricting speech must serve an important government interest.¹²² This consideration is largely duplicative of the requirement of having a compelling government interest for a content-neutral restriction on speech.¹²³

The DDTC's authority to promulgate the ITAR stems from the AECA.¹²⁴ The AECA explicitly states that its regulations are designed to advance the inter-

¹¹⁵ See *Renton*, 475 U.S. at 48 (holding that a statute regulating sexually explicit speech should be treated as a content-neutral restriction because its purpose was to target crime); *Karn*, 925 F. Supp. at 10; see *supra* notes 66–70 and accompanying text (discussing the secondary effects doctrine).

¹¹⁶ See *Bernstein*, 945 F. Supp. at 1286–90. In *Chi Mak*, for example, the Ninth Circuit mentioned "prior restraint," but did not apply the *Freedman* procedural requirements to the ITAR. See *Chi Mak*, 683 F.3d at 1136. *Karn* held that the plaintiff lacked standing to challenge the ITAR on prior restraint grounds. *Karn*, 925 F. Supp. at 12–13; see also *Posey*, 864 F.2d at 1496–97 (finding that the ITAR does not violate the First Amendment without applying the prior restraint analysis).

¹¹⁷ See *Bernstein*, 945 F. Supp. at 1286; 22 C.F.R. § 120.1(a) (2014) (stating that the DDTC has authority to regulate defense articles and technical data); § 120.11 (defining information falling within the public domain); § 120.17(a) (stating that "export" means transmitting regulated articles outside the United States, or disclosing the information to a foreign government or person); § 125.1(a) (stating that "technical data" in the public domain is not subject to the ITAR's licensing requirement).

¹¹⁸ See *infra* notes 122–165 and accompanying text.

¹¹⁹ See *infra* notes 122–129 and accompanying text.

¹²⁰ See *infra* notes 130–145 and accompanying text.

¹²¹ See *infra* notes 146–165 and accompanying text.

¹²² See *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 164–65 (2002); *Cox v. New Hampshire*, 312 U.S. 569, 575–76 (1941).

¹²³ See *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968); *supra* notes 71–74 and accompanying text (discussing the factors relevant to the constitutionality of a content-neutral restriction on speech).

¹²⁴ See The Arms Export and Control Act of 1976, 22 U.S.C. § 2778(a) (2012); 22 C.F.R. § 120.1(a) (2014).

ests of world peace, as well as United States foreign policy and national security.¹²⁵ Yet, in 1971, in *New York Times Co. v. United States*, a majority of the Supreme Court held that national security interests alone do not justify a prior restraint.¹²⁶ Accordingly, in *Bernstein*, the court stated that national security concerns alone do not justify the prior restraint imposed by the ITAR.¹²⁷ The AECA, however, also gives the Executive Branch authority to promulgate regulations to advance world peace and foreign policy concerns.¹²⁸ Even if world peace and foreign policy are insufficient, or are too similar to national security interests to justify restriction, courts are unlikely to review policy determinations by the political branches.¹²⁹

2. The DDTC's Licensing Standards

Second, a licensing scheme must also have clear standards that effectively remove the licensing official's discretion.¹³⁰ The DDTC process for licensing

¹²⁵ See 22 U.S.C. § 2778(a) (stating that the President has authority to regulate the export of defense articles to further national security and foreign policy); *Karn*, 925 F. Supp. at 10 (noting that the rationale of the ITAR is to promote vital national security interests); 22 C.F.R. § 120.1(a) (stating that the purpose of the ITAR is to advance national security and foreign policy).

¹²⁶ See 403 U.S. 713, 714 (1971) (per curiam). The case consisted of nine separate opinions regarding the circumstances in which the government interest is, if ever, strong enough to justify enjoining publication. See *id.* at 714–62. For example, Justice Hugo Black concluded that no law could constitutionally restrict the press. See *id.* at 717–18 (Black, J., concurring). By contrast, Justice William J. Brennan, Jr. stated that such restraints are permissible in extremely narrow circumstances, perhaps limited to times the United States is at war. See *id.* at 725–26 (Brennan, J., concurring).

¹²⁷ See *Bernstein*, 945 F. Supp. at 1288. Given the fractured decision in *New York Times Co.*, its applicability to preventing the publication of technical data is unclear. See 403 U.S. at 714–62. Most significantly, it is not clear that posting technical data online, 3D CAD files in particular, occupies a sufficiently high place on the spectrum of First Amendment values, such that it warrants the highest levels of protection. See *Chi Mak*, 683 F.3d at 1136 (implicitly stating that the ITAR does not govern highest value speech because it specifically excludes from its scope certain high value speech, such as scholarly works).

¹²⁸ 22 U.S.C. § 2778(a)(1) (“In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services . . .”). Accordingly, national security arguably is not the only justification for regulation. See *N.Y. Times Co.*, 403 U.S. at 714; *Bernstein*, 945 F. Supp. at 1288. Other courts have acknowledged the importance of the government interests advanced by the ITAR. See *Chi Mak*, 683 F.3d at 1135–36; *Karn*, 925 F. Supp. at 10–12.

¹²⁹ See *Bancoult*, 445 F.3d at 432–33 (holding that issues closely connected to foreign policy and national security are non-justiciable); *Karn*, 925 F. Supp. at 11–12 (holding that the impact a particular article would have on a foreign military is a political question); see also *Haig v. Agee*, 453 U.S. 280, 292 (1981) (holding that matters closely connected to foreign policy and national security are rarely appropriate for judicial evaluation).

¹³⁰ See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 770 (1988); *Bernstein*, 945 F. Supp. at 1289; *supra* notes 83–86 and accompanying text (discussing the requirement that licensing schemes restricting speech must limit the government's discretion in issuing or denying licenses in order to survive constitutional scrutiny).

consists of two primary steps.¹³¹ First, one must first determine whether the ITAR applies to the article or technical data to be exported.¹³² If any ambiguity exists as to whether the ITAR governs the particular article or technical data, the distributor should submit a Commodity Jurisdiction request.¹³³ Second, if the article or technical data is subject to the ITAR, the distributor must obtain approval from the DDTC by applying for the appropriate license.¹³⁴

The USML provides the criteria for determining whether an article is, in the first instance, a regulable defense article or technical data.¹³⁵ If the technical data at issue does not qualify as a defense article, then the DDTC has no authority to regulate its export.¹³⁶ The USML further provides a non-exhaustive list of eight enumerated factors based on which the DDTC may deny a license.¹³⁷

¹³¹ See 22 C.F.R. § 120.1(c) (2014) (stating certain grounds of ineligibility); § 120.4(a) (stating that the DDTC uses the Commodity Jurisdiction procedure to determine whether the USML covers a specific article); § 120.17 (defining export); § 125.1 (stating that the ITAR governs the export of unclassified technical data); § 127.1 (stating that one violates the ITAR by exporting technical data without the required license).

¹³² 22 C.F.R. § 120.4(a); *see also* § 121.1(I)(i) (defining technical data as it pertains to firearms up to .50 caliber).

¹³³ 22 C.F.R. § 120.4(a); *supra* notes 33–36 and accompanying text (explaining the procedure for the Commodity Jurisdiction request).

¹³⁴ See 22 C.F.R. § 123.1(a) (stating that one must acquire a license before exporting a defense article or technical data, and listing the relevant forms). DSP-5 licenses are for permanent exports for unclassified articles or technical data. *Id.*

¹³⁵ See, e.g., 22 C.F.R. § 120.10 (stating that technical data is “information . . . required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles,” including “blueprints, drawings, photographs, plans, instructions or documentation”); § 121.1(I)(i) (incorporating the definition of technical data in § 120.10 into the USML); § 121.1(I)(j)(1) (stating that a Category I firearm is “weapon not over .50 caliber (12.7mm) which is designed to expel a projectile by the action of an explosive or which may be readily converted to do so”).

¹³⁶ See 22 C.F.R. § 123.1(a) (stating that the DDTC must approve exports of defense articles).

¹³⁷ See 22 C.F.R. § 126.7(a) (2014). These grounds for denial include when: (1) the DDTC determines that denying the license furthers world peace, national security, or foreign policy; (2) the DDTC believes the applicant already violated the ITAR or other export restrictions; (3) the applicant is charged or indicted with violating certain criminal statutes; (4) the applicant has been convicted of violating certain criminal statutes; (5) the applicant is ineligible to contract with or receive a license from any federal agency; (6) the applicant, manufacturer, or other party to the export (including parties with an interest in the export) has been debarred, suspended, or is ineligible to receive a license from any federal agency; (7) the applicant omitted information expressly required for an application, exemption, or other authorization under the ITAR; (8) the applicant is subject to other relevant sanctions under U.S. laws. *See id.*; *see also* § 127.7(a)–(c) (stating that the Assistant Secretary of State for Political-Military Affairs may “debar”—i.e. prohibit from export—any individual charged with or already convicted of certain crimes). Even when the applicant has been convicted of an enumerated crime, the DDTC retains discretion to issue licenses, although when limited conditions are satisfied. § 127.7(b)–(c) (stating that the DDTC retains discretionary authority, under limited circumstances, to grant licenses to applicants convicted of criminal statutes).

The process of applying for a license to export defense articles provides some insight into the criteria considered by the DDTC.¹³⁸ For example, applicants for permanent export licenses must submit Form DSP-5, which requires information regarding various aspects of the applicant's intended export.¹³⁹ Also, as a matter of policy, the DDTC denies licenses for the export of defense articles to certain countries.¹⁴⁰

In *Bernstein*, the only case to evaluate the ITAR as a prior restraint, the court referred to the ITAR as "a paradigm of standardless discretion."¹⁴¹ Although the ITAR requires certain information from applicants, the court held that the ITAR does not limit the licensing official's ability to approve or deny applications.¹⁴² The ITAR further gives the DDTC the authority to deny, revoke, suspend, or amend licenses whenever "otherwise advisable."¹⁴³ The court emphasized the effect unpredictable licensing had on commercial vendors of cryptography software.¹⁴⁴ Accordingly, the *Bernstein* court held that the ITAR was unconstitutional due to the broad discretion conferred to the DDTC, leaving a substantial risk of arbitrary or discriminatory licensing decisions.¹⁴⁵

¹³⁸ See U.S. Dep't of State, Directorate of Defense Trade Controls, *Guidelines of Completion of a Form DSP-5, Application/License for Temporary Export of Unclassified Defense Articles*, https://www.pmdtc.state.gov/DTRADE/documents/DTrade_DSP_5_Instructions.pdf, archived at <http://perma.cc/8E65-ML5R> (last visited Sept. 6, 2014) [hereinafter "DSP-5 Instructions"]. For temporary export licenses, applicants must submit a Form DSP-73. 22 C.F.R. § 123.1(a)(2).

¹³⁹ See 22 C.F.R. § 123.1(a)(2). Information the applicant must disclose includes, among other things, the specific countries of export, the USML category, the value of the data, and the purpose of the data. See DSP-5 Instructions, *supra* note 138, at 3–8.

¹⁴⁰ 22 C.F.R. § 126.1(a) (stating that it is United States policy to deny licenses to export defense articles to Belarus, Cuba, Eritrea, Iran, North Korea, Syria, Venezuela, or any country currently facing a United States embargo). The ITAR allows the DDTC to make an exception to these prohibitions based on undue hardship. § 126.3.

¹⁴¹ *Bernstein*, 945 F. Supp. at 1289; see also *Lakewood*, 486 U.S. at 757, 770 (holding that an ordinance was unconstitutional because it granted the mayor unfettered discretion to grant or deny licenses for public speech).

¹⁴² *Bernstein*, 945 F. Supp. at 1289; 22 C.F.R. § 126.7 (stating that the DDTC "may" deny a license on certain grounds); § 126.13 (stating that certain information is required when applying for a license through the ITAR); § 127.7(b)–(c) (stating that the DDTC retains discretion, in certain circumstances, to grant licenses to applicants otherwise ineligible); see also § 125.2(a) (stating that a DSP-5 license is required for the export of unclassified technical data); DSP-5 Instructions, *supra* note 138, at 3–8 (stating that the applicant must disclose, among other things, the intended country of export, a description of the transaction, a description of the technical data, and the dollar value of the commodity).

¹⁴³ *Bernstein*, 945 F. Supp. at 1289; 22 C.F.R. § 126.7(a)(1) (2014).

¹⁴⁴ *Bernstein*, 945 F. Supp. at 1289–90. The court relied on an industry report, which stated that the lack of predictability and the risk of discriminatory licensing inhibited the development of commercial products. *Id.*

¹⁴⁵ 945 F. Supp. at 1289. *Bernstein* did not, however, engage in a political question analysis. See *id.* at 1286–93. Courts are unlikely to second guess ultimate licensing decisions made on foreign policy grounds. See *Haig*, 453 U.S. at 292; *Bancoult*, 445 F.3d at 432–33; *Karn*, 925 F. Supp. at 11–12.

3. The *Freedman* Procedural Protections and the ITAR

A constitutionally valid licensing scheme must also provide certain procedural protections to minimize the risk of censorship.¹⁴⁶ The protections require (1) that the licensing official either grant or deny the license within a brief, fixed period of time; (2) the decision must be subject to prompt judicial review; and (3) the government generally must bear both the burden of going to court to suppress the speech and the burden to prove the speech is not protected.¹⁴⁷ Although the first two elements are always required, the government may not need to initiate action or bear the burden of proof when the licensing decision is purely ministerial and the applicant has a strong incentive to go to court.¹⁴⁸

Although the ITAR provides a specific ten day limitation for the initial designation of an article on the USML upon submission of the Commodity Jurisdiction request, the ITAR does not impose a time limitation on the licensing determination itself.¹⁴⁹ If the DDTC does not provide a final determination within 45 days, the applicant can request an expedited determination.¹⁵⁰ By contrast, neither the ITAR nor the DSP-5 instructions contain an explicit time limitation with respect to the actual licensing determination, indicating that the DDTC can hold onto an application for an unlimited amount of time.¹⁵¹

The AECA specifically precludes the possibility of judicial review for the initial designation of an article as belonging on the USML.¹⁵² Although the designation of an item as a defense article is distinct from the licensing decision

¹⁴⁶ See *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227–30 (1990) (plurality opinion); *Freedman v. Maryland*, 380 U.S. 51, 57–58 (1965).

¹⁴⁷ See *FW/PBS*, 493 U.S. at 227–30; *Freedman*, 380 U.S. at 58–59; *Bernstein*, 945 F. Supp. at 1289.

¹⁴⁸ See *FW/PBS*, 493 U.S. at 228–30 (holding that the government did not bear either burden because a ministerial licensing scheme that restricted expression integral to an applicant's business provided a strong incentive for the applicant to go to court). In *FW/PBS, Inc. v. City of Dallas*, the Court held that ministerial determinations, unlike content-based restrictions, are not presumptively invalid. See *id.* at 229. Additionally, the business owners in *FW/PBS* needed the license at issue to maintain their business. *Id.* The necessity of the license provided a strong incentive for the business owners to challenge a denial in court, making it unnecessary to impose that burden on the government. *Id.* at 229–30. By contrast, the film distributors in *Freedman v. Maryland* were less motivated to challenge denials. See *id.* (citing *Freedman*, 380 U.S. at 58–60) (stating that the licensees in *FW/PBS* have much more at stake than those in *Freedman*); see also *supra* notes 59–65 and accompanying text (noting that the value of the speech may also play a role in content-neutral restrictions).

¹⁴⁹ See *Bernstein*, 945 F. Supp. at 1289; 22 C.F.R. § 120.4(e) (2014).

¹⁵⁰ 22 C.F.R. § 120.4(e).

¹⁵¹ See *Bernstein*, 945 F. Supp. at 1289 (noting that the ITAR places no time limit on licensing decisions); 22 C.F.R. § 126.7(b); DSP-5 Instructions, *supra* note 138, at 3–8.

¹⁵² See The Arms Export Control Act, 22 U.S.C. § 2778(h) (2012) (“The designation by the President (or by an official to whom the President’s functions . . . have been duly delegated), in regulations issued under this section, of items as defense articles or defense services for the purposes of this section shall not be subject to judicial review.”).

itself, the USML designation makes the license necessary.¹⁵³ The ITAR does not, however, foreclose sharing technical data domestically.¹⁵⁴ It is also unclear that the exemption from judicial review would immunize designations from constitutional challenges, rather than challenges based on the DDTC's determination that an article meets the specifications of a USML category.¹⁵⁵ Even if applicants assert a constitutional challenge to an article on the USML, courts still may decline to hold designations unconstitutional, based on the political question doctrine.¹⁵⁶

In contrast, the licensing decision itself may be subject to judicial review, because the ITAR does not specifically prohibit judicial review of the licensing decision.¹⁵⁷ The ITAR provides a denied applicant the opportunity to request that the DDTC reconsider a denial, and allows the applicant to provide additional information.¹⁵⁸ The presence of internal administrative review, however, is typical administrative practice and does not preclude the possibility of judicial review.¹⁵⁹ Nevertheless, the political question doctrine may also prevent judicial review of the licensing determination itself.¹⁶⁰

Finally, the ITAR does not address whether the government bears the burden of going to court to suppress the speech or proving that the restriction is a

¹⁵³ See 22 C.F.R. § 123.1(a). A license is not required if the article or data falls within the public domain exception. *Id.*; § 120.11; see also *Bernstein*, 945 F. Supp. at 1292 n.13 (stating that the preclusion of judicial review applies only to initial designations of defense articles, not to licensing decisions).

¹⁵⁴ See 22 C.F.R. § 120.17(a) (defining “export” to mean transmission of defense articles or technical data outside the United States or to foreign entities).

¹⁵⁵ See *Karn*, 925 F. Supp. at 8–9 (stating that both parties agreed that 18 U.S.C. § 2778(h) did not prevent constitutional challenges to USML designations); see *supra* note 36 and accompanying text (discussing the controversy over whether Congress can preclude judicial review of constitutional questions).

¹⁵⁶ See *Bancoult*, 445 F.3d at 432–33; *Mandel*, 914 F.2d at 1223; *Martinez*, 904 F.2d at 602; *Karn*, 925 F. Supp. at 11–12; see also *supra* note 101 and accompanying text (explaining that the political question doctrine allows courts to avoid deciding issues constitutionally committed to other branches of government).

¹⁵⁷ See *Bernstein*, 945 F. Supp. at 1292 n.13. In fact, the Administrative Procedure Act, 5 U.S.C. § 702 (2012), states that any person adversely affected by agency action is entitled to judicial review. 5 U.S.C. § 702.

¹⁵⁸ 22 C.F.R. § 126.7(c)–(d) (2014).

¹⁵⁹ See *Webster v. Doe*, 486 U.S. 592, 603 (1988) (holding that congressional intent to preclude judicial review of constitutional questions must be explicit); see also 5 U.S.C. § 557(b)–(c) (describing the standard procedures for internal administrative review of agency action).

¹⁶⁰ *Mandel*, 914 F.2d at 1223 (holding that the extent to which an article would significantly contribute to a foreign country's military power is an unreviewable political question). The DDTC may deny licenses based on its determination that export of the article will negatively affect United States national security and foreign policy. 22 C.F.R. § 126.7(a)(1). The Supreme Court has explicitly stated that questions relating to national security and foreign policy are rarely appropriate for judicial review. *Haig*, 453 U.S. at 292.

valid restraint on speech.¹⁶¹ Yet, the government is not required to bear this burden where the ultimate licensing decisions are ministerial in nature, because ministerial decisions have been recognized as less likely to result in content-based censorship.¹⁶² The ITAR provides some objective criteria for the initial USML designation, and some objective standards for licensing decisions.¹⁶³ As one court found, however, the DDTC's ability to deny licenses based on concerns of foreign policy and national security arguably leaves significant room for discretion.¹⁶⁴ Accordingly, the court noted the DDTC can deny or approve licenses arbitrarily, and thus must prove that the suppressive effect of denying the license is justified.¹⁶⁵

III. A CONSTITUTIONAL CATCH-22: THE CONSTITUTION REQUIRES JUDICIAL REVIEW, YET COURTS WILL NOT REVIEW THE ITAR BECAUSE OF THE CONSTITUTION

Evaluating the International Traffic in Arms Regulations' ("ITAR") effect on free expression involves a difficult balancing act between strong government interests and an individual's right to free speech.¹⁶⁶ This Part concludes that courts are ultimately unlikely to find the ITAR is unconstitutional as it pertains to 3D CAD files for firearms.¹⁶⁷ Section A asserts that 3D CAD files for firearms qualify as technical data under the ITAR.¹⁶⁸ Section B then argues that firearm CAD files do not occupy a high position on the scale of First Amendment values.¹⁶⁹

¹⁶¹ See *Bernstein*, 945 F. Supp. at 1289 (stating that the ITAR contains no burden on the government to go to court to prove the validity of the restriction on speech).

¹⁶² See *FW/PBS*, 493 U.S. at 228–30; *Freedman*, 380 U.S. at 58–59; *supra* notes 87–92 and accompanying text (describing the procedural safeguards for licensing restraints on speech). Because the Supreme Court has not yet considered the ministerial exception doctrine in the context of high-value speech, it may be limited to low-value speech. See *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 779–80 (2004) (citing *FW/PBS*, 493 U.S. at 779–81) (stating that in *FW/PBS*, the Supreme Court held that the government need not bear the burden of proof in the adult business licensing context); see also *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978) (stating that the Court affords protection according to the value of the speech); *Chi Mak*, 683 F.3d at 1136 (indicating that at least some speech regulated by the ITAR is not high value).

¹⁶³ See 22 C.F.R. § 126.7(a)(2)–(8); *supra* notes 130–140 and accompanying text (discussing the criteria considered by the DDTC in granting or denying a license to export under the ITAR).

¹⁶⁴ See *Bernstein*, 945 F. Supp. at 1289 (stating that the ITAR is a “paradigm of standardless discretion”); 22 C.F.R. § 126.7(a)(1) (2014).

¹⁶⁵ *Bernstein*, 945 F. Supp. at 1289–90; 22 C.F.R. § 126.7(a)(1); see also *supra* notes 83–92 and accompanying text (discussing the *Freedman* safeguards and the requirement that licensing schemes restricting speech utilize objective criteria).

¹⁶⁶ Compare *United States v. Chi Mak*, 683 F.3d 1126, 1136 (9th Cir. 2012) (stating that there is a strong government national security interest in regulating data through the USML), with *Bernstein v. U.S. Dep't of State*, 945 F. Supp. 1279, 1289–90 (N.D. Cal. 1996) (holding that the ITAR is an unconstitutional prior restraint on speech).

¹⁶⁷ See *infra* notes 173–257 and accompanying text.

¹⁶⁸ See *infra* notes 173–186 and accompanying text.

¹⁶⁹ See *infra* notes 187–202 and accompanying text.

Section C then reasons that, although the ITAR is a content-based restriction, the purpose of the statute is not to regulate speech, but to target secondary effects associated with the proliferation of technical data related to weapons.¹⁷⁰ Section C also contends that the ITAR passes the *O'Brien* test, because the legitimacy of the government interest involved in advancing world peace, national security, and foreign policy outweighs the exporter's interest in disclosing technical data to foreign entities.¹⁷¹ Finally, Section D concludes that First Amendment jurisprudence creates a constitutional catch-22 when applied to the ITAR, because courts will likely decline to review the Directorate of Defense Controls' ("DDTC") licensing decisions, even though such review is necessary.¹⁷²

A. CAD Files for 3D Firearms are Technical Data Under the ITAR, and Posting Technical Data Online Qualifies as Exportation

3D CAD files, which allow users to print functional weapons, or even a functional part of a weapon, qualify as technical data under the ITAR.¹⁷³ Technical data is broadly defined as information necessary for the manufacture of a defense article, designated on the United States Munitions List ("USML").¹⁷⁴ The CAD file for the Liberator allows a 3D printer user to create a Category I .380 caliber firearm.¹⁷⁵ Although the Liberator may fire only one shot before falling apart, the USML does not distinguish between high and low quality firearms.¹⁷⁶ Therefore, the CAD file is technical data directly related to the manufacture of a defense article listed on the USML.¹⁷⁷ Similarly, the CAD file for an AR-15 lower receiver qualifies as technical data.¹⁷⁸ Although the ITAR does not

¹⁷⁰ See *infra* notes 203–210 and accompanying text.

¹⁷¹ See *infra* notes 211–231 and accompanying text.

¹⁷² See *infra* notes 232–257 and accompanying text.

¹⁷³ See 22 C.F.R. § 120.10 (2014); Goldstein, *supra* note 13, at 3–4.

¹⁷⁴ See 22 C.F.R. § 120.10. Category I of the USML includes nonautomatic, semiautomatic, and fully automatic firearms, up to .50 caliber. § 121.1(I)(a)–(b). A firearm is further defined as a weapon designed to fire a projectile from an explosive force. § 121(I)(j)(1). Category I also includes technical data related to such firearms. § 121.1(I)(i).

¹⁷⁵ See 22 C.F.R. § 121.1(I)(a), 121.1(I)(j)(1) (stating that firearms up to .50 caliber are defense articles, and defining firearm as a weapon that fires a projectile by explosive force); Greenberg, *supra* note 12.

¹⁷⁶ See 22 C.F.R. § 121.1(I)(a); § 121.1(I)(j)(1). The Liberator withstood firearm testing relatively well, depending on the printer material used. Andy Greenberg, *3D-Printed Gun Stands Up to Agents' Testfiring—Except When It Explodes*, FORBES.COM, Nov. 14, 2013, <http://www.forbes.com/sites/andygreenberg/2013/11/14/3d-printed-gun-stands-up-to-federal-agents-testfiring-except-when-it-explodes-video/>, archived at <http://perma.cc/FP7K-HZFE> (noting that a version of the Liberator printed with lower quality plastics exploded on its first firing, and another printed with higher quality material remained in tact after firing eight rounds).

¹⁷⁷ See 22 C.F.R. § 120.10; § 121.1(I)(a); § 121.1(I)(i)–(j)(1); Goldstein, *supra* note 13, at 4.

¹⁷⁸ See 22 C.F.R. § 120.10; § 121.1(I)(a); § 121.1(I)(i)–(j)(1); Salazar, *supra* note 11.

specifically define the receiver as a firearm, the CAD file directly relates to the manufacture of a functional AR-15.¹⁷⁹

Moreover, placing technical data on the Internet constitutes exportation under the ITAR.¹⁸⁰ Posting the file online effectively makes the information publicly accessible to foreign entities.¹⁸¹ Without the ability to regulate the disclosure of technical data via the Internet, the ITAR would be wholly unable to prevent the dissemination of technical data for defense articles.¹⁸²

Furthermore, CAD files for the Liberator and the AR-15 lower receiver are unlikely to fall within the public domain exception.¹⁸³ The very act of placing technical data in the public domain requires either a license or prior approval from a government agency.¹⁸⁴ Therefore, the fact that the Internet is accessible from a library is irrelevant if the information became available in violation of the

¹⁷⁹ See 22 C.F.R. § 121.1(I)(a) (2014); § 121.1(I)(i)–(j)(1). The Gun Control Act of 1968 defines the receiver as the firearm, and the receiver is typically the part of the weapon containing the serial number. Gun Control Act of 1968, 18 U.S.C. § 921(a)(3) (2012); Camiel, *supra* note 11. Therefore, the CAD file is directly related to a significant component of the AR-15. See 18 U.S.C. § 921(a)(3); 22 C.F.R. § 121(I)(i).

¹⁸⁰ See *Bernstein*, 945 F. Supp. at 1288 (noting that posting files on the Internet is exportation under the ITAR because it involves sending the information outside the United States “in any manner”) (citing 22 C.F.R. § 120.17(a)(1)); Goldstein, *supra* note 13, at 3. Each subsequent download by a foreign entity may constitute an additional unauthorized export. Goldstein, *supra* note 13, at 3. In *Junger v. Daley*, the Court of Appeals for the Sixth Circuit held that posting a file on the Internet constituted an export under the Export Administration regulations. 209 F.3d 481, 483 (6th Cir. 2000). Unlike the ITAR, however, the Export Administration Regulations explicitly state that downloading from the Internet, or causing information to be downloaded, constitutes an export. See *id.*; see also 22 C.F.R. § 120.17; 22 C.F.R. § 734.2(b)(9)(ii) (2014).

¹⁸¹ See *Bernstein*, 945 F. Supp. at 1288; Goldstein, *supra* note 13, at 3–4 (noting that Internet users downloaded the Liberator CAD file approximately 100,000 times before the State Department instructed Defense Distributed to remove it).

¹⁸² See 22 C.F.R. § 120.17 (stating that exporting includes disclosing information across borders or to a foreign entity “in any manner”). The fact that users downloaded the Liberator CAD file over 100,000 times demonstrates the necessity of such power. Goldstein, *supra* note 13, at 4. Indeed, it would be a strange policy to hold that the DDTTC can prohibit directly mailing (or e-mailing) technical data, but so long as the information is posted online, where anyone in the world can access it, the disclosure falls outside of the ITAR’s reach. See *Bernstein*, 945 F. Supp. at 1288; Goldstein, *supra* note 13, at 3–4.

¹⁸³ See 22 C.F.R. § 120.11; § 125.1(a); Goldstein, *supra* note 13, at 3 (stating that, for the purposes of the ITAR, the mere fact that information is available on the Internet does not automatically mean that information is within the public domain).

¹⁸⁴ See 22 C.F.R. § 120.17 (stating that export includes sending regulated information outside the United States “in any manner”); Goldstein, *supra* note 13, at 3 (stating that the initial act of transmitting technical data into the public domain without an export license may constitute a violation of the ITAR).

ITAR.¹⁸⁵ Accordingly, Defense Distributed exported its CAD files under the ITAR's definition.¹⁸⁶

B. CAD Files for Firearms and the Spectrum of First Amendment Values

CAD files for firearms do not occupy a high position on the scale of First Amendment values.¹⁸⁷ Typical examples of high-value speech include political speech, freedom of the press, and speech connected to other substantive rights.¹⁸⁸ Distributors of 3D firearm CAD files could argue that the act of posting their CAD files online is political speech entitled to the highest protection.¹⁸⁹ By posting the file online, they could claim to be expressing their political views about democratizing gun possession.¹⁹⁰

¹⁸⁵ See 22 C.F.R. § 120.11(a) (2014) (defining public domain to include information available at bookstores and public libraries); § 120.17(a) (defining export to include transmission of a defense article to a foreign entity “in any manner”); Goldstein, *supra* note 13, at 3 (stating that the act of transmitting information into the public domain is regulated by the ITAR's export restrictions).

¹⁸⁶ See *Bernstein*, 945 F. Supp. at 1288 (finding that posting technical data on the Internet is functionally equivalent to transmitting the data outside of the United States); 22 C.F.R. § 120.17 (defining “export” to include transmitting technical data outside of the United States); Goldstein, *supra* note 13, at 3–4 (stating that the ITAR regulates the act of making technical data available via the Internet).

¹⁸⁷ See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (stating that there is a spectrum of First Amendment values); *Chi Mak*, 683 F.3d at 1136 (stating that the ITAR creates specific exceptions for high-value speech); *supra* notes 59–65 and accompanying text (discussing how courts treat restrictions on speech differently based on the value of the speech at issue). The CAD file may be commercial speech, which the Supreme Court defines as “speech which does no more than propose a commercial transaction.” See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983). Defense Distributed, however, allowed users to download the file at no charge, so the ultimate applicability of commercial speech rules is unclear. See *Bolger*, 463 U.S. at 66; Salazar, *supra* note 11.

¹⁸⁸ See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713, 715–16 (1971) (Black, J., concurring) (stating that the protections of a free press are essential to democracy); *NAACP v. Button*, 371 U.S. 415, 428–30 (1963) (holding that a state law effectively preventing the NAACP from litigating civil rights claims violated the First Amendment). In 1963, in *NAACP v. Button*, the Supreme Court invalidated a state statute because the statute precluded the only meaningful avenue of speech available to the NAACP to ensure equal protection under the law. See 371 U.S. at 429–30; see also *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 161 (2002) (holding that a licensing requirement for door-to-door canvassing was unconstitutional as applied to Jehovah's witnesses because it limited expression connected to the free exercise of religion); *Emp't Div. v. Smith*, 494 U.S. 872, 881–82 (1990) (stating that the Court invalidates neutral, generally applicable laws as violations of the Free Exercise clause when they implicated other constitutional rights, including free expression).

¹⁸⁹ See *Texas v. Johnson*, 491 U.S. 397, 411 (1989) (stating that political expression is among the most highly valued forms of speech); see also *supra* note 59–65 and accompanying text (discussing the varying levels of scrutiny that courts apply to restrictions on speech, based on the speech's value).

¹⁹⁰ See *Johnson*, 491 U.S. at 411. In a television interview, a founder of Defense Distributed, Cody Wilson, indicated that the purpose of posting the CAD files online was to make a political statement. *The Glenn Beck Program*, THE BLAZE (Jan. 17, 2013), available at http://www.video.theblaze.com/media/video.jsp?content_id=25560075&topic_id=24584158, archived at <http://perma.cc/B7WV-NGFF> (at 4:40).

Simply claiming that expression is “political,” however, does not automatically entitle it to the highest level of protection.¹⁹¹ For example, in 1968, in *United States v. O’Brien*, the U.S. Supreme Court heard a case involving an individual who protested the Vietnam War by burning his draft card.¹⁹² The Court upheld a law prohibiting destruction of draft cards because the statute did not intend to suppress the speech, but rather intended to maintain the integrity of the draft.¹⁹³ By contrast, in 1989, in *Texas v. Johnson*, the Supreme Court overturned a conviction for disturbing the peace, premised on a public flag burning demonstration to express dissatisfaction with the government.¹⁹⁴ The Court emphasized that the First Amendment’s most vital purpose is protecting speech that expresses and induces political dissatisfaction.¹⁹⁵ Accordingly, posting CAD files for firearms online more closely resembles the case in *O’Brien* than the circumstances of *Johnson*.¹⁹⁶ Similar to the law banning the destruction of draft cards, the ITAR does not set out to restrict free expression, but rather exists to advance national security and foreign policy objectives.¹⁹⁷

Restrictions on speech that implicate other substantive rights are more likely to violate the First Amendment.¹⁹⁸ Yet, it is not clear that regulating the distribution of CAD files for 3D firearms online meaningfully affects another substantive right—namely the right to keep and bear arms.¹⁹⁹ Arguably, by restrict-

¹⁹¹ See *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (rejecting the argument that any conduct can be labeled speech whenever the individual intends to express an idea).

¹⁹² *Id.* at 369.

¹⁹³ *Id.* at 375.

¹⁹⁴ 491 U.S. at 404, 408–12.

¹⁹⁵ *Id.* at 408–09.

¹⁹⁶ Compare *Johnson*, 491 U.S. at 411 (holding that expressing political dissatisfaction by burning the American flag is entitled to strong First Amendment protections), with *O’Brien*, 391 U.S. at 376 (stating that expression is not automatically entitled to strong First Amendment protection because he or she proclaims it is a statement of political discontent).

¹⁹⁷ See The Arms Export Control Act of 1976, 22 U.S.C. § 2778(a) (2012) (stating that the Executive Branch has authority to regulate the exportation of defense articles to further national security, foreign policy, and world peace); *O’Brien*, 391 U.S. at 377–79 (holding that Congress’s power to establish the draft is explicitly established by the Constitution and is “beyond question”); *Karn v. U.S. Dep’t of State*, 925 F. Supp. 1, 11–12 (D.D.C. 1996) (declining to scrutinize the designation of a defense article on the USML because it is a foreign policy judgment reserved for the Executive Branch). The ITAR authorizes the DDTC to deny a license application if it determines permitting the export undermines the goals of the Arms Export Control Act (“AECA”). 22 C.F.R. § 126.7(a)(1) (2014).

¹⁹⁸ See *Watchtower*, 536 U.S. at 161 (noting that an ordinance prohibiting handbilling, without respect to content, implicated high-value speech because it infringed on a traditional method of religious expression); *Smith*, 494 U.S. at 881–82 (stating that the Court invalidates neutral, generally applicable laws as violations of the Free Exercise clause when they implicated other constitutional rights, including free expression); *Button*, 371 U.S. at 428–30 (holding that a law limiting the NAACP’s ability to bring civil rights claims was unconstitutional because the act precluded the only meaningful avenue of speech available to ensure equal protection under the law).

¹⁹⁹ See U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”); *District of Columbia v.*

ing the dissemination of CAD files for firearms, the ITAR may implicate rights protected by the Second Amendment.²⁰⁰ The ITAR's effect on Second Amendment rights, however, appears tenuous at best.²⁰¹ The ITAR does not foreclose all meaningful exercise of Second Amendment rights because the regulations do not prohibit an individual from possessing or creating a gun—even a 3D printed one—but merely from disclosing the CAD file to foreign entities.²⁰²

C. The ITAR Under Intermediate Scrutiny: The O'Brien Test

Ultimately, the majority of courts considering the ITAR and the First Amendment have incorrectly concluded that the ITAR is content neutral, but have properly applied intermediate scrutiny.²⁰³ The ITAR regulates the export of technical data on the basis of its contents, and is therefore a content-based restriction.²⁰⁴ For example, if Defense Distributed had posted only CAD files for

Heller, 554 U.S. 570, 624–25 (2008) (holding that the Second Amendment protects weapons that were commonly used for a lawful purpose at the time of the founding).

²⁰⁰ See *Heller*, 554 U.S. at 624–25, 628 (stating that the handgun is the weapon Americans overwhelmingly choose for self-defense). Some argue that the Supreme Court's decision in 2008, in *District of Columbia v. Heller*, could be interpreted to also ensure a person's right to create his or her own gun. See *id.*; Jensen-Haxel, *supra* note 7, at 474–84 (arguing that *Heller* could be interpreted to guarantee an individual right to manufacture personal firearms).

²⁰¹ See *Heller*, 554 U.S. at 624–25. *Heller* leaves open the question regarding *how* similar a weapon must be to weapons used for lawful purposes at the time of the founding. See *id.*; Jensen-Haxel, *supra* note 7, at 487. Accordingly, the Second Amendment only protects plastic firearms if they are similar enough to weapons used for lawful purposes in the late eighteenth-century. See *Heller*, 554 U.S. at 624–25. Currently, however, federal law prohibits weapons that do not set off standard metal detectors. Gun Control Act of 1968, 18 U.S.C. § 922(p)(1) (2012). For the purposes of that section, however, the AR-15 lower receiver does not qualify as a firearm. See § 922(p)(2)(A) (stating that the firearm does not include the receiver in that particular section).

²⁰² See 22 C.F.R. § 120.17; § 123.1(a). Accordingly, the ITAR's potential impact on Second Amendment rights is far more limited than the law at issue in *Button*, which effectively prohibited the NAACP from meaningfully pursuing equal protection rights. See *Button*, 371 U.S. at 429–30 (holding that a statute was unconstitutional because it foreclosed the only mode of expression to achieve goals of equal protection).

²⁰³ See, e.g., *Chi Mak*, 683 F.3d at 1134–35 (holding that the ITAR is not content-based because it regulates based on the data's function rather than its content); *Bernstein*, 945 F. Supp. at 1288 (applying strict scrutiny to conclude that the ITAR is an unconstitutional restriction on speech); *Karn*, 925 F. Supp. at 10 (holding that the ITAR is content neutral given the purpose of the regulation); see also *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (holding that facially content-based restrictions on speech designed to target regulable secondary effects may be treated as content neutral). The First Amendment limits the ability of legislatures to regulate speech based on a particular subject matter, even if the regulation's purpose is "neutral." See *Police Dep't v. Mosley*, 408 U.S. 92, 95–96 (1972) (stating that the First Amendment precludes the government from restricting speech due to "its message, its ideas, its *subject matter*, or its content") (emphasis added).

²⁰⁴ See *Ashcroft v. ACLU*, 542 U.S. 656, 661, 665–66 (2004) (holding that a law regulating a particular subject, without reference to a point of view, was content-based); *Burson v. Freeman*, 504 U.S. 191, 197 (1992) (plurality opinion) (holding that restrictions based on the topic of speech are content-based restrictions); 22 C.F.R. § 120.4(a) (2014) (stating that, through the Commodity Jurisdiction procedure, the DDTTC determines whether an article meets the qualifications of articles designated

cell phone cases, which are not on the USML, the DDTC would not be involved.²⁰⁵ The mere fact that the ITAR does not suppress a particular point of view does not mean the ITAR is content-neutral.²⁰⁶

Yet establishing that the ITAR's restrictions on technical data are content-based by no means ends the matter.²⁰⁷ The ITAR regulates speech based on its content to address possible secondary effects stemming from the dissemination of technical data to foreign entities.²⁰⁸ The ITAR does not set out to restrict communication, but rather strives to protect substantial national security and foreign policy objectives.²⁰⁹ Accordingly, the ITAR should be subject to intermediate scrutiny, as a content-neutral restriction.²¹⁰

on the USML). *But see Chi Mak*, 683 F.3d at 1134–35 (holding that the ITAR is not content-based as applied to technical data because it regulates based on the data's "function" rather than its "viewpoint").

²⁰⁵ See *Bernstein*, 945 F. Supp. at 1288. Although the court in *Bernstein* specifically addressed a different category of the USML, the analysis is the same for Category I. See *id.*; § 121.1(I)(a); § 121.1(I)(a)(i). The DDTC cannot differentiate between a CAD file for a cell phone case and a CAD file for a firearm without some reference to the content. See *Renton*, 475 U.S. at 48; *Bernstein*, 945 F. Supp. at 1288.

²⁰⁶ See *Bernstein*, 945 F. Supp. at 1288 (indicating that Category XIII(b) of the USML is a content-based restriction because it specifically targets expression of a particular subject).

²⁰⁷ See *Renton*, 475 U.S. at 47–49 (holding that an ordinance regulating the expression of sexually explicit speech should be treated as content neutral because its purpose was to address undesirable secondary effects). The restrictions in *City of Renton v. Playtime Theatres, Inc.* were facially content-based restrictions, applying only to businesses engaged in sexually explicit speech. See *id.*; see also *Ashcroft*, 542 U.S. at 661, 665 (holding that a law regulating a particular subject of speech is content-based). Nevertheless, the Court treated the restriction as content neutral because the purpose of the law was not to restrict speech, but to limit illegal activity that often accompanied such businesses. *Renton*, 475 U.S. at 47–49.

²⁰⁸ See The Arms Export Control Act, 22 U.S.C. § 2778(a) (2012) (stating that the Executive Branch has the authority to regulate the exportation of defense articles to advance the interests of national security, foreign policy, and world peace); *Chi Mak*, 683 F.3d at 1134–35 (holding that the ITAR serves the government's interest in regulating the dissemination of military information); *Karn*, 925 F. Supp. at 10 (stating that the ITAR regulates encryption software to limit foreign intelligence entities' ability to encode communications); see also 22 C.F.R. § 126.7(a)(1) (stating that the DDTC may deny a license to further the objectives of the AECA). Even the court in *Bernstein* acknowledged that the ITAR's purpose could be content neutral. See *Bernstein*, 945 F. Supp. at 1288–89. The court, however, found the ITAR unconstitutional as a prior restraint, even assuming the regulation is content neutral. See *id.*

²⁰⁹ See *Chi Mak*, 683 F.3d at 1134–35; *Karn*, 925 F. Supp. at 10; 22 C.F.R. § 126.7(a)(1); see also *O'Brien*, 391 U.S. at 375 (holding that a statute did not violate the First Amendment because its purpose is not to punish the expression of views).

²¹⁰ See *Renton*, 475 U.S. at 47–48 (holding that a restriction targeting businesses engaged sexually explicit speech was constitutional because the law's purpose was to eliminate prostitution and other crimes commonly accompanying such businesses). The ITAR treats technical data differently from other expression, much like the ordinance at issue in *Renton*, which treated sexually explicit speech differently. See *id.* at 47; 22 C.F.R. § 120.10 (2014); § 121.1(I)(a); § 121.1(I)(i); § 123.1. Nevertheless, the ITAR should be scrutinized as content-neutral because the purpose of the statute is to address compelling secondary effects. See 22 U.S.C. § 2778(a); *Chi Mak*, 683 F.3d at 1134–35 (holding that the ITAR is content neutral and applying the *O'Brien* test).

When examined as a content-neutral regulation, the ITAR passes the *O'Brien* test.²¹¹ The power to regulate the international exchange of arms falls within the constitutional power of Congress.²¹² Furthermore, the regulations serve a compelling government interest, are unrelated to the suppression of speech, and are narrowly tailored to serve that purpose.²¹³ Finally, 3D firearm CAD files do not constitute such high value speech to outweigh the government interest in regulating the disclosure of technical data.²¹⁴

The government has a compelling interest in preventing the unfettered distribution of firearm CAD files, unrelated to limiting expression.²¹⁵ Plastic firearms present a distinct danger to the places where security is most important—beyond metal detectors.²¹⁶ Allowing wide distribution of plastic guns, even guns capable of firing only one shot, presents new security threats to airports, courthouses, schools, and government buildings.²¹⁷ Furthermore, the ability to print

²¹¹ See *O'Brien*, 391 U.S. at 376–77 (stating that a content-neutral restriction is justified if it “is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on the alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest”); *Chi Mak*, 683 F.3d at 1135 (holding that the ITAR is a constitutionally valid content-neutral restriction on expression).

²¹² U.S. CONST. art. I, §§ 8, 10 (establishing that Congress has power to regulate foreign commerce, the value of foreign currency, and approve treaties with foreign countries). Congress granted the President power to regulate international arms traffic. See 22 C.F.R. § 120.1(a).

²¹³ See 22 U.S.C. § 2778(a); *Chi Mak*, 683 F.3d at 1135 (noting that the legitimacy of the government interest regulating defense articles is “unquestionable”); *Karn*, 925 F. Supp. at 10–12; see also *Junger v. Daley*, 8 F. Supp. 2d 708, 722 (N.D. Ohio 1998), *rev’d on other grounds*, 209 F.3d 481 (6th Cir. 2000) (stating that the government could not as effectively promote its foreign policies goals under the similar Export Administration Regulation without its restrictions on speech).

²¹⁴ See *Chi Mak*, 683 F.3d at 1136 (noting that the ITAR creates exceptions for highly protected speech); see also *supra* notes 187–202 and accompanying text (concluding that 3D CAD files for firearms do not warrant the highest levels of First Amendment protection). Highly protected speech exempted from the ITAR’s restrictions includes the public domain exception, for which the firearm CAD files do not qualify. See *Chi Mak*, 683 F.3d at 1136; 22 C.F.R. § 120.10(a)(5); § 120.11; see also *supra* notes 183–186 and accompanying text (arguing that the firearm CAD files do not fall within the public domain exception).

²¹⁵ See 22 U.S.C. § 2778(a); *O'Brien*, 391 U.S. at 377; 22 C.F.R. § 126.7(a)(1). As established under the secondary effects analysis, the purpose of the ITAR is not to suppress speech, but to further the goals of world peace, national security, and foreign policy. See 22 U.S.C. § 2778(a); *Renton*, 475 U.S. at 47–49.

²¹⁶ See Gun Control Act of 1968, 18 U.S.C. § 922(p)(1) (2012) (banning firearms that do not set off standard metal detectors); Evan Perez, *ATF Test Show 3-D Guns Lethal as Metal Detection Law Expires*, CNN, Nov. 15, 2013, <http://www.cnn.com/2013/11/14/politics/3d-guns/>, archived at <http://perma.cc/67KE-KEL5> (stating that one could modify the Liberator’s design to completely exclude any metal part by utilizing a ceramic firing pin). See Greenberg, *supra* note 176 (quoting a spokesperson for the Bureau of Alcohol, Tobacco, Firearms, and Explosives who stated that the Liberator is undetectable and that the plastic guns could “make their way into secure facilities”).

²¹⁷ See Memmott, *supra* note 14 (noting that the Liberator pistol’s incorporation of a steel chunk has no effect on gun’s function). Regulation of the CAD files is essential to controlling the proliferation of plastic 3D guns. See Goldstein, *supra* note 13, at 4 (stating that the Liberator CAD file was downloaded 100,000 times before it was removed); Jensen-Haxel, *supra* note 7, at 463–69 (arguing

an AR-15 lower receiver with the click of a button, allows individuals to print the only regulated component of the firearm.²¹⁸ As 3D printing technology advances and enables printing with stronger materials, including metal, the government interest in regulation of firearm CAD files will only increase.²¹⁹

Finally, the proscriptions of the ITAR are narrowly tailored to serve the compelling government interests enunciated by the Arms Export Control Act (“AECA”).²²⁰ First, the restrictions, as applied to CAD files, only apply to technical data directly related to defense articles on the USML.²²¹ Significantly, the ITAR does not regulate information already in the public domain.²²² Additionally, the restrictions apply only to moving the data across borders or disclosing it to foreign entities.²²³ Thus, even if denied a license under the ITAR, an individual can still share CAD files for firearms, so long as he or she limits disclosures to United States citizens who are in the United States.²²⁴ Although posting these CAD files on the Internet is likely the most effective way to rapidly disseminate schematics domestically, distributors could alternatively distribute the files by other means online, or in hard copies.²²⁵ The First Amendment does not guarantee the most effective means of protected expression; rather it guarantees some effective means for protected expression.²²⁶

that the prospect of easily printable guns in individuals’ homes largely, if not entirely, renders existing gun controls obsolete).

²¹⁸ See 27 C.F.R. § 478.92(a)(1) (2014) (stating that manufacturers of firearms must place all identifying information, including the serial number, model, and caliber, on the weapon’s receiver); Jensen-Haxel, *supra* note 7, at 452, 464–65 (stating that the receiver is the only individually regulated part of a firearm); Camiel, *supra* note 11 (stating that the lower receiver is the only serialized part of an AR-15 rifle).

²¹⁹ See Richard A. D’Aveni, *3-D Printing Will Change the World*, HARV. BUS. REV., available at <http://hbr.org/2013/03/3-d-printing-will-change-the-world/ar/pr>, archived at <http://perma.cc/LKW2-VT6M> (last visited Sept. 9, 2014) (noting that 3D printing technology will expand and become more affordable); SOLID CONCEPTS, *supra* note 15.

²²⁰ See 22 U.S.C. § 2778(a); *Chi Mak*, 683 F. 3d at 1136; see also *Junger*, 8 F. Supp. 2d at 720 (stating that the government could not as effectively promote its foreign policies goals under the closely related Export Administration Regulations without restricting speech to some extent).

²²¹ 22 C.F.R. § 120.10 (2014); § 121.1(I)(i).

²²² See *Chi Mak*, 683 F.3d at 1136; 22 C.F.R. § 120.10(b) (stating that technical data does not include general scientific information or in the public domain).

²²³ 22 C.F.R. §§ 120.16–17(a).

²²⁴ See *id.*

²²⁵ See 22 C.F.R. § 120.17(a); Goldstein, *supra* note 13, at 3. These alternative measures do not necessarily mean the distributors would escape the reach of the ITAR. See §§ 120.16–17; § 126.7. Unlike posting on the Internet, however, they are not subject to a potential per se rule that the mode of distribution qualifies as an export under the ITAR. *Bernstein*, 945 F. Supp. at 1288; § 120.17(a). The distribution method, however, must require a way to identify potential purchasers, because disclosing technical data to a foreign national even within the United States constitutes an export under the ITAR. See §§ 120.16–17(a).

²²⁶ See *Renton*, 475 U.S. at 47 (holding that content-based restrictions on the time, place, and manner of speech are constitutionally permissible if they leave open other possibilities for communication); Stone, *supra* note 54, at 48–49 (arguing that the Supreme Court applies different standards of review depending, in part, on the availability of other means of communication); see also *Button*, 371

Given the significance of the government's interest in preventing undetectable firearms in secure areas, the government interest substantially outweighs the costs of the relatively limited restrictions of the ITAR.²²⁷ The Court has held that government interests such as preventing crimes and the convenient policing of public demonstrations justified content-neutral restrictions on speech.²²⁸ The government interest in preserving high security in sensitive locations, such as airports and government buildings, is patently greater than the government interest in reducing prostitution or in avoiding double-booked parades.²²⁹ Furthermore, the restriction on public demonstrations in previous cases concerned *all* forms of speech, whereas the relevant portions of the ITAR apply only to technical data disclosed to foreign entities.²³⁰ Accordingly, because the government interest is great, and the restriction on speech is less comprehensive than a blanket regulation on all forms of public demonstration, the ITAR clearly passes this portion of the *O'Brien* test.²³¹

U.S. at 428–30 (holding that a Virginia law keeping the NAACP from litigating was an unconstitutional restraint on speech because it closed the only meaningful avenue for expression).

²²⁷ See *Chi Mak*, 683 F.3d at 1135–36 (noting that the ITAR furthers a strong government interest while withholding regulation from high-value speech); *Karn*, 925 F. Supp. at 11–12; see also *supra* notes 187–202 and accompanying text (concluding that the ITAR does not regulate high-value speech).

²²⁸ *Renton*, 475 U.S. at 47–52 (holding that the government interest in preventing crimes associated with purveyors of sexually explicit content justified a restriction on sexually-explicit speech); *Cox v. New Hampshire*, 312 U.S. 569, 575–78 (1941) (holding that the government's interest in the orderly administration of parades and public demonstrations justified a restriction requiring government approval prior to such demonstrations). The restriction in *Renton* was not facially content neutral, but was nonetheless subject to intermediate scrutiny under the secondary effects doctrine. See *Renton*, 475 U.S. at 47–52; *supra* notes 66–74 and accompanying text (discussing the secondary effects doctrine and the constitutionality of content-neutral restrictions).

²²⁹ *Compare* *Snepp v. United States*, 444 U.S. 507, 511–13 (1980) (holding that the government's "vital" interest in national security trumped a former CIA employee's First Amendment right to publish stories without the CIA's prior approval), and *Chi Mak*, 683 F.3d at 1135–36 (holding that the strong government interest in controlling the exportation of technical data justifies regulating the dissemination of the data), with *Renton*, 475 U.S. at 47 (holding that a facially content-based restriction on speech was justified based on the compelling government interest in eliminating the secondary effect of illegal prostitution), and *Cox*, 312 U.S. at 576 (holding that a city had a sufficiently compelling interest in managing demonstrations and parades on public streets to justify requiring a permit for such activities).

²³⁰ See *Cox*, 312 U.S. at 575–76 (upholding a restriction on public demonstrations and parades because of the government interest in the orderly administration of such activities); 22 C.F.R. § 120.17 (2014) (defining "export" to include transmitting information outside of the United States and to foreign entities domestically).

²³¹ See *Renton*, 475 U.S. at 47–52 (holding that the government interest in reducing crime associated with business engaged in sexually explicit speech justified restriction); *Cox* 312 U.S. at 575–76 (holding that the government interest in the orderly administration of parades and public demonstrations justified requiring permits prior to conducting such activities); *Chi Mak*, 683 F.3d at 1135–36 (noting that the ITAR furthers a strong government interest in national security and foreign policy); *Karn*, 925 F. Supp. at 11–12 (holding that the ITAR serves vital government interests in national security and foreign policy).

D. Courts Will Likely Decline to Conduct the Necessary Judicial Review

Even though the ITAR survives the *O'Brien* test, the regulations are nonetheless a flawed licensing scheme due to the absence of procedural protections essential to reduce the risk of censorship.²³² Although the government has a sufficient compelling interest in regulating the exportation of technical data, the ITAR still suffers substantial constitutional deficiencies, such as a lack of objective licensing criteria, the unlimited time for decisions, and the lack of judicial review.²³³ Nevertheless, because USML designations and the ITAR licensing decisions present political questions, courts are unlikely to overturn them as unconstitutional restrictions of speech.²³⁴

Licensing schemes, however, must have objective standards to remove virtually all discretion from the licensing officials to mitigate the threat of censorship.²³⁵ The ITAR provides a number of objective criteria, based upon which the DDTC may deny a license application.²³⁶ One factor, however, allows the

²³² See *Freedman v. Maryland*, 380 U.S. 51, 58–59 (1965) (establishing procedural requirements necessary for a constitutional prior restraint on speech); *Bernstein*, F. Supp. 945 at 1289 (holding that the ITAR does not possess any of the required procedural protections); see also *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227–30 (1990) (holding that when the licensing decision is ministerial, not all of the procedural protections are required); see *supra* notes 89–92 and accompanying text (discussing the procedural safeguards required for a constitutional prior restraint).

²³³ See The Arms Export Control Act, 22 U.S.C. § 2778(h) (2012) (precluding judicial review of USML designations); *Chi Mak*, 683 F.3d at 1135–36 (noting that the ITAR furthers a strong government interest in national security and foreign policy); *Bernstein*, 945 F. Supp. at 1289 (holding that the ITAR fails to satisfy any requirement for a prior restraint); *Karn*, 925 F. Supp. at 11–12 (holding that the ITAR serves vital government interests in national security and foreign policy); 22 C.F.R. § 126.7(a)(1) (stating that the DDTC may deny a license to further world peace, national security, foreign policy, or whenever “otherwise advisable”). The requirement of a compelling government interest is duplicative of the *O'Brien* test, and is therefore not re-evaluated here. See *O'Brien*, 391 U.S. at 376–77 (stating that, in order to be constitutional, a content-neutral restriction on speech must further a substantial government interest); *Freedman*, 380 U.S. at 58–59 (holding that only prior restraints serving an important government interest can be constitutional); see *supra* notes 239–242 and accompanying text (arguing that the ITAR serves a compelling government interest). *But see N.Y. Times Co.*, 403 U.S. at 717–18 (Black, J., concurring) (rejecting that national security concerns alone justify a prior restraint on publication by the press); *Bernstein*, 945 F. Supp. at 1288 (holding that national security alone does not justify a prior restraint). Although it is possible a court could invalidate the ITAR because of the unlimited time frame for licensing decisions, this deficiency is likely the easiest to remedy by passing a new rule limiting the time. See *Bernstein*, 945 F. Supp. at 1289. Accordingly, the remainder of this Note focuses on the more sensitive issues, due to the separation of powers and foreign policy concerns. See *infra* notes 234–257 and accompanying text.

²³⁴ See *United States v. Mandel*, 914 F.2d 1215, 1223 (9th Cir. 1990) (holding that judicial review is not available to challenge the designation of articles on the USML); *United States v. Martinez*, 904 F.2d 601, 602 (11th Cir. 1990) (holding that the designation of an article on the USML is itself a political question).

²³⁵ See *City of Littleton v Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 783 (2004); *Bernstein*, 945 F. Supp. at 1289.

²³⁶ See *Bernstein*, 945 F. Supp. at 1289 (noting that the ITAR provides a list of requirements for licensing); 22 C.F.R. § 126.7(a)(2)–(8). The DDTC also has a policy to deny licenses to certain countries, including, among others, Cuba, Iran, North Korea, Syria, and Venezuela. § 126.1(a).

DDTC to deny a license to further the policy objectives of world peace, national security, foreign policy, or when “otherwise advisable.”²³⁷ Even if the national security and foreign policy objectives were sufficiently objective, the “whenever advisable” ground for denial is precisely the kind of boundless discretion a licensing official cannot have.²³⁸

Finally, the ITAR does not specifically address judicial review of licensing decisions.²³⁹ Although, there is no judicial review of the designation of articles on the USML, the designation alone does not preclude the individual from exporting technical data, but rather requires the individual to acquire a license.²⁴⁰ Nevertheless, the mere designation of an article on the USML infringes on the rights of the would-be exporter.²⁴¹ Absent such a designation, the individual would be free to post the technical data, in this case a 3D CAD file, on the Internet.²⁴²

Arguing that the designation itself is an unconstitutional restraint, however, is unlikely to prevail because the ITAR represents executive authority at its apex.²⁴³ Through the AECA, Congress grants the Executive Branch the ability to regulate the export of firearms and related technical data, among other things.²⁴⁴ Accordingly, the ITAR draws on the authority of both the executive and legislative branches, limiting the circumstances in which judicial review is appropriate.²⁴⁵ Moreover, matters related to foreign affairs are almost exclusively under

²³⁷ The Arms Export Control Act, 22 U.S.C. § 2778(a) (2012); 22 C.F.R. § 126.7(a)(1).

²³⁸ *Bernstein*, 945 F. Supp. at 1289 (holding that the ITAR is a “paradigm of standardless discretion”); cf. *Littleton*, 541 U.S. at 783 (holding that an ordinance made licensing decisions based on sufficiently nondiscretionary criteria such as the applicant’s age, accuracy of the application’s information, prior discipline, history of compliance with tax obligations, and authorization to conduct business within the state). Denying a license whenever it is “advisable,” as permitted under the ITAR, is a far cry from such quantifiable considerations. See *Littleton*, 541 U.S. at 783; 22 C.F.R. § 126.7(a)(1). For instance, a DDTC official who disapproves of the use of 3D printers to manufacture firearm components could deny an application for export on those grounds, rather than the impact the license would have on the ITAR’s policy objectives. See *Bernstein*, 945 F. Supp. at 1289; § 126.7(a)(1).

²³⁹ See *Bernstein*, 945 F. Supp. at 1292 n.13 (stating that the AECA precludes judicial review only as to the designation of items on the USML, not the licensing decision).

²⁴⁰ 22 U.S.C. § 2778(h); 22 C.F.R. § 120.17 (2014). Furthermore, the ITAR does not prohibit the export of information already in the public domain. See 22 C.F.R. § 120.10(a)(5) (stating that technical data does not include information in the public domain).

²⁴¹ See 22 C.F.R. § 120.6 (defining defense article to include technical data); § 123.1(a) (stating that a license is required to export defense articles); see also *Bernstein*, 945 F. Supp. at 1289 (indicating that the lack of judicial review for USML designations contributes to the licensing officials’ excessive discretion under the ITAR).

²⁴² See 22 C.F.R. § 120.6; § 123.1(a).

²⁴³ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring) (stating that presidential authority is at its greatest when exercised pursuant to a congressional act).

²⁴⁴ See 22 U.S.C. § 2778(a) (2012); 22 C.F.R. § 120.1(a).

²⁴⁵ See 22 U.S.C. § 2778(a); *Youngstown*, 343 U.S. at 335–37; see also *Karn*, 925 F. Supp. at 11–12 (stating that the courts should not review policy judgments by the political branches on matters of foreign policy).

the purview of Congress and the Executive.²⁴⁶ Therefore, as two Circuit Courts of Appeals have already held, the designation of an article on the USML is a political question, entrusted to the political branches by the Constitution.²⁴⁷

Although the ITAR is silent as to judicial review of the licensing determination itself, the Administrative Procedure Act generally permits review of agency action.²⁴⁸ Nevertheless, the licensing decision could also fall under the political question doctrine, and therefore evade judicial review.²⁴⁹ The applicability of the political questions doctrine, however, likely depends on the grounds for denial.²⁵⁰ If, for example, the DDTC denies the license because the applicant failed to include information required by the form, there is no political question.²⁵¹ On the other hand, if the DDTC denies an application because it determines denial is necessary to advance the policy objectives of the ITAR, the question is likely a political one, which courts would decline to decide.²⁵²

²⁴⁶ See *Haig v. Agee*, 453 U.S. 280, 292 (1981) (holding that foreign affairs are “so exclusively entrusted to the political branches” that judicial intervention is rarely appropriate); see also U.S. CONST. art. I, § 8 (establishing that Congress has power to regulate foreign commerce, the value of foreign currency, and approve treaties with foreign countries); U.S. CONST. art. I, § 10 (stating that states cannot enter treaties, impose duties, or make treaties with foreign states); U.S. CONST. art. II, § 2 (establishing that the President is the commander in chief of the military, and that the President can enter treaties with foreign countries and appoint ambassadors).

²⁴⁷ See *Mandel*, 914 F.2d at 1223; *Martinez*, 904 F.2d at 602; see also *Haig*, 453 U.S. at 292.

²⁴⁸ See The Administrative Procedure Act, 5 U.S.C. § 702 (2012); *Webster v. Doe*, 486 U.S. 592, 603 (1988) (stating that congressional intent to preclude constitutional challenges must be explicit); *Karn*, 925 F. Supp. at 8–9 (noting that the parties agreed that the AECA’s explicit preclusion of judicial review does not apply to constitutional challenges).

²⁴⁹ *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006); *Mandel*, 914 F.2d at 1223; *Martinez*, 904 F.2d at 602. The DDTC may deny a license based on its assessment of the article’s effect on American foreign policy and national security objectives. 22 C.F.R. § 126.7(a)(1) (2014). As one court noted, assessing the extent to which a particular defense article (including technical data) would contribute to a foreign country’s military capability is a political question. *Mandel*, 914 F.2d at 1223.

²⁵⁰ Compare 22 C.F.R. § 126.7(a)(1) (stating that the DDTC may deny a license based on foreign policy or national security concerns, or when otherwise advisable), with § 126.7(a)(2)–(8) (providing a number of objective grounds for denial). The DDTC must inform an applicant of the grounds for denial, unless security or policy warrant otherwise. § 126.7(b). *But see Lakewood*, 486 U.S. at 770 (stating that requiring a licensing official to state grounds for denial does not cure a defective scheme granting the official excessive discretion).

²⁵¹ See *Bancoult*, 445 F.3d at 433 (holding that issues intimately related to foreign policy and national security are non-justiciable political questions); 22 C.F.R. § 126.7(a)(7). Whether the applicant properly filled out the form is not intimately related to concerns of foreign policy. See § 126.7(a)(7); see also *Littleton*, 541 U.S. at 783 (stating that denying a license based on the applicant’s provision of false information is a sufficiently objective criterion to avoid censorship). The DDTC may also deny a license if the applicant has been convicted of certain crimes, another criteria the Supreme Court has held to be sufficiently objective. See *Littleton*, 541 U.S. at 783; § 126.7(4). Yet, the scheme at issue in *City of Littleton v. Z.J. Gifts D-4, L.L.C.* stated that licenses “shall” be denied for failing to satisfy these objective criteria. See *Littleton*, 541 U.S. at 783. The ITAR, by contrast, states that the DDTC “may” deny a license if the applicant fails to satisfy a condition. § 126.7(a).

²⁵² See *Bancoult*, 445 F.3d at 432–33; *Mandel*, 914 F.2d at 1223; *Martinez*, 904 F.2d at 602.

In sum, the AECA and the ITAR fail to meet the procedural protections set out in 1965 in *Freedman v. Maryland* by the Supreme Court.²⁵³ The DDTC has no time limit to issue licensing decisions and can deny licenses based on broad, subjective criteria.²⁵⁴ Furthermore, even though Congress did not preclude constitutional challenges to USML designations, the determinations are still likely unreviewable under the political question doctrine.²⁵⁵ Similarly, depending on the criteria, the political question doctrine likely precludes judicial review of the ultimate licensing decision.²⁵⁶ Ironically, the very act of declining to provide judicial review of licensing decisions renders the regulatory scheme unconstitutional.²⁵⁷

CONCLUSION

Utilizing the International Traffic in Arms Regulations (“ITAR”) to prohibit the dissemination of weapons-related technical data on the Internet places critical government interests in national security and foreign policy at odds with the First Amendment. The ITAR’s limitations conform to the two most reviled types of restrictions on free speech: it is both content-based and a prior restraint. Although content-based restrictions are typically strictly scrutinized, courts should apply only intermediate scrutiny to the ITAR, because the regulations exist to address the secondary effects associated with the proliferation of weapons and weapons-related technical data.

The ITAR’s procedural deficiencies as a prior restraint, however, are far more problematic. The Constitution requires that licensing decisions that restrict speech must be subject to judicial review. Yet, under the political question doctrine, courts routinely decline to decide matters intimately connected with foreign policy and national security. Foreign policy and national security determinations are non-justiciable political questions, but simultaneously, the lack of

²⁵³ See *Freedman*, 380 U.S. at 58–59; see also *FW/PBS*, 493 U.S. at 227–28 (stating that the limited period of time for licensing decisions and the availability of judicial review are essential to save a prior restraint from constitutional infirmity); *Bernstein*, 945 F. Supp. at 1289 (holding that the ITAR fails to satisfy the *Freedman* factors).

²⁵⁴ See *Bernstein*, 945 F. Supp. at 1289.

²⁵⁵ See *Mandel*, 914 F.2d at 1223 (holding that decisions made by the political branches’ that are intimately related to foreign policy and national security are non-justiciable); *Karn*, 925 F. Supp. at 11–12 (indicating that the determination concerning a particular article would meaningfully affect a foreign country’s military capabilities and therefore is intimately connected to foreign policy and national security).

²⁵⁶ See *Mandel*, 914 F.2d at 1223 (holding that matters of foreign policy and national security are not subject to judicial review); *Karn*, 925 F. Supp. at 11–12 (holding that the DDTC’s determination that a particular article would impact the AECA’s foreign policy and national security objectives is a non-justiciable political question). 22 C.F.R. § 126.7(a)(1) (2014).

²⁵⁷ See *FW/PBS*, 493 U.S. at 227–28 (stating that licensing schemes restricting speech must be subject to judicial review); *Freedman*, 380 U.S. at 58–59 (stating that prior restraints are only justified if the government bears the burden of proof, showing that objective criteria govern licensing decisions and that such decisions are subject to judicial review); *Bernstein*, 945 F. Supp. at 1289 (holding that the ITAR fails to satisfy each of the *Freedman* criteria).

judicial review renders the regulatory scheme an unconstitutional prior restraint. Because the ITAR's explicit purpose is to advance foreign policy and national security, the intersection of the ITAR and the First Amendment creates a constitutional catch-22.

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