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TIME, PLACE, AND MANNER RESTRICTIONS FOR FIREARMS: WHAT THE FIRST AMENDMENT CAN TELL US ABOUT THE FUTURE OF SECOND AMENDMENT JURISPRUDENCE

Jarom Harrison

I. INTRODUCTION

In 1939, the Supreme Court heard United States v. Miller and held that the Constitution did not protect the right to possess firearms unrelated to official militia service. The Supreme Court would not hear another Second Amendment case until District of Columbia v. Heller nearly seventy years later. Heller reversed the militia service rationale and found that the Second Amendment was intended to protect citizens’ right to self-defense.

Heller was considered a major victory for guns rights activists because it clarified the rationale behind the Second Amendment. According to the Heller court, gun rights aren’t primarily intended to preserve the militia; rather, citizens have a right to own guns for personal self-defense. However, there are some exceptions to when

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this right can be exercised. *Heller*’s opinion openly states that lawmakers are free to keep firearms out of the hands of felons and the mentally ill, and out of schools\(^4\) despite the fact that most of these groups have an *enhanced* need for self-defense.\(^5\) The Court didn’t help matters when it gave a footnote in its opinion noting that these presumptively lawful regulatory measures were identified only as examples. “Our list,” said Justice Scalia, writing for the court, “does not purport to be exhaustive.”\(^6\)

So where does the list of exceptions exhaust itself? If guns can be banned in schools, can they also be banned in movie theaters? What about gun-free zones on military bases or in densely-populated urban areas with high crime rates? The exceptions are not the problem. Most would agree that they are sound policy, and few would argue for more guns in the hands of criminals or in kindergartens. The problem is that the *Heller* court gave no legal reasoning to support their list, claiming only that courts in the future will have “time enough” to expound upon the exceptions in the future.\(^7\)

Fortunately, the Supreme Court has already struggled with creating exceptions to the exercise of essential rights and has come up with some classic answers. Like the right to bear arms, the First Amendment right to speech is also essential, and is heavily protected. And just like with the right to bear arms, the Supreme Court has held that there are certain situations where the right to speech can be appropriately abridged to further important governmental objectives.\(^8\)

Can courts use the reasoning of First Amendment exceptions to clarify Second Amendment exceptions? In writing the majority opinion for *Heller*, Justice Scalia practically invited comparison to

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8 Examples of governmental objectives warranting bans on free speech include bans on speech that is disruptive (See Grayned v. City of Rockford, 408 U.S. 104 (1972)) or likely to lead to violence (See Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)) or is likely to lead to imminent lawless action (Brandenburg v. Ohio 395 U.S. 444 (1969)).
the First Amendment when he said, “Of course the right was not unlimited, just as the First Amendment’s right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose.”

This article will argue that current firearm bans fall into three categories which roughly mirror the Time, Place, and Manner exceptions to the First Amendment. After providing a short background of Second Amendment jurisprudence, this article will discuss Time, Place and Manner restrictions (hereafter TPM) in subsequent and respective sections. For each of the TPM exceptions, I will examine the rationale behind the exceptions and determine whether a similar rationale could be used in evaluating exceptions to Second Amendment rights. The purpose of this article is not to suggest a firm standard of review but to discuss the challenges and merits of adopting (as Scalia suggests) First Amendment standards of review for Second Amendment questions.

II. A BRIEF HISTORY OF SECOND AMENDMENT JURISPRUDENCE

Second Amendment jurisprudence is in its second infancy. After nearly 70 years of Second Amendment silence, the Court heard District of Columbia v. Heller in 2008 and held that Second Amendment rights are rooted in the right to self-defense. However, the court also threw a curveball when it announced that some laws which restrict Second Amendment rights are constitutional. On this list, they upheld firearm bans in places such as hospitals and schools, and also upheld bans for some classes of people, such as mentally disabled persons, and convicted felons. Presumably, not all schools are risk-free zones, and felons and the mentally ill still encounter

dangerous situations. Did these peoples’ right to self-defense simply evaporate?

“I would have preferred that [they] not have been there,” said Robert Levy about the list of exceptions. Levy, executive director of the Cato Institute and the main backing force behind the Heller litigation, stated that the exceptions in Scalia’s written opinion “created more confusion than light.” The legal world at large has also wondered where these exceptions have their origin. None of the exceptions listed on Scalia’s list come from established legal doctrine, and they definitely don’t come from the Constitution’s text, which states simply that the right to bear arms shall not be infringed. “So much,” writes Adam Winkler of the UCLA law review, “for sticking to history and restricting the personal value choices of the judges.”

Even though firearm regulations interfere with the Constitutionally-protected right to self-defense, they seem legitimate because the government has sound reasons to impose them. Society is uncomfortable with dangerous people obtaining firearms, so we create an exception and ban sales to ex-felons and the mentally ill. Society does not want guns and children in close proximity, so we create another exception and ban guns in certain school districts. Similarly, concealed carry restrictions might marginally restrict self-defense but are viewed as a way to improve the safety of public streets and prevent confrontations from escalating into violence. Self-defense is vital, but does not amount to an unlimited invitation to use weapons indiscriminately. When the exercise of Second Amendment rights creates an unbearably dangerous environment, the government can step in with appropriate safeguards.

12 See Winkler, supra note 3, at 1568.
14 id.
15 See Winkler, supra note 3, at 1568.
16 U.S. Const. amend. II, § 1.
17 See Winkler, supra note 3, at 1561.
18 id, at 1572.
The bulk of firearm ownership in America is legal and there are obvious limits to the government’s ability to regulate firearms. But how can courts weigh the validity of regulations which claims sanctuary on the “exceptions” list? We need a new standard of Second Amendment review, and preferably one that has proven to effectively safeguard vital rights in the past.

Fortunately, the court has wrestled with the problem of exceptions to extremely important rights in other areas, especially in First Amendment jurisprudence. Speech is not protected if it tends to break the peace or libels maliciously. However, even speech that is normally protected can be banned if it meets certain criteria. In restricting protected speech, the Supreme Court has laid down some specific rules, mandating that protected speech can be limited at certain times, in certain places, and in certain manners. Government may impose reasonable time, place, and manner restrictions when they satisfy four prongs of a legal test: (1) The regulated speech is content neutral, (2) The restrictions are narrowly-tailored and (3) serve a significant governmental interest, and (4) the restrictions leave ample alternative means to convey the message and infringe on the right to a minimum degree.

While it is impossible to review all examples of firearms legislation in a country that contains 300 million citizens and nearly as many firearms, restrictions to the Second Amendment can be broken down into three categories which are roughly equivalent to the time, place, and manner restrictions common in First Amendment

21 I.E, a city can ban everybody from posting signs on the City Hall lawn, but they can’t ban only certain groups whose signs they dislike. See United States v. O’Brien, 391 U.S. 367 (1968).
jurisprudence. Heller’s list of exceptions also mentions the possibility of “person” exceptions, which is an idea foreign to First Amendment jurisprudence. Because of their overwhelming prevalence, we will first discuss place and manner restrictions and then move on to the comparatively rarer time restrictions. Finally, we will discuss a major shortcoming of TPM analogies for the Second Amendment by discussing the person restrictions mentioned above.

III. Place Restrictions: Gun-Free Zones

Heller explicitly protects a citizen’s right to bear arms in his or her own home for self-defense. But there are plenty of historical occasions where Second Amendment rights have been abridged in other areas. A Boston law from the colonial period declared that no loaded firearms were allowed in any “Dwelling-House, Stable, Barn, Out-house, Store, Ware-house, Shop or other building [sic].” The “Wild West” also had controls on firearms enacted for the safety of citizens. Even cities traditionally associated with gun violence—Dodge City and Tombstone, for example—required people to leave their weapons at the city limits when arriving in town.

Such geographical—or place—restrictions on firearms continue today. Even states with robust pro-gun laws, such as Georgia,


knowledge that there are certain places which might be appropriately zoned “gun-free.”

Courthouses, hospitals, schools, and prisons have all been offered up as places where Second Amendment rights take a back seat to safety concerns. All of these exceptional places also fit nicely on the list of “presumably lawful” exceptions from *Heller*.

*Heller* clearly gives the nod for certain gun-free zones, but provides no explanation for why they are acceptable. Why does your right to self-defense evaporate when you step into a gun-free zone, such as a school? With school shootings on the rise, it certainly isn’t because schools are never dangerous.

Place-based speech restrictions provide a standard of review that might help to clarify why gun-free zones are acceptable. In *Schneider v. State*, the court wrote that municipal authorities can ban disruptive speech in the streets because they have a duty to keep their streets operating in an efficient manner. “Municipal authorities have the duty to keep their communities’ streets open and available for movement of people and property, the primary purpose to which the streets are dedicated.” In other words, if an officer asks you to stop blocking Main Street with your political rally, you can’t ignore him by claiming that you are exercising your First Amendment rights.

Cities also have a duty to keep their citizens safe, and a similar rationale could be used to justify place restrictions on firearms. If a city can prevent the exercise of First Amendment rights in the name of keeping traffic flowing, it doesn’t stagger the imagination to think that it can also prevent the exercise of Second Amendment rights to

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28 See Winkler, *supra* note 3, at 1572 (discussing how courts adopt a tacit interest balancing approach to Second Amendment regulations, balancing the exercise of the right against concerns for public safety).


prevent a mass shooting in a mall. However, additional safeguards are needed to prevent the enactment of overly-inclusive firearm bans such as the one that was struck down in *Heller*.

Turning to the doctrine of the First Amendment, we find that cities may ban protected speech in a certain area if they have a compelling reason to do so. A city-wide ban on pamphleteering in *Lovell v. Griffin* was overturned because it was overly restrictive, not being limited to a specific time or place.\(^{31}\)

More recent developments have clarified that cities can ban speech in geographically-limited places when speech places an unacceptable burden on the public. For instance, they can make a “fixed buffer zone” around abortion clinics\(^{32}\) to protect people from unwanted or aggressive “counseling”, or they can ban unauthorized fundraising in airports to maintain the flow of passenger traffic.\(^{33}\) However, there is another requirement. The place restriction must not only (1) be of a limited and specific geographical area, but also (2) demonstrate that it directly addresses a specific and urgent problem in the community.

The *Lovell* court overturned the pamphleteering ban because it was overly broad geographically, thus banning pamphleteering in the entire city. A similar ban was overturned in *Schneider*, not because it was overly broad geographically\(^{34}\), but because it lacked a compelling justification.\(^{35}\) *Schneider* found that the city interest of keeping the streets clean from litter was not more important than the city’s duty to uphold free speech.

\(^{31}\) Lovell v. City of Griffin, 303 U.S. 444, 451 (1938).


\(^{34}\) Schneider v. State of New Jersey, 308 U.S. 147 (1939).

\(^{35}\) ibid. at 163. “The public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution.”
We can apply these same principles to place-based firearm restrictions, and indeed, we already do. For instance, cities can impose geographically-limited firearm bans in schools because they have a special interest in preventing a very urgent problem: gun violence near large concentrations of children.\(^{36}\) Several states have laws requiring patrons at bars to leave their guns at the front door.\(^{37}\) State legislatures are not insensitive to people’s need to defend themselves in bars, but they consider it a higher priority to protect innocent patrons who might be harmed should a conflict escalate out of control. Similarly, the United States military still has a no-carry policy for troops serving on military bases, even after mass shootings occurred twice at the same base in the space of five years.\(^{38}\) And finally, hospitals are another area where the prerogative to ban firearms is widely utilized. Concerns about safety of the ill and the widespread prevalence of dangerous equipment and flammable gasses have led to many hospitals declaring themselves gun-free.\(^{39}\)

In short, the government seeks to impose a “place” restriction on Second Amendment rights in places where the possession of a firearm would pose a higher-than-usual risk to the safety of those present. Are these restrictions analogous to the place restrictions on speech mentioned in *Lovell* and *Schneider*? They certainly seem similar. In *Heller*, the ordinance that was struck down was a city-wide ban on handguns, much like the city-wide ban on pamphleteering

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36 See Winkler, *supra* note 3, at 1572, saying “We do not want guns in schools because, given the immaturity of many students, we fear that guns there will result in violence and death.”


that was struck down in Lovell. Under Schneider, the court would have allowed a geographically-limited ban if the rationale had been compelling enough. This is very similar to Scalia’s allowance that banning firearms in specific places, such as hospitals and schools, is constitutional.

Although they appear similar facially, the two legal reasonings might not be identical de facto. The justification offered for place restrictions in Schneider was that limited bans don’t interfere with the essential act of expression.

“So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against.”

If a person temporarily lacks access to free speech because of a narrow place restriction, then he is not much inconvenienced by having to offer his opinion twenty minutes later in a different place. Unfortunately, there is no such recourse for the right to self-defense. If a person is temporarily denied the exercise of Second Amendment rights, the results could be fatal. It doesn’t matter if he or she could have exercised his right twenty minutes later. The need for a gun, unlike the need to speak, is vital at all times because of the unpredictability of an attack. Nobody ever died because the government forbade political speech in a non-public forum such as an airport. On the other hand, people die in gun-free zones on a regular basis.


However, if the right to own a gun is rooted in self-defense, as per *Heller*, then what if self-defense isn’t necessary? A gun-free zone isn’t necessarily a defense-free zone. Instead of self-defense, there can exist state-defense, or defense by proxy, because the government supposedly takes responsibility for citizens’ protection. Courthouses, jails, and perhaps even schools could fit into this category when they ask citizens to leave firearms at the door. People still have the right to be defended, but since the government disarms all comers and takes responsibility for the safety of the patrons of these “gun-free” zones, it could be argued that in abridging Second Amendment rights, the government does not necessarily render citizens defenseless.

This argument is suspect because over 92% of mass shootings have occurred in official “gun-free” zones. This leads to another question, too large to discuss in the confines of this paper: To what extent is the government liable when it fails to protect you in an area of presumed protection?

In short, place-based gun bans have long been a part of American history and probably will remain so as long as the government can find a compelling justification for disarming citizens. It is not clear whether or not adopting a First Amendment–type rationale would be helpful because the abridgement of First Amendment rights rarely leads to violent deaths of those deprived, while the same cannot be said for the abridgment of Second Amendment rights. However, government might also take shelter in the claim that they are providing an acceptable alternative to the exercise of the Second Amendment when they take it upon themselves to protect the citizens they have disarmed.

### IV. Manner

The second broad category is *manner* restrictions. First Amendment manner restrictions occur when the government determines that a particular method of expression is so inherently problematic that it creates a sufficiently compelling reason for the government to

42 id.
ban it. Examples include expression that is extremely annoying, or has historically been used to intimidate certain minority groups.

Heller likewise forbids the exercise of Second Amendment rights in certain “manners.” For example, in Miller v. United States, the court affirmed the constitutionality of the Harrison Narcotic Act, which prohibited the ownership of typically non-civilian weapons, such as machine guns or sawed-off shotguns. Over seventy years later, the Supreme Court explained this decision in Heller, justifying the rule by claiming that such weapons were banned because they were not in common use. Ironically, if we look at why they are not in common use, we find that it’s because they have been banned under the National Firearms Act since the Miller decision in 1939. Despite this catch-22, it is easy to see how First Amendment “manner” logic could apply to Second Amendment issues in other cases.

For instance, there is a strong push from the anti-gun lobby to ban handguns. Due to their relatively small size, handguns are easy to conceal and transport, making them the gun of choice for many criminals. Interestingly, the Heller court found that handguns are protected specifically because they are also in widespread use as an implement of self-defense. This decision has raised the eyebrows of some legal scholars. Why should popularity, be it among citizens or among criminals, be the determining factor of the legality of a type of weapon?

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43 Ward v. Rock Against Racism, 491 U.S. 781, 782 (1989). “That the city has a substantial interest in protecting citizens from unwelcome and excessive noise, even in a traditional public forum such as the park, cannot be doubted.”


45 United States v. Miller, 307 U.S. 174, 178 (1939). SEE ALSO id. 175 n.1


47 See Winkler, supra note 3, at 1572-73.


49 See Winkler, supra note 3, at 1560.
The rationale behind First Amendment “manner” restrictions is eminently more logical. When weighing a manner-based restriction on speech, the court bans only those expressions of the right which are likely to pose a significant danger/nuisance to others. This makes a lot more sense than the Supreme Court’s insistence on banning weapons which are not in “common use.” What if every American went out tomorrow and bought a rocket-propelled grenade launcher on the black market? That would make them common, but it would not make them legal. It is far more feasible to adopt the “manner” rationale of the First Amendment.

Adopting a “manner” approach where governments ban only expressions of the right which are particularly problematic would have the added benefit of giving communities flexibility to meet a problem which has resisted legal solutions for decades; namely, the cultural split in firearm regulations between rural and urban America.

Support for firearms is strongest in rural America where guns are associated with values like self-reliance, manhood, and patriotism. The opposite is true in urban centers. Rural America also enjoys a much lower rate of gun crime, and hence, rural dwellers’ support for gun regulation is understandably low. Most gun crime occurs in large cities with half of all homicides occur in America’s sixty three largest cities, which contain only 16% of the population. It is unsurprising, then, that urban city dwellers overwhelmingly favor gun control. A recent study found that 56% of urban residents called

50 See Blocher, supra note 25; Gary Kleck, Crime, Culture Conflict and the Sources of Support for Gun Control: A Multilevel Application of the General Social Surveys, 39AM. BEHAV. SCIENTIST 387, 401 (citing Hazel Erskine, The Polls: Gun Control, 36 PUB. OPINION Q. 455 (1972)).


for stricter gun control, contrasted with a 34% preference found in rural areas.\footnote{Public Opinion on Gun Control Laws (Feb. 2013), Tex. Pol., http://laits.utexas.edu/txp_media.}

This makes it clear that different communities have different needs for gun control laws. Perhaps Waco, Texas wants to allow everything from a .22 rifle to .50 caliber machine guns. That doesn’t mean we ought to legalize .50 caliber machine guns in the ganglands of downtown LA. By adopting the “manner” rationale of the First Amendment, communities would be left free to regulate particularly dangerous types of weapons (dangerous for their community) as long as they left open a viable and meaningful alternative to self-defense.

Of course, there is a lot of room for abuse here. Communities could claim that the ordinary citizen has no need for anything other than .22 rifle for self-defense and drastically move to reduce other weapons in a draconian fashion. This is where the other part of the four-pronged TPM test is eminently useful.

First Amendment TPM restrictions require that a community ban specific manners of speech in only a narrowly-tailored fashion. Narrowly-tailored restrictions restrict only the right to the extent necessary to address the problem. “The essence of narrow tailoring is that the regulation focuses on the source of the evils the government seeks to eliminate and eliminates them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils.”\footnote{Arthur D. Hellman Et Al., First Amendment Law: Freedom of Expression & Freedom of Religion 410, (Lexis Nexus ed., 2nd ed. 2010).}

This narrow-tailoring would prohibit communities from reasoning that a person only needs one type of gun for self-defense, and that they therefore only have to allow that gun. In order to ban a certain type of weapon, the city must show that there is a substantial evil arising from the use and possession of that weapon and that the ban is effective in curbing that evil without being overly restrictive in other areas.

Out of all the TPM restrictions discussed in this paper, manner-based restrictions would provide the most help for Second Amend-
ment jurisprudence. City officials and legislators are eager to make policies that protect their citizens in the face of real threats from armed criminals. But these officials err when they seek to ban entire classes of firearms for no other reason than their menacing appearance or negative reputation. By adopting the “narrowly-tailored” approach to manner-based restrictions, governments could simultaneously move to protect their citizens while still being held accountable for the effectiveness of their policies.

V. Time

Time restrictions of the First Amendment are the most foreign to gun control laws. However, the idea of a “time” based restriction for gun carry is not totally unthinkable. What about a law that forbade firearm carriage on Main Street between the hours of 8:00 AM and 7:00 PM? This would allow police to operate when pedestrian traffic is thick and the risk for a mass shooting is the highest. It would also allow citizens the chance to carry guns during the nighttime hours when they are alone and particularly vulnerable to individually-targeted crimes.

It is not clear, however, whether time restrictions would work, given recent findings in a DC study that studied the incident of gunshots in relation to the implementation of juvenile curfew laws. The researchers found that time-based restrictions on firearm carry by minors actually led to an increased number of shots being fired. Nonetheless, the idea is fascinating, and deserves further exploration as one way in which the right to self-defense can be balanced against the problems that right creates for those in charge of public safety policies.

Another example of time-based restrictions would be restricting firearms during a time of emergency. During the chaos after Hurricane Katrina, New Orleans Mayor Ray Nagin ordered the police to confiscate all public weapons, resulting in public outrage when it

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was revealed that many of the weapons were never returned to their owners.\textsuperscript{56} Later, the 4th Circuit in \textit{Bateman v. Perdue} found that a law requiring owners to surrender their firearms during official states of emergency is unconstitutional.\textsuperscript{57} UCLA law professor Eugene Volokh commented that this was because the law excessively intruded upon citizens’ Second Amendment rights.\textsuperscript{58} Such emergency measures limit firearm usage “that is at the very core of the Second Amendment at a time when the need for self-defense may be at its very greatest.”\textsuperscript{59} Therefore, the law failed the narrowly-tailored prong of the TPM test, and the government’s compelling interest in public safety was insufficient to justify the ban.\textsuperscript{60}

In conclusion, time-based firearm restrictions are a stretch. Restricting firearms at certain times suffers from the same problems mentioned in the discussion about place restrictions; namely, that, unlike speech, the need for self-defense is constant and can’t be wholly effective if it only applies at certain times. Still, time-based restrictions represent a creative way for local and state governments to create narrowly-tailored legislation that fits the third prong of the speech test.

\textbf{VI. Person}

An area in which First Amendment analogies fall short is in person restrictions. \textit{Heller} is very specific in saying that certain individuals (including the mentally ill and the convicted) might forfeit

\begin{itemize}
\item \textsuperscript{57} \textit{Bateman v. Perdue}, NO. S:10-CV-26S-H.
\item \textsuperscript{58} Eugene Volokh, \textit{District Court Holds Second Amendment Applies Outside the Home, Strikes Down Ban on Gun Transportation During State of Emergency, The Volokh Conspiracy} (Jan. 29th, 2016, 7:03 PM), http://volokh.com/2012/03/29/district-holds-second-amendment-applies-outside-the-home-strikes-down-ban-on-gun-transportation-during/.
\item \textsuperscript{59} Bateman v. Perdue NO. S:10-CV-26S-H, 16.
\item \textsuperscript{60} See Volokh, \textit{supra} note 58.
\end{itemize}
their rights to a firearm, even though such people might have an enhanced need for self-defense. It is difficult to imagine a court upholding a similar First Amendment ban on a class of individuals. Banning only criminals from speaking? Banning only communists from speaking? This would run afoul of the “content-neutral” test in O’Brien and other landmark speech cases. Clearly, TPM restrictions are not equipped to deal with Heller’s suggestion that certain classes of people can lose their Second Amendment rights. Courts will probably be forced to add new tests and doctrines to deal with the person-based restrictions mentioned in the Heller opinion.

VII. CONCLUSION

TPM restrictions provide a useful framework for starting to think about Second Amendment Jurisprudence. However, the analogies aren’t perfect: TPM analogies fail woefully when discussing the “person” bans outlined in the “presumptively lawful” list in Heller, but they work quite well in coming to understand “place” bans and would do a great deal to improve upon the “manner” type restrictions which are currently in a state of deep confusion. Courts should, of course, not rely solely on talmudic comparisons between the First and Second Amendment, but TPM restrictions are a good starting place as courts look to form a standard of review for the exceptions to the 2nd Amendment right to self-defense established in Heller.
