Nebraska Law Review

Volume 93 | Issue 2 Article 5

2014

Making Second Amendment Law with First Amendment Rules: The Five-Tier Free Speech Framework and Public Forum Doctrine in Second Amendment Jurisprudence

Kenneth A. Klukowski
Liberty University School of Law

Kenneth A. Klukowski*

Making Second Amendment Law with First Amendment Rules: The Five-Tier Free Speech Framework and Public Forum Doctrine in Second Amendment Jurisprudence

TABLE OF CONTENTS

I. Introduction 430
II. The Second Amendment after *Heller* and *McDonald* ... 433
  A. An Individual Right Applicable to the States 433
  B. Myriad Questions Remain 437
III. Rationale and Limits of Applying This Framework to the Second Amendment 440
  A. Similarities Between First and Second Amendments 441
  B. Normative Principles of Per Se Rules and Strict Scrutiny 444
    1. Reviving Strict Scrutiny to be Sufficiently Strict 444
    2. Clarity of Per Se Rules 446
  C. Disparities Between the First and Second Amendments 447
    1. Inherent Deadliness of Firearms 448
    2. Some Persons are Beyond the Scope of the Second Amendment 450
    3. The Right to Bear Arms is a Right of Citizenship 452

* Former Research Fellow, Liberty University School of Law, and Senior Legal Analyst, Breitbart News; B.B.A. 1998, Univ. of Notre Dame; J.D. 2008, George Mason Univ. This Article was written and accepted for publication before the author entered federal service on August 11, 2014, and the opinions expressed here are his alone. The author would like to thank Sandy Froman, Amanda Klukowski, Nelson Lund, and Kevin Marshall. Any insights are the result of their input; all errors are the author's alone. Dedicated to Hunter E. Klukowski.

IV. A Three-Step Analysis for Second Amendment Cases Using Five Standards of Review 455
A. Five-Tiered Scrutiny Framework for Second Amendment 457
B. Three Questions to Determine Proper Level of Scrutiny 459
1. Step One: Whether the Amendment Applies 459
2. Step Two: Public Location Versus Private 462
3. Step Three: Identifying Level of Scrutiny 462
V. Three Forms of Heightened Scrutiny Apply to Burdens on the Second Amendment on Private Property 463
A. Strict Scrutiny for Burdens on Core Second Amendment Right 466
1. Core Burdens Undermine the Purpose of the Amendment 467
2. The Standard Strict Scrutiny Formulation 472
B. Per Se Invalidity for Firearm Bans or Confiscations 472
C. Intermediate Scrutiny for Incidental Burdens 478
VI. The Public Forum Doctrine Applies to Burdens on the Second Amendment on Public Property 484
A. The Need for the Public Forum Doctrine for the Second Amendment 485
B. Applying the Four Types of Public Forum to the Second Amendment 487
1. Standard Framework for Traditional and Designated Public Forums 488
2. Additional Restrictions Permissible in Limited Public Forums 491
3. Reasonableness Test for Nonpublic Forums 492
VII. Conclusion 494

I. INTRODUCTION

The United States is half a decade into developing a jurisprudence applying the Second Amendment. If the jurisprudential balance of the Supreme Court shifts by a single vote, then it is distinctly possible that the Second Amendment could be effectively erased from the Constitution, as the Court could overrule the two foundational cases currently on the books or confine them to their facts. But assuming the Second Amendment survives these perils, the next quarter-century will likely see a series of Second Amendment cases develop a meaningful and consequential jurisprudence regarding a constitutional provision exercised daily by millions of Americans.

This would parallel the jurisprudence governing the Free Speech Clause of the First Amendment. That provision was barely developed

before the Supreme Court held in 1919 that inciting imminent lawlessness is not protected by the First Amendment.[1] The number of free speech cases proliferated once the Court incorporated that right into the Fourteenth Amendment Due Process Clause in 1925.[2] The right to bear arms is poised to follow the same track.

As well it should. Americans only exercise many of their constitutional rights if they are suspected of running afoul of the law. However, since mere possession of a firearm is an exercise of the right to bear arms, Second Amendment rights are exercised daily by tens of millions of Americans, as are First Amendment rights. Parallels between free speech and gun rights suggest a common doctrinal framework could govern both.

An estimated 70 million or more Americans possess 310 million firearms,[3] regulated by as many as 20,000 gun laws at the federal, state, and local levels.[4] This essentially creates infinite permutations of fact patterns for judicial review of gun laws, determining whether a given gun law is unconstitutional when applied to certain persons under certain circumstances. Yet only two Supreme Court cases—both of recent vintage—currently provide direct guidance: *District of Columbia v. Heller*,[5] and *McDonald v. Chicago*.[6] Courts are only now beginning to grapple with the magnitude of the task of devising a framework to govern such multitudinous possibilities.

There is a growing need for such a framework. A federal appeals court said in 2009 in one Second Amendment case what could be said in most Second Amendment cases currently in the courts: "The government has approached this case as though all it had to do to defend

1. Schenck v. United States, 249 U.S. 47, 52 (1919). The Court subsequently refined this rule on incitement. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).
2. Gitlow v. New York, 268 U.S. 652, 666 (1925).
3. WILLIAM J. KROUSE, CONG. RESEARCH SERV., RL32842, GUN CONTROL LEGISLATION 8 (2012), *archived at* http://perma.unl.edu/NTM9-PATN; *see also Firearm Fact Card 2011*, NAT'L RIFLE ASS'N INST. FOR LEGIS. ACTION (Jan. 20, 2011), http://www.nraila.org/newsissues/fact-sheets/2011/firearm-fact-card-2011.aspx, *archived at* http://perma.unl.edu/Y884-TGCA (presenting Second Amendment issues and various statistics about gun owners in the United States). There is reason to believe these numbers could be significantly higher. *See* Carl Bialik, *Guns Present Polling Conundrum*, WALL ST. J. BLOG (Mar. 22, 2013, 11:30 PM), http://blogs.wsj.com/numbers/guns-present-polling-conundrum-1223/, *archived at* http://perma.unl.edu/BZ6Z-HWVG.
4. Gun-control advocates dispute this frequently-cited number, sometimes with qualifiers such as the Brookings Institution saying that there are 300 laws that are "major." *See* JON S. VERNICK & LISA M. HEPBURN, THE BROOKINGS INST., TWENTY THOUSAND GUN CONTROL LAWS? 2 (2002), *archived at* http://perma.unl.edu/4WYL-RWTQ. The number 300 seems low given the variety of statutes, regulations, and ordinances, but this Article's point remains regardless.
5. 554 U.S. 570 (2008).
6. 561 U.S. 742 (2010).

the constitutionality of [the gun-control law at issue] is invoke *Heller*'s language about certain 'presumptively lawful' gun regulations . . . . Not so."[7] By contrast, the Second Amendment may not be "singled out for special—and specially unfavorable—treatment."[8] Nor does *Heller* allow courts to apply uniformly some intermediate-scrutiny standard that effectively defers to legislatures, giving significant weight to assertions of personal liberty under the Second Amendment while also giving government significant latitude to restrict that liberty. Just as the Court firmly rejected "a free-floating test for First Amendment coverage . . . [utilizing] an ad hoc balancing of relative social costs and benefits,"[9] so too the Court rejected Justice Stephen Breyer's proposed "interest-balancing" approach to Second Amendment cases.[10]

There is no need to reinvent the jurisprudential wheel. Rather than spending years devising a series of tests to reach correct judgments in a rapidly building wave of Second Amendment litigation, judges should recur to a framework that has served the Nation and the law quite well for many years. Although a universal theory to govern constitutional law continues to elude the judiciary and the academy, a common framework governing two commonly-exercised constitutional liberties—conveniently situated in adjacent Amendments—is philosophically attractive in moving incrementally toward a coherent and consistent system of constitutional review.

The five-tiered framework of standards of review that governs the First Amendment should also govern the Second Amendment. Three levels of scrutiny apply to speech on private land, depending on the nature of the burden on speech, ranging from per se invalidity, to strict scrutiny, to intermediate scrutiny. Two additional levels of restrictions are constitutionally permissible on public land under the public forum doctrine: one allows limitations to preserve the forum for the purpose for which the public has access to the government property, and in the case of a nonpublic forum, the test is mere reasonableness.

Many in law school learn the adage, "Hard facts make bad law." This Article's approach facilitates robust protections for law-abiding Americans as they seek to own and carry common firearms in their daily lives, while enabling government to address public-safety concerns regarding dangerous persons, unusually-dangerous weapons, and sensitive locations. The federal courts of appeals for several circuits generally support this approach,[11] as do several leading schol-

7. United States v. Skoien (*Skoien I*), 587 F.3d 803, 805 (7th Cir. 2009), *rev'd en banc*, 614 F.3d 638 (7th Cir. 2010).
8. *McDonald*, 561 U.S. at 778–79.
9. United States v. Stevens, 559 U.S. 460, 470 (2010).
10. *Heller*, 554 U.S. at 634–35.
11. *See, e.g.*, Ezell v. City of Chi., 651 F.3d 684, 700–04 (7th Cir. 2011).

ars.[12] Courts do not face a binary choice of upholding severe restrictions on a person's gun ownership in his own home or allowing that same person to carry a machinegun into the White House. Neither is acceptable, nor mandated by the Constitution.

Part II of this Article sets forth the current state of the law on the Second Amendment. Part III discusses the proposed approach for Second Amendment judicial review, consisting of a three-step inquiry. These three steps dictate which of five levels of scrutiny should apply in any given case. Part IV explores the rationale and normative principles underlying this theory, including the desirable clarity of per se rules and the need to restore strict scrutiny to a test that is sufficiently strict to provide adequate protection for core exercises of fundamental rights. Part IV also acknowledges three differences between the First and Second Amendments that suggest areas on the margins where the jurisprudence of the two Amendments might diverge. Part V expounds the three levels of scrutiny that apply to burdens on Second Amendment exercises on private property. Part VI explains how public forum doctrine offers two additional standards of review that apply on public property. Finally, Part VII concludes with a discussion on how courts should proceed regarding the Second Amendment.

II. THE SECOND AMENDMENT AFTER *HELLER* AND *MCDONALD*

The federal judiciary has taken only the first steps in developing Second Amendment jurisprudence by defining that provision's scope and contours. The Supreme Court's most recent case included a signal that the entire concept of a private right to bear arms is only a single vote away from being eradicated by the Court's current membership.[13] But assuming the Supreme Court's two recent decisions endure, the next three decades will almost certainly see an array of consequential cases in this energetically-contested area of law.

A. An Individual Right Applicable to the States

The Supreme Court decided *District of Columbia v. Heller* in 2008. In an opinion by Justice Antonin Scalia, the Court held the Second Amendment secures the right of law-abiding and peaceable citizens to

12. *See, e.g.*, Nelson Lund, *Second Amendment Standards of Review in a* Heller *World*, 39 FORDHAM URB. L.J. 1617, 1628–36 (2012) [hereinafter Lund, *Standards of Review*]; Glenn H. Reynolds & Brannon P. Denning, Heller's *Future in the Lower Courts*, 102 NW. U. L. REV. 2035, 2042–44 (2008); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1454–72 (2009).

13. *See McDonald*, 561 U.S. at 916 (Breyer, J., dissenting) (arguing that the Court should reconsider *Heller*); *id.* at 941 (insisting "the Framers did not write the Second Amendment in order to protect a private right").

own readily-usable firearms unconnected to any form of militia service,[14] resolving a three-way circuit split on the meaning of the Amendment.[15] The Court reached its conclusion by examining the original meaning of the Second Amendment's text, though some scholars find Justice Scalia's opinion wanting as an exemplar of originalism.[16] As Judge Laurence Silberman wrote for the D.C. Circuit, to determine precisely what is protected by the Second Amendment, courts "look to the lawful, private purposes for which people of the [Framers'] time owned and used arms."[17] Such purposes include hunting and self-defense.[18]

The Court also explained the relationship between the two clauses in the Amendment. The first is a prefatory clause that announced the civic purpose of the right, which can resolve ambiguities regarding the right, but not constrain the following operative clause of the Amendment.[19] Additionally, "the 'militia' in colonial America consisted of a subset of 'the people,'"[20] while "the people" seemingly "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[21] And "state" refers to any polity[22]—in this case, the American nation. The Court held that the Federal City's categorical ban on handgun ownership violated the individual right to bear arms, and invalidated the D.C. gun ban.[23]

Two years later, Justice Samuel Alito wrote for the Court in *McDonald*, holding the Second Amendment is a fundamental right, applicable to state and local governments through the Fourteenth

14. District of Columbia v. Heller, 554 U.S. 570, 576–95 (2008).
15. Kenneth A. Klukowski, *Armed By Right: The Emerging Jurisprudence of the Second Amendment*, 18 GEO. MASON U. C.R. L.J. 167, 174–76 (2008).
16. *E.g.*, Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1344 (2009) [hereinafter Lund, *Originalist*].
17. Parker v. District of Columbia, 478 F.3d 370, 382 (D.C. Cir. 2007), *aff'd sub nom. Heller*, 554 U.S. 570.
18. United States v. Emerson, 270 F.3d 203, 251–54, 268 (5th Cir. 2003) (discussing various sources). The latter of these interests, self-defense, is ancillary to the natural right of self-preservation. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *136, *139–40 (1765); Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995, 1003–04 (1995) (book review).
19. *Heller*, 554 U.S. at 576–78.
20. *Id.* at 580.
21. United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).
22. *Heller*, 554 U.S. at 597 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 208 (1833)); *see generally* Eugene Volokh, *Necessary to the Security of a Free State*, 83 NOTRE DAME L. REV. 1 (2007) (arguing that, for the purposes of interpreting the term "free state" in the Second Amendment, in the Framers' time "free state" was a political term of art meaning "free country," or the opposite of a despotism).
23. *Heller*, 554 U.S. at 635–36.

Amendment under the Court's incorporation doctrine.[24] Four Justices concluded the right to bear arms was incorporated into the Due Process Clause,[25] while Justice Clarence Thomas wrote separately that the right to bear arms was applicable to the States through the Privileges or Immunities Clause.[26]

But the five-Justice majority agreed that "[a] clear majority of the States in 1868 . . . recognized the right to keep and bear arms as being among the foundational rights necessary to our system of Government."[27] Justice Alito wrote for the Court, concluding that the Second Amendment "right is 'deeply rooted in this Nation's history and tradition,'"[28] characterizing Blackstone as asserting in 1765 that the right to arms was regarded as "one of the fundamental rights of Englishmen."[29] He cited to *Heller*'s rationale that the right was to create a bulwark against a tyrannical regime imposing its will through military might to intimidate the people, and surveyed various scholarly works to show that facilitating a latent counter-threat of popular armed resistance "was fundamental to the newly formed system of government."[30]

---

24. McDonald v. City of Chi., 561 U.S. 742, 767–78 (2010).

25. *Id.* at 780–85, 791 (plurality opinion of Alito, J.).

26. *Id.* at 805–13 (Thomas, J., concurring in part and concurring in the judgment). In doing so, Justice Thomas agreed that the right is "fundamental" to an "American scheme of liberty" and "deeply rooted" in America's history and tradition. *Id.* at 806. But he takes the position that it applies to the States because it is among the "privileges or immunities" of American citizens through that clause of the Fourteenth Amendment. *Id.* Justice Thomas' opinion is the one consistent with the original meaning of the Fourteenth Amendment. *See* Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. REV. 195, 197, 234–52 (2009).

27. *McDonald*, 561 U.S.at 777, *see* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 11–17, 50–54 (2008); *see generally* Stephen P. Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms": Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341 (1995) (tracing the adoption of the Fourteenth Amendment and analyzing the relationship between the Amendment and the Freedmen's Bureau Act, focusing on the right to keep and bear arms).

28. *McDonald*, 561 U.S. at 767 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

29. *Id.* at 768 (quoting District of Columbia v. Heller, 554 U.S. 570, 594 (2008) (citing in turn 1 BLACKSTONE, *supra* note 18, at *136, *139–40)). Scholarly treatises contemporaneous with the adoption of the Fourteenth Amendment likewise referred to the right to bear arms as fundamental. *E.g.*, TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA § 118 (1867).

30. *McDonald,* 561 U.S. at 769. (citing, *inter alia*, 17 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 360, 362–63 (J. Kaminski & G. Saladino eds. 1995) (collecting sources); STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT 171–278 (2008)).

Unfortunately, the majority opinions in both cases are marred by dicta,[31] which could create problems in the lower courts. All federal appellate courts afford considerable weight to Supreme Court dicta,[32] and, as such, this dicta often proves controlling. *Heller*'s dictum says the Court is not "cast[ing] doubt" on certain "longstanding prohibitions" regarding felons, the mentally ill, firearms in "sensitive places," and limitations on firearms commerce.[33] The Court designates all of these as "presumptively lawful" and adds that this list is not exhaustive.[34] This ipse dixit is devoid of textual and historical support, entails premises not grounded in the Constitution, and may sow confusion among the lower courts.[35] As Professor Lund says, some speculate this was the price Justice Scalia had to pay to garner five votes for his opinion, but such auguring is best left to others.[36] What is clear—by contrast—is that the same five Justices reaffirmed this dictum in *McDonald*, writing, "We repeat those assurances here."[37] Lund opines, "This repetition of *Heller*'s 'assurances' is unnecessary and irresponsible. . . . Their reappearance in Alito's *McDonald* opinion is the single largest obstacle to regarding that opinion as a sound model of judicial restraint."[38]

Despite their imperfections, *Heller* and *McDonald* are valuable for reasons beyond the fact that their holdings are correct. In terms of fundamental constitutional principles, for example, these decisions were important for limited government by declaring that an individual right to bear arms is necessary to the security of a free republic. "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."[39] Theories that would deny an indi-

31. The courts of appeals are split on whether this language is actually dicta. Some recognize that it is. *See, e.g.*, United States v. Scroggins, 599 F.3d 433, 451 (5th Cir. 2010); United States v. McCrane, 573 F.3d 1037, 1047 (10th Cir. 2009) (Tymkovich, J., concurring). Others wrongly conclude it is not dicta. S*ee, e.g.*, United States v. Rozier, 598 F.3d 768, 771 n.6 (11th Cir. 2010); United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010). Others note this disagreement without deciding. *See, e.g.*, United States v. Marzzarella, 614 F.3d 85, 90 n.5 (3d Cir. 2010).

32. *See, e.g.*, Wynne v. Town of Great Falls, 376 F.3d 292, 298 n.3 (4th Cir. 2004); McCalla v. Royal MacCabees Life Ins. Co., 369 F.3d 1128, 1132 (9th Cir. 2004); Crowe v. Bolduc, 365 F.3d 86, 92 (1st Cir. 2004); Sierra Club v. EPA, 322 F.3d 718, 724 (D.C. Cir. 2003); United States v. City of Hialeah, 140 F.3d 968, 974 (11th Cir. 1998); Reich v. Cont'l Cas. Co., 33 F.3d 754, 757 (7th Cir. 1994).

33. *Heller*, 554 U.S. at 626–27.

34. *Id.* at 627 n.26.

35. *See* Lund, *Originalist*, *supra* note 16, at 1356–68.

36. *See id.* at 1345.

37. McDonald v. City of Chi., 561 U.S. 742, 786 (2010).

38. Nelson Lund, *Two Faces of Judicial Restraint (Or Are There More?) in* McDonald v. City of Chicago, 63 FLA. L. REV. 487, 502 (2011).

39. United States v. Sprague, 282 U.S. 716, 731 (1931).

vidual right accordingly do violence to the plain meaning of the words in the Second Amendment, and to the rules of grammar and syntax that prevailed in 1791. By rejecting such a tortured interpretation of the Amendment's words, the Justices in the majority reinforced a cardinal principle that goes to the heart of why America has a written Constitution at all—to delimit the powers of government in the lives of the American people.

The collective-right theories rejected by the Supreme Court in both cases were based on fanciful thinking that denied the simple reality—embraced in *Heller* and *McDonald*—that the right to keep and bear arms is premised on a fundamental mistrust of government's ability to protect its citizens, and also a mistrust of governmental benevolence—that the American people as a whole might one day need to protect their liberty against their own government. Such premises are repugnant to many with a romantic view of human nature and great faith in government. But it is manifestly clear that those were the beliefs of the Framers.

B. Myriad Questions Remain

The *Heller* Court made clear it was prudently not purporting to "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment."[40] Many questions remain regarding the reach, limits, contours, specifics, and purpose of the right to keep and bear arms. Such questions will likely occupy the judiciary and the academy for decades. Perhaps the most unavoidable question is whether the right to bear arms extends beyond the home. *Heller* and *McDonald* both involved plaintiffs who wanted handguns in their privately-owned homes for self-defense,[41] but the Supreme Court's reasoning strongly implies that the right to bear arms also extends beyond the home.[42] These decisions led both the Seventh Circuit and Ninth Circuit to hold that the Second Amendment extends outside the home in opinions by Judges Richard Posner[43] and Diarmuid O'Scannlain,[44] respectively. Two circuits have assumed so without holding.[45]

Another important question is whether the right to bear arms includes the right to carry concealed weapons. The Supreme Court quotes Oliver Wendell Holmes as saying, "There has been a great dif-

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

41. *Id.* at 573; *McDonald*, 561 U.S. at 750.

42. Moore v. Madigan, 702 F.3d 933, 935 (7th Cir. 2012).

43. *Id.* at 937.

44. Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1172 (9th Cir. 2014).

45. *See* Drake v. Filko, 724 F.3d 426, 431 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013).

ference of opinion on the question."[46] On one hand, the Supreme Court stated in dictum that the Second Amendment right does not include the right to carry arms concealed.[47] As early examples, in 1840 both the Tennessee and Alabama Supreme Courts held that carrying concealed weapons is outside the scope of the right to bear arms in their States,[48] as did the high courts in Georgia and Louisiana exercising concurrent jurisdiction to interpret the Second Amendment soon thereafter.[49] Recently, the Seventh Circuit agreed that "a state may be able to require 'open carry'—that is, require persons who carry a gun in public to carry it in plain view rather than concealed."[50]

On the other hand, the Kentucky Supreme Court invalidated a ban on concealed carrying for violating its state constitution's right to bear arms.[51] The Ninth Circuit found this case of significant probative value,[52] approvingly quoting Nelson Lund, who wrote the Kentucky case is "especially significant both because it is nearest in time to the founding era and because the state court assumed (just as [*Heller*] does), that the constitutional provision . . . codified a preexisting right."[53] While Judge O'Scannlain has provided the most helpful exploration to date,[54] the Supreme Court has yet to weigh in.

Another series of questions for which we do not have answers as yet asks what weapons are encompassed by the right to bear arms. What types of firearms, if any, are not protected by the Second Amendment, and why? What other sorts of projectile weapons are secured by the Amendment, whether ancient (such as bows or crossbows) or modern (such as rocket propelled grenades or mortars)? How about non-projectile weapons? Or nonlethal weapons?[55] What about edged weapons? Does the Second Amendment's orbit encircle knives? If so, would this also extend to swords? While the courts might go many years before anyone will claim the right to carry a spear, judges

46. *Heller*, 554 U.S. at 618 (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *340 n.2 (Oliver Wendell Holmes, Jr. ed., 12th ed. 1873)).
47. Robertson v. Baldwin, 165 U.S. 275, 281–82 (1897).
48. Aymette v. State, 21 Tenn. 154, 158 (1840); State v. Reid, 1 Ala. 612, 614–16 (1840).
49. Nunn v. State, 1 Ga. 243, 251 (1846); State v. Chandler, 5 La. Ann. 489, 490 (1850). These were before the Fourteenth Amendment was adopted in 1868.
50. Moore v. Madigan, 702 F.3d 933, 938 (7th Cir. 2012) (citations omitted); *see also* James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After* Heller, 97 CORNELL L. REV. 907, 920–21 (2012) ("If concealed carry and open carry are in fact equal alternative outlets for the same indivisible right, then a state can ban or burden one so long as it allows the other.").
51. *See* Bliss v. Commonwealth, 2 Litt. 90, 90 (Ky. 1822).
52. Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1156 (9th Cir. 2014).
53. *Id.* (quoting Lund, *Originalist*, *supra* note 16, at 1360).
54. *See id.* at 1156–66.
55. *See generally* Craig S. Lerner & Nelson Lund, Heller *and Nonlethal Weapons*, 60 HASTINGS L.J. 1387 (2009) (criticizing the argument that only those arms in existence in the Eighteenth Century are protected by the Second Amendment).

could quickly confront cases involving switchblades or jackknifes. As a matter of original meaning, at least certain types of blades are "arms" within the meaning of the Second Amendment.[56]

Still more questions involve persons prohibited from possessing arms. Several courts have upheld the federal statutory prohibition on convicted felons possessing firearms,[57] and no court of appeals to date has invalidated that provision. Regarding barring felons from owning firearms, "Congress sought to rule broadly—to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'"[58] Violent felons fit this bill, but what about white-collar felons?[59]

Despite the concerns that rightly attend behavioral abnormalities, would the statutory prohibition on substance abusers owning firearms[60] survive meaningful judicial review? Congress intended "to keep firearms out of the possession of drug abusers" because they are undeniably "a dangerous class of individuals."[61] But some young people who get caught up in self-destructive habits turn their lives around. At minimum, courts must carefully draw distinction between former users versus "abusers" regarding fundamental rights.

Still other questions concern whether the government can require licenses or permits, and if so, with what conditions. Licensing schemes are widespread for various firearm-related matters, and it will be interesting to see how the judiciary grapples with the emerging challenges to these requirements, hopefully providing more than a rubber-stamp.

Answering these questions requires courts to apply standards of review and levels of scrutiny to laws that burden the right to bear arms. Regarding the dicta in *Heller* already discussed in section II.A, Judge Diane Sykes observes that "it is not entirely clear whether this

56. Cockrum v. State, 24 Tex. 394, 403 (1859); *see also* David B. Kopel, Clayton E. Cramer & Joseph Olson, *Knives and the Second Amendment*, 47 MICH. J. L. REFORM 167 (2013) (arguing that under the Supreme Court's standard in *Heller*, knives are "arms" and should be protected by the Second Amendment because they are typically possessed by law-abiding citizens for lawful purposes, including self-defense).

57. *E.g.*, United States v. Rozier, 598 F.3d 768, 771 (11th Cir. 2010); United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010); United States v. Anderson, 559 F.3d 348, 352 (5th Cir. 2009). This prohibition is codified at 18 U.S.C. § 922(g)(1) (2012).

58. Scarborough v. United States, 431 U.S. 563, 572 (1977) (quoting 114 CONG. REC. 14,773 (daily ed. May 23, 1968) (statement of Sen. Long)).

59. *See generally* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695 (2009) (arguing that stripping an individual of his right to keep and bear arms due to a felony conviction is constitutionally dubious unless the individual was convicted of a crime of violence).

60. 18 U.S.C. § 922(g)(3) (2012).

61. United States v. Cheeseman, 600 F.3d 270, 280 (3d Cir. 2010).

language should be taken to suggest that the listed firearms regulations are presumed to fall outside the scope of the Second Amendment . . . or that they are presumptively lawful under even the highest standard of scrutiny applicable to laws that encumber constitutional rights."[62] This is only one of many questions pertaining to the level(s) of scrutiny courts should apply in Second Amendment cases. It is to those questions we now turn.

III. RATIONALE AND LIMITS OF APPLYING THIS FRAMEWORK TO THE SECOND AMENDMENT

The First Amendment framework is eminently useful in resolving Second Amendment issues. As already discussed in Part II, several courts—including the Supreme Court—have signaled support for this approach. But even more important is why judges have so quickly moved in this direction, a reason that would compel this Article's argument even without judicial support.

The multiple tiers of scrutiny for the Free Speech Clause of the First Amendment have little to do with the unique characteristics of speech. Rather, it is a conceptual approach to navigate the line-drawing problems arising from the widespread exercise of a fundamental right in a free society. It just so happens that both free speech and the right to bear arms fit that description.

Many fundamental rights—and most enumerated rights, whether fundamental or not—are never used by most Americans; they are only triggered when the coercive organs of government (e.g., law enforcement personnel and criminal prosecutors) exert power against a person. If the police never search a person or his home, then he never asserts his Fourth Amendment rights. If he is never criminally prosecuted, then he never exercises most of his Fifth and Sixth Amendment rights. If he is never detained in jail or criminally sentenced, then he never uses his Eighth Amendment rights.

By contrast, the First and Second Amendments are exercised by many millions of Americans daily. People exercise free speech rights with many of the words they express on almost any subject matter. And the mere act of owning a firearm is an exercise of the Second Amendment, meaning almost 100 million Americans exercise that right continually.[63]

For both rights, picture a series of five concentric circles. The innermost is the indispensable center of the right, violations of which are per se invalid. The second circle encompasses direct burdens on the right that do not inherently violate the indispensable core. The

62. *Skoien I*, 587 F.3d 803, 808 (7th Cir. 2009), *rev'd en banc*, 614 F.3d 638 (7th Cir. 2010).

63. *See supra* notes 3–4 and accompanying text.

third circle is further removed from the center point, encompassing incidental burdens on the right. The outer two circles only tangentially burden the right. A person slips to the fourth level only when venturing upon publicly-owned spaces that are not traditional forums, where the individual's right to demand certain liberties is lessened as he is now in a place owned by society at large, places that are only open for specific purposes. And the fifth is the farthest removed from the center, whereby the person has entered a public space in which there is no expectation that the right at issue would be exercised, because the purpose for which the person has access to this government location has nothing whatsoever to do with that right. The protection afforded by the pertinent fundamental liberty radiates from the center, and diminishes as a person treads further from that central purpose for which the American people enshrined that right in the Constitution.

There are several theoretical questions to be asked regarding matters outside the Second Amendment's inner core. When the Second Amendment applies, are the ends sufficiently important and the means sufficiently tailored that the individual interest outweighs the public interest? Or does the Second Amendment not apply at all because the burden is per se beyond the bounds of the historical reach of the right applied in a modern context? While that discussion may seem as unproductive as debating how many angels can dance on the head of a pin, these are necessary questions to grind a philosophical lens through which to conceptualize Second Amendment issues.

A. Similarities Between First and Second Amendments

Leading jurists are recognizing that the First and Second Amendments enjoy a shared foundation. Justice Scalia expressly compared permissible restrictions on the Second Amendment as analogous to those permissible to speech under the First Amendment,[64] as did Judges Diane Sykes and Diarmuid O'Scannlain.[65] The interests may be different, but the fact that both Amendments guarantee interests that share common characteristics reinforces the theory that they can likewise share a common doctrinal framework for judicial review.

64. *See* District of Columbia v. Heller, 554 U.S. 570, 595 (2008) ("Of course the right [to bear arms] was not unlimited, just as the First Amendment's right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*." (citation omitted)).

65. Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1194–99 (9th Cir. 2014); Ezell v. City of Chi., 651 F.3d 684, 699 (7th Cir. 2011) (reasoning that the First and Second Amendments both protect "intangible and unquantifiable interests").

The First Amendment is implicated when a speaker possesses information and is placed under "restraints on the way in which the information might be used."[66] Both "the creation and dissemination of information are speech within the meaning of the First Amendment."[67] As the case law and literature discussed in this Article show, the Second Amendment is implicated when a person seeks to procure, possess, carry, or use bearable firearms that are descendants of those known to the Framers—as well as certain other weapons—for any lawful purpose, including collective defense and personal self-defense. Both ownership and possession of such "arms" are within the Second Amendment, as are ancillary aspects of gun ownership, such as the meaningful ability to acquire ammunition, practice with firearms, transport arms between locations, and have ready access to firearms in everyday settings.

The conceptual foundation for the reach of both Amendments is coextensive and coterminous. "The protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment."[68] So the rationales justifying various speech restrictions should be analogous to corresponding restrictions of the right to bear arms.

Like other fundamental rights, the courts must ensure the rights of the minority are given full protection against majority will expressed through the normal democratic process. Although many citizens might find firearms objectionable, in that regard it is no different than speech, which is protected even if it moves people to unhappy tears or inflicts great pain.[69] "Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects."[70] Similarly, advocates of gun control try to characterize criminological data as showing that firearm ownership—or owning certain types of arms—is detrimental to society.

Setting aside the debate of whether those arguments accurately reflect empirical data, it ignores the countermajoritarian role of the judiciary. A central impetus for constitutional protections is that they protect unpopular things. If something is popular, then its proponents can often marshal public opinion to codify its protection in law. It is *unpopular* speech that requires judicial protection, because that unpopularity can lead to politicians enacting or allowing measures censoring that speech. Similarly, it is the role of the courts to protect unpopular exercises of the Second Amendment, as this fundamental

66. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984).
67. Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2667 (2011).
68. Parker v. District of Columbia, 478 F.3d 370, 399 (D.C. Cir. 2007) *aff'd sub nom. Heller*, 554 U.S. 570.
69. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011).
70. *Sorrell,* 131 S. Ct. at 2670.

right serves vital liberty interests, which can be imperiled in the wake of televised tragedies or when the arms under discussion have a physical appearance that is easy to demonize or demagogue.

Like the Free Speech Clause, the Second Amendment is "premised on mistrust of governmental power."[71] Freedom to share information and opinions regarding the issues of the day, and regarding those who wield or seek power, is a condition precedent to enlightened democracy. *Heller* discussed the Second Amendment as a safeguard against government tyranny.[72] Beyond that, in securing a private right to self-defense against criminals, the Second Amendment recognizes the reality that when a crime is committed, often the only two persons present are the criminal and the victim. Without any cynicism, the right recognizes that in any society—and especially in a society kept free by having only limited government—the police are not omnipresent to keep citizens safe at all times.

The paternalistic arguments offered against both Amendments fail for the same reason. "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[73] This showcases the mistrust of government power underlying that right. So too, many gun-control measures are predicated upon the belief that ordinary people are not competent to own or use firearms, whether they are licensing regimes that require onerous testing of knowledge or proficiency, or impose protracted delays or byzantine registration systems to obtain arms.[74]

This list of similarities is not exhaustive.[75] But taken with the material discussed in this Article, these similarities strongly suggest that judicial efforts to protect both fundamental rights can proceed in tandem.

---

71. Citizens United v. FEC, 130 S. Ct. 876, 882 (2010) (discussing the Framers' First Amendment purposes).

72. District of Columbia v. Heller, 554 U.S. 570, 600 (2008). *See also infra* section IV.B (suggesting three questions to determine the proper level of scrutiny when analyzing a law that burdens an individual's right to keep and bear arms).

73. 44 Liquormart v. Rhode Island, 517 U.S. 484, 503 (1996).

74. *See, e.g.*, Ezell v. City of Chi., 651 F.3d 684, 690–91 (7th Cir. 2011) (detailing Chicago's post-*McDonald* licensing and registration system).

75. For example, the conventional idea that overbreadth doctrine only applies in the First Amendment context is incorrect, as it can be applied to certain other fundamental rights as well. Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 261 (1994). It can be applied to Second Amendment challenges as well, though a full discussion of that issue is beyond the scope of this Article.

B. Normative Principles of Per Se Rules and Strict Scrutiny

This Article's theory is premised on several principles. Two of them are normative, yielding benefits to various aspects of judicial review, not just the Second Amendment.

1. Reviving Strict Scrutiny to be Sufficiently Strict

Strict scrutiny must be worthy of its name; "strict" should be truly "strict," not merely "significant." It should take more than a good college try to satisfy strict scrutiny. Otherwise aspects of liberty encapsulated in fundamental rights will lack the vigor the Supreme Law of the Land should command in a free society. That is why strict scrutiny is "the most demanding test known to constitutional law."[76]

For a Second Amendment example, a district court upheld the felon-possession restriction of firearms under strict scrutiny.[77] Such cases simply cite the elements of strict scrutiny in a formulaic fashion, then in a cursory manner assert that protecting society from criminals is a compelling interest and whatever the gun-control measure is also happens to be narrowly tailored, and that is the end of it. It cannot be that simple. While everyone should agree that a confessed axe murderer should not be able to have a gun (or an axe, for that matter), is strict scrutiny satisfied by a prohibition so broad that a non-violent white-collar felon like Martha Stewart can never defend herself in her own home?[78] Is there a compelling public interest in protecting society from overzealous home decorators with annoying politics and a penchant for lying through her teeth about her financial investments? It seems doubtful that a child dressed in a Martha Stewart costume on Halloween would strike terror in anyone's heart, and with good reason. Martha Stewart with a gun is no more threatening than Martha Stewart decorating a wedding cake, yet federal law categorically excludes her from owning a gun as a vile menace to society.

Yet the problem goes much broader than Second Amendment cases. The courts have emasculated strict scrutiny. Under strict scrutiny, content-based restrictions are presumptively invalid,[79] shifting the burden to the government.[80] As such, government must be truly tasked with carrying that burden, not merely checking a box.

Regarding narrow tailoring and compelling interests, Chief Justice Earl Warren acknowledged some imprecision in designating certain public interests "compelling" versus others that are instead merely

76. City of Boerne v. Flores, 521 U.S. 507, 534 (1997).
77. *See* United States v. Engstrum, 609 F. Supp. 2d 1227 (D. Utah 2009).
78. *See generally* Marshall, *supra* note 59.
79. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).
80. Ashcroft v. ACLU, 542 U.S. 656, 660 (2004).

"important."[81] It is incumbent upon courts to draw that line carefully, reserving the label "compelling" for public interests of the highest magnitude, and not calling anything "narrowly tailored" that is not laser-beam focused on effectively advancing that interest with as close a fit as a key inserted into a door lock.

But in 2003 the Court significantly degraded strict scrutiny. Discrimination based on race is subject to strict scrutiny.[82] In *Grutter v. Bollinger*, the Court declared that the intangible benefits of racial diversity in college classrooms were a truly compelling public interest and that racial preferences were narrowly tailored to achieve it.[83] In *McConnell v. FEC*, the Court invented another compelling interest: that giving campaign contributions can create the mere appearance of possible corruption without any evidence of actual corruption, and that preventing such an appearance is a compelling public interest.[84] The Court held 5-4 that a statute criminalizing organizational political speech as a felony was narrowly tailored to advance this novel compelling interest.[85] Such scrutiny is no longer "strict" in any meaningful sense. These cases give the appearance of being results-driven, ad hoc expedients designed to reach foreordained policy outcomes. It is true that strict scrutiny should not be "strict in theory but fatal in fact."[86] "But the opposite is also true. Strict scrutiny must not be strict in theory but feeble in fact."[87]

Strict scrutiny must be rehabilitated. A Second Amendment framework where strict scrutiny is worthy of its name is one where, when triggered, the burden will only survive if its public purpose is of paramount importance, and where government very carefully devises a law narrowly achieving this critical interest, without burdening the right in any other respect. This can be achieved if the framework reserves such an exceptionally-daunting obstacle for a limited class of restrictions, leaving most others to a less demanding standard. Strict scrutiny will remain strict only if it is not regularly invoked. That way, when triggered by laws that cut to the core of the Second Amendment (or any other fundamental right), it should prove the undoing of the law at issue except in those rare cases where government truly satisfies this usually-fatal standard.[88]

---

81. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968).
82. Johnson v. California, 543 U.S. 499, 505–06 (2005).
83. Grutter v. Bollinger, 539 U.S. 306, 325 (2003).
84. McConnell v. FEC, 540 U.S. 93, 143–52, 221 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310, 366 (2010).
85. *Id.* at 203–09.
86. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring).
87. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2421 (2013).
88. Core Second Amendment interests—burdens on which thus warrant strict scrutiny—are discussed *infra* in subsection V.A.1.

2. Clarity of Per Se Rules

However, there are situations in which even strict scrutiny proves insufficient to vindicate constitutional rights. Those are (1) categorical bans on firearms, and (2) firearm confiscations, both of which will be discussed in section V.B.

This Part of the Article, which discusses rationales and normative principles, explicitly notes that—all things being equal—per se rules are preferable to any form of ends-means analysis. Courts face an easier task when hornbook law dictates that something is either legal or it is not. The public benefits from certainty and clarity, and the courts benefit as scarce judicial resources are not expended upon meritless claims, or upon spending more time performing a multistep analysis than simply citing a rule that unequivocally dictates a result that can be stated in one sentence.

Per se rules are also employed by drawing the line—frequently discussed in this Article—of determining whether the Second Amendment applies in a given situation. Some will result in a quick "yes." For example, whether the right applies outside the home, since a person is more likely to have need of a means of self-defense when walking the streets at night than in the more-secure environment of their own home.[89] Others will note the existence of the line but require considerable study to determine which side of the line controls. For example, under English common law, "the offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land."[90] Is there such a limit to the Second Amendment, and if so, does it only exclude scythes and halberds, or might the right exclude certain weapons that, realistically speaking, many people might want to use? These rulings will draw clear lines that will hopefully build this jurisprudence in a predictable and coherent fashion. And the judiciary should easily dispose of certain prohibitions, such as per se holding that law-abiding adults ages eighteen through twenty possess Second Amendment rights, and strike down the federal prohibition allowing these adult citizens to purchase and possess handguns, but not purchase them from a licensed firearm dealer.[91]

Per se rulings will also take off the table certain questions wherein courts are giving short shrift to the Second Amendment. The Second and Fourth Circuits have held that near-absolute bans on carrying firearms outside the home are constitutional, applying a faux interme-

89. Moore v. Madigan, 702 F.3d 933, 937 (7th Cir. 2012).

90. 4 BLACKSTONE, *supra* note 18, at *148–49.

91. *See* NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185 (5th Cir. 2012) (upholding 18 U.S.C. § 922(b)(1) (2012)).

diate scrutiny that more resembles rational-basis review.[92] Those courts have simply recited the elements of intermediate scrutiny discussed in Part V in a formulaic fashion, with an approach that presumes the validity of the gun control measure at issue, and predictably sustains it. Such a deferential reaction to the government's talismanic assertion of "public safety" is *not* a proper application of any form of heightened scrutiny. The Supreme Court should rule definitively that the Second Amendment applies in force outside the home, and box the inferior courts into setting a high bar for laws that burden that right.

C. Disparities Between the First and Second Amendments

Before exploring the core theory in this Article, it is helpful to note the limits of analogizing the First and Second Amendments. There are two ways in which they are indisputably different, and a third in which they should be regarded as different.

First, the two ways in which free speech rights are clearly different from the right to bear arms. One is entirely self-evident: Guns are deadly, and the government has a vital interest in protecting the public from illegal violence. The other is less evident, but no less beyond debate: As a matter of original meaning and practical modern application, certain persons cannot exercise the Second Amendment. The third is debatable, but very likely true, that the Second Amendment is a right that inheres in national citizenship, not in personhood. While every human being has First Amendment rights to free speech and freedom of religion, it is possible that only *citizens* have a legal right to demand access to firearms in America.

Before discussing those three, it is worth noting there are other aspects wherein the First and Second Amendments diverge. Where these issues are implicated, courts should not follow a free-speech approach.

The clearest of these is the rule against prior restraints, where the government requires a permit of sorts before the speech is uttered. "[A]ny system of prior restraints comes . . . to this Court bearing a heavy presumption against its constitutional validity."[93] But when it comes to firearms, many restraints are prior restraints. It overreaches to argue there is a *heavy* presumption of invalidity regarding *all* firearm licensing laws, and such a rule would be irreconcilable with *Heller* and *McDonald*.

92. *See* Woollard v. Gallagher, 712 F.3d 865, 879–81 (4th Cir. 2013); Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 89–97 (2d Cir. 2012).

93. Freedman v. Maryland, 380 U.S. 51, 57 (1965) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)) (internal quotation marks omitted).

Next, in 1968 the Court suggested that when a given action contained both speech and nonspeech elements, they could be subjected to different levels of scrutiny.[94] Such an argument fails in part because the Court subsequently applied that same lesser form of speech protection (intermediate scrutiny) not only to tangential restrictions on speech, but to speech content if it is commercial speech. If courts were to derogate isolated elements of gun ownership, such as saying the Second Amendment does not include the right to obtain ammunition, for example, then it could eviscerate the entire right. A gun without ammunition is little more than an expensive paperweight. There are concomitant elements aside from just buying, owning, and possessing the firearm itself, and those matters must be protected to the same extent as having the gun.

Another difference is the rule against compelled speech versus the need for national security. Government cannot coerce anyone to say something they do not believe, because "freedom of speech prohibits the government from telling people what they must say."[95] Without this principle, free speech means little, for "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving expression, consideration, and adherence."[96] By contrast, national security is an existential imperative. The Constitution expressly authorizes Congress to raise a military,[97] and separately provides for federalizing and arming state militias for certain purposes.[98] As long as citizens with contrary religious scruples are assigned to noncombat roles, the government can compel the bearing of arms, and even conscript citizens into military service.

1. Inherent Deadliness of Firearms

One obvious distinction between the two Amendments is that words are not intrinsically, ipso facto dangerous in the same way as firearms. Children are told, "Sticks and stones may break my bones, but words can never hurt me." Setting aside intentional infliction of emotional distress and other literally harmful words, the basic truth parents impress upon children remains that words are usually just words; many may be painful and can be misused, but words generally only have whatever power we choose to allow them.

If someone is a violent felon, or insane, or does not control his anger, his words are still not inherently deadly. While words can be

94. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968).
95. Rumsfeld v. Forum for Academic and Inst'l Rights, Inc., 547 U.S. 47, 61 (2006) (citations omitted).
96. Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).
97. U.S. CONST. art. I, § 8, cls. 12, 13.
98. *Id.* cls. 15, 16.

hurtful, they are rarely physically harmful. The same cannot be said for any such person with a gun. While a criminal conviction in a court of law for a specific crime provides what few would contest is a legitimate process for depriving a person of a constitutional right (at least if that crime is serious or violent), how exactly do we make such a definitive and final determination for those with either mental problems or a malignant disposition?

It must be acknowledged for the sake of public safety that there are persons who have not been convicted of committing a serious crime or crime of violence, but who nonetheless are manifestly dangerous to themselves or others, and cannot be entrusted with a gun.[99] Those with paranoid delusions or hallucinations might take up arms against innocent people whom the deranged person honestly believes pose a deadly threat. Even more difficult to deal with are people who are simply evil; there are sadistic or depraved persons who function normally in society and are capable of otherwise-productive lives, but nonetheless have complete disregard for the rights of others, including the right to life. These persons bereft of empathy and compassion are no less dangerous, but they are harder to detect than the man screaming in front of witnesses about a supposed threat that everyone else in the room can conclude does not really exist.

The Fifth and Fourteenth Amendments permit deprivation of liberty, just not "without due process of law."[100] The question becomes what sort of process is due to deprive an American citizen of this fundamental right. Although a detailed discussion is beyond the scope of this Article, scholars should engage in a vigorous debate on how you deprive someone of the right to exercise the Second Amendment without a conviction for relevant crimes.[101] For example, if someone is civilly committed for dangerous behavior, that is one thing. But what if a person is put into a counseling facility at age sixteen because he is a "problem teenager" with exasperated parents, but matures into a perfectly responsible adult? As another example, if someone tells a therapist that they are having difficulty controlling their fantasy of killing a particular person down the street one could naturally conclude you do not want that person to access a firearm, but someone seeing a therapist about "routine" depression who is prescribed a typical antidepressant medication should not automatically lose a right guaranteed by the Constitution. Policymakers will need to develop a

99. *See* Whether the Second Amendment Secures an Individual Right, 28 Op. O.L.C. 126, 189 n.261 (2004) (discussing Framing-era sources), *archived at* http://perma.unl.edu/CSE9-FVSY.

100. U.S. CONST. amend. V, cl. 5; *id.* amend. XIV, § 1, cl. 3.

101. While certain misdemeanors—such as domestic violence—could plausibly lead to disarmament, the right to bear arms cannot be considered truly fundamental if nonviolent misdemeanors such as reckless driving or writing a bad check could result in forfeiting the right.

clear framework in this highly sensitive area—one that implicates privacy involving often-delicate circumstances—and then courts will need to subject that framework to judicial review.

In this regard the Second Amendment may be *sui generis* among fundamental rights. This issue of denying gun rights to those without criminal convictions may prove to be one of the most challenging aspects of formulating workable judicial standards for the Second Amendment, and is one area where the First Amendment framework contains no clear guidance. One Framer who was a leading legal authority on the Constitution may have reflected the original meaning of the Second Amendment when he wrote that a specific person could be disallowed from bearing arms "attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them."[102]

Another peculiar concern involves police power. States would seem at first glance to have more latitude regarding firearms laws because States have inherent authority to make laws governing public health, public safety, and personal responsibility.[103] This concern is not as readily evident when exercising First Amendment rights. But *McDonald* signaled that the Second Amendment right in the States is coextensive with the right against the federal government,[104] suggesting that either the Court did not consider this police-power issue, or has concluded that the federal right's supersession of the States through the Fourteenth Amendment completely defeats this additional state interest.

2. Some Persons are Beyond the Scope of the Second Amendment

The two Amendments are also different because some persons are beyond the scope of the Second Amendment, as discussed in subsection IV.B.1, while every person can claim free speech rights. The Court has suggested—if not actually held—that the Second Amendment does not secure the right to bear arms for convicted felons.[105] Justice Scalia indicated in *Heller* that the Court was not calling that prohibition into question.[106]

Under narrow circumstances, beginning in 1938, certain felons—those convicted of crimes of violence—could be debarred the posses-

102. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 126 (2d ed. 1829).

103. *See infra* cases cited note 198.

104. McDonald v. City of Chi., 561 U.S. 742, 765 (quoting Malloy v. Hogan, 378 U.S. 1, 10–11 (1964)).

105. *See* Lewis v. United States, 445 U.S. 55, 65 n.8 (1980).

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

sion of firearms as a consequence of their conviction.[107] In 1961, more felons were disqualified from acquiring firearms that had traveled in interstate commerce.[108] Then, the Gun Control Act of 1968—the most sweeping federal gun-control measure in American history—broadened this prohibition to become almost absolute.[109]

This prohibition did not stop with felons. After 1968, a person "who has been adjudicated as a mental defective or who has been committed to a mental institution" could not possess a firearm.[110] Later, under the 1996 Lautenberg Amendment, possession of a firearm became a federal felony for a person convicted of a misdemeanor involving domestic violence.[111]

Lawyers debate whether all these prohibitions are consistent with the right to bear arms. Some constitutional scholars posit that a criminal conviction does not categorically denude a citizen of Second Amendment rights,[112] while others argue that it can, at least when the crime committed is a felony.[113] The Fourth Circuit held that a violent misdemeanor did not automatically negate Second Amendment rights, but that for such misdemeanants, courts should apply intermediate scrutiny instead of strict scrutiny.[114]

---

107. *See* Federal Firearms Act, ch. 850, § 2(f), 52 Stat. 1250, 1251 (1938), *superseded by* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (previously codified at 15 U.S.C. §§ 901–10). Although this provision refers to persons convicted of a crime of violence, it lists twelve specific crimes, eleven of which are "serious violent felonies" and only one of which is a misdemeanor. *See* United States v. Skoien (*Skoien II*), 614 F.3d 638, 649 n.8 (7th Cir. 2010) (en banc) (Sykes, J., dissenting); *accord* Marshall, *supra* note 59, at 698–707.

108. *See* Act of Oct. 3, 1961, Pub. L. No. 87-342, 75 Stat. 757 (amending the Federal Firearms Act to encompass "crime punishable by imprisonment for a term exceeding one year" instead of "crime[s] of violence."). This statute actually forbade the "receipt" of a firearm; the prohibition was changed to "possession" in 1986. *See* Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449.

109. *See* Gun Control Act of 1968, Pub. L. No. 90-618, § 922 (g), 82 Stat. 1213, 1220 (codified in relevant part at 18 U.S.C. § 922(g) (2012)).

110. *Id.* § 922(g)(4), 82 Stat. 1220.

111. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 101(f) [§ 658(b)(2)(C)], 110 Stat. 3009, 3009–371 to –372, (sponsored by Sen. Frank Lautenberg) (codified at 18 U.S.C. § 922(g)(9) (2012)). A crime of domestic violence is defined as any offense that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. § 921(a)(33)(A)(ii) (2012).

112. *E.g.*, Marshall, *supra* note 59, at 714–28.

113. *See, e.g.*, Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1359–64 (2009); *accord* United States v. McCane, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich, J., concurring); *cf.* STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT 273 (2008) (discussing the original understanding of whether the right to bear arms extended to persons with criminal convictions).

114. United States v. Chester, 628 F.3d 673, 682–83 (4th Cir. 2010); *see also* United States v. Booker, 644 F.3d 12, 25 (1st Cir. 2011) (concluding that a categorical

But courts might hold the federal statute stripping domestic-violence misdemeanants of the right to bear arms fails strict scrutiny.[115] Although the High Court has designated preventing domestic violence a public interest of compelling magnitude,[116] courts might not hold a lifetime bar on the right to self-defense the least restrictive means,[117] at least when the offense does not rise to felony status. The nature and gravity of the offense should be relevant to whether an American citizen forfeits her constitutional rights.

Judge Easterbrook wrote for the Seventh Circuit that Congress can categorically forbid certain types of persons from possessing firearms without a criminal conviction, civil commitment hearing, case-specific findings, or judicial proceeding.[118] This is a provocative position, given that citizens cannot be shorn of any other fundamental right without due process. Easterbrook sidesteps this fact by pointing to categorical denials of protection under the Free Speech Clause, the examples he cites of obscenity, defamation, and incitement.[119] But those are categories of *speech*, not *speakers*; a person can escape the restriction by declining to engage in that form of speech, but is free to use any other speech. One shudders to think of the public reaction if the federal government attempted to strip another class of citizens (for example, Republicans who identify as "Tea Party" supporters or Democrats who identify as union supporters) of their First Amendment rights to speak at rallies. On the other hand—as already noted—firearms are unlike speech in that they are inherently deadly, so plausible arguments can be made that the government should deal with people who are clearly dangerous but have not had a judicial proceeding. The challenge would be how to make and effectuate such determinations consistent with due process, lest government create an expansive program for unilaterally designating large numbers of people as unfit to bear arms, defeating a central purpose of the Amendment.

3. The Right to Bear Arms is a Right of Citizenship

The third issue is whether noncitizens have a Second Amendment right to bear arms. The First Amendment rights discussed in this Article apply to all persons; every human being in this country enjoys free-speech rights, as typical laws regulating billboards, radio broadcasts, or book publishing make no mention of a person's citizenship.

---

ban on gun ownership by domestic violence misdemeanants requires intermediate scrutiny).

115. *See Skoien I*, 587 F.3d 803, 811 n.5 (7th Cir. 2009), *rev'd en banc on other grounds*, 614 F.3d 638 (7th Cir. 2010).
116. *See* United States v. Salerno, 481 U.S. 739, 749 (1987).
117. *Skoien I*, 587 F.3d at 811 n.5.
118. *Skoien II*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc).
119. *Id.*

Moreover, laws discriminating on the basis of alienage are subject to strict scrutiny.[120] Yet the *Heller* Court declared "a strong presumption that the Second Amendment right . . . belongs to all *Americans*."[121] That statement refers to citizens, not aliens—whether legally present or not.[122]

The Court has upheld laws that treat noncitizens differently. Notwithstanding the general rule of strict scrutiny for such laws,[123] various statutes nonetheless survive challenges. States may require their government officers to be citizens.[124] Restrictions have also been upheld for police officers,[125] probation officers,[126] and public school teachers.[127] But the Court has invalidated citizenship restrictions on receiving welfare payments,[128] obtaining fishing licenses,[129] licenses to practice law,[130] or becoming a notary public.[131]

The Second Amendment was designed as a check on governmental power.[132] As discussed in section V.B, it is a right of self-defense against both public and private violence, codified in the Constitution to guarantee the American people could effectively resist a tyrannical regime.[133] It is relevant regarding firearm possession to note that aliens lawfully present are subject to being drafted into military service,[134] but that is as an *instrumentality* of government—an agent

120. Graham v. Richardson, 403 U.S. 365, 371–72 (1971). Laws that distinguish between legal and illegal aliens are subject to a lesser standard, which is officially rational-basis review but occasionally looks more like intermediate scrutiny. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982).

121. District of Columbia v. Heller, 554 U.S. 570, 581 (2008) (emphasis added).

122. This statement becomes much more complicated due to the manner in which the Court later held that the right to bear arms extends to the States through the Fourteenth Amendment. Four Justices voted to incorporate the right into the Due Process Clause, which applies to all persons, while Justice Thomas' *McDonald* concurrence the right belongs in the Privileges or Immunities Clause, which only applies to citizens.

123. It should be noted that as a matter of original meaning, the Fourteenth Amendment was not designed to convey the same protection regarding alienage that it confers regarding race. *See* Sugarman v. Dougall, 413 U.S. 634, 649–50 (1973) (Rehnquist, J., dissenting).

124. Boyd v. Nebraska. *ex rel.* Thayer, 143 U.S. 135, 161 (1892).

125. Foley v. Connelie, 435 U.S. 291, 297–300 (1978).

126. Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

127. Ambach v. Norwick, 441 U.S. 68 (1979).

128. Graham v. Richardson, 403 U.S. 365 (1971).

129. Torao Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

130. *In re* Griffiths, 413 U.S. 717 (1973*; but see id.* at 730 (Burger, C.J., joined by Rehnquist, J., dissenting).

131. Bernal v. Fainter, 467 U.S. 216 (1984).

132. THOMAS COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 271 (1880); *see also* JOHN POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES § 239 (1868) (referring to the "usurpations of government").

133. District of Columbia v. Heller, 554 U.S. 570, 599 (2008).

134. 50 U.S.C. app. § 454(a) (2012), *upheld by* Astrup v. INS, 402 U.S. 509 (1971).

under governmental control—not the *master* of government, with an inalienable right to abolish an oppressive regime.

Laws that allow the exclusion of noncitizens generally do so because states have an "interest in establishing [their] own form of government, and in limiting participation in that government to those who are within the basic conception of a political community."[135] Consequently, citizenship may be required for "officers who participate directly in the formulation, execution, or review of broad public policy."[136] This concept is embedded in the Constitution itself, which lists as requirements for various federal elected offices that the officers be citizens of the United States, for at least a requisite number of years.[137]

Children have constitutional rights.[138] This includes First Amendment rights,[139] even when attending public school.[140] Yet children do not have Second Amendment rights. Even though these children are citizens, rights pertaining to citizenship can be restricted to adults—or at least those of responsible age.[141] In these age-of-majority restrictions there are again parallels with voting rights. Voting is likewise restricted to adults,[142] despite being a fundamental right. Restricting voting to citizens is entirely—even self-evidently—constitutional.[143] The American people express their consent to be gov-

135. Sugarman v. Dougall, 413 U.S. 634, 642–43 (1973) (internal quotation marks omitted).

136. *Id.* at 647.

137. *See* U.S. CONST. art. I, § 2, cl. 2 (Representatives must be a citizen for seven years); *id.* art. I, § 3, cl. 3 (Senators must be a citizen for nine years); *id.* art. II, § 1, cl. 4 (President must have been a citizen from birth).

138. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).

139. Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503 (1969).

140. Morse v. Frederick, 551 U.S. 393 (2007). However, these rights can be diminished vis-à-vis those exercised by adults. *See id.* at 396–97, 404–05.

141. For example, interstate travel is a fundamental right, but one secured by the Privileges or Immunities Clause, not the Due Process Clause, and thus is a right of citizens. *See* Saenz v. Roe, 526 U.S. 489, 501–02 (1999); Crandall v. Nevada, 73 U.S. (6 Wall.) 36, 44 (1868). A law denying a sixteen-year-old with a valid driver's license the ability to travel to an adjacent state would probably not survive judicial review. But laws denying gun ownership to children will almost certainly be upheld.

142. *Cf.* U.S. CONST. amend. XXVI.

143. *See* Pope v. Williams, 193 U.S. 621, 632–33 (1904). Other Supreme Court cases are a mixed bag. Take for example *Reynolds v. Sims*, 377 U.S. 533 (1964). The Court referred to every citizen being entitled to legislative districts of equal population so that each citizen would have an equal vote. *See id.* at 567–68. However, such populations include both citizens and noncitizens, meaning that some citizens' vote would count more than others, unless each legislative district had the same number of noncitizens counted in its population, so as to dilute each citizen's vote by an equal amount.

erned via the ballot box.[144] The Second Amendment is the corollary right to voting, which ensures that those in power govern only by the consent of the governed.

Ultimately, the Supreme Court has held that "the right to govern is reserved to citizens."[145] Justice Thurgood Marshall later wrote for the Court, "We have therefore lowered our standard of review when evaluating . . . the exclusions that entrust only to citizens . . . [matters that] go to the heart of representative government."[146] When a person exercises a private right of self-defense, he is exercising an aspect of the Second Amendment unconnected to these concerns. Even then, it is a separate question whether that right—which belongs to every human being—carries with it the concomitant right to choose any instrumentality to effectuate self-defense. In either event, state legislatures are free to extend the right to bear arms to some or all noncitizens to address these concerns. Many noncitizens should be able to obtain firearms for lawful purposes. Such decisions, however, are public-policy choices to be made by elected leaders, not constitutional entitlements to be enforced by the courts.[147]

As discussed below in section V.B, private self-defense is not the foremost purpose of the right to bear arms. The Second Amendment is a "doomsday provision," triggered only in the exceptionally unlikely event "where the government refuses to stand for reelection and silences those who protest."[148] Such a right of exercising an ultimate form of sovereignty that supersedes the United States government itself is one the Constitution reserves exclusively to the American people.

IV. A THREE-STEP ANALYSIS FOR SECOND AMENDMENT CASES USING FIVE STANDARDS OF REVIEW

Heller offers only scant guidance on the applicable standard of review for Second Amendment cases. Although declining to declare a level of scrutiny, the majority indicated that rational-basis review does not apply,[149] at least not to core exercises of the right by law-abiding citizens. But as the Seventh Circuit observes, "strict scrutiny

144. *Cf.* J. Kenneth Blackwell & Kenneth A. Klukowski, *The Other Voting Right: Protecting Every Citizen's Vote by Safeguarding the Integrity of the Ballot Box*, 28 YALE L. & POL'Y REV. 107, 107–08, 114–16 (2009).

145. Foley v. Connelie, 435 U.S. 291, 297 (1978).

146. Bernal v. Fainter, 467 U.S. 216, 221 (1984) (internal quotation marks omitted).

147. Again, this is only if Clarence Thomas is correct in situating this right in the Privileges or Immunities Clause, rather than the Due Process Clause. *See supra* notes 26 and 122 and accompanying text.

148. Silveira v. Lockyer, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of reh'g en banc).

149. Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1149 (9th Cir. 2014) (citing District of Columbia v. Heller, 554 U.S. 570, 628–29 & n.27 (2008)).

cannot apply across the board."[150] It has always been acknowledged that the right to bear arms could be regulated to some extent, but to what extent is open to debate.[151]

No constitutional right is absolute,[152] as the Supreme Court has repeated in the specific context of the right to bear arms.[153] Not all burdens on the right are an abridgement of the right to bear arms. "*McDonald* emphasized that the Second Amendment limits, but by no means eliminates, governmental discretion to regulate activity falling within the scope of the right."[154] Effectuating this right while addressing governmental interests will prove an interminable challenge.

In tackling the questions arising from a virtually-infinite number of permutations of personalized factors intersecting a daunting number of federal, state, and local laws, no single standard of review can possibly apply the Second Amendment correctly. It is not enough to say that strict scrutiny applies, despite the fact that strict scrutiny is the general rule for burdens on fundamental rights.[155] One rule cannot guarantee sufficiently robust protection for core exercises of the Amendment by law-abiding and peaceable citizens in their daily lives, while simultaneously accommodating valid governmental concerns regarding specific locations and dangerous persons, as well as incidental burdens on Second Amendment rights.

Courts have understood the Justices' statements as indicating that courts should consult First Amendment principles when determining whether a burden on the right to bear arms is consistent with the Second Amendment.[156] So there is a firm foundation for exploring how a common doctrinal framework can protect both rights. This Article attempts to do so both by examining what the Supreme Court has held regarding free speech and the right to bear arms, as well as surveying lower courts' efforts to develop a coherent framework.

At least five circuits apply a two-part test: First, does the challenged law fall within the scope of the Second Amendment? If not, then the inquiry ends. If within that scope, some argue the second step is to ask: Does the challenged law meet the applicable level of

150. *Skoien I*, 587 F.3d 803, 811 (7th Cir. 2009), *rev'd en banc on other grounds*, 614 F.3d 638 (7th Cir. 2010).

151. *See, e.g.*, THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 350 (Leonard W. Levy ed., Da Capo Press 1972) (1868).

152. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 358 (2003) (First Amendment).

153. *E.g.*, *Heller*, 554 U.S. at 681 (Breyer, J., dissenting).

154. Ezell v. City of Chi., 651 F.3d 684, 699 (7th Cir. 2011) (citation omitted) (internal quotation marks omitted).

155. *See* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457–58 (1988).

156. *See, e.g.*, United States v. Decastro, 682 F.3d 160, 167 (2d Cir. 2012).

scrutiny?[157] This sequential approach is a logical method for judicial review.[158]

The model set forth in this Article is consistent with this two-step approach. But explicitly adding an additional element for a three-step approach makes even more sense, as it provides a rationale for which of five levels a court must choose, depending on the severity of the burden and the character of the property wherein the citizen is attempting to exercise the right. Such an intermediate step highlights the public versus private distinction, which is what requires either more rigorous scrutiny or less demanding scrutiny. Courts must draw a distinction between public and private lands. They must recognize both the additional concerns that can be cited to justify regulations in public places that are inapplicable to private homes, and realistically alleviate pressure on judges to apply an unduly-restrictive standard on core exercises of the right. Otherwise, the Second Amendment will lack the broad reach and robust character that attends other fundamental rights, such as those codified in the First Amendment.

A. Five-Tiered Scrutiny Framework for Second Amendment

The highest form of protection under the Free Speech Clause applies to viewpoint-based discrimination, where even strict scrutiny does not suffice. The courts have always held viewpoint restrictions unconstitutional,[159] and viewpoint discrimination is per se invalid as a categorical rule.[160] For content-based restrictions that do not differentiate between viewpoints, strict scrutiny applies,[161] under which the law is presumptively invalid,[162] and will only be upheld if the government can show the law is narrowly tailored to achieve a compelling public interest.[163] Content-neutral regulations are subject to intermediate scrutiny,[164] and will be upheld if the law is substantially related to an important government interest.[165]

157. *See* NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 194–95 (5th Cir. 2012); *Ezell*, 651 F.3d at 703–04 (discussing cases in four circuits).
158. *See* Lund, *Standards of Review*, *supra* note 12, at 1633–36.
159. *E.g.*, Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).
160. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107–13 (2001); *see also* Virginia v. Black, 538 U.S. 343, 361–62 (2003) (holding that content-based restrictions can be valid if they are viewpoint-neutral).
161. *E.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 391–92 (1992).
162. United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 235 (2003) (Souter, J., dissenting).
163. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007).
164. United States v. O'Brien, 391 U.S. 367, 376–77 (1968).
165. This is the standard formulation under the Equal Protection Clause. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976). Intermediate scrutiny for speech regulations sometimes invokes the narrow-tailoring prong normally associated with

If a person is speaking on public land, then courts perform a public-forum analysis. If the location is either a traditional public forum or a designated public forum, then the three levels described above apply on the same terms as they would on private land.[166] If the public location is a limited public forum, then the government can restrict speech in additional viewpoint-neutral ways consistent with the limited purpose for which the public has access to that location.[167] In a nonpublic forum, government can impose any reasonable restrictions that are viewpoint-neutral.[168] Reasonableness is synonymous with rational-basis review, under which the regulation is presumptively valid, and the challenger must show it is not rationally (i.e., reasonably) related to any legitimate public interest.[169]

Utilizing a multitiered approach is not unique to free speech, with voting perhaps the most apparent example. Voting is a fundamental right,[170] and laws burdening that right are subject to one of three levels of scrutiny. Severe burdens on the voting franchise are subject to strict scrutiny.[171] Laws that discriminate between similarly situated voters without burdening the right to vote itself are subject to rational-basis review.[172] Measures that burden the right of casting a ballot, but not severely, are subject to a balancing test that is a form of intermediate scrutiny.[173] Under this last, relatively lenient standard, restrictions on voting need only be (1) reasonable, (2) neutral with re-

---

strict scrutiny. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989). This Article argues that the equal-protection variation is more desirable for a Second Amendment framework.

166. Widmar v. Vincent, 454 U.S. 263, 267–70 (1981).

167. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985); *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (holding that the government must respect the boundaries of a limited forum in a viewpoint-neutral manner).

168. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678–79 (1992).

169. City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985). Any law is that is rationally related to advancing a legitimate public interest is reasonable. Conversely, any law not rationally related to legitimate interests is unreasonable. One struggles to hypothesize a law that would fail rational-basis review yet be reasonable, or vice versa.

170. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966).

171. Burdick v. Takushi, 504 U.S. 428, 434 (1992).

172. *See* McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807–09 (1969).

173. When examining such incidental burdens, courts:

> weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.

Burdick, 504 U.S. at 434 (internal quotation marks omitted) (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

gards to political viewpoints, and (3) justified by important interests.[174]

The judiciary should adapt the free-speech approach to the Second Amendment. While voting rights are exercised occasionally, Second Amendment rights are exercised daily, just like First Amendment rights. Usually voting is exercised at a specified location within a narrow time period, while First and Second Amendment rights are exercised in countless settings and contexts. As such, the Free Speech Clause provides a closer analogue.

While no manmade system is without flaws, this five-tier free-speech approach has proven effective. Thus if a city is issuing permits for an abortion rally, it is per se invalid to issue a permit to a pro-choice group while denying one to a pro-life group. If the city wishes to ban discussion of abortion at all and either group sues, a court will apply strict scrutiny in making the city justify its prohibition. If the city issues the permit for a rally to be held between 2:00 p.m. and 6:00 p.m. (regulating time), in a park (place), without loudspeakers or bullhorns (manner), a court will apply intermediate scrutiny. But if pro-life or pro-choice citizens wish to speak on the issue at a public library (a limited public forum), the library can assign them to a closed-door room, limit their number to those that can safely fit in that room, and require them to use "inside" voices. If they are in an airport (a non-public forum), the federal government could ban discussing abortion altogether with other travelers, so long as the authorities do not allow one side to speak while banning the opposing side.

B. Three Questions to Determine Proper Level of Scrutiny

Courts should adopt a three-step approach for analyzing laws that arguably burden the right to keep and bear arms. Step One assesses whether the Second Amendment applies both to the weapon at issue and to the person attempting to assert the right. Step Two assesses whether the challenged law pertains to arms on public land versus private land. Then Step Three assesses the appropriate level of constitutional scrutiny.

1. Step One: Whether the Amendment Applies

Step One is an obvious threshold, asking at the outset whether the Second Amendment applies at all. This inquiry must be asked with respect to the weapon (or weaponizable object) and also whether the person in question can exercise Second Amendment rights.[175] As al-

174. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 451–52 (2008).

175. *See, e.g.*, United States v. Marzzarella, 614 F.3d 85, 89–93 (3d Cir. 2010); *cf.* United States v. Huitron-Guizar, 678 F.3d 1164, 1165–66 (10th Cir. 2012).

ready discussed in more detail in section III.C, *Heller* suggests that the Second Amendment protects weapons that are typically possessed by law-abiding citizens for lawful purposes.[176] If one is being restricted from having an object and wishes to challenge the regulation/restriction on Second Amendment grounds—whether that object is a Browning pistol, an M-16 machinegun, a Tomahawk cruise missile, or a teaspoon—it simplifies matters to begin with whether it is an "arm." Of those four objects, the first is, the second is debatable, and the latter two are not.[177]

Although at first it may seem a convenient dodge to refer to certain objects as categorically outside the Second Amendment, the same is true for the First Amendment. The Supreme Court has long held that "some categories of speech [are] unprotected as a matter of history and legal tradition. So too with the Second Amendment."[178] As Judge Sykes explains:

> [I]f the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment—1791 or 1868—then the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review.[179]

The central purpose of the free-speech guarantee is fostering open discussion of matters of public concern.[180] Consequently, the Court has recognized at least nine types of content that are unprotected by the Free Speech Clause.[181] Such unprotected types of speech include advocating lawlessness,[182] obscenity,[183] defamation,[184] criminal speech,[185] "fighting words,"[186] child pornography,[187] fraud,[188]

176. *See* District of Columbia v. Heller, 554 U.S. 570, 623–25 (2008). *But see* Lund, *Standards of Review*, *supra* note 12, at 1628 (inferring from a specific passage in *Heller* that the Court was avoiding such a suggestion).
177. Justice Scalia implied in *Heller* that machineguns are not protected. *See Heller*, 554 U.S. at 624–25.
178. Ezell v. City of Chi., 651 F.3d 684, 702 (7th Cir. 2011) (citing United States v. Stevens, 559 U.S. 460 (2010)).
179. *Id.* at 702–03.
180. Morse v. Frederick, 551 U.S. 393, 403 (2007); *see also* Citizens United v. FEC, 558 U.S. 310, 329 (2010) (holding that political speech is central to the Free Speech Clause).
181. *See* United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (plurality opinion).
182. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
183. *See, e.g.*, Miller v. California, 413 U.S. 15, 23–24 (1973).
184. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 268–69 (1964). Evidently defamatory speech receives intermediate scrutiny, but defamation automatically fails because it never satisfies the ends-means criteria of that standard of review. For more discussion, see *infra* notes 376–80 and accompanying text.
185. *See, e.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 495–97 (1949); *see also* 18 U.S.C. § 1001 (2012) (criminalizing knowingly telling a falsehood to a federal agent).
186. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
187. *See* New York v. Ferber, 458 U.S. 747, 756–64 (1982).

threats,[189] or grave and imminent threats to public order.[190] Part of the counterintuitive rationale for these exclusions is that doing so actually furthers free speech and thought.[191] There may be other types of unprotected speech, though the Court is loath to declare others.[192]

While many mistake the basic scope of the Second Amendment, both as a matter of original meaning and of practicality, there are certain weapons that are not shielded by the Second Amendment, and certain persons who cannot exercise the Second Amendment.[193] One is the difference between "arms" and "ordnance," disposing of questions about weapons characterized by large "booms." In 1789, exploding weapons were ordnance, in contradistinction to arms.[194] Thus rocket-propelled grenades, improvised explosive devices, missiles, and modern cannons are all categorically outside the right to bear arms. Additionally, "keep and bear" implies a limitation. The Second Amendment extends "to all instruments that constitute *bearable* arms."[195] Thus, "bear" suggests a weapon that an average adult could carry over distances. This excludes extraordinarily large firearms—such as an antiaircraft gun—from Second Amendment protection.

When conducting this first step of a Second Amendment analysis, courts must be required to begin by presuming that the Second Amendment applies. This initial presumption will prevent courts from dodging difficult questions or eliding legitimate Second Amendment claims. The burden must be on the *government* to demonstrate

188. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–73 (1976).

189. *See* Watts v. United States, 394 U.S. 705, 707–08 (1969).

190. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931).

191. *See* United States v. Alvarez, 132 S. Ct. 2537, 2545 (2012) (plurality opinion).

192. *See* United States v. Stevens, 559 U.S. 460, 472 (2010); *cf.* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734 (2011). Justice Clarence Thomas persuasively argued for another type of unprotected speech. *See id.* at 2751–61 (Thomas, J., dissenting) (arguing that the original meaning of the Free Speech Clause did not include a seller's right to communicate with children without parental consent, or a child's right to access material of which his parents disapproved). Some false statements are also protected by the First Amendment, *Alvarez*, 132 S. Ct. at 2547, 2551 (plurality opinion), though this holding is wrong for the reasons expressed by the dissent, *see id.* at 2556–65 (Alito, J., dissenting).

193. Scholars are beginning to recognize this fact. *See, e.g.*, Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 413 (2009) ("*Heller* categorically excludes certain types of 'people' and 'Arms' from Second Amendment coverage, denying them any constitutional protection whatsoever."). While many will draw these lines in the wrong places—especially among those who previously advocated the collective-right theory and thus did not accept that *any* private person had any right to possess *any* weapons—the fact remains that these limits do exist, and so they must be explored.

194. *See* David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1199 (2010) (quoting State v. Kessler, 614 P.2d 94, 98 (Or. 1980)).

195. District of Columbia v. Heller, 554 U.S. 570, 582 (2008) (emphasis added).

that both law and history show the Second Amendment does not apply. If any such evidence is inconclusive, the Second Amendment must be considered,[196] and courts must proceed to the next step.

2. Step Two: Public Location Versus Private

Steps Two and Three determine which level of scrutiny applies. There are five such levels. From one end to the other, these move from the most deferential standard to one that is so bereft of deference that perhaps nothing government says justifies the restriction. Step Two dictates whether the public-forum doctrine applies. If on public land, then under the public-forum doctrine the standard of review is determined by whether that particular government land or facility is a (1) traditional or designated public forum, (2) limited public forum, or (3) nonpublic forum. Since under the state-action doctrine the Second Amendment only applies to government actors,[197] private property owners are generally free to decide whether to allow those visiting their property to possess firearms at all.[198] As with free speech, a person on his own land enjoys broader protections under the Second Amendment than on public property and one of three standards of review discussed in Part V governs. Most fact patterns for Second Amendment cases at Steps Two and Three involve either a person on his own land, or on government land.

3. Step Three: Identifying Level of Scrutiny

Step Three determines the level of scrutiny a court must apply in that situation. If the person is on private land, heightened scrutiny always applies. The restriction is subject to strict or intermediate scrutiny, or could even be per se invalid. These are also the options in a traditional or designated public forum. If the location is instead a limited public forum, Second Amendment rights (like First Amendment rights) can be further restricted in any manner that maintains the purpose for which the forum is open. If the location is a nonpublic

196. *See* Ezell v. City of Chi., 651 F.3d 684, 703 (7th Cir. 2011).

197. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 194–97 (1989).

198. The right of ownership includes the right to exclude others from entering your property. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). Most private-property owners have a near-absolute right to exclude firearms. *See id.* The most likely exception would be public accommodations, such as restaurants and hotels. Even then, however, it is possible that the right might extend no further than keeping a firearm locked in your vehicle when you are, for example, eating your meal at a restaurant. It is possible that there is no judicially-enforceable right in such places, yet states still have power to make laws pertaining to public safety and personal responsibility, *see* Gonzales v. Oregon, 546 U.S. 243, 270 (2006); Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996), such as allowing employees to have firearms in their locked vehicles.

forum (of which the courts to date only recognize three such types of publicly-accessible locations), then the government can restrict it in any manner that is reasonable, so long as it does not violate the core purpose of the right to bear arms.

These five levels are explained more below in Parts V and VI.

V. THREE FORMS OF HEIGHTENED SCRUTINY APPLY TO BURDENS ON THE SECOND AMENDMENT ON PRIVATE PROPERTY

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them."[199] Taking this perspective, the Second Amendment was adopted as a fundamental right in 1791, so just like its First Amendment sibling, burdens on the right to bear arms in modern times must be accorded the breadth and strength reflected by heightened scrutiny, consistent with the vigor the Framers designed both Amendments—along with other provisions in the Bill of Rights—to carry against government infringement.

Heightened scrutiny is designed to systematize the impact that rights should effectuate if those rights are fundamental in status. Such heightened scrutiny would even attend ancillary aspects of the Second Amendment, such as the ability to buy ammunition or the ability to practice with firearms. As a leading nineteenth-century treatise explains, "No doubt, a citizen who keeps a gun or pistol under judicious precautions, practises in safe places the use of it, and in due time teaches his sons to do the same, exercises his individual right."[200]

Recognizing that fact, one significant inconsistency in an otherwise-excellent opinion was Judge Sykes's reasoning that "*Heller*'s reference to presumptively lawful gun regulations" renders intermediate scrutiny "the most appropriate standard of review."[201] While presumptive validity attaches to rational-basis review,[202] a presumption of *unconstitutionality* attends any form of heightened scrutiny—either strict *or intermediate*.[203] It is erroneous to say that presumptive validity leads to that result, since *Heller*'s problematic reference to presumptively valid regulations is the aspect of *Heller* most *incompatible* with heightened scrutiny.

---

199. *Heller*, 554 U.S. at 634–35.

200. BENJAMIN VAUGHAN ABBOTT, JUDGE AND JURY: A POPULAR EXPLANATION OF LEADING TOPICS IN THE LAW OF THE LAND 333 (New York, Harper & Brothers 1880), *quoted in Heller,* 554 U.S. at 619.

201. *Skoien I*, 587 F.3d 803, 812 (7th Cir. 2009), *rev'd en banc*, 614 F.3d 638 (7th Cir. 2010) (internal quotation marks omitted).

202. As a general matter, acts of Congress enjoy a strong presumption of constitutionality. United States v. Five Gambling Devices, 346 U.S. 441, 449 (1953) (plurality opinion).

203. Heckler v. Mathews, 465 U.S. 728, 744 (1984) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–25 (1982)).

Furthermore, while courts are deferential to policymakers under rational-basis review, heightened scrutiny looks skeptically at government, insisting the government prove its measures actually advance sufficiently vital public interests to justify burdening constitutional rights.[204] When heightened scrutiny is applied, no matter if the interest pursued is truly compelling (strict) or simply important (intermediate), the government action must actually work to "accomplish that purpose."[205]

When properly applied, strict scrutiny is exceedingly difficult to satisfy, because courts accord great "deference to the primacy of the individual liberties the Constitution secures."[206] Thus the deference to government power under rational-basis review is inverted, deferring instead to the superseding instrument that limits government power. Under the former, judicial restraint means giving every benefit to democratically-elected political actors. Under the latter, judicial restraint means letting the American people's Constitution fulfill its role in securing liberty by constraining those same political actors.

When judicially reviewing most laws—even when there is no plausible way the state's purported interests are advanced by its chosen means—courts are to search for some legitimate purpose that the challenged measure might advance, and sustain the law if such an interest can be identified.[207] Not so with strict or intermediate scrutiny. When applying heightened scrutiny, courts cannot "supplant the precise interests put forward by [the government] with other suppositions."[208]

Whether triggered by the First Amendment or the Second, heightened scrutiny alters the calculus in a very significant way, premised on deep skepticism of government's true aims or valid concerns. "The First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'"[209] Politicians are unlikely to take issue with which football team is better or whether a particular restaurant's best dish is the steak versus the chicken. When a government disagrees with a message, frequently that message is critical of the government.

---

204. *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2420 (2013).

205. Shaw v. Hunt, 517 U.S. 899, 908 (1996) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986)). It is reasonable to assume that courts should be more skeptical when strict scrutiny is invoked than when applying intermediate scrutiny.

206. *Skoien I*, 587 F.3d 803, 811 n.5 (7th Cir. 2009), *rev'd en banc on other grounds*, 614 F.3d 638 (7th Cir. 2010).

207. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963).

208. Edenfield v. Fane, 507 U.S. 761, 768 (1993).

209. Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2664 (2011) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

Judge O'Scannlain writes for the Ninth Circuit that "only regulations that substantially burden the right to keep and bear arms trigger heightened scrutiny under the Second Amendment."[210] This is true if substantial burdens include those on the time, place, and type of firearm, or if any limitation of an eligible person possessing a constitutionally-covered firearm is per se a substantial burden. Otherwise, that statement is certainly not the case for the First Amendment, where as discussed in section V.C, even incidental burdens enjoy heightened protection. Only by regularly applying heightened scrutiny can courts truly recognize the right to bear arms as a fundamental right on par with other foundational liberties.

Nor should there be a tenure exception to the Second Amendment. The D.C. Circuit holds it is reasonable to presume that longstanding regulations do not burden the constitutional right to bear arms.[211] Why? That puzzling statement is inconsistent with the Supreme Court's jurisprudence regarding other enumerated rights, including First Amendment religious liberty.[212] Under this theory, as long as the government has gotten away with violating the Constitution long enough, judges eventually presumed the infringement is okay. The appellate court's reasoning is further undermined by the fact that the Second Amendment has only been judicially recognized nationwide as an individual right since 2008, so preexisting infringements could not have been effectively challenged.

There is "no principled basis on which to create a hierarchy of constitutional values. . . . "[213] Since both the First and Second Amendments codify fundamental rights, they must be attended by equal force. "To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution."[214] Consequently, government may not "treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees."[215] Heightened scrutiny should be equally common in judicial review involving either Amendment.

---

210. Nordyke v. King, 644 F.3d 776, 786 (9th Cir. 2011).

211. Heller v. District of Columbia, 670 F.3d 1244, 1253 (D.C. Cir. 2011).

212. *See* Marsh v. Chambers, 463 U.S. 783, 790 (1983) ("Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees . . . .").

213. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 484 (1982).

214. Ullmann v. United States, 350 U.S. 422, 428–29 (1956).

215. McDonald v. City of Chi., 561 U.S. 742, 780 (2010) (plurality opinion).

A. Strict Scrutiny for Burdens on Core Second Amendment Right

We begin with the familiar territory of strict scrutiny. Laws burdening fundamental rights are subject to strict scrutiny.[216] *Heller* "suggests, *at a minimum*, that gun laws that severely restrict the core Second Amendment right identified in *Heller*—that of 'law-abiding, responsible citizens to use arms in defense of hearth and home'—should receive exacting scrutiny."[217] That term is not particularly helpful, as it is sometimes employed when referring to strict scrutiny,[218] but more often refers to intermediate scrutiny.[219] Judge Diane Sykes's context indicates intermediate scrutiny, as she is speaking of the "minimum" standard that should apply, which would be nonsensical if referring to strict scrutiny. As professors (should) tell students, it is important not to get stuck in Label-Land, remembering that the courts are bound by the actual words of decisional law, not the post-hoc gloss whereby academics try to systematize what the judiciary does. Nonetheless, when the central components of fundamental rights are burdened, the scrutiny that should follow must be strict—in fact, as well as in name.

Surveying various common-law restrictions on the right to arms, Judge Laurence Silberman reasoned that the restrictions at bar did "not impair the *core conduct* upon which the right was premised."[220] This approach is perfectly reasonable, provided that it does not define the core of the Second Amendment so narrowly as to enable courts to give inadequate effect to a right that the Supreme Court has specifically held is fundamental.

Some federal appeals courts apply rational-basis review to laws that do not burden the core of the Second Amendment.[221] This borders on the absurd. One would search in vain for any other fundamental rights where a law that does not burden the "core" of the right gets relegated to such a minimal form of protection—merely the general constitutional prohibition against irrational laws. Instead, so long as a person is on private land instead of public land, at the very least intermediate scrutiny should attach. When on private land, height-

216. Clark v. Jeter, 486 U.S. 456, 461 (1988).

217. *Skoien I*, 587 F.3d 803, 811 (7th Cir. 2009) (emphasis added) (citation omitted) (quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008)), *rev'd en banc on other grounds*, 614 F.3d 638 (7th Cir. 2010).

218. *E.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 742–43 (2007) (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289–91 (1978) (opinion of Powell, J.)).

219. *See, e.g.*, Davis v. FEC, 554 U.S. 724, 744 (2008).

220. Parker v. District of Columbia, 478 F.3d 370, 399 (D.C. Cir. 2007) (emphasis added), *aff'd sub nom. Heller*, 554 U.S. 570.

221. *See, e.g.*, United States v. Decastro, 682 F.3d 160, 167 (2d Cir. 2012).

ened scrutiny should always be triggered when the Second Amendment applies to the person and weapon at issue.

1. Core Burdens Undermine the Purpose of the Amendment

Every constitutional right is designed to serve a particular purpose. A burden on the core of that right undermines the very purpose for its codification. Courts must apply the most unforgiving scrutiny to government measures that intrude upon a fundamental right in a manner that undermines the impetus for that right's inclusion in the Constitution.

Once again, take the First Amendment as a comparator. The Free Speech Clause is meant to advance the nation's interest in "uninhibited, robust, and wide-open" debate.[222] Consequently, "[a]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[223]

Free speech is a fundamental right, so strict scrutiny applies when certain types of restrictions are placed on speech.[224] Specifically, strict scrutiny applies to content-based discrimination,[225] which restricts discussion of certain subjects, as this cuts to the core of the right protected by the First Amendment.[226] This content-based trigger for speech is more precisely the protection afforded "core speech" or "pure speech"—which is to say, political speech,[227] as opposed to commercial speech (discussed below). Such speech goes to the central liberty protected by the Free Speech Clause.[228]

"Both the right to speak and the right to refrain from speaking are complimentary components of the broader concept of individual freedom of mind protected by the First Amendment."[229] As such, both coercing individuals to speak, and forcing them to subsidize the speech of others with whom they disagree, are subject to strict scrutiny.[230] One seminal case invalidated a law requiring students to say

222. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
223. Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983)).
224. *See, e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000).
225. Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 800 (1985).
226. Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995) ("[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message.").
227. *See* Citizens United v. FEC, 558 U.S. 310, 340 (2010).
228. Carey v. Brown, 447 U.S. 455, 467 (1980).
229. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1211 (D.C. Cir. 2012) (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977)) (internal quotation marks omitted).
230. *Id.* (citing United States v. United Foods, Inc., 533 U.S. 405, 410–11 (2001); Wooley v. Maynard, 430 U.S. 705, 714 (1977)). Strict scrutiny sometimes does not apply to compelled speech if it concerns disclosing "purely factual and uncon-

the Pledge of Allegiance as violating both the Free Speech Clause and the Free Exercise Clause,[231] and is the foundational case of this compelled-speech doctrine. Treading upon either part of this judicially-recognized core of free speech triggers strict scrutiny.

Correspondingly, this is the level of scrutiny that should attend burdens on the core of the Second Amendment. To "keep" arms means to have custody,[232] or retain possession,[233] and to "bear arms" means

---

troversial" commercial advertising to prevent misleading consumers, Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985), or general commercial speech which is subject to intermediate scrutiny, *see infra* section V.C. Even when *Zauderer* is implicated, however, some Justices signal there are limits on the extent to which government can compel speech under the aegis of disclosure. *See, e.g.*, Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1343–44 (Thomas, J., concurring in part and concurring in the judgment).

231. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). It should also be noted that one recent Supreme Court case invoked this rule in a broader First Amendment context. In *Town of Greece v. Galloway*, the Supreme Court upheld the constitutionality of "legislative prayer," the opening of policymaking bodies' sessions with an invocation. 134 S. Ct. 1811, 1815 (2014). In doing so, the Court reaffirmed its first legislative prayer case. *See id.* (reaffirming Marsh v. Chambers, 463 U.S. 783 (1983)). But the Court went much further than simply restating *Marsh*. In upholding legislative prayer in 2014, the Court eschewed the "endorsement test" that it has often used in Establishment Clause cases since that test's adoption in 1989, a test which asks whether a hypothetical "reasonable observer" would believe that the government is endorsing religion. *County of Allegheny v. ACLU Greater Pittsburg Ch.*, 492 U.S. 573, 578–79, 620 (1989). In that 5–4 decision, the Court narrowly adopted Justice Sandra Day O'Connor's novel theory proposing the endorsement test from *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring). Justice Anthony Kennedy wrote a vigorous dissent for four Justices in *Allegheny*, arguing that the Establishment Clause is instead violated when a person is coerced to participate in a religion or religious exercise against his conscience. *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part). The dissent also insisted that any test—such as the endorsement test—that "would invalidate longstanding traditions cannot be a proper reading of the [Establishment] Clause." *Id.* at 670. Consistent with this last point, in *Town of Greece*—which was also written by Justice Kennedy—a majority of the Court declared as the general test for the Establishment Clause that courts must conduct a historical inquiry and invalidate state actions that historically would have been regarded by the Framers as an establishment of religion. *See Town of Greece*, 134 S. Ct. at 1819; *see also id.* at 1820–24. The final part of Justice Kennedy's opinion was a plurality opinion for three Justices, in which he wrote that for practices that pass muster under this history-based test, courts must also look to see whether it satisfies the "coercion test" that he set forth in his *Allegheny* dissent. *See id.* at 1824–27 (plurality opinion). The plurality expressly cited *Barnette* during this discussion, *see id.* at 1825 (citing *Barnette*, 319 U.S. at 642), tying this rule from the Free Speech Clause and the Free Exercise Clause to encompass also the Establishment Clause, and broadly casting it as "an elemental First Amendment principle." *Id. Town of Greece* thus appears to represent a major doctrinal shift in First Amendment jurisprudence.

232. District of Columbia v. Heller, 554 U.S. 570, 582 (2008) (quoting SAMUEL JOHNSON, 1 DICTIONARY OF THE ENGLISH LANGUAGE 1095 (4th ed. 1773) (reprinted

to carry them[234]—defined broadly to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action . . . ."[235]

Congress and the ratifying States chose those words for a specific purpose. The right to bear arms was understood by the founding generation "to be an individual right protecting against both public and private violence."[236] The latter is quite clearly a right of self-defense against criminals. This right of self-defense was propounded by political philosophers whose writings were foundational to the Framers such as Locke, Hobbes, and Montesquieu,[237] with a long lineage through the centuries.[238]

The former requires more explanation, and includes the right to withstand government oppression that crosses the line into tyranny. As Judge Janice Rogers Brown wrote when serving on the California Supreme Court pre-*Heller*, "Extant political writings of the [Founders'] period expressed a dual concern: facilitating the natural right of self-defense and assuring an armed citizenry capable of repelling foreign invaders and quelling tyrannical leaders."[239] The *Heller* Court

---

1978)). This dictionary is often used by the Court in defining terms in the Constitution's text. Parker v. District of Columbia, 478 F.3d 370, 384 (D.C. Cir. 2007) (citing, *e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 199 (2003)), *aff'd sub nom. Heller*, 554 U.S. 570.

233. *Heller*, 554 U.S. at 583 (quoting NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (reprinted 1989)).

234. *Id.* at 584 (collecting sources).

235. Muscarello v. United States, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting) (quoting BLACK'S LAW DICTIONARY 214 (6th ed. 1990)), *aff'd*, *Heller*, 554 U.S. at 584, 586.

236. *Heller*, 554 U.S. at 594. Hunting is also a secondary right under the Second Amendment.

> We are not suggesting that keeping and bearing firearms for hunting falls outside the scope of the Second Amendment; to the contrary . . . *Heller* specifically stated that "Americans valued the ancient right . . . for self-defense *and hunting*." We . . . only . . . clarify that [this law] does not strike at the heart of the Second Amendment right as explicated in *Heller*.

Skoien 1, 587 F.3d 803, 812 (7th Cir. 2009) (quoting *Heller*, 554 U.S. at 599), *rev'd en banc on other grounds*, 614 F.3d 638 (7th Cir. 2010). Because hunting is not a core aspect of the right to arms, there are governmental regulations regarding hunting that would not be permissible if impairing self-defense. Hunting can be characterized as an aspect of self-reliance for those dependent upon it to provide food, in which case it would at least partially share a philosophical foundation with self-defense.

237. THOMAS HOBBES, LEVIATHAN 146 (Marshall Missner ed., 2008) (1651); JOHN LOCKE, THE SECOND TREATISE ON GOVERNMENT § 16 (1690); BARON DE SECONDAT DE MONTESQUIEU, DE L'ESPRIT DES LOIS [THE SPIRIT OF THE LAWS] bk. X, ch. 2 (1748).

238. *See* James Warner, *Disarming the Disabled*, 18 GEO. MASON U. C.R. L.J. 267, 269–74 (2008).

239. Kasler v. Lockyer, 2 P.3d 581, 602 (Cal. 2000) (Brown, J., concurring).

noted approvingly that contemporaneously with the adoption of the Second Amendment, nine state constitutions specified a right to bear arms for purposes of both personal self-defense and defending the state,[240] reasoning that this dual purpose was also embodied in the federal right.[241] As Judge Diarmuid O'Scannlain wrote for the Ninth Circuit, the "right contains both a political component—it is a means to protect the public from tyranny—and a personal component—it is a means to protect the individual from threats to life or limb."[242]

This dual-right concept is rooted in early case law. As a Louisiana court put it, the Second Amendment right "is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations."[243] That final reference is interesting, as in modern society where many gun owners prefer carrying their firearms in a concealed fashion, it is worth noting these courts speak of this right as specifically a right to carry firearms openly, not necessarily concealed.[244]

Some discuss the right of self-defense as one arising under natural law.[245] This is a two-edged sword. On one hand, it is a helpful constraint on government power in that it reinforces the concept that certain rights are inalienable; the American political philosophy accepts some rights as conveyed by a source that transcends civil authorities.[246] On the other hand, uncoupling judicial power from an approach grounded in the text, structure, and history of American positive law in general and the Constitution in particular invites unconstrained judicial philosophical musing and quasi-academic speculations of foreign laws and cultures that are quite different from America's, introducing a greater likelihood of interpreting the Constitution incorrectly. In this instance, referencing natural law reinforces the constitutional text as a codification of the American people's acknowledging the right to bear arms as one antedating the Republic, derived from the "laws of nature" underlying the Declaration of Independence.[247]

240. *Heller*, 554 U.S. 570, 585 n.8 (2008) (listing provisions).

241. *Id.* at 584–85.

242. Nordyke v. King, 563 F.3d 439, 451 (9th Cir.), *vacated for reh'g en banc*, 575 F.3d 890 (9th Cir. 2009).

243. State v. Chandler, 5 La. Ann. 489, 490 (1850).

244. *See Heller*, 554 U.S. 570, 613 (2008).

245. *See, e.g.*, David B. Kopel, *The Natural Right of Self-Defense:* Heller*'s Lesson for the World*, 59 SYRACUSE L. REV. 235, *passim* (2008).

246. DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

247. *Id.* para. 1.

The American right codified "the natural right of resistance and self-preservation" recognized under English law.[248] Although self-defense is the central aspect of the right secured by the Second Amendment, defense against common criminals was not the impetus for the codification of the Amendment.[249] The overriding concern was instead raising a bulwark against unchecked government power.[250] Of the thirty-seven States in the Union when the Fourteenth Amendment was ratified in 1868, twenty-two had an express right to bear arms,[251] many of which explicitly denominated a right to self-defense.[252]

And by that year, this right was not just one against federal power; the focus of this concept shifted to guarantee a right against state power. Justice Alito observed:

> By the 1850's, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights—the fear that the National Government would disarm the universal militia—had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense.[253]

What began in the Constitution as a focus to make sure the new national government did not become too powerful expanded to become a concern for individual humans against oppressive government force at any level. Though given the vast resources of the federal government, the greatest possible threat from governmental overreaching will likely always be found at the national level.

The nation's ever-lengthening existence without a tyrannical regime seizing power caused the antityranny rationale to recede vis-à-vis personal self-defense, but that fortuitous fact does nothing to vitiate the initial concern's legitimacy. The Founders' concern regarding an oppressive, authoritarian ruler resulted in an intergenerational insurance policy, intended as a safeguard for the next century more than for the next decade, as the further into the future one looks, the less certain one can be about the political environment or form of government that will be hold sway in America.

---

248. 1 BLACKSTONE, *supra* note 18, at *139. The Supreme Court recognizes that Blackstone's work "constituted the preeminent authority on English law for the founding generation." Alden v. Maine, 527 U.S. 706, 715 (1999).

249. *Heller*, 554 U.S. at 599.

250. *Id.*

251. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 50 (2008).

252. *See, e.g.*, *id.*

253. McDonald v. City of Chi., 561 U.S. 742, 770 (2010) (citing MICHAEL D. DOUBLER, CIVILIAN IN PEACE, SOLDIER IN WAR 87–90 (2003); AKHIL AMAR, BILL OF RIGHTS: CREATION AND RECONSTRUCTION 258–59 (2000)).

2. The Standard Strict Scrutiny Formulation

Government actions triggering the "most rigid scrutiny"[254] "are constitutional only if they are narrowly tailored to further compelling governmental interests."[255] Government cannot satisfy strict scrutiny by invoking "broadly formulated interests justifying the general applicability of government mandates."[256]

Narrow tailoring means that the government's action is "precisely tailored" to achieve the goal.[257] That is to say, it must be necessary to the accomplishment of the goal.[258] The challenged measure must actually achieve the compelling interest it purports to serve. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."[259]

Content-based restrictions on speech are presumptively invalid.[260] When strict scrutiny applies, the government bears the burden of proving that the reasons for the challenged measure are "clearly identified and unquestionably legitimate."[261] The same must be true for the Second Amendment.

Courts must set a high bar under strict scrutiny, but not an insuperable barrier. While the inherent deadliness of firearms will likely make it easier for governments to satisfy the compelling-interest aspect of strict scrutiny, courts must nonetheless be inflexible in demanding that the means chosen to satisfy those interests are truly narrowly-tailored, with a singular focus on achieving that objective in the least restrictive manner, burdening the right to arms no more than absolutely necessary.

B. Per Se Invalidity for Firearm Bans or Confiscations

Yet sometimes even strict scrutiny is not enough. In those rare instances, courts must completely shut the door on a species of gun control via a categorical rule that such a restriction is per se invalid. In these situations, the rebuttable presumption of invalidity that attends strict scrutiny must be elevated to an "irrebuttable" presumption, whereby no interest can be so compelling, or no means can be

254. Loving v. Virginia, 388 U.S. 1, 11 (1967) (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)).
255. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419 (2013) (internal citation omitted).
256. Gonzales v. O Centro Espirita Beneficent Uniao do Vegetal, 546 U.S. 418, 431 (2006).
257. *Fisher*, 133 S. Ct. at 2417 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978)).
258. *Id.* at 2418 (quoting *Bakke*, 438 U.S. at 305 (Powell, J., concurring)).
259. NAACP v. Button, 371 U.S. 415, 438 (1963).
260. R.A.V. v. City of St. Paul, 505 U.S. 377, 391–92 (1992).
261. City of Richmond v. J.A. Croson Co., 488 U.S. 448, 533–35 (1989) (quoting Fullilove v. Klutznick, 448 U.S. 469, 533–35 (1980) (Stevens, J., dissenting)).

sufficiently narrow, to ever allow such a restriction. That is because such a restriction goes beyond burdening the core of a fundamental right, and instead violates the indispensable heart of the right, which government may never do. The Supreme Court held that the right to bear arms was specifically codified in the Constitution because the founding generation was especially concerned that the federal government might someday wish to disarm them.[262] So that is one thing the Second Amendment categorically forbids. It is a burden that ipso facto impermissibly infringes upon the right.

For the First Amendment, the verboten infringement is viewpoint discrimination. Irrespective of subject matter, there is never an instance where one viewpoint on the subject is allowed, but the opposing viewpoint is not. In a political discussion, government can never say that one can support Democrats, but not Republicans, or support abortion, but not oppose it. Viewpoint discrimination is per se unconstitutional.[263] While the Supreme Court has never definitely ruled on that question, and some disagree with this assertion of per se invalidity,[264] the Supreme Court should clearly so hold in an appropriate vehicle case presenting that question, and forever dispel the caveats. The Court's language is that waiving restrictions on a favored speaker or denying equal treatment to a disfavored speaker "would *of course* be unconstitutional."[265] On any given subject, government cannot say you may speak about this issue only if you take the side the state favors.[266]

For the Second Amendment, the analogous nonstarter is disarming society regarding common firearms.[267] The essential heart of the Second Amendment is to enable American people to resist tyranny, and so one arms restriction that can never be allowed is for the government to assert any justification for rendering the people defenseless against their rulers. Scholars link the right to personal self-defense to the

262. District of Columbia v. Heller, 554 U.S. 570, 599 (2008).

263. *See* Boos v. Barry, 485 U.S. 312, 318–19 (1988); Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

264. *E.g.*, Eugene Volokh, Essay, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2426 n.44 (1997).

265. Thomas v. Chi. Park Dist., 534 U.S. 316, 325 (2002) (emphasis added).

266. The government does not engage in viewpoint discrimination when it conditions taxpayer funding used for messages on the grantee not using those funds to disseminate a message that is contrary to government policy. *Rust v Sullivan*, 500 U.S. 173, 193 (1991). For example, Congress can decline family-planning funding to an organization that will use those funds to promote abortion as a form of family planning. *See id.* at 192–200. Lawmakers cannot prohibit an organization for taking a pro-life versus pro-choice viewpoint, but the First Amendment does not compel lawmaking to fund such speech.

267. *See* Peruta v. Cnty. of San Diego, 724 F.3d 1144, 1170 (9th Cir. 2014) ("It is the rare law that 'destroys' the right, requiring *Heller*-style per se invalidation.").

right to fend off tyranny.[268] It is a particular type of self-defense, one that the Constitution never allows government to abrogate. The Seventh Circuit notes that the Supreme Court suggested certain gun-control laws are categorically invalid.[269] And there is need for such an absolute rule.

During the ratification of the Constitution, "fear that the federal government would disarm the people in order to impose rule through [the military] was pervasive."[270] Antifederalists objected to the proposed Constitution for this reason,[271] and Federalists defended the proposed Constitution on the grounds that "because Congress was given no power to abridge the ancient right of individuals to keep and bear arms, such a force could never oppress the people."[272]

The Second Amendment was designed to inoculate the American people against such a political disease. When the citizens "of a nation are trained in arms and organized, they are better able to resist tyranny."[273] Access to arms and a motivating interest to attain proficiency in those arms could empower the citizens of the new nation to preclude an overbearing government of the type they saw through history.

These lessons from history were not merely known to the Framers as students of world history, or even more specifically as men well-versed in European history. America's pedigree was distinctly British. The Framers were keenly aware that British monarchs of the previous century disarmed political dissidents as a precursor to oppressing them.[274] They wished to prevent America from walking in the path of the nation from which they had just forcibly broken away.

---

268. *E.g.*, Kopel, *Natural Right*, *supra* note 245, at 243 ("Although personal self-defense is not specifically mentioned in the Declaration of Independence, that natural right is the intellectual foundation, in Western philosophy, of the right of the people to defend all their natural rights by using force to overthrow a tyrant.") (footnote omitted).

269. Ezell v. City of Chi., 651 F.3d 684, 703 (7th Cir. 2011) ("Both *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases . . . are categorically unconstitutional.").

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

271. *Id.* at 598 (citing, *e.g.*, Letters from the Federal Farmer III (Oct. 10, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 234, 242 (Herbert J. Storing ed. 1981); John Smilie, *in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 508-09 (Merrill M. Jensen ed. 1976)). It is noteworthy that the Bill of Rights—including the Second Amendment—had not yet been proposed, but Scalia later adds that the addition of the Second Amendment did not allay the Antifederalists' concerns. *Id.* at 604.

272. *Id.* at 599 (citing four sources in THE ORIGIN OF THE SECOND AMENDMENT 38, 40, 275–81, 556 (David Young ed., 2d ed. 2001)).

273. *Id.* at 598.

274. *Id.* at 594 (citing JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 31–53 (1994); LOIS G. SCHWOERER, THE DECLARATION

As such, the Framers sought to safeguard the American people against a similar fate. Congress has broad and sweeping power to raise and arm military forces under the control of the federal government.[275] That military would be under the exclusive authority of a single Commander-in-Chief.[276] The Constitution had to foreclose this military becoming an instrumentality of subjugation. The Framers understood that "history show[s] that the way tyrants had eliminated a militia . . . was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents."[277]

The Framers' solution was to have the civilian population spread throughout the country so well armed that an organized military force would find it impractical to reduce the citizenry to despotism by martial force. "It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down."[278]

This idea was essential to secure the Constitution's ratification and set the baseline of political thought in the Early Republic.[279] Federalists cited the ubiquity of private firearm ownership among the general American population to ameliorate Antifederalist concerns that "a strong federal government would lead to oppression and tyranny."[280] Framing-era legal scholars touted the Second Amendment as a safeguard against the federal government overstepping its bounds.

> No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people. . . . But if in any blind pursuit of inordinate power, either [Congress or state legislatures] should attempt it, this amendment may be appealed to as a restraint on both.[281]

Perhaps the foremost American authority on Blackstone in the early Republic was Henry St. George Tucker.[282] Designating the English right to bear arms as the precursor of the Second Amendment in

---

OF RIGHTS, 1689, at 76 (1981)); *see* THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 270–72 (Rothman & Co. 1981) (1880).

275. Lichter v. United States, 334 U.S. 742, 755–58 (1948); Selective Draft Law Cases, 245 U.S. 366 (1918); *see also Ex parte* Quirin, 317 U.S. 1, 25–26 (1942) (discussing congressional powers for providing for the common defense).

276. U.S. CONST. art. II, § 2, cl. 1.

277. *Heller*, 554 U.S. at 598.

278. *Id.* at 599.

279. *See, e.g.*, 1 ANNALS OF CONG. 778 (1789) (Joseph Gales ed., 1834); Klukowski, *Citizen Gun Rights*, *supra* note 26, at 240.

280. Parker v. District of Columbia, 478 F.3d 370, 390 (D.C. Cir. 2007), *aff'd sub nom. Heller*, 554 U.S. 570.

281. RAWLE, *supra* note 102, at 125–26.

282. *See Heller*, 554 U.S. at 594 (referring to Tucker's work as the "most important" Blackstone commentary).

his seminal work on Blackstone,[283] Tucker described the right to bear arms as "the true palladium of liberty . . . . Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction."[284] Tucker stated as a categorical rule that "prohibiting any person from bearing arms" is unconstitutional.[285] Justice Joseph Story made an identical claim, writing, "One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms . . . ."[286]

Those who say the weaponry employed by the modern U.S. military makes talk of resisting tyranny antiquated fail to understand the intended effect of such a right. "The deterrent effect of a well-armed populace is surely more important than the probability of overall success in a full-out armed conflict."[287] It is not the certainty of military victory, but rather the daunting prospect of an armed population ready to defend themselves, that provides this deterrent.[288] Advancements in weaponry and the sheer size and discipline of the United States Armed Forces mean this deterrent is not as effective as it would have been two centuries ago,[289] though doubtless most American troops would not participate in a campaign against their own countrymen. Even so, since a dictator wishes to rule over a countryside rather than reduce it to an uninhabitable wasteland, and therefore must take territory with ordinary weapons rather than employing weapons of mass destruction, tens of millions of gun owners spread across such a vast land mass as the United States, each of those citizens in their homes or similar shelter rather than on an open battlefield, still pose a formidable obstacle to any would-be despot.

This overriding focus on ensuring against rogue governmental power was also seen during Reconstruction. There were systematic

283. 2 [Henry] St. George Tucker, Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States 143 n.d (1803).

284. 1 Tucker, *supra* note 283, at App. 300.

285. *Id.* at 289.

286. Joseph Story, A Familiar Exposition of the Constitution of the United States § 450 (1840). Justice Clarence Thomas quoted another work by Story expressing the same view. *See* Printz v. United States, 521 U.S. 898, 939 (1997) (Thomas, J., concurring) (quoting 3 Joseph Story, Commentaries on the Constitution of the United States § 1890, 746 (1833)).

287. Parker v. District of Columbia, 478 F.3d 370, 383 n.9 (D.C. Cir. 2007), *aff'd sub nom. Heller*, 554 U.S. 570.

288. Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1, 56–58 (1996); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103, 115 (1987).

289. Lund, *Originalist*, *supra* note 16, at 1373.

attempts to disarm blacks after the Civil War.[290] The original apprehension that the *federal* government would disarm the people was replaced by the concern—with a stronger evidentiary basis—that the *States* would seek to disarm some classes of its citizens,[291] specifically black Americans. Indeed they did so, searching homes illegally and punishing owners when they found weapons.[292] The right to bear arms—applicable to the States through the Fourteenth Amendment—addressed that concern.[293]

Whether in 1791, 1868, or the present, citizens cannot be denied arms. Measures that categorically ban law-abiding citizens from possessing usable firearms must be per se unconstitutional. Absolute bans come in two forms. One completely forbids citizens from possessing and having ready access to usable firearms. The other is blanket gun confiscations such as happened in New Orleans in 2005,[294] since its endpoint achieves that same result. The Second Amendment never tolerates government disarming its citizens. "[T]he threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that the right . . . was codified in a written Constitution."[295]

Such categorical bans also come in two forms. One is seen in *Heller* and *McDonald*, where citizens could not even possess common firearms in the home. Another would allow some gun possession within the home, but categorically forbid any carrying of firearms outside the home. Illinois had such a law, until the Seventh Circuit invalidated the statute in 2012.[296]

The Framers' paramount purpose for the Second Amendment was to resist a tyrannical government,[297] an unlikely scenario to modern

290. McDonald v. City of Chi., 561 U.S. 742, 771 (2010). The irony of attempts to disarm blacks during Reconstruction is highlighted by the fact that during the Civil War blacks had been deliberately armed to participate in the war effort. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 8 (1988)). These attempts to disarm blacks in the South led to Northerners in Congress to press for a response at the federal level that would preempt these "Black Codes" and ensure black Americans the right to bear arms. *See* STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876, at 9 (1998).

291. *McDonald*, 561 U.S. at 772.

292. *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 338 (1991).

293. *See* Klukowski, *Citizen Gun Rights*, *supra* note 26, at 249–52.

294. *See generally* Stephen P. Halbrook, *"Only Law Enforcement Will Be Allowed to Have Guns": Hurricane Katrina and the New Orleans Firearm Confiscations*, 18 GEO. MASON U. C.R. L.J. 339 (2008).

295. District of Columbia v. Heller, 554 U.S. 570, 599 (2008).

296. *See* Moore v. Madigan, 702 F.3d 933, 934 (7th Cir. 2012) (citing various subsections of 720 ICLS 5/24).

297. *See* Silveira v. Lockyer, 328 F.3d 567, 583–85 (2003) (Kleinfeld, J., dissenting from the denial of reh'g en banc).

Americans but one very much in the mind of eighteenth-century political revolutionaries. It is one that can never be allowed to fade completely from sight. As Judge Alex Kozinski of the Ninth Circuit wrote when his court voted against an individual right to arms pre-*Heller*:

> The majority falls prey to the delusion—popular in some circles—that ordinary people are too careless and stupid to own guns, and we would be far better off leaving all weapons in the hands of professionals on the government payroll. But the simple truth—born of experience—is that tyranny thrives best where government need not fear the wrath of an armed people. Our own sorry history bears this out: Disarmament was the tool of choice for subjugating both slaves and free blacks in the South. . . . A revolt by Nat Turner and a few dozen other armed blacks could be put down without much difficulty; one by four million armed blacks would have meant big trouble.
>
> All too many of the great tragedies of history—Stalin's atrocities, the killing fields of Cambodia, the Holocaust, to name but a few—were perpetrated by armed troops against unarmed populations. Many could well have been avoided or mitigated, had the perpetrators known their intended victims were equipped with a rifle and twenty bullets apiece . . . . If a few hundred Jewish fighters in the Warsaw Ghetto could hold off the Wehrmacht for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars.
>
> My excellent colleagues have forgotten these bitter lessons of history. The prospect of tyranny may not grab the headlines the way vivid stories of gun crime routinely do. But few saw the Third Reich coming until it was too late. The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed—where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.[298]

The Second Amendment was written into the Constitution to ensure that a "citizens' militia" outside governmental control could act "as a safeguard against tyranny."[299] Kozinski—whose parents were Holocaust survivors—penned his sobering explanation for why the Framers regarded the right to bear arms as utterly nonnegotiable for the American people.

C. Intermediate Scrutiny for Incidental Burdens

For incidental burdens of fundamental rights—burdens that do not impinge the core of a fundamental right—intermediate scrutiny is often employed. To survive intermediate scrutiny, government must demonstrate that the challenged state action is substantially related to achieving an important public interest.[300] More demanding than the rational-basis test, this form of heightened scrutiny demands both that the law at issue "directly advances a substantial government in-

298. *Id.* at 569–70 (citations omitted).
299. *Heller*, 554 U.S. 570, 599 (2008).
300. Craig v. Boren, 429 U.S. 190, 197 (1976); *see also supra* note 165 (discussing the level of scrutiny afforded to Second Amendment regulations).

terest and that the measure is drawn to achieve that interest."[301] Since politicians typically say whatever they are doing is important, courts must screen out those that are not by regarding a public interest as important only if "the proffered justification is 'exceedingly persuasive.'"[302]

Intermediate scrutiny is designed to strike a middle ground between the "near-automatic condemnation" of strict scrutiny and the "near-automatic approval" of rational-basis review.[303] Intermediate scrutiny has been described as "proportionality,"[304] i.e., as requiring that the means "fit" the ends "in proportion to the interest served."[305]

Government must justify both the ends and the means, accounting for burdens imposed and substantiating its claims with sufficient proof. Intermediate scrutiny requires not only that the public interest be sufficiently important, but also that "the cost . . . be carefully calculated."[306] Whether the challenged action actually serves the asserted interest cannot rest on "mere speculation or conjecture."[307] When employing this standard, "the public benefits of the restrictions must be established by evidence . . . . lawyers' talk is insufficient."[308]

But in most other respects this standard is more relaxed than strict scrutiny.[309] "Under intermediate scrutiny, the government need not establish a close fit between the statute's means and its end, but it must at least establish a reasonable fit."[310] Overbreadth is not inherently fatal to this inquiry, either. "Intermediate scrutiny tolerates laws that are somewhat overinclusive,"[311] accommodating "the difficulty of establishing with precision the point at which restrictions

301. Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2667–68 (2011) (citations omitted).
302. United States v. Virginia, 518 U.S. 515, 533 (1996) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1996)).
303. *See* United States v. Alvarez, 132 S. Ct. 2537, 2552 (2012) (Breyer, J., concurring).
304. *E.g.*, Randall v. Sorrell, 548 U.S. 230, 249 (2006) (plurality opinion of Breyer, J.); Bartnicki v. Vopper, 532 U.S. 514, 536 (2001) (Breyer, J., concurring).
305. Bd. of Trs. of State. Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (quoting Posades de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 341 (1985)).
306. *Id.*
307. Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995) (quoting Edenfield v. Fane, 507 U.S. 761, 770–71 (1993)).
308. Annex Books, Inc. v. City of Indianapolis, 581 F.3d 460, 463 (7th Cir. 2009).
309. Some complain that intermediate scrutiny is not all that rigorous in practice. *E.g.*, Ronald J. Krotoszynski, Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 UCLA L. Rev. 1239, 1260 (2008). But this is a problem of application, not principle. If courts take intermediate scrutiny seriously, it imposes a significant barrier to government regulation.
310. *Skoien 1*, 587 F.3d 803, 805–06 (7th Cir. 2009) (emphasis omitted), *rev'd en banc on other grounds*, 614 F.3d 638 (7th Cir. 2010).
311. *Id.* at 815. Overbreadth doctrine can apply to Second Amendment claims. *See supra* note 75.

become more extensive than their objective requires."[312] And unlike strict scrutiny—under which no deference is given to legislative judgments[313]—courts accord some limited deference to legislators when applying intermediate scrutiny.[314]

But the government must still carry the burden of proof, which for strict scrutiny requires a "strong basis in evidence" that the means employed advances the purported interest.[315] Although case law is not clear regarding the strength of evidence required for intermediate scrutiny, given that rational-basis review requires no evidence, it is likely the state must introduce some evidence similar to "substantial evidence" for agency fact-finding under the Administrative Procedure Act.[316] Likewise, while under strict scrutiny the means must be a *precise* fit,[317] one that *achieves* the purported interest,[318] here the means-tailoring requires the government action directly *advance* the asserted public interest to a *material degree*.[319]

Intermediate scrutiny applies to content-neutral regulations of speech, those that are justified without reference to content.[320] Content-neutral regulations of speech are deemed incidental burdens on free speech rights.[321] As with strict scrutiny, the burden rests on the government to justify the regulation as consistent with the First Amendment.[322]

Intermediate scrutiny is also the level of scrutiny that attaches to commercial speech,[323] owing to the subordinate position the Supreme Court believes commercial interests occupy "in the scale of First

312. Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 481 (1989).

313. *See supra* note 205 and accompanying textual paragraph.

314. Shelby Cnty. v. Holder, 679 F.3d 848, 861 (D.C. Cir. 2012) (citing Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997)), *rev'd in part on other grounds,* 133 S. Ct. 2612 (2013).

315. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion).

316. Pub. L. No. 79-404, § 10(e), 60 Stat. 237, 243 (1946) (codified at 5 U.S.C. § 706(2)(E) (2012)).

317. Grutter v. Bollinger, 539 U.S. 306, 387 (2003) (Rehnquist, C.J., dissenting).

318. *Id.* at 333 (majority opinion).

319. *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 626 (1995) (material degree); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (directly advance).

320. Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986).

321. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

322. Edenfield v. Fane, 507 U.S. 761, 770–71 (1993).

323. *Cent. Hudson*, 447 U.S. at 564–65 (1980). The circuits are split on whether intermediate scrutiny attends compelled commercial speech. *Compare* United States v. Philip Morris USA Inc., 566 F.3d 1095, 1143 (D.C. Cir. 2009) (intermediate), *with* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 554 (6th Cir. 2012); Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006) (strict). *See supra* notes 95–96 and accompanying text (discussing compelled speech).

Amendment values."[324] Commercial speech is "expression related solely to the economic interests of the speaker and its audience."[325] The Supreme Court asserts that government's "power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is linked inextricably to those transactions."[326] Even then, "[p]ermissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques."[327] When commercial speech is at issue, government has authority not only to restrict false speech, but also speech that is deceptive or misleading.[328] The test from *Central Hudson* is "whether the regulation directly advances the government interest asserted, and whether it is not more extensive than is necessary," and the public interest purportedly served by the challenged state action must be "substantial."[329] And again, the government bears the burden of proof.[330]

Also, consider slander and libel. Although it is possible that allegedly defamatory speech is not demonstrably false, it is nonetheless actionable in tort because free speech "is not the only societal value at issue" in such situations.[331] For this reason, although slander and libel laws may in fact chill protected speech, there is no unconditional immunity from liability for defamation.[332] Compensating defamed individuals for the harm to their reputation is a "strong and legitimate" public interest.[333] The intermediate level of scrutiny for false speech is also illustrated by the fact that defamed individuals can recover even when the defamation was the result of mere negligence, not just intentionally or knowingly false speech.[334] It is doubtful that holding someone liable for negligent speech would satisfy strict scrutiny.

---

324. Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).
325. *Cent. Hudson*, 447 U.S. at 561.
326. 44 Liquormart v. Rhode Island, 517 U.S. 484, 499 (1996) (quoting Friedman v. Rogers, 440 U.S. 1, 10 n.9 (1979)) (internal quotation marks omitted).
327. *Cent. Hudson*, 447 U.S. at 574 (Brennan, J., concurring in judgment) (footnote omitted).
328. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–72 n.24 (1976).
329. *Cent. Hudson*, 447 U.S. at 566. The Court actually frames this as a four-part test, with the first step determining whether the speech comes within the orbit of the Free Speech Clause. *Id.* I do not frame it as such because that aspect of the inquiry occurs in Step One of this Article's proposed approach. *See supra* subsection IV.B.1.
330. Thomas v. W. States Med. Ctr., 535 U.S. 357, 373 (2002).
331. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).
332. *Id.*
333. *Id.* at 348.
334. *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 774 (1986). However, such negligent statements evidently enjoy greater protection than intentional defamation. The Court invalidated both presumed and punitive damages for negligent

While strict scrutiny attends questions of whether a citizen may possess a common firearm, intermediate scrutiny attends questions of how and when a citizen may possess those same arms. As historically accepted burdens on the right to arms show, "the state has a right to prescribe a particular manner of carry, provided that it does not cut off the exercise of the right."[335] An example of this is requiring serial numbers on firearms.[336]

Registering firearms is separate from a government registry specifying which citizens own each specific firearm. "The registration of firearms gives the government information as to how many people would be armed for militia service if called up."[337] However, it is also a prerequisite to effectively confiscate all firearms in society to disarm the citizenry. So not only is Judge Silberman correct in suggesting that courts should look askance at certain gun regulations because the Second Amendment's right is broader that the civic purpose of equipping a militia,[338] some such regulations could actually help defeat the core of the right secured by the Amendment.

Judge Sykes applied the intermediate test under the Equal Protection Clause, saying, "we ask whether the government has established that the statute is substantially related to an important governmental interest."[339] In Sykes' two-tiered approach discussed previously, she adds, "Laws that restrict the right to bear arms are subject to meaningful review, but unless they severely burden the core Second Amendment right of armed defense, strict scrutiny is unwarranted."[340]

Whether a court articulates the line as Sykes has, or takes the similar approach outlined in this Article, the question remains of finding where a judge steps down the stair from strict to intermediate scrutiny. A quick and easy parallel with free speech would be to say that these are regulations on the time, place, and manner of firearm ownership. But firearms retain enduring characteristics that can distinguish one type from another.

It is far beyond the scope of this Article to explore that topic in detail. Instead, I suggest research on each of the following items.

---

defamation because such a sanction "unnecessarily exacerbates" the chilling of protected speech. *Gertz*, 418 U.S. at 350.

335. Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1172 (9th Cir. 2014) (quoting Nunn v. State, 1 Ga. 243, 248 (1846)) (internal editing marks omitted).

336. 18 U.S.C. § 922(k) (2012) (prohibiting possessing firearms where serial number has been "removed, obliterated, or altered").

337. Parker v. District of Columbia, 478 F.3d 370, 399 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 554 U.S. 570 (2008).

338. *See id.* at 389 (citing Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 801–07 (1998)).

339. *Skoien I*, 587 F.3d 803, 805 (7th Cir. 2009), *rev'd en banc on other grounds*, 614 F.3d 638 (7th Cir. 2010).

340. *Id.* at 812.

First, the caliber of a firearm is a nonissue for the Constitution. Although no one attempts to suggest that a .40-caliber pistol is subject to different rules than a .22, some politicians try to make an issue of .50-caliber firearms. Second, much more persuasive arguments can be made that fully automatic firearms (i.e., machineguns and submachineguns) should not be treated the same as common firearms. While some would argue there is no Second Amendment protection at all, that position is likely wrong unless someone can explain why. It is much more likely that keeping and bearing these firearms is subject to intermediate scrutiny, and that it will be much easier to show in court how many restrictions would satisfy intermediate scrutiny, with the result that these firearms are unlikely to play a greater role in American society than they currently do.

Intermediate scrutiny would also apply to a broad range of permitting and licensing systems. So long as these concern the times and places a person could carry firearms, they would fit neatly into the way the law conceptualizes speech. Although many such issues would involve public property, rather than homes, oftentimes in traditional or designated forums the standards of review would be the same as on private land, and it is in that context that intermediate scrutiny will be most often seen.

For example, the Second Circuit upheld "imposing fees on the exercise of constitutional rights . . . when the fees are designed to defray (and do not exceed) the administrative costs of regulating the protected activity."[341] It suggested such fees might be unconstitutional if they were "so high as to be exclusionary or prohibitive."[342]

But even assuming such licenses are constitutional at all, there must be stringent limits to survive heightened scrutiny. A fee of $20 would be one thing, but if a city that is hostile to gun rights—such as New York City—set up an excessively elaborate administrative system that the city claimed justified a $200 fee, that must fail under intermediate scrutiny. With this standard of review, courts should not only disallow "prohibitive" costs, but also anything more than a minimal burden. And if this license is required to possess a common firearm in the home, it should be struck down anyway under intermediate scrutiny.

It is plausible to suggest that the government could have a registration system for extraordinary (meaning exceedingly unusual and dangerous) weapons such as Class III firearms (i.e., fully-automatic machineguns), but that such a system would be unconstitutional if it attempted to register ordinary firearms. But such a system must still survive intermediate scrutiny, so the burden would be on the govern-

341. Kwong v. Bloomberg, 723 F.3d 160, 165 (2d Cir. 2013) (citations omitted).
342. *Id.* at 166.

ment to show that it is substantially related to achieving some important interest. Courts should be inflexible in forcing government to make its case, brushing aside feel-good assurances from politicians and instead demand persuasive evidence that such systems substantially advance important interests.

The touchstone must be that government "may not destroy the right to bear arms in public under the guise of regulating it."[343] Intermediate scrutiny regulates the manner of exercising the Second Amendment; it never prevents that exercise.

VI. THE PUBLIC FORUM DOCTRINE APPLIES TO BURDENS ON THE SECOND AMENDMENT ON PUBLIC PROPERTY

The public forum doctrine was first proposed in a 1965 law review article,[344] and was adopted by the Court in 1972.[345] This doctrine is central to free-speech jurisprudence, leading one scholar to claim "the story of the First Amendment is the story of the public forum doctrine."[346] Henceforth, the story of the Second Amendment may also be the story of the public forum doctrine.

The public forum doctrine manages the nexus of individual liberty expressing itself in government-owned places.[347] The doctrine is rooted in dictum in *Hague v. Committee for Industrial Organizations*, where Justice Owen Roberts explained that streets and parks "have immemorially been held in trust . . . and . . . been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[348] That dictum was subsequently elevated to a holding, and been repeatedly reaffirmed.[349] In 1972 the Court added that in such places "justifications for selective exclusions . . . must be carefully scrutinized."[350]

343. Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1174 (9th Cir. 2014).
344. *See* Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 3.
345. *See* ROBERT C. POST, CONSTITUTIONAL DOMAINS 205 (1995) (discussing Police Dep't of Chi. v. Mosley, 408 U.S. 92, 99 n.6 (1972)); Kenneth L. Karst, *Public Enterprise and Public Forum: A Comment on* Southern Productions, Ltd. v. Conrad, 37 OHIO ST. L.J. 247, 248 n.7 (1976).
346. Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1535 (1998).
347. *See generally* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987) (discussing the development of the public forum doctrine and proposing that public and nonpublic forums should be distinguished on the basis of the nature of the government action involved).
348. Hague v. Committee for Industrial Organizations, 307 U.S. 496, 515 (1939) (plurality opinion) (dictum).
349. *E.g.*, United States v. Kokinda, 497 U.S. 720, 743 (1990).
350. *Mosley*, 408 U.S. at 98–99.

Every facility and parcel of land is either privately owned or government owned. But people do not shed their constitutional protections whenever they set foot on government land, therefore a doctrine is necessary to protect rights while recognizing that the person is now on government premises. "Without a baseline expectation that free expression on public property is appropriate, such balancing tests tend to favor the government."[351]

In our democratic society, citizens must often go to a government location to assert rights or obtain services. "In the First Amendment context, the Supreme Court long ago made it clear that one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[352] Americans need not choose to forfeit their constitutional protections against government in order to access places held in common by all.

It is almost self-evident that "in an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. . . . [The extent to] which such facilities are made available is an index of freedom."[353] It should be equally obvious that if an American citizen has a fundamental right to bear arms in self-defense, then the extent to which he may do so in these places where interpersonal contact is at its zenith somehow fits into this liberty matrix as well.

A. The Need for the Public Forum Doctrine for the Second Amendment

"To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*."[354] Yet the factors discussed in this Article—especially the inherent deadliness of firearms—make clear that there are police-power concerns (especially public safety) that government must grapple with when citizens carry firearms in public. The reasons for the public forum doctrine for First Amendment issues apply *a fortiori* for Second Amendment issues.

Both the Constitution's text and logic dictate that the Second Amendment extends beyond the home. The textual case is clear. "The right to 'bear' as distinct from the right to 'keep' arms is unlikely to refer to the home. To speak of 'bearing' arms within one's home would at all times have been an awkward usage. A right to bear arms thus

351. Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140, 2140 (2009).
352. Ezell v. City of Chi., 651 F.3d 684, 697 (7th Cir. 2011) (quoting Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 76–77 (1981) (internal citation and quotation marks omitted)).
353. Kalven, *supra* note 344, at 11–12.
354. Moore v. Madigan, 702 F.3d 933, 937 (7th Cir. 2012).

implies a right to carry a loaded gun outside the home."[355] Surely the right to bear arms means something more than carrying it from your living room to your bedroom, as the Supreme Court's reasoning dictates. "Both *Heller* and *McDonald* do say that 'the need for defense of self, family, and property is *most* acute' in the home, but that doesn't mean it is not acute outside the home."[356] Constitutional rules must delineate those rights, especially once a person sets foot on the sidewalk or street at the edge of their property.

Judge Silberman wrote that "it is presumably reasonable 'to prohibit the carrying of weapons when under the influence of intoxicating drink, or to a church, polling place, or public assembly, or in a manner calculated to inspire terror . . . .'"[357] Certain prohibitions seem reasonable, such as saying you cannot carry firearms if you are publicly intoxicated. Others do not seem reasonable at all, such as some States' laws saying you cannot carry into a church; each church's leadership should be perfectly free to decide whether to allow their employees or members to carry firearms. This is especially true for close-knit churches that function as families, where instead of anonymous strangers, members know each other and are actively engaged in their church's life. But that aside, such regulations still beg the question of how high a bar the Constitution sets for such regulations, and how that bar is raised or lowered in spaces controlled by government.

Though it may seem counterintuitive, applying public forum doctrine should enhance gun rights in public, rather than restrict them. Without this doctrine for free speech, government officials would be tempted to completely bar expression, fearing that once any meaningful speech is allowed, they cannot draw a line to keep it from becoming a cacophony.

The same rationale applies to gun rights in public spaces. Allowing firearms does not mean public parks would become the Wild West. As the forum allows government to impose significant additional restraints, public officials may feel more comfortable—as is often the case for public speech—in not attempting draconian restrictions. While some restrictions may be slapped down in court, such efforts are long, expensive, and unpredictable. Government opening the doors wide *ab initio* of its own accord could both avoid such protracted litigation and allow citizens to better exercise this fundamental right.

---

355. *Id.* at 936.

356. *Id.* at 935 (quoting District of Columbia v. Heller, 554 U.S. 570, 628 (2008)).

357. Parker v. District of Columbia, 478 F.3d 370, 399 (D.C. Cir. 2007) (quoting State v. Kerner, 107 S.E. 222, 225 (N.C. 1921)), *aff'd sub nom. Heller*, 554 U.S. 570.

Public forum doctrine is not a panacea. It has received more than its share of thoughtful criticism,[358] such as some scholars saying it is "an edifice now so riven with incoherence and fine distinctions that it is on the verge of collapse."[359] I am more sanguine about this doctrine, since with consistent application the lines between different forum types can be clarified. Although such refinement will not result in a flawless doctrine, such perfection is always unattainable anyway when flawed human beings seek to systematize into an imperfect legal framework the behavior of other flawed human beings. While many scholars' egos will refuse to acknowledge these undeniable limits of human effort, hopefully judges will not let the perfect be the enemy of the good, and accept that—properly delineated—public forum doctrine will work well enough both to secure this fundamental right and to address public concerns.

In fact, public forum should work better for the Second Amendment than the First. The concept of a forum is more theoretical in the context of speech, and therefore more esoteric. The Court has always had to grapple with how to apply this doctrine in a metaphysical forum such as an internal mail system,[360] or access to government funds.[361] These difficulties are exacerbated by newer technologies such as webpages and internet communication.[362] By contrast, in the context of the right to bear arms, every forum is a literal forum, with geographical boundaries, precise physical limits, and objectively verifiable features. This is an aspect of a traditional forum in First Amendment cases,[363] but would apply to *every* type of forum for Second Amendment cases. This makes public forum doctrine much easier to apply to burdens on the right to bear arms.

B. Applying the Four Types of Public Forum to the Second Amendment

The Supreme Court speaks of three types of public forum. As bold as this may sound, the Supreme Court is incorrect. There are four types of public forum.[364] The Court has said there are three, but courts provide differing lists: in one case the Supreme Court says the

358. *See, e.g.*, POST, *supra* note 347, at 1797–1800; David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 186 (1992).

359. Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1381 (2001).

360. *E.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

361. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995).

362. Lyrissa Lidsky, *Public Forum 2.0*, 91 BOSTON U. L. REV. 1975, 1994–2002 (2011); *Strict Scrutiny*, *supra* note 351, at 2141.

363. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998).

364. At least one other scholar shares my view on this. *See* Lidsky, *supra* note 362, at 1981–91.

list is traditional, limited, and nonpublic,[365] but many federal appeals courts say the list is traditional, designated, and nonpublic.[366]

This improper enumeration has led scholars to say the Court created "a complex maze of categories and subcategories" of forums (a.k.a. "fora").[367] Properly enumerated, the four types of public forum are: traditional, designated, limited, and nonpublic. Each of these four types is governed by different rules, and is even more useful for properly respecting and upholding gun rights than they are for speech rights.

1. Standard Framework for Traditional and Designated Public Forums

The first two forum types result in the application of the same standards of review. They are the traditional public forum and the designated public forum. The only difference between the two is that one exists by nature, and the other is created by the government. There are certain public spaces to which citizens traditionally have unfettered access. There are certain other places that are owned by the government, but in which the government can open the doors so wide for public access that a person present at that location perceives no material difference from a traditional forum pertaining to rights of expression.

As just noted, there is some confusion whether there is a difference between a designated forum versus a limited forum. The difference is a subtle one that exists more de facto than de jure. In theory, anytime the government opens a forum it could be limited in the sense that the government is opening the space to the public for a reason, and so that would allow for additional restrictions on either speech or arms. This Article distinguishes the two by saying that a governmentally opened forum that has no manifest reason for restricting speech or gun rights beyond the sort of uses seen in a traditional forum is a designated forum that is unlimited, as opposed to a limited forum where there are reasons for additional restrictions.

A traditional public forum is the "quintessential" forum.[368] The Supreme Court has recognized three traditional public fora: parks,[369] streets,[370] and sidewalks.[371] These places are essentially always open

365. *See Perry*, 460 U.S. at 45–46.
366. *See, e.g.*, Bowman v. White, 444 F.3d 967 (8th Cir. 2006); Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65 (1st Cir. 2004).
367. MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 409[D] at 4–71 (2d ed. 1984).
368. Frisby v. Schultz, 487 U.S. 474, 481 (1988) (quoting *Perry*, 460 U.S. 37).
369. Hague v. CIO, 307 U.S. 496, 515 (1939) (plurality opinion).
370. *See* Jamison v. Texas, 318 U.S. 413, 417 (1943).
371. *See* Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357, 377 (1997); United States v. Grace, 461 U.S. 171, 183–84 (1983).

to everyone. Although most people do not go to public fora to engage in speech, they enjoy broad liberty to express ideas. "[B]y long tradition or by government fiat [this forum is] devoted to assembly and debate."[372] Accordingly, government's ability to restrict speech here is "very limited."[373] Since traditional fora are defined with reference to their historical uses, it is unlikely the Court will recognize any additions to its current list of three.[374]

A designated public forum is one opened by the government for people to engage in speech, such as a fairground during the state fair for public speeches or a community center opened for a town hall meeting. There must be clear indicia of government intent to create a designated forum.[375] And government may also eliminate the forum at any time, closing it to the public regarding First Amendment activity.[376] More precisely, this type of designated forum is an *unlimited* designated forum, as opposed to the *limited* designated forum discussed below. Although it does not enjoy broader protection than a traditional forum, it is worth noting that, unlike in a traditional forum, many people attending a designated forum do so knowing that public speech will be a prominent activity at that location (if not the only activity).

The level of scrutiny that applies in either a traditional forum or a designated forum is exactly what it would be if the speaker were on private land.[377] As discussed in Part V, strict scrutiny attends content-based restrictions;[378] intermediate scrutiny applies to content-neutral restrictions on speech pertaining to time, place, or manner; and viewpoint discrimination is per se invalid.[379]

These principles can be applied to firearms. Even supporters of the right to bear arms admit that whether the Second Amendment covers carrying handguns in public is not as easily answered as in the

372. *Perry*, 460 U.S. at 45.

373. United States v. Grace, 461 U.S. 171, 177 (1983).

374. *See* Lidsky, *supra* note 362, at 1983 n.36 (citing Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998)).

375. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802–03 (1985).

376. *See Perry*, 460 U.S. at 46.

377. *Id.* (holding that when the government opens its lands to the public, "it is bound by the same standards as apply in a traditional public forum").

378. *Id.* at 45 (holding that content-based discrimination must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end").

379. It is worth noting here that the Court has separately indicated this per se rule applies specifically in the public-forum context. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another."); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972) (Government may not "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views").

home.[380] "A man's home is his castle." A citizen does not have complete dominion over his surroundings once he leaves that castle to venture amongst other people. Sociability requires that people have more regard for the concerns and predilections of others when voluntarily entering public places, so it becomes more difficult to draw the line with regard to firearms.

At the same time, it makes perfect sense why the right extends to public places. Judge Richard Posner—an outspoken critic of recognizing the Second Amendment as an individual right[381]—acknowledges that "knowing that many law-abiding citizens are walking the streets armed may make criminals timid."[382] Nothing in the text or history of the Second Amendment says anything to the contrary.

That fact notwithstanding, several inferior federal courts have not taken the Second Amendment as seriously as they take the First Amendment. The Fourth Circuit went so far as to say it did not know whether the Second Amendment applies at all outside the home,[383] and the Second Circuit would not affirm that the right extends even to a summer home.[384] Denying that the Second Amendment applies broadly—such as on private land in a summer home—is irreconcilable with earnestly regarding the right to bear arms as a fundamental right.

The Second Amendment certainly applies outside the home, including public places. In a traditional public forum or designated public forum, heightened scrutiny always applies in one of its three forms. Burdens on the core of the Second Amendment are subject to strict scrutiny; burdens on the time, place, or manner are subject to intermediate scrutiny; and an absolute ban on bearing any firearms in a traditional or designated forum is categorically unconstitutional.

When you think of the sorts of public places where people would seek to carry guns for lawful and well-intentioned reasons, most are traditional forums. One thinks of someone carrying a concealed pistol when they are going for a walk in the park, or taking a stroll in the neighborhood, or when walking down the street to buy something at the corner store. Many other places would be designated forums, such as political rallies at community meeting sites.

380. *See, e.g.*, Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 554 U.S. 570 (2008).

381. *See* Richard A. Posner, *In Defense of Looseness*, THE NEW REPUBLIC, Aug. 27, 2008, http://www.newrepublic.com/article/books/defense-looseness, *archived at* http://perma.unl.edu/PSJ2-LES3.

382. Moore v. Madigan, 702 F.3d 933, 937 (7th Cir. 2012).

383. United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011).

384. *See* Osterweil v. Bartlett, 706 F.3d 139 (2d Cir. 2013).

2. Additional Restrictions Permissible in Limited Public Forums

The Supreme Court recognized limited public fora in *Widmar v. Vincent*.[385] The Court later expanded upon this in *Perry*, where Justice Byron White discussed designated fora, but then added in a footnote, "A public forum may be created for a limited purpose," specifying as two examples that such limitations include which groups could access the facility, or the subjects being discussed.[386] Perhaps the defining case is *Rosenberger v. Rector & Visitors of Univ. of Va.*[387] Justice Anthony Kennedy's opinion for the Court held that the school's student activities fund was a limited public forum,[388] and the college's policy disallowing funds to a religious newspaper was unconstitutional viewpoint discrimination.[389]

The Supreme Court has held that in a limited forum government may impose additional restrictions consistent with keeping the forum functioning in the manner for which people access it. First, whatever restrictions would be constitutional in a traditional forum are also allowed in a limited forum. Any additional restrictions must be "reasonable in light of the purpose served by the forum,"[390] so long as they are viewpoint neutral.[391] This test refined and updated the Court's earlier holding that the "crucial question" in content-neutral regulations is "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[392] If so, then another theoretical construct through which to understand the limited forum is that the rule remains intermediate scrutiny, but the government has additional important interests when creating limited fora, and so can employ additional restrictions as means to advance those interests, so long as they are properly tailored.

Government can exclude a speaker from a limited forum whose speech falls within the parameters of the forum's limited purpose, but only if the exclusion satisfies strict scrutiny.[393] In doing so, courts must carefully examine the exclusion to determine if what is actually happening is a form of viewpoint discrimination, which the Constitution never permits.

---

385. 454 U.S. 263, 272 (1981).
386. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983).
387. 515 U.S. 819 (1995).
388. *Id.* at 829–30.
389. *Id.* at 831.
390. *Id.* at 829 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).
391. Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001); *Perry*, 460 U.S. at 46 (citing U.S. Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114, 131 n.7 (1981)).
392. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).
393. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998); *see also* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1248–49 (1999) (discussing this standard).

Applying the Second Amendment here is relatively straightforward, building upon the designated forum discussion above. Locations such as libraries are limited forums, so additional restrictions could be imposed (so long as the government can articulate a rationale predicated upon the nature of a library), but there still could not be a categorical rule that no citizen could ever have any type of firearm.

3. Reasonableness Test for Nonpublic Forums

Finally, there is the nonpublic forum. A nonpublic forum is a government facility to which at least some private citizens have access but "which is not by tradition or designation a forum for public communication."[394] In other words, it is a government location or facility that is not any of the three types of public forum already discussed.

Consequently, in a nonpublic forum, government may impose any speech restriction so long as it is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[395] Government has the ability to "preserve the property under its control for the use to which it is lawfully dedicated,"[396] which implicitly includes the ability to deny access to persons whose intended activities do not pertain to that purpose.[397] For example, the government can deny access to an airport to anyone who is not engaging in air travel.

The reasonableness standard is synonymous with rational-basis review. When you say a law is rationally (or reasonably) related to promoting some legitimate public interest, you are simply asking if the law is reasonable. Rational-basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."[398] The court cannot even consider whether the law actually advances the purported interest; the inquiry is instead whether the legislature was literally irrational in thinking the law would in any way advance *any* interest.[399]

Rational-basis review allows for imperfect distinctions and even clearly unequal treatment of similarly-situated persons, as it requires only that the challenged law or action "advances legitimate legislative goals in a rational fashion."[400] And rather than assessing whether the law actually advances the purported public interest, a reviewing court

394. *Perry*, 460 U.S. at 46.
395. *Id.*
396. United States v. Grace, 461 U.S. 171, 178 (1983) (quoting Adderley v. Florida, 385 U.S. 39, 47 (1966)).
397. *Perry*, 460 U.S. at 49.
398. Heller v. Doe, 509 U.S. 312, 319 (1993) (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993)).
399. *See Beach Commc'ns*, 508 U.S. at 313 (1993); W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671–72 (1981).
400. Schweiker v. Wilson, 450 U.S. 221, 234 (1981).

merely asks whether the legislative body or government actor was reasonable in believing the law would do so.[401] Given how easy it is to pass this minimal standard of review, essentially the only speech restrictions in a nonpublic forum that fail judicial review are instances of viewpoint discrimination.[402] Government regulatory power regarding speech is at its apogee in a nonpublic forum.

Thus far the Court has clearly recognized only three types of nonpublic forums: airports,[403] public schools,[404] and military facilities.[405] But many other locations would fit this description, such as courtrooms and legislative galleries. The public is admitted on a space-available basis to the Supreme Court and may also gain access to watch debates in Congress, but have no constitutional right to speak out in those places.

This then is the rule that would govern in what *Heller* ambiguously referred to as sensitive government places. While it would seem that this is where the First/Second Amendment analogy breaks down, since firearms can be barred from such places, this instead illustrates the propriety of the rule. As discussed in detail in Parts III & IV, the Second Amendment secures a right for self-defense and a special right against government tyranny. For a nonpublic forum, private citizens bearing arms can be disallowed because government assumes the obligation of physically protecting the citizen. Any visitor to a statehouse or county courthouse knows they are protected by armed security (typically police officers), and in places such as the White House, U.S. Capitol, or Supreme Court, the armed presence is so great that those places are essentially fortresses.

The same is true in all three types of recognized nonpublic fora. Military bases have military security, airports are protected by local police and federal agents, and many schools have armed security, typically city police or county sheriff's deputies. By choosing to enter those premises, the citizen temporary impairs his own right to personally engage in self-defense, but the government is there to effectuate that right.

All that leaves is the concern regarding tyranny. But it is a self-evident truth that the right to protect against oppressive government does not mean you can carry weapons into government facilities. It is a right to defend your family and community against an advancing tyrannical force. If you are strolling into the government's nonpublic

401. *Beach Commc'ns*, 508 U.S. at 315.

402. *E.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393–94 (1993).

403. Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 684–85 (1992).

404. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 50–51 (1983).

405. Greer v. Spock, 424 U.S. 828, 838 (1976).

buildings, then presumably you are not currently in a state of revolution against a tyrant.

Government can accommodate Second Amendment interests. It could provide gun-check stations at guard posts on the perimeter of the government facility. Or it could permit an individual to keep his firearm in his vehicle in the parking lot outside the security perimeter. Any restriction would be permitted in such a setting, unless it was patently unreasonable. To analogize to viewpoint discrimination, it is likely that the only type of restriction that is per se unreasonable is one that intends to leave citizens unprotected and defenseless—and it is unlikely many such restrictions are on the books.

VII. CONCLUSION

It goes without saying that no series of Supreme Court decisions will ever end the controversy over guns in America.[406] Both sides of this debate hold deep passions, and no data set or reasoned argument is going to resolve such energetic, visceral disagreement.

But the sheer number of firearms and gun owners in America, living under so many relevant laws, makes it imperative that the judiciary develop a system of judicial review to provide sufficiently broad contours to the right to bear arms commensurate with that right's fundamental nature, while simultaneously recognizing the significant public interests that government must give effect to regarding public spaces and especially sensitive locations. The urgency of this need is further accentuated by this Article's earlier discussion of what types of weapons other than firearms are within the orbit of the Second Amendment.

Applying the various levels of scrutiny governing the Free Speech Clause can address all these concerns on private land. And if the public forum doctrine governing free speech on public land and facilities is engrafted into the Second Amendment, it provides the additional regulatory powers to fully satisfy pressing public needs without impairing in the slightest citizens' self-defense interests when going about their daily lives.

Such a unified framework governing both the First Amendment and the Second Amendment demonstrates the reality that there is no hierarchy among the Constitution's fundamental rights. And it will enable courts to take advantage of a doctrinal framework they have been developing for almost a century involving speech, as judges seek to give full effect to the right to bear arms, even during this nascent stage of development of the emerging jurisprudence governing the Second Amendment.

406. *Cf.* MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS, *passim* (2007).