Note

Loaded Questions: A Suggested Constitutional Framework for the Right to Keep and Bear Arms

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In 2008, a special police officer named Dick Heller sued the District of Columbia because the government denied him permission to keep a handgun in his own home.[1] In *District of Columbia v. Heller*, the Supreme Court took up its first gun case since the 1930s and ruled that the Second Amendment right to keep and bear arms belongs to the individual American citizen, not the state governments.[2] It specifically held that the amendment applies to handguns, at least in the home,[3] and that self-defense is the core of the Second Amendment right.[4] This decision invalidated a ban on handguns that had stood in the District for over thirty years.[5] Shortly after *Heller*, several plaintiffs sued the city of Chicago, which had a nearly identical handgun ban,[6] on the theory that Second Amendment applies to the states in addition to the federal government.[7] Once again, the Court sided with the plaintiffs—average citizens

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1. District of Columbia v. Heller, 554 U.S. 570, 570 (2008).
2. *Id.* at 595.
3. *Id.* at 635.
4. *Id.* at 628–29.
5. D.C. CODE § 7-250.02 (LexisNexis 2001) (criminalizing possession of handguns not registered in the District prior to September 24, 1976), *invalidated by Heller*, 554 U.S. at 635–36. *Heller* also invalidated certain provisions requiring firearms in the home to be rendered inoperable while not in use. 554 U.S. at 635.
6. CHI., ILL., MUNICIPAL CODE §§ 8-20-040(a), 8-20-050(c) (2009), *invalidated by* McDonald v. City of Chi., 130 S. Ct. 3020, 3043 (2010).
7. *McDonald*, 130 S. Ct. at 3026–27.

seeking the same relief as Mr. Heller.[8] In invalidating the Chicago ordinance, the Court not only extended the Second Amendment's protections to the states, but also indicated that it does not intend to treat the right to keep and bear arms any less favorably than other fundamental rights.[9]

There are at least several hundred major gun laws on the books at the federal and state levels, and perhaps many more than that at the local level.[10] The Supreme Court's declaration that the right to keep and bear arms is a fundamental, individual right has the potential to alter, in a very real way, the average American's right to purchase, sell, possess, and even carry a firearm. It may also limit, perhaps severely, the government's power to make policy decisions regarding guns. Who may be denied possession? On what grounds? Are guns not allowed in certain places? Where? What types of firearms may be prohibited? Can the government enact licensing or registration schemes? These and other questions have been the subject of much speculation.[11] With estimates of guns in this country running into the hundreds of millions,[12] and in light of the plethora of recent cases seeking to define the contours of the Second Amendment,[13] such issues will need to be resolved.

Sooner or later, the Supreme Court is going to have to refine the scope of the right to keep and bear arms. As lower courts render judgments as to the extent and meaning of this

8. *Id.* at 3050.

9. *Id.* at 3043 ("[The City of Chicago] must mean . . . that the Second Amendment should be singled out for special—and specially unfavorable—treatment. We reject that suggestion.").

10. *See, e.g.*, Jon S. Vernick & Lisa M. Hepburn, *Twenty Thousand Gun-Control Laws?*, BROOKINGS INST. 2 (Dec. 2002), *available at* http://www.brookings.edu/es/urban/publications/gunbook4.pdf. It is not readily known how many local gun laws there are. *Id.*

11. *See, e.g.*, David Rittgers, *Gun Control After* McDonald, CATO @ LIBERTY (Mar. 10, 2010, 4:45 PM), http://www.cato-at-liberty.org/gun-control-after-mcdonald/; Matthew Scarola, *Analysis: State Gun Regulations and* McDonald, SCOTUSBLOG (June 28, 2010, 10:24 PM), http://www.scotusblog.com/2010/06/analysis-state-gun-regulations-and-mcdonald/.

12. *E.g.*, *Déjà Vu, All Over Again: "More Guns, Less Crime,"* NAT'L RIFLE ASS'N INST. FOR LEGIS. ACTION (Sept. 17, 2010), http://www.nraila.org/legislation/federal-legislation/2010/d%C3%A9j%C3%A0-vu,-all-over-again-more-guns,-l (estimating the number of handguns alone at nearly 100,000,000).

13. *See, e.g.*, United States v. Yancey, 621 F.3d 681, 682 (7th Cir. 2010) (challenging a law prohibiting users or addicts of controlled substances from possessing firearms); United States v. Skoien, 614 F.3d 638, 639 (7th Cir. 2010) (challenging a law denying possession of a firearm to one convicted of a misdemeanor crime of domestic violence).

right, the high court will be required to correct or affirm these decisions as a way of guiding other governmental units in constitutionally enacting, enforcing, and interpreting gun-control laws.

This Note suggests the Court should use First Amendment free-speech jurisprudence to guide its future Second Amendment decisions. Part I discusses the current state of Second Amendment law, including recent major Supreme Court decisions and certain types of common gun regulations found throughout the country. Due to the recent decisions in *Heller* and *McDonald*, these weapon laws will need to be scrutinized in light of the Second Amendment, rather than simply through the lens of the states' police power. However, because the need to analyze these laws under the Second Amendment has only recently become a requirement, courts will need to either invent entirely new scrutiny doctrines or borrow them from other areas of the law. For this reason, the first Section also discusses free-speech doctrines that can be readily converted from the First Amendment to apply to the Second Amendment. Part II analogizes free speech to self-defense in selecting and applying scrutiny tests for various existing and hypothetical gun-control laws. Part III argues that courts really only need to apply the strict- and intermediate-scrutiny tests as they already exist in order to properly adjudicate many of the issues likely to come before them—but that they should understand that the important parts of these tests in the free-speech context may be different than what is important in the self-defense context. Specifically, this part suggests that both strict and intermediate scrutiny together are required to properly adjudicate Second Amendment challenges, and that surprisingly little alteration is needed to usefully adapt these tools from the First Amendment context.

I. A MANDATE WITHOUT A FRAMEWORK FOR ADJUDICATION

This Part discusses the current state of the law with regard to national and state-level gun control. It begins by discussing how the *Heller*[14] and *McDonald*[15] decisions will certainly be the foundation upon which future gun-control litigation is based. This is followed by a brief synopsis of typical gun-control

14. District of Columbia v. Heller, 554 U.S. 570, 570 (2008).
15. McDonald v. City of Chi., 130 S. Ct. 3020, 3020–50 (2010).

laws. Finally, judicial standards for resolving challenges to laws on First Amendment grounds will be explained, due to their potential applicability in the Second Amendment context.

A. THE CURRENT STATE OF GUN-CONTROL LAW IN THE UNITED STATES

The Supreme Court's recent landmark cases settled a major dispute between two schools of thought on what right the Second Amendment protects. First, in *Heller*, the Court decided who holds the right to keep and bear arms: the individual citizen.[16] Second, the *McDonald* Court held that states, and not merely the federal government, must respect the Second Amendment, and that they are not free to regulate firearms in any manner they please.[17] While the Court did touch briefly on what sorts of regulations are and are not permitted,[18] it left much of the Second Amendment's scope to be decided another day.

Gun-control legislation is often enacted at the state level. Even following the *Heller* and *McDonald* decisions, no further challenge to gun-control laws has made its way up to the Supreme Court. This Section outlines the background of the laws likely to face a challenge on Second Amendment grounds.

Some states require a permit for mere possession of a firearm ("simple possession").[19] Others require a permit to purchase a gun but do not require one for simple possession.[20] Of the states requiring permits to possess, most jurisdictions issue them based on objective criteria, such as a clean criminal history, and issuance is not subject to the discretion of the issuing authority.[21] Normally the issuance of such a permit is simple, inexpensive, and relatively quick, although there are certain

16. 554 U.S. at 595.

17. 130 S. Ct. at 3043.

18. *Heller*, 554 U.S. at 626–27 (recognizing that the Second Amendment right has limits and indicating that certain types of gun-control laws would probably withstand future challenges).

19. *See, e.g.*, 430 ILL. COMP. STAT. ANN. 65/1 (West 2011) (requiring a firearm identification card in order to possess a firearm); MASS. ANN. LAWS ch. 140, § 129C (LexisNexis 2007) (same).

20. *E.g.*, MINN. STAT. ANN. § 624.7132 (West 2012) (requiring a permit for the purchase of a handgun or military-style rifle).

21. *See, e.g.*, ILL. STATE POLICE, APPLICATION FOR FIREARM OWNER'S IDENTIFICATION CARD (2012), *available at* http://www.isp.state.il.us/docs/6-181x.pdf (listing only such objective criteria as conditions of issuance).

notable exceptions to this general rule.[22] Generally, private-party (non-dealer) sales are subject to only minimal government oversight.[23] Under federal law, all felons, those convicted of misdemeanor crimes of domestic violence, the mentally incompetent, addicts, and certain others are prohibited from possessing firearms.[24]

Most states restrict the ability of citizens to carry weapons in public.[25] Only Illinois, however, has no legal mechanism for an ordinary citizen to do so.[26] The vast majority of states have weapon-carry permit regimes in place that require authorities to issue permits to citizens if they meet certain objective criteria.[27] Under these "shall-issue" systems, the objective application requirements typically include lack of a felony conviction; lack of an adjudication of mental incompetence; the procurement of statutorily required training; and payment of a fee, among others.[28]

Seven states still use restrictive "may-issue" permit systems.[29] The defining characteristic of these permit schemes is

22. *Compare id.* (requiring only a simple one-page application, a picture, a ten-dollar fee, and approximately thirty days of processing time), *with* N.Y. PENAL LAW § 400.00(4-a) (McKinney 2008) (allowing up to six months processing time without cause and more time with good cause shown), *and* N.Y.C. POLICE DEP'T, HANDGUN LICENSE APPLICATION (2010), *available at* http://www.nyc.gov/html/nypd/downloads/pdf/permits/HandGunLicenseApplicationFormsComplete.pdf (requiring a fifteen-page application and nearly $450 in fees).

23. *See Unlicensed Person Questions*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, http://www.atf.gov/firearms/faq/unlicensed-persons.html#private-record-keeping (last visited May 16, 2012) (noting that those not in the firearms business may sell guns without record-keeping requirements and need only follow a few basic laws when doing so, unless more is required by state law).

24. Gun Control Act of 1968, 18 U.S.C. § 922(g) (2006).

25. *See, e.g.*, FLA. STAT. ANN. §§ 790.01–.336 (West 2007); WASH. REV. CODE ANN. § 9.41.050 (West 2010). *But see* VT. STAT. ANN. tit. 13, §§ 4003–16 (2009) (lacking a licensing requirement for public carry and placing virtually no place or manner restrictions on the armed citizen).

26. 720 ILL. COMP. STAT. ANN. 5/24-1(a)(4) (West 2010). The District of Columbia also generally prohibits the carry of firearms outside of the home. D.C. CODE § 22-4504(a) (LexisNexis 2010).

27. *See US State Pages*, HANDGUNLAW.US, http://www.handgunlaw.us (last updated Feb. 1, 2012) (reviewing state laws to create a map showing that most states allow for objectively issued permits or do not require any permit to carry a gun in public).

28. *E.g.*, MINN. STAT. ANN. § 624.714(2) (West 2012); OHIO REV. CODE ANN. § 2923.125 (West 2004).

29. *US State Pages*, *supra* note 27 (indicating states that use may-issue permitting systems in beige). Although Alabama is technically a may-issue state, Alabama sheriffs now universally dispense with "good cause" require-

that, in addition to the requirements of the shall-issue systems, the issuing authority—typically the local police or county sheriff with jurisdiction over the applicant's residential address—may make a discretionary decision as to whether an applicant should receive the permit, even if all the other requirements are fulfilled. Generally, such determinations take the form of an issuing authority's subjective opinion of an applicant's fitness to carry a firearm in public, whether the applicant has shown a satisfactory need to carry a handgun, or both.[30]

Typical weapon-carry laws, both shall- and may-issue, specify restrictions on the places in which permit holders may carry their firearms in public.[31] Many states do not allow their permit holders to carry guns into the secure areas of airports, schools, bars, prisons, private establishments posting signage asking that guns not be carried inside, or other sensitive places.[32] States also regularly restrict the manner in which weapons may be carried, most often regulating whether the firearm must be concealed from plain view by the licensee and by specifying that they cannot be intoxicated by drugs or alcohol while armed.[33] Other restrictions exist, particularly under may-issue schemes where the permit has been granted only for a limited purpose.[34] Many states honor the carry permits of at least some other states in the same way that they recognize a driver's license.[35] Applications for permits to carry in public, under both

ments voluntarily and thus function almost identically with shall-issue state permit regimes. *Shall-Issue, May-Issue, No-Issue and Unrestricted States*, BUCKEYE FIREARMS ASS'N, http://www.buckeyefirearms.org/node/6744 (last visited May 16, 2012).

30. *E.g.*, N.J. ADMIN. CODE § 13.53-2.3(a) (2007) (requiring the applicant to have both "good character" and "a justifiable need to carry a handgun").

31. *E.g.*, N.C. GEN. STAT. § 14-269.2 to -.4 (2009).

32. *E.g.*, TEX. PENAL CODE ANN. § 46.03 (West Supp. 2010).

33. *E.g.*, MINN. STAT. § 624.7142 (2010) (setting penalties for permit holders who carry handguns while under the influence of alcohol and specifying different penalties depending on a person's blood alcohol concentration); TEX. PENAL CODE ANN. § 46.035 (penalizing permit holders who intentionally fail to keep their handguns concealed).

34. *E.g.*, N.Y. PENAL LAW § 400.00(2) (McKinney 2008) (authorizing the state to issue several types of permits with various restrictions on where and under what circumstances a handgun may be carried, as well as a permit that does not contain such restrictions); Letter from Jason A. Guida, Dir. of the Firearms Record Bureau, Commonwealth of Mass., to Applicant (Dec. 22, 2010), *available at* http://www.mass.gov/eopss/docs/chsb/firearms/non-resident-application.pdf (listing potentially applicable restrictions to nonresident applications for permits).

35. *E.g.*, COLO. REV. STAT. § 18-12-213 (2010) (recognizing, with certain restrictions, any permit from another state that recognizes a Colorado permit);

may- and shall-issue systems, are almost always more complicated, time-consuming, and expensive to complete than the analogous laws governing the simple possession of firearms.[36]

B. JUDICIAL REVIEW IN THE FIRST AMENDMENT CONTEXT

As noted earlier, with the Supreme Court clarification that gun laws placing restrictions on individuals must be scrutinized in light of the Second Amendment, some framework for the invalidation of impermissibly broad gun-control laws must be adopted by the courts.[37] In *Heller*, the Supreme Court hinted that it may borrow First Amendment doctrines to adjudicate the permissibility of firearm regulations.[38] Several lower courts have followed the Supreme Court's lead and decided cases in light of First Amendment principles—most visibly, the doctrines of strict scrutiny and intermediate scrutiny.[39] For this reason, these doctrines and their attendant considerations are summarized in this Section.

Strict scrutiny is a test reserved for core elements of First Amendment rights, such as freedom from governmental suppression of speech.[40] This test places an onerous burden on the government to justify a law that purports to allow it to directly

IND. CODE § 35-47-2-21 (LexisNexis 2009) (recognizing permits from all other states).

36. *Compare* OHIO STATE ATT'Y GEN., STATE OF OHIO APPLICATION FOR LICENSE TO CARRY A CONCEALED HANDGUN (2011), *available at* http://www.ohioattorneygeneral.gov/files/Forms/Forms-for-Law-Enforcement/Crime-and-Violence-Prevention/Standard-Concealed-Carry-License-App-.aspx (requiring a four-page application, training, fees, extensive questioning, and more before a permit will be issued), *with* OHIO REV. CODE ANN. § 2923.20(a)(1) (West 2004) (requiring only that firearms not be "recklessly" sold to prohibited persons).

37. *See infra* Part I.A.

38. *See* District of Columbia v. Heller, 554 U.S. 570, 582, 591 & n.14, 595, 606, 620 n.23, 626, 635 (drawing several parallels between the First and Second Amendments).

39. *See, e.g.*, Ezell v. City of Chi., 651 F.3d 684, 706–08 (7th Cir. 2011) (examining the applicability of both tests in the Second Amendment context); United States v. Skoien, 614 F.3d 638, 641–42 (7th Cir. 2010) (noting that some level of scrutiny is required to evaluate a law denying possession of a firearm to one convicted of a misdemeanor crime of domestic violence).

40. *See* R.A.V. v. City of Saint Paul, 505 U.S. 377, 382 (1992) (noting that proscription of speech based on disagreement with the message is a presumptively invalid use of government power); Simon & Schuster, Inc., v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115–16 (1991) (noting that taxes or other regulations based on the content of expression will normally conflict with the First Amendment (citing Ark. Writers' Project, Inc., v. Ragland, 481 U.S. 221, 230 (1987))).

infringe on these core rights. The doctrine of strict scrutiny presumes the governmental regulation invalid.[41] In order to overcome this presumption, the government must show that its regulation serves a "compelling" state interest, and in addition, that this interest is served in the way that is least burdensome to the restricted First Amendment activity.[42] The level of importance of the government interest at stake is a key factor because the courts do not lightly declare government interests "compelling."[43]

Intermediate scrutiny, on the other hand, requires only that the government tread carefully when enacting laws that, although not directly abridging core civil liberties, nevertheless impose practical burdens on those seeking to exercise their rights. Where, for example, the government seeks not to regulate First Amendment rights themselves and instead enacts policies that—while burdening those rights—serve other legitimate purposes, the courts apply intermediate review to the challenged laws.[44] Even where free speech is at its most protected, such as on a public street, the government may place reasonable time, place, or manner restrictions on the expressive activity in order to achieve these secondary goals.[45] When the government does so, the law will normally be subjected only to intermediate scrutiny.[46]

When applying intermediate scrutiny, a court will first ask if the government had the constitutional power to pass the law.[47] If it did, the regulation needs to further an "important" state interest unrelated to the suppression of speech.[48] Unlike

41. *R.A.V.*, 505 U.S. at 382.

42. *Ark. Writers' Project*, 481 U.S. at 231.

43. *See, e.g.*, *Simon & Schuster, Inc.*, 502 U.S. at 119–21 (preventing criminals from profiting from their crimes, at least through the selective seizure of book profits as opposed to other assets, is insufficient grounds to regulate in a content-based manner); Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 586 (1983) (raising taxes is insufficient grounds for content-based regulations); Carey v. Brown, 447 U.S. 455, 465 (1980) (holding that the right to privacy is insufficient grounds for content-based regulation).

44. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (requiring that the government interest be unrelated to the suppression of speech in order for intermediate scrutiny to apply).

45. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

46. *See id.* at 798 (noting that the *O'Brien* test is the appropriate review of the government's reasonable time, place, and manner regulations on speech).

47. *O'Brien*, 391 U.S. at 377.

48. *Id.*

strict scrutiny, however, the Supreme Court has made it clear that the state does not face a high bar justifying a government interest as "important."[49] The burden imposed by the law must still be no broader than necessary to advance the interest in question, and importantly, the speaker must still have ample alternative opportunity to deliver his or her message.[50]

Thus, at least in the arena of the First Amendment, the deference given to the government in making and enforcing its laws is low, and judicial oversight is high, when fundamental rights are directly burdened. In contrast, the courts give greater leeway to the passage and enforcement of restrictions that incidentally burden these rights. Because of the great disparity in the difficulty of overcoming these two different tests, litigants have big incentives to persuade the courts to apply the level of scrutiny most beneficial to their litigation objectives.

One major determinant of how to scrutinize gun-control laws—namely the declaration that the Second Amendment in general and the right to self-defense in particular are fundamental rights—was settled in *McDonald*.[51] However, other key questions remain unanswered with respect to common state gun restrictions, such as when a state's need for weapon restrictions becomes important or even compelling, whether the right to self-defense extends beyond an individual's home, and whether certain burdens on the self-defense right are direct or incidental. The next Part analyzes how well the strict- and intermediate-scrutiny doctrines are suited to test various major gun-control laws now on the books.

49. *See, e.g.*, Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 683 (1992) (finding that the government has an important interest in enacting regulations so that passengers at airport terminals do not have to alter their walking paths to avoid religious solicitors); Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 650 & n.13 (1981) (noting that convenience of the fairgoers and even managing the flow of a crowd at government fairgrounds were important interests for purposes of intermediate scrutiny); Smith v. City of Fort Lauderdale, 177 F.3d 954, 956 (11th Cir. 1999) (finding that protection of business from beggars annoying customers on the beach is an important state interest).

50. *O'Brien*, 391 U.S. at 377; *see also Ward*, 491 U.S. at 791 (elaborating on the requirement of leaving open ample alternative methods of communication).

51. *See* McDonald v. City of Chi., 130 S. Ct. 3020, 3043 (2010) (rejecting the suggestion that the Second Amendment should be treated less favorably by the Court than other provisions contained in the Bill of Rights).

II. ANALYSIS OF STRICT- AND INTERMEDIATE-SCRUTINY TESTS IN THE GUN-CONTROL CONTEXT

Not long after the Supreme Court decided *Heller*, commentators began calling for a decision as to what constitutional test should be used to determine the validity of gun-control laws.[52] The language in *Heller* itself precludes the possibility of rational basis review,[53] leaving most interested parties to wrangle over whether strict or intermediate scrutiny should apply. This Part uses examples of current gun regulations to analyze the appropriateness of each test, ultimately concluding that neither test alone is sufficient to adjudicate challenges to gun regulations.

Strict scrutiny is a difficult doctrine for a governmental unit to legislate or enforce its laws under, and as such, a flat declaration that all gun-control laws should be scrutinized using this test would certainly lead to a more robust Second Amendment.[54] However, such severe protection for gun rights would be well out of step with other civil-liberties jurisprudence,[55] and would likely lead to results unacceptable to all but the most extreme gun-rights advocates. In any event, the Court has clearly signaled that many types of current gun regulations may well be permissible—language that casts serious doubt on the possibility the Court will adopt blanket application of strict scrutiny in future Second Amendment cases.[56] This is not to say that strict scrutiny categorically fails to properly answer Second Amendment questions—indeed it answers some quite eloquently—but the analysis will show that strict scrutiny alone is not well suited to answer all Second Amendment questions likely to come before the Court.

Intermediate scrutiny, on the other hand, recognizes that even fundamental rights must give way to other reasonable

52. *See, e.g.*, Stephen Kiehl, *In Search of a Standard: Gun Regulation After* Heller *and* McDonald, 70 MD. L. REV. 1131, 1156–60 (2011) (arguing that except in rare circumstances, intermediate scrutiny should apply). *See generally* Lawrence Rosenthal & Joyce Lee Malcolm, McDonald v. Chicago*: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437 (2011) (presenting two scholars' viewpoints regarding which standard of scrutiny should apply to the Second Amendment).

53. District of Columbia v. Heller, 554 U.S. 570, 628–29 & n.27 (2008).

54. *See generally* R.A.V. v. City of Saint Paul, 505 U.S. 377, 395–96 (1992) (striking down an ordinance that prohibited hate speech because it failed strict scrutiny).

55. *See Ward*, 491 U.S. at 791 (noting that even restrictions on speech are not always subject to strict scrutiny).

56. *Heller*, 554 U.S. at 626–27 & n.26 (listing several types of broad gun regulations that are "presumptively lawful").

needs of society.[57] The lower burden imposed by intermediate scrutiny merely requires the government to legislate carefully in its attempt to realize those societal needs in order to make sure that the burdens are imposed for an important reason and that the prohibitions do not swallow up a meaningful opportunity to exercise the right.[58] The Supreme Court noted in *Heller* and *McDonald* that it did not intend to let its recognition of the Second Amendment as a fundamental right snuff out reasonable gun-control legislation, and intermediate scrutiny of these laws will certainly allow for that result.[59] Nevertheless, this test alone is improper for—and in fact, incapable of—protecting the core Second Amendment right of self-defense.

A. STRICT SCRUTINY VS. INTERMEDIATE SCRUTINY: FIREARM DISABILITIES BASED ON CRIMINAL HISTORY

One of the simplest and most common types of gun-control laws in the United States are laws that place a lifetime prohibition on convicted criminals from possessing a firearm.[60] The theory is that if a person has shown that he or she cannot be trusted to obey the law, then society certainly does not want him or her to have access to a gun because of the serious potential that such a person may cause severe harm.[61] In strict scrutiny terms, this argument is a public-safety justification that the government would hypothetically attempt to characterize as "compelling" to a reviewing court. It should be obvious that, unlike in the First Amendment context, the government will not always have a difficult time convincing a court that such a public safety justification is a compelling-government interest able to withstand strict scrutiny.[62]

57. *See, e.g.*, *Ward*, 491 U.S. at 798–99 (upholding an ordinance that allowed government officials to restrict the volume of a message to preserve the peace and quiet of the surrounding neighborhood).

58. *Id.* at 791.

59. *Heller*, 554 U.S. at 626–27.

60. *See, e.g.*, Gun Control Act of 1968, 18 U.S.C. § 922(g) (2006) (prohibiting anyone who has been convicted of a crime punishable by more than one year in jail from possessing a firearm).

61. *See* David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 590 (1987) (explaining that the impetus for the first major federal gun-control legislation in the United States stemmed from prohibition-era gangsters' effective and deadly use of submachine guns and sawed-off shotguns).

62. *Heller*, 554 U.S. at 689 (Breyer, J., dissenting) (noting that in gun cases, the government should theoretically have little trouble justifying a compelling interest in public safety in the strict-scrutiny context).

That said, the right to self-defense is now considered fundamental.[63] Because lifetime possession bans for criminals are a direct infringement on the core self-defense right,[64] courts should not readily accept government contentions that all criminality raises public safety concerns serious enough to justify this direct burden on Second Amendment rights. Infringements on fundamental rights, even—and perhaps especially—for unpopular groups, deserve careful review by the judiciary when the government attempts to abridge them.[65]

While it is relatively uncontroversial to say that criminals need to be punished, it is quite clear that the Constitution would not permit the permanent removal of other fundamental rights, such as the right to speak freely or the right to a trial by jury, even for those who have been previously convicted of very serious crimes.[66] Nevertheless, the right to bear arms presents special dangers from its misuse that these other rights do not. There may be good reason to permanently strip gun rights from some individuals, but the fundamental nature of the right to bear arms means that courts should require some minimum level of criminality before accepting as compelling any public-safety justifications the government advances. Indeed, it seems logical for courts to require a connection between an offender's past criminal behavior and the future probability he or she will cause harm if given access to a firearm, before courts deem a public safety argument by the government compelling.

This is not to say that a detailed, fact-specific inquiry is needed in the case of every defendant.[67] Rather, when criminal history is used as a justification for a law denying firearms rights to convicted offenders, the courts could look to how the

63. *See* McDonald v. City of Chi., 130 S. Ct. 3020, 3050 (2010) (concluding that since the Second Amendment is a fundamental right, it must be incorporated against the states).

64. Even under the narrowest reading of *Heller*, a lifetime ban on simple possession is most certainly a direct infringement on the core Second Amendment right of self-defense because one subject to such a disability can never again possess a firearm.

65. *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 3019 (2010) (Alito, J., dissenting) (noting that special considerations are normally required for unpopular groups in the First Amendment context).

66. Even the ability to disenfranchise criminals, while an equally severe sanction, is explicitly supported by the Fourteenth Amendment. U.S. CONST. amend. XIV, § 2.

67. *See* R.A.V. v. City of Saint Paul, 505 U.S. 377, 395–96 (1992) (analyzing the strict-scrutiny test in terms of the law in question, rather than the individual who the law affects).

law operates, taking into account such factors as whether the law affects offenders whose predicate crime is one of violence; whether the offense is a felony; and whether the convict is a repeat offender. These factors can assist courts in determining whether a challenged law is likely to prevent the misuse of a firearm in the future.[68] The analysis of these kinds of factors will provide a simple way for courts to assess whether the government's offered justification for a particular law is truly compelling.

For example, few would argue that repeat, violent felons should be allowed to possess a gun. Such offenders have shown not only that they have the capacity to commit serious crimes of violence, but also that they have not changed their ways even after being sentenced to a presumably serious punishment.[69] Even in the case of a first-time violent felony offender, although the criminal has not necessarily shown a propensity to repeat his behavior, violent felonies are generally regarded by society as the most reviled infractions of our criminal codes.[70] The risk of allowing such a person access to firearms is too great to require the government to place much faith in his rehabilitation.[71] Thus, in this scenario, the state interest in preventing such a person from obtaining a firearm would certainly be compelling[72] because the connection between past behavior and future risk is clear.

On the flipside, nonviolent misdemeanants present a similarly easy case. Such criminals simply do not present the same

68. These are not the only possible factors to consider. For example, predicate convictions linked to organized crime or to drug distribution may demonstrate a connection between past behavior and future fear of firearm misuse sufficient to justify a state denying such convicts access to firearms.

69. *See* MODEL PENAL CODE § 1.04(2) (1962) (defining felonies as crimes punishable by imprisonment for more than one year or by death).

70. Most state death penalty statutes require commission of a violent felony, usually murder. *See, e.g.*, OR. REV. STAT. ANN. § 163.105 (West Supp. 2010) (allowing for the death penalty for aggravated murder).

71. *See generally* PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf (finding that over sixty percent of prisoners convicted of a violent crime were rearrested for a new crime within three years of their release and that the subsequent crime almost always involved a serious misdemeanor or felony).

72. *See generally* Simon & Schuster, Inc., v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118–19 (1991) (asserting that the State has a compelling interest in "ensuring that victims of crime are compensated by those who harm them" and "ensuring that criminals do not profit from their crimes").

danger to society that their violent-felon counterparts do.[73] Although these offenders certainly need to be held accountable for their crimes—and may even pose a significant threat of recidivism[74]—where they have chosen to leave violence out of the equation, the State should not so easily brush their fundamental right to defend themselves aside. Laws permanently abridging their Second Amendment rights would not make a sufficient showing that the fear of future firearm misuse is reasonably grounded in such minor, limited past misconduct, and courts should reject government assertions that the public safety interest as to those convicts is compelling.[75]

The harder cases, not surprisingly, fall in between these two extremes. A nonviolent felon, for example, doubtless requires serious punishment—perhaps even very serious punishment—for his or her crime.[76] However, this need is met through sentencing.[77] Lenient judicial review of laws collaterally impairing the fundamental right to self-defense, however, are not justified if the offender does not show any propensity for violence in general or the misuse of a firearm in particular. Where the connection between an offender's past crime and future potential to misuse a gun is lacking, even in a felony case, courts should again reject a contention that a lifetime possession ban serves a compelling state interest.

Arguably the closest call between the societal need for safety and respect for fundamental Second Amendment rights manifests itself in the case of the violent misdemeanant. Here, only one factor, violence, is present. Violence is the single most com-

73. *Cf.* K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 273 n.5 (2009) (discussing FBI arrest statistics for minor, nonviolent crimes). Infractions for disorderly conduct, drunkenness, vandalism, curfew, loitering, liquor law infractions, and other minor crimes account for nearly twelve million of the fourteen million tracked arrests. *Id.*

74. Chol Daniel Kim, *Chapter 16: Expanding the Pilot Program that Assists Indigent Inmates After Release*, 40 MCGEORGE L. REV. 459, 464 (2009) (noting significant recidivism rates among misdemeanor offenders, particularly if no jail time is served).

75. Laws categorically denying firearms rights to nonviolent misdemeanants are rare, if they exist at all. Such a law is proposed here as a hypothetical to round out the strict-scrutiny analysis.

76. *See* Zachery Kouwe, *Fraud Victims Want Maximum for Madoff*, N.Y. TIMES, June 16, 2009, at B3 (recounting losses resulting from Bernard Madoff's $65 billion Ponzi scheme).

77. *See* Diana B. Henriques, *Madoff, Apologizing, Is Given 150 Years*, N.Y. TIMES, June 30, 2009, at A1 (discussing the imposition of a 150-year sentence on Bernard Madoff, despite his advanced age).

pelling reason to permanently prohibit firearm possession because of the serious harm that a propensity for violence, coupled with access to firearms, can cause.[78] The ability of government to deny civil rights to persons convicted of serious crimes, whether or not violent, has long been established.[79] Given the Supreme Court's recent decisions, however, the judiciary should take a skeptical view of laws purporting to deny those convicted of a single crime of misdemeanor violence from ever possessing a firearm and demand more justification from the government before it is allowed to exercise such a severe sanction.

The classification of a crime as a misdemeanor is the traditional expression of society's decision not to brand the criminal harshly.[80] If this is what society has decided, then a subsequent decision to collaterally punish an offender through permanent removal of fundamental Second Amendment rights becomes suspect.[81] The nature of a misdemeanor conviction indicates both that the criminal is not a serious danger to others and is not deserving of serious punishment.[82] Under these circumstances, the public safety interest probably falls short of compelling.[83]

78. *Cf.* District of Columbia v. Heller, 554 U.S. 570, 636 (2008) (taking notice of the problem presented by handgun violence in the United States).

79. *Cf.* U.S. DEP'T OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS 1–5 (1996), *available at* http://www.ncjrs.gov/pdffiles1/pr/195110.pdf (discussing the general ability of the state and federal governments to impose civil disabilities on convicted criminals).

80. *See* 18 U.S.C. § 3559(a)(6)–(8) (2006) (defining as misdemeanors crimes punishable by as little as five days of incarceration); U.S. DEP'T OF JUSTICE, *supra* note 79 (referring throughout to the imposition of civil disabilities by the state and federal governments only for felonies).

81. *See Heller*, 554 U.S. at 626 (finding that although the Second Amendment protects an important individual right, that right has its limits, and indicating that the longstanding prohibitions on felons possessing firearms are likely to remain viable into the future). By implication, laws denying possession to misdemeanants would then rest on shakier constitutional ground. *See id.*

82. *See* 18 U.S.C. § 3559(a)(6)–(8).

83. One notable point of contention is the current federal lifetime possession ban on anyone convicted of a misdemeanor crime of domestic violence and its state analogues. Gun Control Act of 1968, 18 U.S.C. § 922(g)(9) (2006). Recently, some courts have attempted to reconcile this issue through various methods of justification, not the least of which is that if the assault had been perpetrated against a stranger, it would have been a felony; yet, it is only a misdemeanor when committed against a family member. *See, e.g.*, United States v. Skoien, 614 F.3d 638, 643 (7th Cir. 2010). Whether the proper solution to this issue is for states to rebrand these crimes as felonies if they want to ban domestic abusers from firearm possession, or to carve out a special ex-

If a violent misdemeanant repeats his or her crimes, however, society now has additional concerns. If the criminal commits a series of violent offenses, although of only moderate severity, courts should not zealously protect that individual's fundamental rights in the hope that his or her crimes will not eventually become more harmful. The serious risk that this kind of offender will eventually use a weapon in the course of his or her violence justifies recognition of the State's compelling interest in denying that individual access to a firearm.[84]

Application of the intermediate-scrutiny test to any lifetime possession ban ignores the obvious fact that such statutes are a direct, rather than incidental, burden on one's Second Amendment rights. This makes intermediate scrutiny inapplicable in the first instance.[85] While some might argue that the main goal of these laws is societal safety, and that the burden to criminals is an incidental consequence of those laws, such an argument does no more than semantically recast the justification for the societal interest at stake into an assertion that the burden to the right is indirect.

This would be akin to arguing that a law forbidding any news coverage of the 2008 market crash would not be suppression of speech, but rather an attempt to prevent an economic meltdown by putting an "incidental" burden on the press's free-speech rights. The problem becomes even clearer when these lifetime-possession bans are tested under the "meaningful alternative opportunity" prong of the intermediate-scrutiny test. Indeed, there is expressly never going to be *any* opportunity for someone subjected to a lifetime ban on simple possession to meaningfully exercise his or her Second Amendment right to self-defense.[86] The absolute inapplicability either of these parts of the test to such laws highlights the inability of intermediate scrutiny to properly adjudicate their constitutionality.

One's criminal background is of grave concern to the government when that person attempts to obtain possession of a

ception in Second Amendment jurisprudence for such criminals is beyond the scope of this Note.

84. *See* BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, VIOLENT FELONS IN LARGE URBAN COUNTIES 1 (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/vfluc.pdf (finding that although fifty-six percent of violent felons had a prior conviction record, only fifteen percent had a conviction for a prior violent *felony*).

85. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (describing the intermediate-scrutiny test in terms of incidental burdens).

86. 18 U.S.C. § 922(g).

firearm.[87] The need of society to keep guns out of the hands of serious criminals is great.[88] Despite this need, where fundamental rights are concerned, the government should not be given leave by courts to over solve this problem at the expense of individuals who, despite some poor choices, do not truly represent a threat of violence to others. When criminal history is the justification for permanent removal of Second Amendment rights, the burden to society is small when the courts require the government to exclude minor and nonviolent offenders from the scope of such laws.

As discussed below, because strict scrutiny is not "automatically" fatal in the Second Amendment context—and indeed leads to results largely consistent with the current state of the law—there is little reason to fear that its application to bans based on criminal history will leave violent criminals able to legally purchase firearms.

B. STRICT SCRUTINY VS. INTERMEDIATE SCRUTINY: LICENSING REQUIREMENTS FOR SIMPLE POSSESSION OF A FIREARM

Some states require licensure for simple possession of a firearm,[89] and almost every state requires a license to carry a firearm in public.[90] Normally, application procedures are simple, inexpensive, and the delay prior to issuance is short.[91] Permits for public carry of firearms are almost always more complicated, more expensive, and take longer to issue than permits for simple possession.[92] Nevertheless, even applications for public carry permits normally require only a few pages,[93]

87. *See, e.g.*, Michael Luo, *Guns in Public, and out of Sight*, N.Y. TIMES, Dec. 27, 2011, at A1 (documenting the serious consequences of allowing criminals access to firearms).

88. *Id.*

89. *See, e.g.*, 430 ILL. COMP. STAT. ANN. 65/1 (West Supp. 2011); MASS. ANN. LAWS ch. 140, § 129C (LexisNexis 2007).

90. *See, e.g.*, FLA. STAT. ANN. § 790.01 (West 2007); WASH. REV. CODE ANN. § 9.41.050 (West 2010). *But see* VT. STAT. ANN. tit. 13, § 4003 et. seq. (2009) (lacking a licensing requirement for public carry and placing virtually no place or manner restrictions on the armed citizen).

91. *See, e.g.*, ILL. STATE POLICE, *supra* note 22.

92. *See supra* note 36.

93. *See, e. g.*, COMMONWEALTH OF PA., APPLICATION FOR A PENNSYLVANIA LICENSE TO CARRY FIREARMS (2007), *available at* http://www.co.centre.pa.us/sheriff/license_to_carry.pdf (requiring a two-page application); WIS. DEP'T OF JUSTICE, APPLICATION FOR CONCEALED WEAPON LICENSE (2011), *available at* http://www.doj.state.wi.us/dles/cib/ConcealedCarry/concealed-carry-application-11-11.pdf (requiring a five-page application, four of which are either instructions or legal reminders).

rarely cost more than $100,[94] and are frequently issued within thirty, sixty, or sometimes ninety days.[95] Some states, however, make the administrative procedures extremely expensive, confusing, or complicated, and impose onerous waiting periods prior to issuance—even for permits for simple possession.[96]

Whether a law that requires licensing for simple possession should be subjected to review under strict or intermediate scrutiny can be somewhat more complicated than determining how other laws should be scrutinized. This is because it may not be readily apparent if the questioned licensing procedures amount only to an incidental burden, or to a direct infringement on the Second Amendment. For example, a law may require that an applicant wishing to purchase a handgun must fill out a one page form, pay a small (or no) fee, and wait for the license to arrive in the mail.[97] Minnesota, which has such a law, requires that the issuing authority make a determination within a set period of time—seven days.[98] In the event that a license is not approved in this time period, or if it is denied, the applicant can avail him or herself of effective procedural protections.[99]

New Jersey has a law facially similar to that in Minnesota, but it does not require the issuing authority to approve or deny the application within any set period of time.[100] The New Jersey law also allows for a denial based on extremely vague standards, such as if the applicant is not considered to possess "good character and good repute in the community in which he

94. *See, e.g.*, MINN. STAT. ANN. § 624.714(3)(f) (West 2012) (allowing the sheriff to charge actual costs of issuing the permit, not to exceed $100); OR. REV. STAT. ANN. § 166.291(5)(a) (West 2011) (totaling $65 in fees).

95. *See, e.g.*, FLA. STAT. ANN. § 790.06(6)(c) (West 2011) (requiring issuance, denial, or request for further information within ninety days of application); § 166.292(1) (requiring issuance of approved applications within forty-five days).

96. N.Y. PENAL LAW § 400.00(4-a) (McKinney 2012) (allowing up to six months processing time without cause, and more time with good cause shown); N.Y.C. POLICE DEP'T, *supra* note 22 (requiring a fifteen-page application and nearly $450 in fees).

97. *See, e.g.*, MINN. STAT. ANN. § 624.7132 (West 2012) (requiring a permit for the purchase of a handgun or military-style rifle).

98. *Id.* § 624.7132 subdiv. 4.

99. *Id.* § 624.7132 subdiv. 13 (allowing individuals denied permits a hearing to review the sheriff's decision to deny the permit).

100. *See* N.J. STAT. ANN. § 2C:58-3 (West 2011) (failing to specify any time limitations on the decision to approve or deny the application); N.J. ADMIN. CODE § 13:54-1.4 (2011) (same).

lives,"[101] or if "the issuance would not be in the interest of the public health, safety or welfare."[102] Like Minnesota, New Jersey requires the police to inform the applicant of the reason for a denial and allows for an appeal if the police deny the application.[103] But without any requirement that the police issue the permit within a reasonable period of time, it is unclear at what point, if ever, a failure to issue confers standing to appeal such inaction on the grounds it should be considered a denial. This leaves applicants on uncertain footing if the police fail to either issue or deny the permit, no matter how long ago they applied.[104] And although a New Jersey applicant must be informed of the reasons for a denial, the police are also free to make informal investigations and use subjective determinations to deny these permits.[105] Thus, even if one does appeal a denial under this scheme, the applicant is really only trading the subjective opinion of the police for the subjective opinion of the court—which gives great deference to the subjective determinations of the police officials that initially deny the permit.[106]

Other licensing regimes are easier to classify as direct infringements. For example, New York expressly allows six months for approval of a permit for simple possession, and extensions are available for cause.[107] Its application packet is fifteen pages long and costs nearly $450 to complete.[108] Independent of any state interests that might be advanced in support of such a licensing regime, whether they are ultimately justified or not, it is difficult to say that licensing procedures such as these do not significantly interfere with citizens' ability to exercise their Second Amendment rights.

Ultimately, the proper standard of review will depend on the purpose and effect of the licensing law. If the purpose or ef-

101. N.J. STAT. ANN. § 2C:58-3(c).

102. *Id.* § 2C:58-3(c)(5).

103. ADMIN. § 13:54-1.12.

104. *See id.* (failing to offer any appeal process absent an explicit permit denial); *cf. In re* Application of Boyadjian, 828 A.2d 946, 955 (N.J. Super. App. Div. 2003) (noting that police authorities have broad, informal discretion in conducting investigations as to the fitness of particular individuals to own a handgun).

105. *See Boyadjian*, 828 A.2d at 955–56 (noting that police investigations of an applicant's fitness to own a firearm deserve deference and that police determinations in this regard are "presumptively reliable").

106. *See id.*

107. N.Y. PENAL LAW § 400.00(4-a) (McKinney 2008).

108. N.Y.C. POLICE DEP'T, *supra* note 22.

fect is not to obstruct gun ownership in terms of waiting time, expense, complication, or other barriers, then the law need only be defended under the intermediate-scrutiny standard.[109] Where a licensure law imposes serious hurdles to gun ownership, then the restrictions—justified or not—should be defended in terms of strict scrutiny.[110]

C. STRICT SCRUTINY VS. INTERMEDIATE SCRUTINY: TIME, PLACE, AND MANNER RESTRICTIONS

Even in the First Amendment context, laws that would ordinarily be subject to strict scrutiny are sometimes held to a less stringent level of review.[111] One of the most thoroughly developed of these doctrines is the Supreme Court's allowance of governmental regulation executed in a reasonable time, place, or manner.[112] So long as the government seeks to serve an interest that is unrelated to the suppression of speech, it may nevertheless burden speech in its mission to achieve that interest if the regulation is reasonable.[113]

Similar reasoning is applicable in the context of the Second Amendment. There may well be times that the right to possess a firearm for self-defense reasonably gives way to other important needs of society. In cases where a gun regulation falls short of direct infringement on the core self-defense right, courts should only subject those laws to intermediate scrutiny.[114] So long as such indirect burdens advance important gov-

109. *See* Citizens United v. FEC, 130 S. Ct. 876, 898–99 (2010) (noting that strict scrutiny is the appropriate test when serious hurdles, such as censorship based on the speaker or the message content, are implicated "whether by design or inadvertence").

110. *See id.*

111. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (holding that even in a public forum such as a park—where First Amendment rights are generally most strongly protected—government regulation may nevertheless be subjected to mere intermediate review provided that the regulation is not content based).

112. *See id.* at 803 (holding that the government's sound-amplification guideline reasonably regulated the place and manner of expression); *see also, e.g.*, Hill v. Colorado, 530 U.S. 703, 725 (2000) (affirming an appellate decision that certain regulations on abortion protesters were reasonable as to their time, place, and manner and therefore properly subject only to the *Ward* intermediate scrutiny test); City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (recognizing that expressive conduct, in this case nude dancing, may be regulated and subjected to less than strict scrutiny when the governmental goal is something other than suppression of that expression).

113. *E.g.*, *Ward*, 491 U.S. at 791.

114. *See id.* (describing the intermediate-scrutiny test in terms of inci-

ernment interests, the restrictions are not overly broad, and citizens retain meaningful opportunities to vindicate their self-defense rights, then the regulations should survive constitutional challenges under this standard.[115]

1. Time Restrictions

The time restrictions in the First Amendment context are often enacted by laws whose purpose is to preserve the peace and quiet of others.[116] Those exercising their Second Amendment rights, however, do not tend to disrupt the peace and quiet of those trying to sleep or enjoy a park.[117] Even the discharge of a firearm is unlikely, as a practical matter, to have this effect because outdoor shooting ranges are purposefully remote, and indoor shooting ranges are often designed to control the escape of sound.[118] Nevertheless, time restrictions on the discharge of firearms impose such a minor burden on gun owners that even in state laws that preempt nearly all other local regulation of firearms, a common exception to these restrictions typically allows local government to regulate, among other things, the time of day when a gun may be fired.[119]

While it would seem intuitive that part of the right to self-defense would include maintaining proficiency with the weapon

dental burdens on protected interests).

115. *See id*. *But see* District of Columbia v. Heller, 554 U.S. 570, 592 (2008) (referring to self-defense, or "the individual right to possess and carry weapons in case of confrontation," as the core purpose of the Second Amendment right).

116. *See, e.g.*, *Ward*, 491 U.S. at 785–86 (upholding such a restriction promulgated by the City of New York to deal with concert noise issues).

117. This assertion simply refers to the act of carrying a weapon on one's person for the purpose of self-defense—probably concealed—while going about one's business. Firing or even brandishing a firearm in a public place, without the rare justification presented in a legitimate self-defense scenario, is of course lawless and not an individual right within the meaning of the Second Amendment.

118. *See* J. HERNANDEZ ET AL., U.S. ARMY CORPS OF ENG'RS, DEVELOPMENT OF RANGE DESIGN ELEMENTS AND QUALITY CONTROL/QUALITY ASSURANCE GUIDANCE TO REDUCE MAINTENANCE REQUIREMENTS ON TRAINING RANGES 2–3 (2006), *available at* http://www.cecer.army.mil/techreports/ERDC-CERL_CR-06-3/ERDC-CERL_CR-06-3.pdf (noting the remoteness of outdoor ranges); *Firing Range*, WHOLE BUILDING DESIGN GUIDE STAFF, NAT'L INST. BLDG. SCIS., http://www.wbdg.org/design/firing_range.php (last updated June 20, 2011) (noting design considerations as key to mitigating the transmission of noise outside the range).

119. *See* MINN. STAT. ANN. § 471.633(a) (West 2008) (allowing regulation of the discharge of firearms at the municipality level); *see also* N.D. CENT. CODE § 62.1-01-03 (2010) (failing to preempt local governments from regulating the discharge of firearms in the first place).

to be used in a self-defense encounter,[120] society does have an interest in maintaining the peace and quiet of its neighborhoods, particularly at night when people are trying to sleep.[121] A local law prohibiting nighttime shooting practice, for example, would advance that interest although it would burden the right to self-defense. However, such an imposition is both minimal and allows for ample alternative opportunity for the armed citizen to maintain proficiency—namely any time during the day. This type of incidental restriction fits perfectly into intermediate-scrutiny jurisprudence. Application of strict scrutiny to a law like this is unwarranted because the incidental nature of the burden to the self-defense right is so clear, and the rigors of that test would work an undue hardship on the government in seeking to accommodate society's other reasonable needs.[122]

The same restriction on the *possession* of a self-defense weapon at night, however, probably creates a direct and severe burden on the right to self-defense by preventing a meaningful opportunity for citizens to protect themselves at a time of day well-known for its incidence of criminal attack.[123] If the government were to pass such a law, the direct nature of its burden would no longer allow for intermediate scrutiny.[124] It is unclear what compelling societal interest would be at stake in preventing citizens from defending themselves at any particular time of day, but if one was offered by the government, it may be able to survive a challenge, though it should subjected to the judiciary's more stringent test.

120. Ezell v. City of Chi., 651 F.3d 684, 704 (7th Cir. 2011) (suggesting strongly that training and practice with firearms is protected by the Second Amendment).

121. *See Ward*, 491 U.S. at 792 (discussing the government's desire to protect the character of residential areas and the "more sedate activities" that occur there).

122. *Cf.* R.A.V. v. City of Saint Paul, 505 U.S. 377, 382 (1992) (noting the presumptive invalidity of laws subjected to strict scrutiny).

123. *See* RACHEL BOBA, CRIME ANALYSIS AND CRIME MAPPING 196 fig.11.8 (2005) (indicating that a majority of robberies occur between the hours of 6 p.m. and 2 a.m.); *Offense Analysis: United States 2005–2009*, FED. BUREAU OF INVESTIGATION tbl.7 (Sept. 2010), http://www2.fbi.gov/ucr/cius2009/data/table_07.html (indicating that in 2009, for example, nearly fifty-four percent of burglaries occurred either at nighttime or at an unknown time of day).

124. *See Ward*, 491 U.S. at 791 (describing the intermediate-scrutiny test only in terms of incidental burdens on protected rights).

2. Place Restrictions

Place restrictions in the First Amendment context may be enacted for a variety of reasons. The government may wish to curb expressive activity on its business property,[125] it may fear the enhanced risk of criminal activity arising from certain types of speech activities in some places,[126] or it may wish to protect captive audiences from receiving messages they do not want to hear,[127] among others. The key to the constitutionality of these incidental restrictions is that the countervailing societal interest in the prohibition is important and still affords the speaker a meaningful opportunity to reach the intended audience (if they are willing to hear it).[128] If the law regulates the content of a message, or does not allow the speaker a meaningful, alternative opportunity to deliver it, the restriction will be classified as speech suppression by the courts, and must survive—if at all—under the strict-scrutiny test.[129]

Place restrictions in the Second Amendment context, in contrast to time restrictions, are quite likely to be a point of contention in upcoming challenges to gun-control laws. With the Supreme Court declaration that self-defense is *the* core component of the Second Amendment,[130] the question must be asked: If the right to self-defense is so important, should individuals then be able to take a gun with them wherever they go?

Nearly every state has a general prohibition on the carrying of loaded firearms on one's person, but forty-nine states allow citizens to carry weapons outside of their homes.[131] States

125. *See* United States v. Kokinda, 497 U.S. 720, 725 (1990) (noting that when the government acts as a business owner rather than a lawmaker, its actions will be subjected to significantly less judicial scrutiny).

126. *See* MINNEAPOLIS, MINN., CODE OF ORDINANCES § 385.60(a)(3) (2011) (citing, in a typical metropolitan antibegging ordinance, fear of criminal attack as one reason to prohibit certain panhandling activities in listed city locations).

127. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1974) ("While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it.").

128. *See Ward*, 491 U.S. at 791 (noting that the government may impose reasonable restrictions on protected speech if there is still ample opportunity for a speaker to communicate his or her message).

129. *See, e.g.*, R.A.V. v. City of Saint Paul, 505 U.S. 377, 382 (1992) (noting that content-based regulations on speech are subject to strict scrutiny and are "presumptively invalid").

130. *See* District of Columbia v. Heller, 554 U.S. 570, 599 (2008).

131. *See US State Pages*, *supra* note 27 (indicating in red the jurisdictions that both do not issue such permits and also generally prohibit the carrying of firearms in public).

that follow this regime almost universally have a list of prohibited places where permits to carry a gun are not valid and the default rules of prohibition apply.[132] This Note examines a few of the more common restrictions on place here and makes suggestions as to whether the restrictions should be subjected to strict or intermediate scrutiny.

Of the most common restrictions on places where permit holders are not allowed to take their weapons, sensitive areas are perhaps the least controversial.[133] This category includes the secure portion of airports, jails, police stations, court houses, and the like.[134] In each of these places, not only is there a strong government interest in keeping weapons out, but security is also normally very tight in these kinds of locations.[135] Although laws prohibiting weapons in these places would probably even survive strict scrutiny, because the burden here is limited and indirect to the core self-defense right, the proper test is intermediate scrutiny.

Where the government interest in prohibiting weapons is so strong as to be manifested by its willingness to provide weapon screening and armed security at the place in question—and because a permit holder is free to rearm themselves once they leave a sensitive place—carry restrictions in sensitive places should have little trouble passing intermediate scrutiny.

Another standard place restriction is at "crowded events." This includes crowded sporting events, parades, demonstrations, or other similarly crowded places.[136] These places also tend to provide security for patrons and often will have medical personnel on standby in case of an emergency.[137] In such plac-

132. *See, e.g.*, MISS. CODE ANN. § 45-9-101(13) (2011) (listing numerous prohibited locations where individuals may not carry guns).

133. *See generally, e.g.*, Editorial, *Mr. Ridge's Red-Alert Day*, N.Y. TIMES, Dec. 1, 2004, at A30 (assuming the need for tight security at a long, nonexclusive list of sensitive places, including airports).

134. *E.g.*, N.M. STAT. ANN. § 29-19-11 (West 2011) (prohibiting firearms in any courthouse, absent permission from the presiding judge); S.D. CODIFIED LAWS § 22-14-23 (2006) (prohibiting firearms in courthouses).

135. *See, e.g.*, *Prison Types & General Information*, FED. BUREAU PRISONS, http://www.bop.gov/locations/institutions/index.jsp (last visited May 16, 2012) (indicating a host of security measures taken at different types of prison facilities).

136. *E.g.*, MISS. CODE ANN. § 45-9-101(13); N.C. GEN. STAT. § 14-277.2 (2011) (prohibiting possession of weapons at parades).

137. *See, e.g.*, *Target Center FAQs*, TARGET CTR., http://www.targetcenter.com/arena_info/faqs (last visited May 16, 2012) (listing information on both

es, courts have grounds to examine and uphold these place restrictions under intermediate scrutiny by considering the following factors: the strong interest in keeping weapons out; the security provided to patrons; the obvious danger that even a justified act of self-defense would pose to crowds that may run into the tens of thousands; and the limited amount of time one's Second Amendment right is burdened. Strict scrutiny is not needed to reach a proper conclusion, and in any case is not the proper test because of the limited and indirect nature of the burden.[138]

Under many state weapon-carry laws, proprietors of private property open to the public may also prohibit weapons on their premises by giving reasonable notification of their wishes to potential patrons.[139] Normally, notice is made through a sign at the entrance of the establishment.[140] Where private parties enact such prohibitions on their own property, as they are free to do even in the First Amendment context, the courts have a limited role to play in protecting the gun owner's Second Amendment interests.[141] When the government merely codifies the right of the private party to ban weapons on its property, the gun owner's Second Amendment rights are not squarely at issue and need not be subjected even to intermediate scrutiny.[142]

3. "Place" Restrictions on Self-Defense Anywhere Outside the Home

While one can imagine more places that it might be reasonable to ban firearms in the pursuit of legitimate government

first aid and security procedures at Minnesota Timberwolves games and other events).

138. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (allowing incidental burdens on protected activities to be examined under intermediate scrutiny).

139. *E.g.*, MINN. STAT. ANN. § 624.714(17) (West 2012).

140. *See, e.g.*, *id.* § 624.714(17)(b)(i).

141. *Cf.* 16A C.J.S. *Constitutional Law* § 650 (2005) ("The exercise of First Amendment rights may properly be restricted when the unbridled exercise of the right may invade and injure the rights of others, or where the rights are used as an integral part of conduct which violates a valid statute." (footnote omitted)).

142. *Cf.* United States v. Kokinda, 497 U.S. 720, 725 (1990) (noting that private businesses enjoy "absolute freedom from First Amendment constraints"). *But cf.* FLA. STAT. ANN. § 790.251 (West Supp. 2011) (enacting a compromise solution in the case of an employee who wishes to carry a gun but works for an employer who prohibits firearms on the premises by protecting the employee from adverse action so long as the gun is secured in the employee's car in the parking lot of the business).

goals, the Supreme Court's declaration that self-defense is the core component of the Second Amendment right raises a major concern. It is not clear from the language in *Heller* whether the Court intends to protect the right to self-defense beyond the home.[143] Although *Heller* describes the need for self-defense as "most acute" in the home,[144] reliable crime statistics indicate that many types of violent crime occur frequently outside the home—often more frequently than in the home.[145] Moreover, only one state, Illinois, currently has a flat prohibition against ordinary citizens carrying firearms in public.[146] A general "place restriction" on the carry of a suitable self-defense weapon anywhere outside the home, unmitigated by a meaningful opportunity to obtain a permit to do so, may therefore fail to meet the standard set by the Supreme Court when it defined the right to self-defense.[147]

While the great majority of states give a meaningful opportunity for citizens to vindicate their self-defense rights outside the home, most often through a shall-issue permit system, seven states give themselves freedom to tightly control the distribution of weapon-carry permits through may-issue licensing

143. *See* District of Columbia v. Heller, 554 U.S. 570, 595 (2008) (avoiding explicit language indicating whether the right to self-defense extends beyond the home).

144. *Id.* at 571.

145. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 (2011) at 205 tbl.323, *available at* http://www.census.gov/compendia/statab/2012/tables/12s0323.pdf (indicating that 68.7% of hate crimes occur somewhere other than a residence); FED. BUREAU OF INVESTIGATION, *supra* note 123 (indicating that in 2009, 27.4% of burglaries occurred in nonresidence locations and 83.1% of robberies occurred outside the home); *The Offenders*, RAPE, ABUSE & INCEST NAT'L NETWORK (RAINN), http://www.rainn.org/get-information/statistics/sexual-assault-offenders (last visited May 16, 2012) (noting that sixty percent of rapes occur somewhere other than at the victim's home).

146. 720 ILL. COMP. STAT. ANN. 5/24-1(a)(4) (West Supp. 2011).

147. *See Heller*, 554 U.S. at 592 ("[W]e find that [the Second Amendment] guarantee[s] the individual right to possess and carry weapons in case of confrontation."). *But see id.* at 626 (noting that early commentary and state court decisions opined that banning the carry of weapons in public, at least those weapons concealed by the bearer, is a permissible government practice because "the right secured by the Second Amendment is not unlimited"). It is important to note that the concealed weapons bans the Supreme Court cited for this proposition allowed the *unconcealed* carry of weapons. *See* Nunn v. State, 1 Ga. 243, 251 (1846) (noting that a law that prohibits concealed carry of a weapon must allow for open carry or the law would be void); State v. Chandler, 5 La. Ann. 489, 489–90 (1850).

schemes.[148] Unlike shall-issue systems, may-issue regimes allow permit-issuing authorities to deny a permit based on non-objective criteria.[149] These states require applicants to convince their local sheriff or police departments that they have a justifiable need to carry a weapon before a permit will be issued.[150] Occasionally, the issuing departments or offices will post public guidelines about what sorts of needs the issuing law enforcement authority considers justified.[151]

Perhaps the most troubling implication for the individual's right to self-defense under a may-issue permit system is that the right becomes contingent upon the ability of the applicant to convince a government official that one really needs it. In free-speech cases, it would be unthinkable to require book publishers or newspaper editors to show a censorship office that they have a "justifiable need" to publish a story, or that they possess the "good character" to exercise the right to a free press.[152] The Supreme Court long ago rejected this type of governmental prior restraint on speech as unconstitutional.[153]

Similarly, the State should not appoint the police as the Censorship Bureau of the Second Amendment. The Supreme Court noted in *Heller* that the Founders decided that all citizens had this "justifiable need" when they codified the Second

148. *See US State Pages*, *supra* note 27 (indicating which states have shall-issue systems and which have may-issue systems). Alabama, although technically a may-issue state, does not tightly control the issuance of weapons permits and was therefore not included in this number. BUCKEYE FIREARMS ASS'N, *supra* note 29.

149. *See, e.g.*, CAL. PENAL CODE § 26150(a)(1)–(2) (West 2012) (requiring the applicant demonstrate both "good moral character" as a prerequisites for the issuance of a license).

150. *See* MD. CODE ANN., PUB. SAFETY § 5-306(a)(5)(ii) (LexisNexis 2011) (requiring an investigation into the applicant's "good and substantial reason" to carry a firearm on the person).

151. *See* MD. STATE POLICE LICENSING DIV., HANDGUN PERMIT APPLICATION 1–2, http://www.mdsp.org/LinkClick.aspx?fileticket=Q-Q4Mgu_vWs%3d&tabid=621&mid=1555 (last visited May 16, 2012) (listing various categories of viable applicants). The only category of applicants not connected to employment activity is personal protection, for which documented evidence of recent victimization is required. *Id.*

152. *Cf.* Citizens United v. FEC, 130 S. Ct. 876, 898 (2010) (citations omitted) ("Premised on mistrust of governmental power, the First Amendment stands against . . . . restrictions distinguishing among different speakers, allowing speech by some but not others.").

153. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 721 (1931) ("The statute in question cannot be justified by reason of the fact that the publisher is permitted to show [in court] . . . that the matter published is true and is published with good motives and for justifiable ends.").

Amendment, and the government (or their police delegates) may not revisit that policy choice without a constitutional amendment.[154] Certain objective criteria might be proper grounds for the denial of a permit—mental incompetence, criminal record, drug addiction, and the like—and states universally require that applicants meet these criteria with either type of permit-issue system.[155]

If the purpose or effect of the state agencies' decisions is to generally deny the right to self-defense to all but a select or favored few, then—as in cases of speech suppression—these laws should be subjected to strict scrutiny because they directly and near-categorically burden the right to self-defense.[156] Even if intermediate scrutiny were applied to restrictive may-issue permit regimes—which it should not be—these laws may still succumb to judicial review because they do not ensure the meaningful opportunity for citizens to exercise their Second Amendment rights.[157] Under these tightly controlled may-issue permitting systems, most people must give up their right to self-defense any time they walk out their front door.

4. Manner Restrictions

Manner restrictions in the free-speech context can be nearly as varied as place restrictions. The government may specify anything from the maximum volume of a spoken message[158] to prohibiting the delivery of the message in an intimidating manner.[159] Like other incidental burdens to First Amendment rights, these restrictions serve other important societal interests. For example, they protect the listener from undue annoy-

154. *See* District of Columbia v. Heller, 554 U.S. 570, 634 (2008) ("The very enumeration of the [Second Amendment] right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.").

155. *E.g.* IDAHO CODE ANN. § 18-3302(1) (Supp. 2011).

156. *Cf. Citizens United*, 130 S. Ct. at 898–99 (noting that when the government enacts laws favoring certain speakers, those laws will be subjected to strict scrutiny). United States v. O'Brien, 391 U.S. 367, 377 (1968) (suggesting its four-factor test for intermediate scrutiny cannot allow governmental suppression of speech).

157. *Cf.* Ward v. Rock Against Racism, 491 U.S. 781, 791–92 (1989) (requiring such a meaningful opportunity in the First Amendment context).

158. *See id.* at 786–87 (describing the manner restrictions placed upon performances at a public bandshell).

159. *See* Virginia v. Black, 538 U.S. 343, 359–60 (2003) (explaining that intimidation—where the speaker intends to create a fear of real harm—is not protected by the First Amendment).

ance, unwanted messages, and intimidation. Therefore, these types of burdens will survive intermediate scrutiny as long as they are not so broad that they eclipse a meaningful opportunity to engage in free speech with the intended (and willing) audience. In the First Amendment context, intermediate scrutiny of time, place, and manner restrictions does not require that the alternatives offered to the speaker to exercise free-speech rights are the speaker's first, or even best, choice for conveying the message.[160]

Manner restrictions are common in the context of firearms. One of the most common manner restrictions is the requirement that, while carrying a weapon in public pursuant to a permit, the gun must be concealed from plain view.[161] Currently, no state requires that the gun be carried openly, although several states leave it to the permit-holder to decide how to carry.[162]

When it comes to the concealment of firearms in public, there are indeed reasonable arguments that either open or concealed carry is the "better" option. Requiring a citizen to advertise the fact that she or he is armed by requiring open carry may be a bad idea—it may cause alarm in public, make the citizen a target for criminal attack, and it may subject the citizen to more danger in a deadly force encounter.[163] Likewise, mandating the concealment of weapons makes a defensive firearm more difficult to draw, which can put a victim at a disadvantage in a deadly force encounter where split seconds can

160. *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654–55 (1981) (upholding time, place, and manner restrictions on free speech regarding the propagation of religious views at a state fair despite the contention that these restrictions created a suboptimal environment in which to convey the speakers' message).

161. *See, e.g.*, TEX. GOV'T CODE ANN. § 411.171(3) (West Supp. 2011) (clarifying that the license only covers those handguns not discernible to "ordinary observation").

162. *E.g.*, MINN. STAT. ANN. § 624.714(1)(a) (West 2012) (failing to require either open or concealed carry under the state-issued license).

163. *See* Robert Mackey, *Frommer May Boycott Arizona over Guns*, LEDE (Aug. 21, 2009, 6:50 PM), http://thelede.blogs.nytimes.com/2009/08/21/frommer-may-boycott-arizona-over-guns/ (highlighting the potential for public alarm from the open carry of weapons, even during a planned political demonstration where the demonstrators announced in advance their intention to carry guns); *Tulsa Police Chief Opposes Open-Carry Proposal*, CONNECTAMARILLO.COM (Nov. 26, 2010, 10:53 AM), http://www.connectamarillo.com/news/story.aspx?id=546437 (documenting one police chief's objections to an open-carry law based on these grounds).

matter.[164] For these reasons, it may be argued that one or the other method of carry can expose a victim to more danger under certain circumstances, and thus place an undue burden on the self-defense right such that a particular restriction on either concealed or open carry should fail intermediate scrutiny. Mitigating this supposed burden, however, is the fact that even if the choice were left to the individual he or she would still be required to assume the set of risks accompanying that choice. This, coupled with the fact that under First Amendment jurisprudence a speaker is not always entitled to his or her first choice as to the time, place, and manner of his or her free speech[165] should mean that the courts should not subject this kind of law to strict scrutiny.

The important point here is that any burden one way or the other is probably incidental, meaning that intermediate scrutiny is the appropriate standard of review.[166] Assuming the government offers an important justification for this kind of restriction, the restriction would probably survive intermediate scrutiny because it does not prevent the meaningful exercise of the self-defense right. Therefore, a court would be unlikely to characterize the regulation as overbroad.

Another common manner restriction is that those carrying firearms, even with their permits, must not do so while intoxicated by drugs or alcohol.[167] This kind of restriction seems eminently reasonable given the effects of such chemicals on the brain—particularly the fact that they impair both judgment and motor skills.[168] The obvious danger of an impaired citizen carrying a gun, coupled with the fact that he or she is free at all times to abstain from the use of drugs and alcohol, is more than

164. For an entire article by a well-known firearms instructor dedicated to the complexities of drawing a concealed handgun, see Massad Ayoob, *Enhancing the Draw, Part I: Access A Step by Step Approach to a Swifter and Cleaner Draw*, GUNS MAGAZINE, Oct. 1, 2005, at 12.

165. Horina v. City of Granite City, 538 F.3d 624, 635 (7th Cir. 2008) ("An adequate alternative does not have to be the speaker's first or best choice." (citing *Int'l Soc'y for Krishna*, 452 U.S. at 647)).

166. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (describing the intermediate scrutiny test solely in terms of incidental burdens).

167. *E.g.*, MONT. CODE ANN. § 45-8-327 (2011); R.I. GEN. LAWS § 11-47-52 (Supp. 2011).

168. *See* Matthew C. Rappold, Note, *Criminal Law—Evidence of Inactive Drug Metabolites in DUI Cases: Using a Proximate Cause Analysis to Fill the Evidentiary Gap Between Prior Drug Use and Driving Under the Influence*, 32 U. ARK. LITTLE ROCK. L. REV. 535, 559 (2010) (noting these impairments as part of the statutory definition of "intoxicated" in Arkansas).

enough justification to deem this kind of manner restriction incidental. Thus, the intermediate-scrutiny test would certainly be appropriate.

Another restriction ordinarily seen in state codes allowing individuals to carry firearms in public is a requirement that the weapon not be carried in a threatening manner. Such "brandishing" laws seek to prevent threats, intimidation, and alarm by specifying that individuals carrying guns in public put them in a holster or other container suitable to the carry of a firearm.[169] Just like free-speech restrictions prohibiting intimidation, laws like this advance other important interests while burdening the underlying fundamental right in only the most tenuous sense. As such, the typical brandishing law should only be subjected to—and will have little trouble surviving—intermediate scrutiny.

As noted earlier, neither strict scrutiny nor intermediate scrutiny alone is appropriate to determine the constitutionality of many other gun-control laws. Reasonable time, place, and manner restrictions should normally be subjected to intermediate scrutiny.[170] Only when these restrictions become so broad—alone or in the aggregate—that they no longer represent a mere incidental burden on the core Second Amendment right of self-defense should the government bear the burden of strict scrutiny.[171]

With its proclamation that the right to keep and bear arms is a fundamental right held by the individual that applies against the states,[172] the judiciary should stand ready to require a more nuanced approach to gun control that is more deferential to this right. While there are many laws on the books that are still constitutional—even under this proposed framework—some are not. Laws permanently stripping criminals of the right to bear arms may need a more refined examination than they are currently given. Reasonable time, place, and

169. *See, e.g.*, TEX. PENAL CODE ANN. § 42.01(a)(8) (West Supp. 2010) (making it a crime to display a firearm in a "manner calculated to alarm").

170. *See Ward*, 491 U.S. at 791 (applying intermediate scrutiny to such a restriction).

171. *Cf.* United States v. O'Brien, 391 U.S. 367, 377 (1968) (applying intermediate scrutiny only to incidental regulation of speech).

172. McDonald v. City of Chi., 130 S. Ct. 3020, 3050 (2010) (holding that the Second Amendment's right to bear arms is applicable to the states); *see also* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (holding that the Second Amendment protects an individual's right to keep and bear arms in the home).

manner restrictions on the Second Amendment, while permissible, must now account for the fact that Second Amendment rights are fundamental and thus cannot be abridged in any way the government sees fit.[173] Nor should licensing procedures present a material obstacle to exercising one's Second Amendment rights. Courts must be mindful of the burden that such restrictions impose; the burden must be justified, and not so heavy that there is no longer a meaningful opportunity to exercise the right.[174]

III. EXISTING FREE-SPEECH TESTS CAN PROPERLY ADJUDICATE GUN-CONTROL REGULATIONS POST-*HELLER*

Since the Supreme Court decided *Heller* in 2008, courts and commentators have wrestled with the issue of whether strict scrutiny, intermediate scrutiny, or some other test should be used to resolve Second Amendment challenges.[175] There is concern among interested parties that one test or the other will tend to lead to the "right" or "wrong" line of decisions regarding individual gun rights.[176] While there is nothing wrong with arguing that the Court should adopt doctrines that protect both rights and restrictions that are uncontroversial, it is important to remember that the Court has already crafted the tools needed to adjudicate these cases—and they work.

Both strict and intermediate scrutiny are indispensible in resolving the plethora of issues likely to come before the judiciary in the near future. The key to determining which test to use is as simple as determining whether the burden on the right is direct or incidental. And the method to determine whether a regulation's burden is direct or incidental is just as simple: If law-abiding citizens wishing to arm themselves obey the challenged restriction, is there a reasonable likelihood that at the moment of a criminal attack the victims will be without immediate access to a weapon because they obeyed the law? If the answer is yes, the burden is direct; if the answer is no, the burden is incidental. Such a test would serve an appropriately sim-

173. *See O'Brien*, 391 U.S. at 377 (requiring the furtherance of an important state interest in order to pass intermediate scrutiny).

174. *See id.*

175. *E.g.*, Kiehl, *supra* note 52, at 1133 (describing how courts have not reached a consensus on how to resolve Second Amendment challenges after *Heller*).

176. *See, e.g.*, *id.* at 1169–70.

ilar purpose to subjecting content-based restrictions to strict scrutiny in the First Amendment arena.[177] Courts should then apply the appropriate test to the regulation, and let it stand or fall as the analysis dictates.

This proposal is likely to cause concerns on both sides of the gun debate. Those who advocate for stronger gun-control measures believe that strict scrutiny is too "hard" of a test for gun-control regulations to pass, while those who argue for more robust self-defense rights think that intermediate scrutiny is too "easy."[178] These concerns fail to take into account that the practicalities of these tests in the Second Amendment context will almost certainly mean that gun-control regulations will have an easier time surviving strict scrutiny, and a more difficult time surviving intermediate scrutiny, than their First Amendment counterparts.

A. CONVENTIONAL WISDOM ON STRICT AND INTERMEDIATE SCRUTINY DOES NOT NECESSARILY MIGRATE WELL FROM THE FREE-SPEECH CONTEXT TO THE SELF-DEFENSE CONTEXT

In Part II, this Note asserted that the sky will not fall if strict scrutiny is applied to laws denying possession of firearms to criminals and the insane because the "strict in theory, fatal in fact" maxim of strict scrutiny could hardly apply in the Second Amendment context. Compelling justifications for race-based policy and speech suppression are rare.[179] Finding a compelling justification to deny firearms to violent felons, and perhaps even lesser criminals, on the other hand, is unlikely to give courts much pause.

An ex-convict obeying a conviction-based dispossession law is clearly suffering a direct infringement on the right to bear arms because it is not only likely, but certain, that he or she will be without immediate access to a weapon in the event of a violent attack. The fact that strict scrutiny is the appropriate test hardly means the law should be invalidated. Rather, it

177. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000) (applying this test to content-based restrictions).

178. *See generally* Rosenthal & Malcolm, *supra* note 52, at 463 (noting that each side implicitly takes issue with a particular level of scrutiny on these grounds).

179. *But see* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (finding a race-based school admissions policy was justified by a compelling-government interest); Korematsu v. United States, 323 U.S. 214, 223–24 (1944) (finding race-based denial of civil rights during wartime was justified by a compelling government interest).

should be relatively uncontroversial for courts to accept the government's public safety justifications as compelling because of the connection between past violent behavior and the risk of future violence.[180]

It is true that the earlier analysis did not take into account the second prong (least burdensome restriction) of the strict-scrutiny test in testing lifetime bans on possession. This prong, however, does not present a significant hurdle to this type of gun-control legislation because the government can easily restrict these bans only to those groups to which they may be constitutionally applied.[181] Despite the application of strict scrutiny to these laws, the Supreme Court's adoption of this proposed framework of adjudication will not leave society with rules permitting violent criminals access to firearms.

There is a similar failure of traditional logic when looking to the practical implications of intermediate scrutiny between the free speech and firearms contexts. One important difference between the burden on free speech rights and the burden on self-defense rights under the intermediate-scrutiny test is that an individual wishing to express a message in a certain time, place, or manner will often have a meaningful alternative opportunity to reach the intended audience, even if his or her preferred time, place, or manner of expressing that message is prohibited.[182] A citizen who wishes to defend him or herself from criminal attack, on the other hand, can never really be certain when he or she will become a victim.[183] Because of this dilemma faced by the potential victim, a citizen seriously concerned about defending him or herself from a life-threatening attack will need to arm himself as part of a daily routine: if he

180. *See generally* LANGAN & LEVIN, *supra* note 71 (noting that violent offenders are highly likely to seriously reoffend shortly following release from prison).

181. It is certainly possible that the extreme length of the ban imposed by these laws may fail strict scrutiny's least-restrictive burden prong. However, the lengthy analysis required to properly determine the constitutional legitimacy of a lifetime ban on possession, as opposed to a three-, five-, or ten-year ban, is beyond the scope of this Note.

182. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

183. *See* Charlie Savage & Eric Lipton, *Real Threats Are Said to Rarely Give Warning*, N.Y. TIMES, Jan. 12, 2011, at A14 (describing such difficulty in determining if, where, and when a violent attack might take place, even when government authorities attempt to protect high-level politicians).

does not, then at the moment the criminal strikes, he will be unable to fight back.[184]

This is an important distinction from free speech where, for example, long laundry lists of prohibited places are commonly seen as permissibly allowing speakers an ample alternative opportunity to deliver their message.[185] In the Second Amendment context, these lengthy prohibitions could easily be too broad to allow a meaningful opportunity to exercise one's self-defense rights, and therefore transform the burden from incidental to direct,[186] and changing the proper test from intermediate scrutiny to strict scrutiny. Thus, just as the compelling justification prong of strict scrutiny need not always be extremely difficult to support in the Second Amendment context, the meaningful alternative opportunity portion of the intermediate-scrutiny test may occasionally prove more difficult here than it would in a First Amendment challenge.

This is not to say that incidental burdens should always, or even frequently, be invalidated under this framework on account of the meaningful alternative opportunity portion of the intermediate-scrutiny test. Indeed, as the backstop to the threshold scrutiny question of whether a burden is direct or incidental, failure of the meaningful alternative opportunity prong only really means that the proper test was not really intermediate scrutiny in the first place, but rather strict scrutiny.[187] In fact, most of the restrictions for which intermediate scrutiny is the proper test will have little trouble surviving. Public safety is frequently going to be an applicable and important government justification for gun restrictions, and the over breadth requirement is probably capable of being legislated around, even if it does invalidate the occasional incidental regulation.

184. *See id.* (noting the apparent lack of predictability in the violent shooting attack against Representative Gabrielle Giffords and others in Arizona).

185. *See, e.g.*, MINNEAPOLIS, MINN., CODE OF ORDINANCES § 385.60(c) (Supp. 2012) (prohibiting certain types of begging within, among other places, ten feet of any crosswalk; at any restroom; within eighty feet of any automatic teller machine; within ten feet of any convenience store; within ten feet of any gas station; or within fifty feet of any park).

186. *See id.* It would be nearly impossible for anyone lawfully carrying a firearm to move from place to place, let alone go about their day, without violating the law in a city imposing such place restrictions on the carry of weapons. *See id.*

187. *See Ward*, 491 U.S. at 790–91 (1989) (requiring ample alternative opportunity to deliver a message in order to uphold incidental speech restrictions in the First Amendment context).

B. GOVERNMENT ASSERTIONS OF COMPELLING PUBLIC-SAFETY INTERESTS MUST ACCOUNT FOR DANGERS INHERENT IN THE RIGHT TO ARMED SELF-DEFENSE

Once a court decides to apply either strict or intermediate scrutiny to a particular law, there are still important questions as to how the states may (or may not) justify the survival of a particular law under a specified level of review. This Section examines a key argument likely to arise between individuals and the State: How important are government obligations to improve public safety in light of the unavoidable dangers a right to armed self-defense presents?

The prime justification for most gun-control laws in the United States, whether explicit or implicit, is the general need of the government to prevent violence.[188] Almost all of these laws, however, were written long before the Supreme Court declared the Second Amendment an individual, fundamental right.[189] In light of *Heller* and *McDonald*, the method of justifying these laws may need to be reexamined.[190]

The Second Amendment clearly *creates* a serious potential for violence in America, just as the First Amendment *creates* the possibility that the Ku Klux Klan will spread a message of violence in pursuit of its racially bigoted goals.[191] As much as one would like to wish away the problem of violence, which is inextricably entwined with the right of gun ownership, it is clear that where one goes, the other may follow. It is no solution to say that the problems that attend this constitutional poli-

188. *E.g.*, Gun Control Act of 1968, Pub. L. No. 90-618, § 101, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921–31 (2006 & Supp. 2011)) (written in 1968) ("The Congress hereby declares that the purpose of this title is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence . . . ."); *see, e.g.*, Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 110102–03, 108 Stat. 1996, 1996–99 (1994) (banning, in the interest of public safety, the transfer and possession of "large capacity ammunition feeding device[s]" and certain semiautomatic rifles and shotguns deemed to be "assault weapons").

189. *E.g.*, 18 U.S.C. §§ 921–31; National Firearms Act, ch. 757, 38 Stat. 1236 (1934) (codified as amended in scattered sections of 26 I.R.C.).

190. *Compare* District of Columbia v. Heller, 554 U.S. 570, 635–36 (2008) (striking down the Washington, D.C., handgun ban and inoperability requirements that had stood since the 1970s), *with* McDonald v. City of Chi., 130 S. Ct. 3020, 3050 (2010) (extending the *Heller* holding by incorporating the Second Amendment against the states).

191. *See* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

cy choice should be grounds for direct infringements of the right in question.[192]

In other contexts—even in the context of the First Amendment—citizen safety is clearly of the utmost importance and can even justify the survival of a law that is examined by the skeptical eye of the strict-scrutiny test.[193] But the very nature of the right to keep and bear arms necessarily reflects a policy choice made during the founding era.[194] The Second Amendment simply does not permit the general possibility of unlawful violence—which unquestionably attends the right of the average citizen to own a gun—to be used by the government as the very justification to take that right away.[195] This argument would be akin to saying that because the Fourth Amendment's warrant requirement will allow some guilty criminals to go free—perhaps free to commit further violent crimes—the government has a compelling public safety interest in effectively dispensing with it. The position that such an argument advances, in either context, is really that the ratification of the amendment was a poor policy decision that the legislature may override by mere statute. It is important that the judiciary makes clear that these constitutional policy decisions may not be revisited by the states until they collectively choose to repeal or modify the Second Amendment.[196]

192. *See Heller*, 554 U.S. at 636 (noting that the government may not violate enshrined constitutional rights in order to combat the problem of gun violence in the United States).

193. *See Brandenburg*, 395 U.S. at 447 (noting that suppression of speech is justifiable where the government seeks to prevent "imminent lawless action"); *see also* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724 (2010) ("Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order."); R.A.V. v. City of Saint Paul, 505 U.S. 377, 383 (1992) (noting that the suppression of "fighting words," defamation, and obscenity can all be proper justification for content-based regulation).

194. *See Heller*, 554 U.S. at 636 ("[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.").

195. *See id.*

196. U.S. CONST. art. V.

This is not to say that public-safety concerns should never, or even infrequently, be proper justification for laws directly infringing on core Second Amendment rights. Rather, in imposing requirements on the government to justify its compelling interests in the strict-scrutiny context, courts should exclude a reasonably acceptable amount of danger from their calculus when determining whether the public-safety interest is compelling. This idea is usefully reduced to a simple formula:

$$P - A \geq C$$

In this equation: *P* represents the overall public-safety concern absent the infringement; *A* represents some acceptable level of danger to society that courts should subtract from the government's overall justification argument because that danger cannot be avoided while still respecting the right to self-defense; and *C* represents a showing of a compelling state interest. If, after courts account for the acceptable amount of danger, the remainder of the government's argument still raises a compelling public safety concern, then courts should recognize that the government interest is compelling. As was shown in the example of possession bans based on criminal history, this is not always a difficult argument to make.

In contrast, under the intermediate-scrutiny test, the general need of the government to control violence need not be more carefully examined as a proper justification for an incidental restriction on the self-defense right. The constitutional dictates of the Second Amendment notwithstanding, courts must not remain totally blind to the government's pressing responsibility to keep people safe.[197] More importantly, because incidental restrictions, by definition, still allow a relatively complete opportunity for citizens to exercise their self-defense rights, there is little need to require the government to account for a certain minimal level of danger in justifying such burdens. In fact, such legislation should be welcomed as a method to reduce the dangers that tend to follow the right to armed self-defense without severely abridging that right.[198]

197. This is implicitly recognized in the conclusion of *Heller*, 554 U.S. at 636.

198. The government must still show that the regulation is narrowly tailored. United States v. O'Brien, 391 U.S. 367, 377 (1968).

C. A HYBRID APPROACH IS REASONABLE BECAUSE IT REACHES REASONABLE RESULTS

American courts will likely see a significant amount of litigation seeking to define the scope of the Second Amendment.[199] Individuals and gun-rights organizations will likely seek to push the right to its outer bounds, while some states and their pro-gun-control amici will seek to justify various firearm regulations to the judiciary—within constitutional constraints. As circuit splits and erroneous federal appellate decisions arise, the Supreme Court will hear some of these cases. The Court has doctrines to examine the constitutionality of these regulations found in its First Amendment jurisprudence; indeed, the Court itself has hinted that it may use them in the coming years.[200]

In setting the standards of review, not all gun regulation needs to be treated in the same way. Laws that seek to deny, discourage, or unduly burden firearm ownership under the guise of general safety must be presumed invalid, and only the most compelling needs of the state may overcome the individual's interest in vindicating the self-defense right. This general principle is predicated on the recognition that the Constitution accepts that some social cost—including violence—will attend the general right of self-defense, and the founders chose that evil over the evils of a population denied the right to keep and bear arms.[201] Even where the government demonstrates a compelling need to prohibit gun ownership, such laws must be tailored to create only the slightest burden that the need justifies.[202] Laws giving state officials vague or subjective discretion to deny permits; regulatory schemes creating unreasonable delay, expense, or complication prior to legal possession or carry of firearms; excessive time, place, or manner restrictions generally impeding the ability to legally defend oneself; and laws permanently stripping gun rights based on a minor or nonvio-

199. *See Heller*, 554 U.S. at 635 (explaining that this is the Court's first in-depth review of the Second Amendment, and that there will be time later to refine the scope of the amendment).

200. *See id.* at 582, 591, 595, 635 (likening the First Amendment in several respects to the Second Amendment).

201. *See id.* at 634–36 (recognizing the clear potential for violence attendant in private gun ownership, but deferring to states' choices regarding whether or not to ratify the Second Amendment).

202. *Cf.* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 816 (2000) (requiring the government prove that less intrusive regulation of content-based speech restrictions are not sufficient to achieve a compelling interest).

lent criminal record should all fall into this category. And they should not survive.

On the other hand, where government regulations advancing safety or other reasonable needs of society do not greatly burden the right to self-defense, courts should rightly relax the standard of review.[203] In such cases, the government need only demonstrate an important interest unrelated to the denial of the right to bear arms and narrowly tailor the laws so that the right to defend oneself can still be meaningfully exercised.[204] Laws imposing objective licensing procedures that are reasonable as to their approval time, complication, and expense, and restrictions on the right to keep and bear arms that are reasonable as to their time, place, and manner should be reviewed, and frequently upheld, under this standard.

CONCLUSION

Undoubtedly, there will be points of contention not readily addressed by current First Amendment doctrines or the proposals in this Note. The Supreme Court may need to borrow from other jurisprudence, different areas of the law, or invent new doctrines out of whole cloth, as the need arises. For the time being, though, it is enough that an existing framework for adjudicating Second Amendment issues is practically already in place and that both the people and the government already understand it.

Converting First Amendment scrutiny doctrines to cover new Second Amendment jurisprudence will allow courts to use a time-tested review standard that is readily adaptable to this newly redefined right. Further, doing so will add legitimacy to future adjudications of a highly polarizing issue, especially in this late date for the doctrine of incorporation. It will also prevent unnecessary missteps and fumbling in the early days of the new Second Amendment jurisprudence.

203. *See O'Brien*, 391 U.S. at 377 (allowing the government to burden, if not suppress, free speech in an effort to advance other important societal interests).

204. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (requiring such restrictions to meet these standards).