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## History, Heller, and High-Capacity Magazines: What is the Proper Standard of Review for Second Amendment Challenges?

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**HISTORY, *HELLER*, AND  
HIGH-CAPACITY MAGAZINES:  
WHAT IS THE PROPER STANDARD OF  
REVIEW FOR SECOND AMENDMENT  
CHALLENGES?**

*Lindsay Colvin\**

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### INTRODUCTION

In 1996, Daniel Chovan was convicted in California state court of a misdemeanor that did not involve a gun.<sup>1</sup> After inflicting corporal injury on his spouse, Cheryl Fix, he was sentenced to 120 days in jail and three years of supervised release.<sup>2</sup> Although Chovan did not use a firearm in committing the offense, he was banned from possessing a gun for the rest of his life under a federal statute applicable only to persons convicted of misdemeanor domestic violence crimes.<sup>3</sup> Chovan challenged the law as an unconstitutional infringement of his Second Amendment rights.<sup>4</sup> In evaluating Chovan's case, the Ninth Circuit was faced with a problem: what standard of review should apply to Chovan's constitutional claim?<sup>5</sup> Absent clear guidance from the Supreme Court, the Ninth Circuit was left to choose its own standard.<sup>6</sup> Even though the Ninth Circuit found that the federal statute substantially burdened Chovan's Second Amendment rights, it opted to grant the federal government moderate deference, and applied intermediate scrutiny.<sup>7</sup> After examining the regulation through this lens, the Ninth Circuit concluded that the statute was constitutional.<sup>8</sup> Thus, without any approval from the Supreme Court

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1. *United States v. Chovan*, 735 F.3d 1127, 1130 (9th Cir. 2013).

2. *Id.*

3. *Id.*

4. *Id.* at 1129–30.

5. *Id.* at 1134.

6. *See id.*

7. *Id.* at 1138.

8. *Id.* at 1130, 1142.

regarding its methodology, the *Chovan* court both independently selected a standard of review for a constitutional challenge and upheld severely burdensome legislation by virtue of its choice.

*Chovan* is not an isolated example of constitutional confusion. In fact, it is simply the most recent example of the legal debate surrounding the proper standard of review for the Second Amendment. The proper analytical framework for statutes challenged as an unconstitutional infringement on individual Second Amendment rights after *District of Columbia v. Heller* has emerged as both a hotly contested and imprecise zone of jurisprudence for lower courts.<sup>9</sup> As an increasing number of Second Amendment cases wend through the federal system, these courts have been faced with two types of challenged gun statutes. This Note defines those two types as statutes that “prohibit” and those that “limit.” “Prohibiting” statutes constitute blanket bans on certain weapons or materials, and include regulations like the District of Columbia (District) handgun ban struck down in *Heller*.<sup>10</sup> “Limiting” statutes create regulations on certain types of weapons or related activities, such as concealed carry laws or purchase restrictions.<sup>11</sup> Prohibiting statutes are immediately more suspect after *Heller*, which explicitly decried legislation “ban[ning] . . . an entire class of ‘arms’ that is overwhelmingly chosen by American society” as an unconstitutional restriction on the right to keep and bear arms.<sup>12</sup> But because the Court failed to specify a level of scrutiny for Second Amendment claims in any form, ruling upon both types of legislation has presented a complicated task for lower courts.<sup>13</sup>

In *Heller*’s wake, two opposing points of view have emerged regarding its proper application in both categorizing statutes affecting the Second Amendment and in classifying their constitutionality. Part I of this Note traces the development of the Supreme Court’s approach to the Second Amendment both before and immediately after the *Heller* decision. Part II examines the evolution of Second Amendment jurisprudence since *Heller*, and posits that legislation regulating high-capacity magazines represents a markedly gray area for judges outlining the contours of the right to keep and bear arms. Part II also outlines the analytical options for courts faced with

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9. 554 U.S. 570 (2008) (*Heller I*).

10. *See id.* at 573.

11. *Cf.* Nicholas J. Johnson, *Administering the Second Amendment: Law, Politics, and Taxonomy*, 50 SANTA CLARA L. REV. 1263, 1264 (2010).

12. 554 U.S. at 628; *cf.* Johnson, *supra* note 11, at 1264.

13. 554 U.S. at 634–35.

Second Amendment challenges that have developed since *Heller*. The majority of courts faced with Second Amendment issues have opted to pursue a two-step, balancing analysis. First, courts choosing this method decide whether the statute regulates conduct that falls within the scope of the Second Amendment.<sup>14</sup> If so, the court then engages in some level of heightened scrutiny of the regulation, which emerges almost invariably as a type of intermediate scrutiny.<sup>15</sup> Alternatively, a small group of justices led by Judge Brett Kavanaugh of the D.C. Circuit<sup>16</sup> have rejected the use of balancing tests as inconsistent with *Heller*. Instead, these judges rely upon the “common use test” delineated in *Heller*, and employ an evaluation of the text, history, and tradition of the challenged statute and the Second Amendment.<sup>17</sup>

Part III of this Note uses high-capacity magazine regulations as a test case for the application of both methodologies, and finds that the approach recommended by Judge Kavanaugh is the preferable option. Because the Kavanaugh approach avoids the judicial interest-balancing so disfavored by the Supreme Court in Second Amendment cases, this Note concludes that Judge Kavanaugh’s analysis is the proper choice for courts faced with Second Amendment challenges. This Note arrives at this result because the Kavanaugh approach is flexible, predictable, easy to apply, and faithful to the core principles articulated by the Supreme Court.

## I. THE CONTOURS OF MODERN SECOND AMENDMENT JURISPRUDENCE: FROM *MILLER* TO *HELLER*

### A. Second Amendment Jurisprudence Before 2008

The words of *Heller* are familiar to all Second Amendment scholars, although they have managed to produce a breathtaking divergence of interpretation. Before *Heller*’s issuance in 2008, courts interpreted Second Amendment cases almost solely through the lens of the canonical case *United States v. Miller*.<sup>18</sup> In *Miller*, the U.S.

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14. See, e.g., *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

15. See, e.g., *id.* at 97. Courts utilizing an interest-balancing test must necessarily apply some form of heightened scrutiny because *Heller* rejected the use of rational basis review for Second Amendment cases. *Heller I*, 554 U.S. at 628 n.27.

16. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

17. See, e.g., *Gowder v. City of Chicago*, 923 F. Supp. 2d 1110, 1118–19 (N.D. Ill. 2012).

18. 307 U.S. 174, 178 (1939).

Supreme Court upheld a federal statute prohibiting the interstate transport of short-barreled shotguns, declaring that possession or use of this type of firearm bore “no reasonable relationship to the preservation or efficiency of a well regulated militia.”<sup>19</sup> The *Miller* Court determined that the Second Amendment should be interpreted and applied with a careful eye to the continuation and effectiveness of state militias.<sup>20</sup> Justice McReynolds, writing for the majority, defined a militia as “comprised [of] all males physically capable of acting in concert for the common defense” who were “expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”<sup>21</sup> As such, lower court opinions expound upon the connection between the Second Amendment and its historical application to the state militias referenced in *Miller*, and generally limit the scope of weapons protected under the amendment to those generally utilized at the time of its passage.<sup>22</sup> However, the *Miller* opinion was also notoriously “opaque and open-ended,” and seemed to raise more questions than it answered about the scope of the Second Amendment.<sup>23</sup>

For the next seven decades, state and federal courts failed to agree upon a uniform evaluation of *Miller*’s meaning.<sup>24</sup> Some embraced a “state’s right” theory, interpreting *Miller* to mean that the Second Amendment protected states in the maintenance of their militias against possible interference by the federal government.<sup>25</sup> These courts held that individuals lack standing to challenge gun legislation, because an individual right to keep and bear arms does not exist.<sup>26</sup> Other courts, in contrast, adopted a “collective right” approach, and held that the Second Amendment protected only the collective possession of arms bearing a reasonable relationship to the preservation or efficiency of a well-regulated militia.<sup>27</sup>

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19. *Id.*

20. *Id.*

21. *Id.* at 179.

22. See Brannon Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 975–76 (1996).

23. See Michael P. O’Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 353 (2009).

24. *Id.* at 354.

25. See, e.g., *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942).

26. See *Silveira v. Lockyer*, 312 F.3d 1052, 1066 (9th Cir. 2003).

27. See, e.g., *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995).

Most courts considering the issue utilized some form of rational basis review when evaluating firearm regulations.<sup>28</sup> Gun regulations were upheld in almost every instance in the wake of the *Miller* decision.<sup>29</sup> But historical interpretation of *Miller* did not garner universal acceptance. For instance, scholar Brannon Denning argued over ten years before the *Heller* decision that applying *Miller* to deny an individual's right to keep and bear firearms "strayed so far from the Court's original holding to the point of being intellectually dishonest."<sup>30</sup> If the Court truly intended to limit the use and possession of firearms to a militia, Denning contended, the case would have been disposed of on standing grounds, because the defendants in the case were not militia members.<sup>31</sup> Had the *Miller* Court foreclosed an individual right to bear arms, he argued, the replacement of state militias with the National Guard would render the Second Amendment, like the Third Amendment, "little more than an anachronistic curiosity."<sup>32</sup>

### B. *District of Columbia v. Heller*. A Novel Approach

Faced with the opportunity to redraw the boundaries of the Second Amendment, the *Heller* Court put some of the questions raised by *Miller* to rest and issued the seminal decision regarding prohibition statutes under the Second Amendment.<sup>33</sup> Petitioner Dick Heller challenged a District law prohibiting the registration of handguns and requiring residents to keep lawfully owned firearms unloaded and disassembled or bound by trigger lock or a similar device.<sup>34</sup> Relying primarily on First Amendment jurisprudence, the Government recommended that the Supreme Court adopt a standard of intermediate scrutiny when evaluating gun control legislation.<sup>35</sup> At

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28. Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1136 (2011).

29. *Id.* at 1134 (citing Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 718 (2007)).

30. Denning, *supra* note 22, at 962–63.

31. *Id.* at 975.

32. *Id.* at 996.

33. *Heller I*, 554 U.S. 570, 595 (2010) (holding that "[t]here seems to us no doubt, on the basis of text and history, that the Second Amendment conferred an individual right to keep and bear arms"); see Nelson Lund, *Second Amendment Standards of Review in a Heller World*, 39 FORDHAM URB. L.J. 1617, 1618 (2012).

34. *Heller I*, 554 U.S. at 570. The law also made it a crime to carry an unlicensed handgun, but authorized the police chief to issue one-year licenses to do so. Heller, a special policeman, applied to register a handgun to keep in his home, but the District denied his request.

35. Lund, *supra* note 33, at 1618.

oral argument, Chief Justice Roberts expressed skepticism that a balancing test was appropriate for Second Amendment analysis, stating:

[T]hese various phrases under the different standards that are proposed, “compelling interest,” “significant interest,” “narrowly tailored,” none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. Isn’t it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time, including you can’t take the gun to the marketplace and all that, and determine how . . . this restriction and the scope of this right looks in relation to those? I’m not sure why we have to articulate some very intricate standard. I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up. But I don’t know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case?<sup>36</sup>

Justice Scalia, writing for the majority, reflected Justice Roberts’s concern and declined to articulate a standard to be applied in every Second Amendment case.<sup>37</sup> Nor did the Court establish *any* consistent standard to be utilized when evaluating the right to keep and bear arms.

Rather than articulate a standard of review for the Second Amendment, the *Heller* Court instead struck down the District’s regulation because it prohibited an entire class of firearms overwhelmingly chosen by Americans for the lawful purpose of self-defense.<sup>38</sup> The Court reached this conclusion by engaging in “the most exacting historical inquiry into any question concerning the right to keep and bear arms.”<sup>39</sup> Justice Scalia concluded that the Second Amendment protects an individual’s right to keep and bear arms for self-defense by exhaustively examining three distinct sources: the amendment’s text, the history behind its enactment, and its traditional

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36. *Id.* at 1618-19 (quoting Transcript of Oral Argument at 44, *Heller I*, 554 U.S. 570 (2008) (No. 07-290), available at [www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/07-290.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-290.pdf)).

37. *Heller I*, 554 U.S. at 628-29.

38. See Lund, *supra* note 33, at 1619.

39. Darrell A. H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 861-62 (2013). The *Heller* decision has also been characterized by scholars as one of the most exacting exercises of originalism ever undertaken by the Supreme Court. See, e.g., Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659 (2009); Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 249 (2008).



interpretation.<sup>40</sup> The challenged statute, he opined, did not require the application of any standard of scrutiny traditionally applied to enumerated constitutional rights (rational basis review, intermediate scrutiny, or strict scrutiny), because it would fail them all.<sup>41</sup> He further classified rational basis review (the standard favored by courts in the wake of *Miller*) as particularly inappropriate, arguing that

[Rational basis review] could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right . . . . If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.<sup>42</sup>

By engaging in a textual, historical, and traditional method of analysis, rather than adhering to the open-ended balancing test recommended by the government, *Heller* also implicitly rejected the application of intermediate or strict scrutiny to prohibition cases.<sup>43</sup>

### C. *Heller's* Limits: Presumptively Lawful Regulations and the Common Use Test

The *Heller* majority dismissed the notion of an unlimited Second Amendment right.<sup>44</sup> Two primary restrictions upon the right to keep and bear arms for self-defense emerge from the decision, both hinging upon the amendment's history, traditional application, and interpretation. The first restriction preserves a set of "longstanding" prohibitions on firearm possession, which Justice Scalia categorized as "presumptively lawful."<sup>45</sup> The opinion specifically includes in this category "prohibitions on [possession] by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places . . . or laws imposing conditions and qualifications on the commercial sale of arms."<sup>46</sup> Scalia was careful to note that the list of presumptively lawful regulations was not exhaustive, leaving room for additions or

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40. *Heller I*, 554 U.S. at 595; *Miller*, *supra* note 39, at 856. Justice Scalia further described this right as reaching its apex in the home. *Heller I*, 554 U.S. at 628.

41. *Heller I*, 554 U.S. at 628–29.

42. *Id.* at 628 n.27.

43. See E. Garret Barlow, *United States v. Reese and Post-Heller Second Amendment Interpretation*, 2012 BYU L. REV. 391, 405; Lund, *supra* note 33, at 1628.

44. *Heller I*, 554 U.S. at 626.

45. *Id.* at 626–27 n.26; see Alexander C. Barrett, *Taking Aim at Felony Possession*, 93 B.U. L. REV. 163, 171–72 (2013).

46. *Heller I*, 554 U.S. at 626–27.

slight alterations.<sup>47</sup> As Justice Breyer pointed out in his dissent, the existence of this list appears to foreclose the application of strict scrutiny to laws burdening individual Second Amendment rights.<sup>48</sup> The majority's explicit approval of a given set of regulations "whose constitutionality under a strict scrutiny standard would be far from clear," he argued, would make the true application of strict scrutiny to Second Amendment cases "impossible."<sup>49</sup> Breyer sharply criticized the majority's failure to articulate a standard, and rejected Scalia's focus on text, history, and tradition.<sup>50</sup> Further, he recommended that the Court employ an interest-balancing inquiry in Second Amendment cases similar to the type utilized in free speech and election law cases.<sup>51</sup>

The second limitation articulated in *Heller* delineates the scope of weapons protected under the Second Amendment.<sup>52</sup> To honor the historical restriction on the possession of "dangerous and unusual weapons," the Court upheld the common use standard first described in *Miller*.<sup>53</sup> Thus, "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes."<sup>54</sup> The precise meaning of the common use exception has become a topic of heated scholarly debate that implicates the vast advancement in firearms technology in previous centuries.<sup>55</sup> Initially troubling is the proper definition of the phrase "at the time," which could refer to two acceptable periods: the time of ratification of the Second Amendment or the modern day.<sup>56</sup> Justice Scalia eliminated the first option in short order:

Some have made the argument, bordering on the frivolous, that only those arms that existed in the [eighteenth] century are protected by the Second Amendment. We do not interpret constitutional rights

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47. *See id.*

48. *Id.* at 688–89 (Breyer, J., dissenting).

49. *Id.*

50. *Id.* at 686–87 (Breyer, J., dissenting).

51. *Id.* at 690 (Breyer, J., dissenting).

52. *Id.* at 627.

53. *Id.*

54. *Id.* at 625.

55. *See, e.g.*, Craig S. Lerner & Nelson Lund, *Heller and Nonlethal Weapons*, 60 HASTINGS L.J. 1387, 1387–88 (2009); Michael S. Obermeier, *Scoping Out the Limits of "Arms" Under the Second Amendment*, 60 U. KAN. L. REV. 681, 683 (2012); Mark Tushnet, *Permissible Gun Regulations After Heller: Speculations About Method and Outcomes*, 56 UCLA L. REV. 1425, 1439–40 (2009).

56. *See* Lerner & Lund, *supra* note 55, at 1387; *see also* Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 710–11 (2012).

that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.<sup>57</sup>

Thus, according to the Supreme Court, the Second Amendment quite clearly extends to protect modern weapons. To rule otherwise would be to accept the absurd logic that “the ‘Armies’ Congress is authorized to raise can consist only of infantry marching on foot with antique black powder muskets . . . [a]nd the ‘Navy’ . . . that Congress is authorized to maintain would be a fleet of wooden sailing ships.”<sup>58</sup>

#### D. Complications Posed by the Common Use Test

Although the common use test seems to refer to weapons and technologies commonly owned in the modern day, this premise raises some critical complications. First, who is the common user? American military organizations often use weapons that private citizens are unable to own or obtain for either home or public use.<sup>59</sup> This has led some scholars to argue that current military utility should serve as “both a necessary and sufficient” test for the constitutional protection of hand-carried weapons.<sup>60</sup> Others argue that protected firearms should be both appropriate for military use, but also for common use by private citizens.<sup>61</sup> The Supreme Court seemed to resolve this question in *Heller* by categorizing the common use exception as a “gloss on the historical tradition of prohibiting the carrying of dangerous and unusual weapons.”<sup>62</sup> The Court rejected the notion that the common user includes military organizations, a criterion it characterized as “startling” in its implications, and held that the arms protected by the Second Amendment are those in

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57. *Heller I*, 554 U.S. at 582 (internal citations omitted).

58. Lerner & Lund, *supra* note 55, at 1387.

59. See Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water (Mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1255 n.66 (2009); O’Shea, *supra* note 23, at 359.

60. See O’Shea, *supra* note 23, at 359.

61. See *id.* During oral argument in *Heller*, Justice Scalia expressed preference for this kind of two-step analysis, though it was not ultimately adopted in the case. See *id.* (quoting Transcript of Oral Argument at 47, *Heller I*, 554 U.S. at 570 (No. 07-290), available at [www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/07-290.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-290.pdf)).

62. O’Shea, *supra* note 23, at 368.

common use at the present time for both inherently private self-defense and “other lawful purposes.”<sup>63</sup>

The second complication raised by the common use test’s engagement with the present period is what scholars deem the “circularity problem.”<sup>64</sup> By permitting national popularity and frequency of use to dictate a class of protected arms, the common use test “effectively empowers the government to create its own exceptions to the Second Amendment right so long as the Supreme Court waits awhile after the banning of a weapon before it checks to see whether such weapons are in common civilian use.”<sup>65</sup> It also permits the government to automatically place new technologies outside of the reach of the Second Amendment through severely restrictive regulations or bans that eliminate the possibility for that technology to ever become “common.”<sup>66</sup> Thus, the test makes the ability to possess novel firearm technology subject to the “good faith of the legislature”—despite the fact that the premise of the Second Amendment is to prevent free people from being wrongfully deprived of arms by the government.<sup>67</sup>

Despite the problems it generates, the common use formula does establish a relatively narrow and well-defined class of protected firearms, excluding most military arms and large-scale deadly weapons.<sup>68</sup> Further, because the *Heller* Court built upon *Miller*’s holding that gun possession must further the “lawful purpose” of self-

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63. *Id.* at 367–68 (quoting *Heller*, 554 U.S. at 624–25). The *Heller* majority offered the example of machine guns to support the alarming nature of the idea of including military organizations as “common users.” *Heller I*, 554 U.S. at 624. Protecting military equipment useful in warfare would mean that the Second Amendment protected machine guns, which would render unconstitutional the National Firearms Act’s prohibition on such fully automatic weapons (a provision not challenged in *Miller*). *See id.*

64. *See Proposals to Reduce Gun Violence: Protecting Our Communities While Respecting the Second Amendment: Hearing Before the Subcomm. on the Constitution, Civil Rights, & Human Rights of the S. Comm. on the Judiciary*, 113th Cong. 13–14 (2013) (statement of Laurence Tribe, Carl M. Loeb Univ. Professor, Harvard Law Sch.); Lerner & Lund, *supra* note 55, at 1411; Darrell A.H. Miller, *Analogies and Institutions in the First and Second Amendments: A Response to Professor Magarian*, 91 TEX. L. REV. 137, 142 n.28 (2013); O’Shea, *supra* note 23, at 384–86.

65. Lerner & Lund, *supra* note 55, at 1411.

66. *Id.*

67. O’Shea, *supra* note 23, at 385.

68. Nicholas J. Johnson, *Supply Restrictions at the Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinalist Critique*, 60 HASTINGS L.J. 1285, 1292 (2009). The handgun, by contrast, is “the quintessential self-defense weapon . . . [and] the most popular weapon chosen by Americans for self-defense in the home.” *Heller I*, 554 U.S. 629.

defense, “[b]y definition, any device that would destroy both the self-defender and the attacker in situations satisfying the imminent threat requirement [of self-defense is] outside the envelope.”<sup>69</sup> While Justice Scalia conceded that a modern militia would necessarily require more sophisticated weapons than those from the eighteenth century, he adhered to the traditional notion that “the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of that right.”<sup>70</sup> In any event, he concluded, the handgun’s popularity for American self-defense in the home rendered at least the District ban invalid.<sup>71</sup>

Taken as a whole, the *Heller* decision establishes three critical propositions: first, that individuals have a constitutional right to protect themselves with usable firearms, and that this right is at its strongest in the home; second, that some burdens upon individual Second Amendment rights are presumptively lawful; and third, that the amendment does not protect dangerous or unusual weapons.<sup>72</sup> The first proposition has been termed “the *Heller* core” by scholars, and is widely accepted in both academia and lower courts.<sup>73</sup> The second two have faced disparate interpretation, in part due to the Court’s failure to articulate a clear standard of review.

## II. CONFLICTING VIEWS ON THE PROPER STANDARD OF REVIEW AND THE UNIQUE CHALLENGES POSED BY HIGH-CAPACITY MAGAZINE LEGISLATION

### A. Expanding *Heller* to the States: *McDonald v. City of Chicago*

After *Heller*, courts were understandably confused. The Supreme Court’s shift from *Miller* to *Heller* left judges mired in an adjusted view of the Second Amendment, and they struggled to find a workable way to apply the case to the increasing number of constitutional challenges to gun laws. The Court attempted to clarify *Heller* in the subsequent case of *McDonald v. City of Chicago* by holding that the individual right to possess a handgun in the home for self-defense applied to the states by virtue of the Fourteenth Amendment.<sup>74</sup> The plaintiffs in *McDonald* challenged a Chicago

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69. Johnson, *supra* note 68, at 1292.

70. *Heller I*, 554 U.S. at 627–28.

71. *See id.* at 629.

72. *See* Kiehl, *supra* note 28, at 1143.

73. *See id.*

74. 130 S. Ct. 3020, 3050 (2010) (plurality opinion).

statute prohibiting individuals from possessing a handgun in the city without a valid registration certificate.<sup>75</sup> The same statute also prohibited the registration of nearly all handguns in city limits, which had the effect of banning handgun possession in Chicago.<sup>76</sup> They additionally challenged an Oak Park, Illinois law making it “unlawful for any person to possess . . . any firearm.”<sup>77</sup>

Justice Alito’s majority opinion held that because the Second Amendment is “deeply rooted in this Nation’s history and tradition,” it is fundamental and must be incorporated to apply against the states under the Due Process Clause.<sup>78</sup> Citing *Heller*, the *McDonald* majority confirmed that “individual self-defense is ‘the *central component*’ of the Second Amendment right . . . [and] ‘the need for defense of self, family, and property is most acute in the home.’”<sup>79</sup> The Court also adopted the *Heller* Court’s careful examination of the history and tradition of the Second Amendment, chronicling the original understanding of everyone from American colonists to the Framers and the drafters of the Fourteenth Amendment.<sup>80</sup> At each step in his analysis, Justice Alito reiterated the view that the right to keep and bear arms is and always has been “among those fundamental rights necessary to our system of ordered liberty.”<sup>81</sup> Writing also for the plurality, Justice Alito further refused to treat the Second Amendment as a “second-class” right, distinct from other portions of the Bill of Rights deemed worthy of incorporation.<sup>82</sup>

The *McDonald* Court, like the *Heller* Court, was careful to observe the state’s right to reasonably burden individual Second Amendment rights.<sup>83</sup> For instance, Justice Alito specifically reaffirmed Justice Scalia’s non-exhaustive list of “presumptively lawful” gun regulations,

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75. *Id.* at 3026 (citing CHI., ILL. MUNICIPAL CODE § 8-20-050(a)–(c) (2009)).

76. *Id.*

77. *Id.* (quoting OAK PARK, ILL. MUNICIPAL CODE § 27-2-1 (2009)) (internal quotation marks omitted).

78. *Id.* at 3036 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

79. *Id.* at 3036 (quoting *Heller I*, 554 U.S. 570, 628 (2008)).

80. *See id.* at 3037–42.

81. *Id.* at 3042.

82. *Id.* at 3044 (plurality opinion). Justices Roberts, Scalia, and Kennedy comprised the plurality opinion. Justice Thomas joined in the majority opinion, agreeing that the Due Process Clause of the Fourteenth Amendment makes the Second Amendment applicable to the states. *Id.* at 3058 (Thomas, J., concurring). But Thomas wrote separately to express his opinion that the Second Amendment should be incorporated through the Privileges and Immunities Clause of the Fourteenth Amendment rather than the Due Process Clause. *Id.* at 3059 (Thomas, J., concurring).

83. *See id.* at 3046.

stating that “[d]espite municipal respondents’ doomsday proclamations, incorporation does not imperil every law regulating firearms.”<sup>84</sup> However, he clearly articulated the suspect nature of blanket bans, like those instituted by Chicago and Oak Park. While the municipal respondents noted that courts had upheld several state and local firearm laws, Justice Alito pointed out the “paucity of precedent sustaining bans comparable to those at issue here and in *Heller*.”<sup>85</sup> Indeed, the municipal respondents in *McDonald* were able to locate only a single case from the late twentieth century upholding a ban similar to the one at issue.<sup>86</sup>

*McDonald* served largely to affirm the core principles of *Heller*’s interpretation of the Second Amendment.<sup>87</sup> The case also lent approval to the historical inquiry the *Heller* Court utilized.<sup>88</sup> But Justice Alito failed to articulate a precise standard of review for modern firearm legislation, the constitutionality of which remains suspect after historical analysis.<sup>89</sup> Despite this omission, Justice Alito stated clearly that the Court likely would *not* consider interest-balancing to be the proper method of judicial review for gun legislation.<sup>90</sup> Evaluating the municipal respondents’ contention that interest-balancing would be appropriate in this instance, Justice Alito asserted that “[i]n *Heller* . . . we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing.”<sup>91</sup> Justice Alito additionally eliminated the possibility of applying a “reasonableness” test, rejecting the municipal respondents’ argument that state and local governments should be able to “enact any gun control law they deem to be reasonable.”<sup>92</sup> Thus, after *McDonald*, both interest-balancing and reasonableness inquiries (like the rational basis test), are inappropriate when evaluating the contours of the right to keep and bear arms.

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84. *Id.* at 3047. Justice Alito additionally cited *Heller*’s statement that the right extends to handguns because they are “overwhelmingly chosen by American society for [the] lawful purpose of self-defense,” implicitly supporting the common use test. *Id.* (quoting *Heller I*, 554 U.S. at 628).

85. *Id.*

86. *See id.* (pointing to municipal respondents’ citation of *Kalodimos v. Morton Grove*, 470 N.E.2d 266 (Ill. 1984)).

87. *See* Kiehl, *supra* note 28, at 1139-40.

88. *See id.* at 1140.

89. *See id.* at 1141.

90. *McDonald*, 130 S. Ct. at 3047 (plurality opinion).

91. *Id.* (citing *Heller I*, 554 U.S. 570, 632-34 (2008)).

92. *Id.* at 3046 (citation omitted).

### B. Evolution of the Common Use Test After *McDonald*

The Supreme Court's affirmation of the right to keep and bear arms spawned a wealth of decisions evaluating the Second Amendment in light of both the *Heller* core and its two articulated exceptions. The first exception, *Heller's* list of "presumptively lawful" statutes, has provided something of a guidepost for courts to follow when making constitutional determinations about gun laws, even if placing a given statute into the "presumptively lawful" category occasionally takes some judicial wrangling.<sup>93</sup> The second exception—the common use test—is somewhat murkier to apply. Nevertheless, the common use test is arguably more faithful to the historical inquiry presented by the *Heller* Court, prompting a more thorough review of the challenged statute and its purpose.

When choosing how to apply the common use test, courts must determine whether the test reaches the challenged statute.<sup>94</sup> Thus, judges are generally required to place gun laws into one of two categories to determine whether the common use test applies. The first are "prohibition statutes," or legislation that either bans or constructively bans firearms themselves or an item critical to their use.<sup>95</sup> These laws fall well within the scope of the common use test because they necessarily implicate an evaluation of whether the banned firearm or equipment was in "common use" at the time the Second Amendment was established.<sup>96</sup> If so (assuming the statute is not "presumptively lawful"), a ban would be unconstitutional. When evaluated under the common use test, these cases are often the "easy fits," and a straightforward answer often emerges; blanket bans are almost always impermissible.<sup>97</sup> The most obviously problematic prohibition statutes concern bans of commonly owned firearms, like the laws struck down in *Heller* and *McDonald*.<sup>98</sup> Other forms of prohibition statutes could possibly be construed to include laws requiring loaded chamber indicators, integral trigger locks, or other mechanisms that severely diminish or eliminate the utility of the

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93. Professor Darrell A.H. Miller has criticized what he considers to be the "mechanical" application of *Heller's* "presumptively lawful" categories in an attempt to fit a challenged statute within one of them; this, he argues, undercuts the exacting and individualized historical inquiry demanded by the *Heller* Court. Miller, *supra* note 39, at 855.

94. Johnson, *supra* note 11, at 1273.

95. *See id.* at 1264.

96. *See id.*

97. *See id.*

98. *See id.* Commonly owned firearms include handguns and popular long guns, the types of weapons that have been in existence in some form since the Framing. *Id.*



firearm for self-defense.<sup>99</sup> But the common use test is far from a death knell to all laws banning guns or related equipment. For instance, the test would uphold statutes prohibiting fully automatic repeaters (true machine guns) because they have traditionally been rare for civilian use and heavily restricted.<sup>100</sup>

The second category of restrictions that courts must consider under *Heller's* common use test are “limiting statutes,” which simply add “regulatory friction” to legally keeping and bearing firearms.<sup>101</sup> Examples include waiting periods, taxes and processing fees, and laws like concealed carry restrictions that regulate possession outside of the home.<sup>102</sup> This type of legislation is often beyond the reach of the common use test, because it does not directly prohibit a commonly owned firearm.<sup>103</sup> But limiting statutes necessarily fall along a sliding scale, and some may present so much “friction” that they become constitutionally problematic. For instance, legislation that effectively eliminates the right to own a gun by employing an escalating series of requirements, waiting periods, and taxes could so severely infringe on the individual right to keep and bear arms in the aggregate as to be unconstitutional, though courts have indicated that such limitations may be tolerable as long as the core Second Amendment right is respected.<sup>104</sup> Limiting statutes create the most complicated issues for courts applying the standard articulated by the *Heller* and *McDonald* Courts.

### C. Popular Option: The *Marzzarella* Two-Step

*Heller* and *McDonald* prompted a veritable flood of Second Amendment challenges.<sup>105</sup> Left without a clearly articulated standard of review to apply when deciding such issues, lower courts were largely left to their own devices to fashion one. As a result, courts faced with gun laws have employed everything from the rational basis test<sup>106</sup> to strict scrutiny<sup>107</sup> in an attempt to determine an appropriate

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99. *See id.* at 1264–65.

100. Johnson, *supra* note 68, at 1293.

101. Johnson, *supra* note 11, at 1274.

102. *Id.*

103. *Id.* at 1273.

104. *Id.*

105. *See* Stacey L. Sobel, *A Tsunami of Legal Uncertainty: What's a Court to Do Post-McDonald?*, 21 CORNELL J.L. & PUB. POL'Y 489, 511 (2012).

106. *See, e.g.*, *Richards v. Cnty. of Yolo*, No. 2:09-CV-01235 MCE-DAD, 2011 U.S. Dist. LEXIS 51906, at \*3 (E.D. Cal. May 16, 2011) (utilizing the rational basis test to deny plaintiff's request for a concealed carry permit because the law at issue did not “substantially burden” his Second Amendment rights). It is worth noting that Justice

method of analysis. Some, like the Seventh Circuit in *Ezell v. City of Chicago*, have held that *Heller* and *McDonald* mandate the application of “heightened scrutiny” to such legislation.<sup>108</sup> Under “heightened scrutiny,” the Seventh Circuit stated that the government must establish a “strong public-interest justification” for the law in question to be upheld.<sup>109</sup> The government’s burden under this test is not one traditionally associated with any established type of review.<sup>110</sup> Such varied experimentation exemplifies lower courts’ deep confusion when faced with Second Amendment challenges.

Many courts considering the issue have settled upon a self-designed two-step inquiry when faced with legislation potentially impinging on the right to keep and bear arms. This test was first laid out by the Third Circuit in *United States v. Marzzarella*.<sup>111</sup> In *Marzzarella*, the defendant was indicted for possession of a handgun with a partially obliterated serial number in violation of federal law.<sup>112</sup> The court employed a dual-pronged test, which required it to first determine “whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee;” if not, the court’s inquiry would conclude.<sup>113</sup> If so, the Third Circuit held, an evaluating court should “evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.”<sup>114</sup> The most appropriate form of means-end scrutiny (for both the Third Circuit and the majority of courts utilizing this test) is most often an intermediate standard of

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Scalia explicitly prohibited the use of the rational basis test for Second Amendment cases. *Heller I*, 554 U.S. 570, 628 (2008).

107. *United States v. Ligon*, No. 3:04-CR-00185-HDM, 2010 U.S. Dist. LEXIS 116272, at \*16–17 (D. Nev. Oct. 20, 2010). Some scholars have advocated for Justice Breyer’s view that it is doctrinally impossible to use strict scrutiny for the Second Amendment while still honoring *Heller*’s “presumptively lawful” exception. See Sobel, *supra* note 105, at 512 (citing Carlton F.W. Larson, *Four Exceptions in Search of a Theory*; *District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1379 (2009)).

108. 651 F.3d 684, 706 (7th Cir. 2011). In *Ezell*, the Seventh Circuit struck down a Chicago law requiring range training as a prerequisite to lawful gun ownership, while simultaneously banning within city limits any range at which such training could take place. *Id.* at 689–90.

109. *Id.* at 708–09. The court classified “heightened scrutiny” as more rigorous, though not quite “strict scrutiny.” *Id.* at 708. The range ban, the Seventh Circuit concluded, fell far short of meeting this standard. *Id.* at 709.

110. Sobel, *supra* note 105, at 513.

111. 614 F.3d 85, 89 (3d Cir. 2010).

112. *Id.* at 87.

113. *Id.* at 89.

114. *Id.*

review, and the regulation must be “substantially related” to an “important governmental interest” to be valid.<sup>115</sup> Thus, the two-step test established in *Marzzarella* and subsequently followed by several circuits<sup>116</sup> combines both a historical *and* an interest-balancing inquiry.

Courts employing this analysis are often required to determine whether the common use test applies during the first step of the *Marzzarella* test, where they must decide whether an individual’s Second Amendment rights have been impermissibly burdened. In doing so, this Note suggests that courts must at least implicitly characterize the challenged statute as prohibiting or limiting.<sup>117</sup> A prohibiting statute will not survive application of the common use test if the gun or equipment prohibited is popularly and historically used.<sup>118</sup> In contrast, a limiting statute will often fall beyond the reach of the common use test,<sup>119</sup> and thus stand a far better chance of moving on to the second step of the *Marzzarella* method of analysis. For instance, in *Marzzarella*, the Third Circuit cast the law banning handguns without serial numbers as a type of prohibiting statute, but held that it would not be protected under the common use test:

[S]erial numbers on firearms did not exist at the time of ratification . . . . It would make little sense to categorically protect a class of weapons bearing a certain characteristic when, at the time of ratification, citizens had no concept of that characteristic or how it fit within the right to bear arms.<sup>120</sup>

Thus, because the regulation did not seem to impermissibly burden the defendant’s Second Amendment rights, the Third Circuit halted its analysis at step one.<sup>121</sup> Consequently, the way courts embracing this test categorize challenged legislation plays a major role in whether the law is subjected to some form of judicial interest-balancing.

Several Circuits, including the Second, Fourth, Fifth, Sixth, Ninth and Tenth, have followed the Third Circuit’s lead in employing the

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115. *See* Sobel, *supra* note 105, at 514.

116. *See, e.g.*, *Woollard v. Gallagher*, 712 F.3d 865, 874 (4th Cir. 2013); *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol Tobacco Firearms & Explosives*, 700 F.3d 185, 195 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *United States v. Reese*, 627 F.3d 792, 799–801 (10th Cir. 2010).

117. *Cf.* *Johnson*, *supra* note 11, at 1264.

118. *Id.*

119. *Id.* at 1273–74.

120. *United States v. Marzzarella*, 614 F.3d 85, 94 (3d Cir. 2010).

121. *Id.* at 95. The court proceeded to analyze and uphold the law under intermediate scrutiny, however, in order to fully foreclose the defendant’s argument. *Id.* at 95–101.

*Marzzarella* test.<sup>122</sup> While some Circuits place more emphasis on the history of the Second Amendment than others, each employs some form of the two-step test articulated in *Marzzarella*.<sup>123</sup> Thus, each Circuit using the test enjoys some ability to customize its application while adhering to the same framework. This local laterality, along with a pattern of nationwide use since the test's inception, could explain the widespread acceptance of this approach among circuit courts.

#### D. Reframing the Question: Judge Kavanaugh Dissents

Despite the *Marzzarella* two-step test's burgeoning popularity, alarmingly few courts have explained how the second part of the test comports with *Heller* and *McDonald*'s rejection of interest-balancing inquiries.<sup>124</sup> Courts utilizing this test seem unwilling to acknowledge the Supreme Court's clear warning against the use of idiosyncratic judicial evaluations of the right to keep and bear arms.<sup>125</sup> Additionally, the indeterminacy of the "consensus candidate" of evaluation—intermediate scrutiny—leaves the door open for just this type of idiosyncratic analysis in an area rife with political controversy and emotional tension.<sup>126</sup> In 2011, Judge Kavanaugh of the D.C. Circuit chose to lead the charge against the use of an interest-balancing analysis for the Second Amendment in *Heller II*.<sup>127</sup> In doing so, he opened the door to a different method of analysis for lower courts considering the issue.

*Heller II* concerned the District's renewed attempts to limit local possession of firearms. Post-*Heller*, the District enacted the Firearms Registration Amendment Act of 2008 (FRA), which (1) required a strict firearms registration procedure and (2) prohibited both the registration of "assault weapons" and the possession of magazines

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122. See *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 864, 874 (4th Cir. 2013); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 97-98 (2d Cir. 2012); *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol Tobacco Firearms & Explosives*, 700 F.3d 185, 195 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *United States v. Reese*, 627 F.3d 792, 799-801 (10th Cir. 2010).

123. Cf. *Woollard*, 712 F.3d at 876-77 (describing only recent threats posed by guns in Baltimore to justify limitations on concealed carry); *Kachalsky*, 701 F.3d at 91 (examining the deep historical roots behind a New York law requiring "good and proper cause" to obtain a concealed carry permit).

124. *Miller supra* note 39, at 870-71.

125. *Id.* (citing *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3045-56 (2010)).

126. *Id.* at 871.

127. *Heller II*, 670 F.3d 1244, 1269-96 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)

with a capacity of more than ten rounds of ammunition.<sup>128</sup> The registration provision was extensive, requiring, among several other things, a demonstration of knowledge of the District's laws and submitting each pistol to be registered "for a ballistics identification procedure."<sup>129</sup> The definition of "assault weapons" as employed by the District included certain brands and models of semi-automatic rifles, pistols, and shotguns (including the Colt AR-15 series of rifles), as well as semi-automatic firearms with certain features regardless of make and model, such as thumbhole stocks.<sup>130</sup> The *Heller II* plaintiffs were each denied applications to register firearms based upon restrictions in the FRA. Dick Heller himself was denied registration of both a semi-automatic rifle and a pistol containing a fifteen-round magazine.<sup>131</sup>

Judge Douglas Ginsburg, writing for the D.C. Circuit majority, utilized the two-step approach articulated in *Marzzarella* to analyze the registration requirements as to handguns.<sup>132</sup> Ginsburg divided the requirements into two categories: "basic" and "novel."<sup>133</sup> He concluded that the basic registration requirement, as applied to handguns but not to long guns, fell into the "presumptively lawful" exception articulated in *Heller*, and thus only reached the first step of the *Marzzarella* analysis.<sup>134</sup> Because the basic requirement to register handguns is "longstanding" and "deeply enough rooted in our history," he determined that such a mandate "does not impinge upon the right protected by the Second Amendment."<sup>135</sup> The majority asserted that the plaintiffs had failed to rebut the presumptively lawful nature of the basic registration because they did not show that the regulation had more than a de minimis effect on their rights.<sup>136</sup> In contrast, Judge Ginsburg subjected the novel registration requirements to the second step of the *Marzzarella* analysis.<sup>137</sup> Utilizing intermediate scrutiny, the D.C. Circuit remanded these

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128. *Id.* at 1247.

129. *Id.* at 1248–49.

130. *Id.* at 1249.

131. *Id.*

132. *Id.* at 1252–53.

133. *Id.* at 1253, 1255. The "basic" registration requirement included only the general requirement to register handguns. "Novel" registration requirements included modern registration restrictions utilized by the District, such as the ballistics-identification provision.

134. *Id.* at 1253–54.

135. *Id.*

136. *Id.* at 1253.

137. *Id.* at 1255.

requirements to the district court for further evidentiary proceedings to give the District an opportunity to “adequately show a substantial relationship between any of the novel registration requirements and an important government interest.”<sup>138</sup>

The *Heller II* majority then separately addressed the question of the “assault weapon” and high-capacity magazine ban.<sup>139</sup> Applying the common use test, Judge Ginsburg could not conclusively determine whether either was entitled to any Second Amendment protection.<sup>140</sup> The court found it clear from the record that both semi-automatic rifles and magazines with a capacity exceeding ten rounds are in common use among private citizens.<sup>141</sup> Nevertheless, the court could not hold with certainty whether they “are commonly used or are useful specifically for self-defense or hunting,” and declined to determine whether the regulation impinged upon the right to keep and bear arms.<sup>142</sup> Because he was reasonably certain that the prohibitions on both did not substantially burden the plaintiffs’ Second Amendment rights, Judge Ginsburg found it unnecessary to resolve this question, and thus subjected them to intermediate scrutiny.<sup>143</sup> The court held that the District’s stated interest supporting the regulation of protecting police officers and controlling crime was important, and that the prohibition was substantially related to this interest because assault weapons and high-capacity magazines are favored by criminals and place law enforcement

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138. *Id.* at 1259–60. The court pointed to the parties’ failure to distinguish between handguns and long guns in their briefs as an example of a sufficient deficiency in the record. *Id.* at 1259.

139. *Id.* at 1260.

140. *Id.* at 1261.

141. *Id.* (reciting statistics from the record revealing that the AR-15 accounted for 14.4% of all rifles produced in the United States for domestic market in 2007. As to large-capacity magazines, the court cited statistics showing that in 1994, 18% of all firearms owned by civilians were equipped with magazines holding more than ten rounds, as well as statistics demonstrating that 4.7 million more such magazines were imported in the United States between 1995 and 2000).

142. *Id.*

143. *Id.* at 1261–62. Unlike the ban in *Heller I*, Judge Ginsburg held, the laws at issue in *Heller II* did not “prohibit the possession of the quintessential self-defense weapon, to wit, the handgun.” *Id.* (internal quotation marks omitted). Notably, the *Heller II* majority did not directly address the frequency with which handguns in the District contained magazines exceeding ten rounds, and consequently did not consider whether the challenged statute substantially affected handgun possession with respect to high-capacity magazines. Furthermore, the *Heller II* court concluded that because other guns are available for self-defense besides semi-automatic rifles or firearms with large-capacity magazines, “the prohibition . . . does not effectively disarm individuals or substantially affect their ability to defend themselves.” *Id.* at 1262.

officials at heightened risk due to their increased firepower.<sup>144</sup> Judge Ginsburg acknowledged *Heller's* rejection of interest-balancing tests, but concluded that heightened scrutiny was not the type of balancing the Supreme Court had rejected.<sup>145</sup>

Judge Kavanaugh disagreed with both the majority's conclusions and its two-step analysis in dissent, and proposed an entirely new test.<sup>146</sup> According to Judge Kavanaugh, the form of evaluation developed from *Marzzarella* is based upon a complete misreading of the *Heller* core, which explicitly prohibited the use of balancing tests like strict or intermediate scrutiny.<sup>147</sup> Rather, *Heller* mandated the examination of "text, history, and tradition" to both determine the scope of Second Amendment rights and assess gun legislation.<sup>148</sup> Under Judge Kavanaugh's reading, *Heller* set forth "precise guidance" for courts faced with challenges to gun legislation, which may fall into one of two categories: bans on categories of guns, or regulations on the sale, possession, or use of guns.<sup>149</sup> He focused upon the common use test for the first category, explaining that legislatures may ban classes of guns "that have been banned in our 'historical tradition' – namely, guns that are 'dangerous and unusual' and thus are not 'the sorts of lawful weapons that' citizens typically 'possess[] at home.'"<sup>150</sup> Judge Kavanaugh further employed the "presumptively lawful" exception for the second category, where he opined that the government "may continue to impose regulations that are traditional, 'longstanding' regulations in the United States."<sup>151</sup>

Turning to the majority's analysis, Judge Kavanaugh severely criticized Judge Ginsburg's interpretation of *Heller's* restriction on interest-balancing: "The premise of the majority opinion's more

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144. *Id.* at 1263–64. Judge Ginsburg also suggested that semi-automatic rifles could fall under *Heller's* "dangerous and unusual" exception, because the *Heller* Court suggested that military M-16 rifles may be in this category and "it is difficult to draw meaningful distinctions between the AR-15 and the M-16." *Id.* at 1263 (citations omitted).

145. *Id.* at 1265. The type of interest-balancing the *Heller* Court rejected, Judge Ginsburg stated, was a more nebulous "judge-empowering 'interest-balancing inquiry' that would have a court weigh the asserted governmental interests against the burden the Government would place upon exercise of the Second Amendment right, a balancing test that is not part of strict or intermediate scrutiny." *Id.*

146. *Id.* at 1271 (Kavanaugh, J., dissenting).

147. *Id.* (Kavanaugh, J., dissenting).

148. *Id.*

149. *Id.* at 1271–72 (Kavanaugh, J., dissenting).

150. *Id.* at 1271 (Kavanaugh, J., dissenting) (citing *Heller I*, 554 U.S. 570, 627 (2008)).

151. *Id.* at 1272 (Kavanaugh, J., dissenting) (citing *Heller I*, 554 U.S. at 626–27).

general point – that *Heller's* rejection of balancing tests does not mean it rejected strict and intermediate scrutiny – is incorrect. Strict and intermediate scrutiny are balancing tests and thus are necessarily encompassed by *Heller's* more general rejection of balancing.”<sup>152</sup> He traced the evolution of heightened scrutiny through its inception in First Amendment jurisprudence, noting,

[S]trict and intermediate scrutiny come in a variety of flavors and are not always applied in the exact same way in all settings . . . . But they always involve at least some assessment of whether the law in question is sufficiently important to justify infringement on an individual constitutional right. That's balancing.<sup>153</sup>

While strict and intermediate scrutiny are appropriate and traditionally utilized in particular scenarios, like substantive due process and First Amendment cases, Judge Kavanaugh cited several areas where such analysis is not invoked to show that heightened scrutiny is not a one-size-fits-all inquiry.<sup>154</sup> He further pointed to the *Heller* majority's express rejection of the intermediate scrutiny analysis proposed in Justice Breyer's dissent in that case.<sup>155</sup> Judge Kavanaugh additionally reminded the majority that “in *Heller*, the Supreme Court affirmed this Court's decision, which similarly declined to adopt a strict or intermediate scrutiny test.”<sup>156</sup> In sum, it “would hardly have been unusual or unthinkable for the Supreme Court to set forth a Second Amendment test based on text, history and tradition – rather than a heightened scrutiny approach.”<sup>157</sup>

Applying the “text, history, and tradition” formulation, Judge Kavanaugh concluded that both restrictions imposed by the District were unconstitutional.<sup>158</sup> As to the registration requirements, he argued that they failed to fall into the “presumptively lawful” category because restrictions of the type utilized by the District are not “longstanding.”<sup>159</sup> The majority's conclusion that basic registration has deep historical roots, he contended, was based upon a

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152. *Id.* at 1280 (Kavanaugh, J., dissenting).

153. *Id.* at 1282 (Kavanaugh, J., dissenting).

154. *Id.* at 1283 (Kavanaugh, J., dissenting). Kavanaugh pointed specifically to the Jury Trial Clause, the Establishment Clause, the Self-Incrimination Clause, the Confrontation Clause, the Cruel and Unusual Punishments Clause, and the Habeas Corpus Clause as examples of areas where the Supreme Court has not used strict or intermediate scrutiny. *Id.*

155. *Id.* at 1278 (Kavanaugh, J., dissenting).

156. *Id.* at 1283–84 (Kavanaugh, J., dissenting).

157. *Id.* at 1283 (Kavanaugh, J., dissenting).

158. *Id.* at 1285 (Kavanaugh, J., dissenting).

159. *Id.* at 1291 (Kavanaugh, J., dissenting).



flawed reading.<sup>160</sup> Though he conceded that colonial militia members were required to register some of their weapons, Kavanaugh pointed out that such laws did not apply to all citizens and required militiamen to submit only one, rather than all of, their firearms for inspection.<sup>161</sup> As such, he found the District's registration requirement unconstitutional because it "is not part of the tradition of gun regulation in the United States; it is the most stringent such law in the Nation; and it is significantly more onerous than traditional licensing requirements or record-keeping requirements imposed only on gun sellers."<sup>162</sup> Because the District's registration requirements were not "longstanding" and thus not presumptively lawful, Kavanaugh had little trouble dismissing them as unconstitutional.

Judge Kavanaugh reached a similar conclusion evaluating the constitutionality of the District's "assault weapons" ban.<sup>163</sup> He characterized the ban on semi-automatic rifles as identical to the clearly unconstitutional handgun ban struck down in *Heller*.<sup>164</sup> Acknowledging the District's concern about the use of semi-automatic rifles in crime, Judge Kavanaugh then pointed to an underlying logical flaw:

In support of its law, [the District] suggests that semi-automatic rifles are 'offensive' and not just 'defensive.' But that is plainly true of semi-automatic handguns as well . . . and yet the Supreme Court held semi-automatic handguns to be constitutionally protected. Moreover, it's hard to see why, if a gun is effective for 'offense,' it might not also be effective for 'defense.' . . . There is no reason to think that semi-automatic rifles are not effective for self-defense in the home, which *Heller* explained is the core purpose of the Second Amendment right.<sup>165</sup>

Kavanaugh was also dismissive of the majority's claim that individuals could own other types of weapons for self-defense, and thus were not entitled to semi-automatic rifles. "In *Heller*," he contended, "[the District] argued that it could ban handguns because individuals could still own rifles. That argument failed."<sup>166</sup> He found no difference between the present scenario and said failed argument: "Here, [the District] contends that it can ban rifles because

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160. *Id.* (Kavanaugh, J., dissenting).

161. *Id.* at 1293 (Kavanaugh, J., dissenting).

162. *Id.* at 1294 (Kavanaugh, J., dissenting).

163. *Id.* at 1290 (Kavanaugh, J., dissenting).

164. *Id.*

165. *Id.*

166. *Id.*

individuals can still own handguns. [The District's] at-least-you-can-still-possess-other-kinds-of-guns argument is no more persuasive this time around."<sup>167</sup> Because the majority could not "persuasively explain why semi-automatic handguns are constitutionally protected but semi-automatic rifles are not," Kavanaugh found the "assault weapons" legislation no more valid than the District's handgun ban in *Heller*.<sup>168</sup>

Judge Kavanaugh further proposed an answer to some of the questions raised in the wake of *Heller* regarding new technology and the common use test.<sup>169</sup> He concluded that the constitutionality of novel technology was still easily resolved under the "text, history, and tradition" test, even though "there obviously will not be a history or tradition of banning such weapons or imposing such regulations."<sup>170</sup> The appropriate analysis in such situations under Judge Kavanaugh's approach would be to "reason by analogy from history and tradition," as courts have done in the face of emerging technology in First and Fourth Amendment cases.<sup>171</sup> This approach takes some indirect steps towards resolving the question of who the common user should be, because it allows courts to identify common users of particular weapons (like military firearms) in the past. Troublingly, this analysis does little to resolve the circularity problem for advanced technologies that may have no historical analogue. Indeed, Judge Kavanaugh himself admitted that "applying constitutional principles to novel modern conditions can be difficult and leave close questions at the margins."<sup>172</sup> But, he argued, "that is hardly unique to the Second Amendment. It is an essential component of judicial decisionmaking [sic] under our enduring Constitution."<sup>173</sup>

### E. Recent Judicial Approval of the Kavanaugh Approach

Though of recent vintage, Judge Kavanaugh's method of interpretation of Second Amendment rights using text, history, and tradition has garnered explicit judicial support in at least one instance since *Heller II's* decision. In *Gowder v. City of Chicago*, the Northern District of Illinois considered the constitutionality of an ordinance prohibiting the approval of a firearm permit for an

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167. *Id.*

168. *Id.*

169. *Id.* at 1275 (Kavanaugh, J., dissenting).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

applicant convicted of unlawful possession of a firearm.<sup>174</sup> The plaintiff, Shawn Gowder, was convicted in 1995 of felony unlawful use of a weapon under Illinois' Safe Neighborhood Act.<sup>175</sup> In 1999, the Illinois Supreme Court found the Safe Neighborhood Act unconstitutional, and Gowder's conviction was reduced to a non-violent misdemeanor.<sup>176</sup> At the time, the City of Chicago required persons living within the city to obtain a permit in order to possess a weapon in their homes.<sup>177</sup> Chicago residents could not obtain the requisite permit if they had been convicted of unlawful use a firearm, even if the offense was a non-violent misdemeanor.<sup>178</sup> Gowder applied for a permit, which the City of Chicago denied because of his previous misdemeanor charge.<sup>179</sup> He subsequently challenged the denial and the constitutionality of the statute.<sup>180</sup>

Reviewing Gowder's motion for summary judgment, Judge Der-Yeghiayan employed Kavanaugh's "text, history, and tradition" method of analysis.<sup>181</sup> He hinged his discussion upon the "presumptively lawful" exception to Second Amendment protection articulated in *Heller*, which approved of longstanding and traditional laws barring felons from firearm possession.<sup>182</sup> Judge Der-Yeghiayan concluded that statutes prohibiting *all* criminals from gun possession—without differentiating between felons and misdemeanants, or violent or nonviolent criminals—did "not find a valid foothold in statutory history," and thus could not find safe harbor as presumptively lawful.<sup>183</sup> The Chicago statute, he described, impermissibly

lumps together non-violent misdemeanants, violent misdemeanants, and felons. While the Supreme Court has historically allowed prohibitions to certain individuals, including felons and those convicted of violent crimes, at the time the Second Amendment was passed . . . it was not intended to apply to non-violent misdemeanants, nor has this group of individuals traditionally been barred from exercising their inherent Second Amendment rights.<sup>184</sup>

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174. 923 F. Supp. 2d 1110, 1113 (N.D. Ill. 2012).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 1113–14.

179. *Id.* at 1113.

180. *Id.*

181. *Id.* at 1119.

182. *Id.* at 1121 (citing *United States v. Skoien*, 614 F.3d 638, 644 (7th Cir. 2010)).

183. *Id.* at 1122.

184. *Id.*

Judge Der-Yeghiayan also found it problematic that the Chicago statute regulated firearm possession in the home by non-violent misdemeanants, clearly infringing upon the *Heller* core.<sup>185</sup> Further, he concluded that even if the Kavanaugh approach was inappropriate and an interest-balancing approach had to be applied, the proper standard would be strict scrutiny, and the Chicago regulation would fail.<sup>186</sup>

#### F. The Puzzle of High-Capacity Magazine Restrictions

High-capacity magazines have emerged as a new frontier for government regulation of firearms and pose unique analytical questions. Unlike guns themselves, magazines do not pose a threat standing alone, nor do they bear any relation to an individual's ability to carry or initially obtain a gun. But the potentially lethal combination of guns and high-capacity magazines have left these items subject to increasing legislation.<sup>187</sup> As such, high-capacity magazines provide a particularly useful vehicle for finding the proper method of analysis for Second Amendment rights. The question and utility of magazine size limitation has come into sharp focus in the wake of mass shootings like those in Aurora and Sandy Hook.<sup>188</sup> Several states, such as Connecticut<sup>189</sup> and New York<sup>190</sup> have rushed to pass laws severely curtailing the legal size of magazines, leaving the

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185. *Id.* at 1122–23. Judge Der-Yeghiayan opined that:

This is a case where a person is required by the City of Chicago to apply for a Chicago Firearm Permit in order to legally possess a firearm at home for self-defense, which is a core Second Amendment constitutional right . . . . The same Constitution that protects the people's right to keep and bear arms prohibits this type of indiscriminate and arbitrary government regulation . . . any attempt to dilute or restrict a core constitutional right with justifications that do not have a basis in history and tradition is inherently suspect.

*Id.*

186. *Id.* at 1123.

187. *See, e.g.*, COLO. REV. STAT. ANN. § 18-12-301 (West 2013); 2013 CONN. ACTS 13-3 (Reg. Sess.); D.C. CODE § 7-2506.01 (2013); 2013 N.Y. Sess. Laws 2230 (McKinney).

188. *Complete Coverage on Theater Shooting in Aurora*, CNN, <http://www.cnn.com/SPECIALS/us/colorado-shooting> (last visited Mar. 15, 2014); Mark Follman & Gavin Aronsen, "A Killing Machine": Half of All Mass Shooters Use High-Capacity Magazines, MOTHER JONES (Jan. 30, 2013), <http://www.motherjones.com/politics/2013/01/high-capacity-magazines-mass-shootings>; *Sandy Hook Shooting: What Happened?*, CNN, <http://www.cnn.com/interactive/2012/12/us/sandy-hook-timeline> (last visited Mar. 15, 2014) (linking to articles detailing the gun control debate).

189. 2013 CONN. ACTS 13-3 (Reg. Sess.).

190. 2013 N.Y. Sess. Laws 2230 (McKinney).

term “high-capacity magazine” itself without a cognizable national definition. Some states limit magazine sizes to seven rounds of ammunition, though the general consensus among states restricting magazine size hovers near ten rounds.<sup>191</sup>

While mass shootings of the sort seen recently are truly horrific incidents to be warded against, it is not clear that magazines over the common ten-round limit would be materially more dangerous than magazines of a smaller size.<sup>192</sup> Although a gun with a larger magazine is theoretically more lethal than one with a smaller magazine, the overwhelming majority of gun crime involves far fewer shots than ten, or even seven.<sup>193</sup> The fear that larger magazines will enable more mass shootings may be a similarly misplaced concern. Indeed, “[g]iven that removing a magazine and inserting a new one takes only a few seconds, a mass murderer—especially one armed with a backup gun—would hardly be stymied by the magazine size limit.”<sup>194</sup> Further, in the extremely rare instance where an individual would need more than ten rounds for self-defense, magazine size limitations require the defender to engage in the additional time and preparation of having a spare magazine available and reloading his or her gun.<sup>195</sup> Though such hypotheticals are certainly grim, it is clear after *Heller* and *McDonald* that limitations on individual Second Amendment rights are to be seriously evaluated under all circumstances.

Because *Heller* is silent as to high-capacity magazine bans, courts are left to independently evaluate the bans’ constitutionality. First, courts must determine whether high-capacity magazines readily fall into one of the two exceptions articulated in *Heller*. Bans on high-capacity magazines are neither longstanding nor deeply rooted in history.<sup>196</sup> Additionally, the “presumptively lawful” exception does not appear to cover high-capacity magazines, as they do not fall in one of the example categories articulated by Justice Scalia.<sup>197</sup>

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191. CONN. GEN. ASSEMBLY, OLR RESEARCH REPORT: LAWS ON HIGH CAPACITY MAGAZINES (2013), available at <http://www.cga.ct.gov/2013/rpt/2013-R-0039.htm>.

192. See Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1489 (2009).

193. *Id.* The average number of rounds fired in the course of a criminal shooting involving a semiautomatic pistol is between 3.2 and 3.7 rounds. *Another Ban on “High-Capacity” Magazines?*, NAT’L SHOOTING SPORTS FOUND. (2013), <http://www.nssf.org/factsheets/PDF/HighCapMag.pdf>.

194. Volokh, *supra* note 192, at 1489.

195. See *supra* text accompanying note 191.

196. See, e.g., *Heller II*, 670 F.3d 1244, 1271 (D.C. Cir. 2011)

197. *Heller I*, 554 U.S. 570, 626–27 (2008).

However, whether high-capacity magazine bans may be valid under the common use test requires more in-depth analysis.

To determine whether a given weapon is valid under the common use test, scholars have proposed that it must meet two separate requirements: quantity and legitimacy.<sup>198</sup> The “quantity” requirement means that the weapon must be either “numerically common” (widely owned) or “functionally common” (functionally identical to other common guns).<sup>199</sup> The “legitimacy” requirement means that the weapon must be possessed for lawful purposes, like self-defense.<sup>200</sup> High-capacity magazines (defined tentatively as magazines capable of holding more than ten rounds of ammunition) are certainly numerically common; by some estimates, more than thirty million detachable magazines in circulation in the United States can accommodate more than thirty rounds.<sup>201</sup> Because high-capacity magazines operate the way traditional magazines have in semi-automatic weapons for over a century, they are also functionally common.<sup>202</sup> Additionally, high-capacity magazines serve an identical purpose to their smaller counterparts: supplying ammunition to a functional firearm. Thus, they are ideally suited in any capacity to a lawful purpose like self-defense. As such, although they are not “arms” in the traditional sense, high-capacity magazines are, by analogy, well within the scope of Second Amendment protection according to *Heller*.<sup>203</sup>

Although high-capacity magazines satisfy the broad requirements of the common use test, to receive the protection offered by *Heller* they must be neither “dangerous” nor “unusual.”<sup>204</sup> This requirement poses a far more complicated issue, and one highly influenced by social attitudes and the “cringe factor” surrounding the use of items intended to provide a relatively large quantity of ammunition to a semi-automatic weapon.<sup>205</sup> While high-capacity magazines are

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198. See Johnson, *supra* note 68, at 1292–93; Dan Terzian, *The Right to Bear (Robotic) Arms*, 117 PENN ST. L. REV. 755, 766–67.

199. Johnson, *supra* note 68, at 1293.

200. Terzian, *supra* note 198, at 766–67.

201. See Johnson, *supra* note 11, at 1273–74. National Shooting Sports Foundation, *Another Ban on “High-Capacity” Magazines?* (2013), available at <http://www.nssf.org/factsheets/PDF/HighCapMag.pdf>. As noted by Judge Ginsburg in *Heller II*, “There may well be some capacity above which magazines are not in common use, but, if so, the record is devoid of evidence as to what that capacity is; in any event, that capacity surely is not ten.” 670 F.3d at 1261.

202. See Johnson, *supra* note 68, at 1298.

203. *Heller*, 554 U.S. at 627.

204. *Id.*

205. See Johnson, *supra* note 68, at 1321–22.

certainly not “unusual,” there is debate over whether they may qualify as “dangerous,” with advocates on both sides of the issue. Those arguing that high-capacity magazines are dangerous and worthy of exclusion from Second Amendment protection state that they are “disproportionately involved in the murder of law enforcement officers and in mass shootings, and have little value for self-defense or sport.”<sup>206</sup> Further, they contend, magazines above a ten-round capacity are more harmful in self-defense situations due to “the tendency . . . for defenders to keep firing until all bullets have been expended, which poses grave risks to others in the household, passersby, and bystanders.”<sup>207</sup> Those who oppose these types of bans point to the utility of high-capacity magazines in protection scenarios.<sup>208</sup> Without high-capacity magazines, they argue, persons in a stressful self-defense situation would have to pause in order to reload the firearm.<sup>209</sup> Moreover, responsible ownership of high-capacity magazines, they contend, presents no more of a threat than ownership of magazines below a smaller mandated number.<sup>210</sup> Additionally, proponents of a “non-dangerous” categorization point to a reduction in violent crime following the expiration of the Federal Assault Weapons Ban in 2004, which banned magazines capable of holding over ten rounds.<sup>211</sup>

The question of new technology and the circularity problem also plague the question of high-capacity magazine restrictions’ constitutionality. Consider a hypothetical scenario in which technological development in after-market magazines for semi-automatic rifles and handguns has created a magazine exceeding ten rounds that is twenty percent less likely to jam when fired rapidly.<sup>212</sup>

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206. *Heller II*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (explaining the District’s argument in favor of the high-capacity magazine ban).

207. *Id.* at 1264.

208. *See, e.g.*, Volokh, *supra* note 192, at 1489; *Another Ban on “High-Capacity” Magazines?*, *supra* note 193.

209. *See, e.g.*, Gene Hoffman, *High Capacity Magazines Are Needed for Self-Defense*, US NEWS & WORLD REPORT (Jan. 8, 2013), <http://www.usnews.com/debate-club/should-high-capacity-ammunition-magazines-be-banned/high-capacity-magazines-are-needed-for-self-defense>; *Another Ban on “High-Capacity” Magazines?*, *supra* note 193.

210. *See* Hoffman, *supra* note 209; Jennifer Steinhauer, *Pro-Gun Lawmakers Are Open to Limits on Size of Magazines*, N.Y. TIMES, Feb. 19, 2013, at A1.

211. *Another Ban on “High-Capacity” Magazines?*, *supra* note 193.

212. After-market high-capacity magazines notoriously experience jamming problems. For instance, the gunman in the Aurora, Colorado movie theater shooting discarded one of the rifles he brought to the scene because the drum magazine he purchased for it failed to feed bullets into the chamber. Susan Candiotti, *Source:*

This advancement creates an admittedly more lethal weapon, but also one that is both more reliable in an extreme self-defense scenario and more useful for endeavors like hunting or sport. Laws banning magazines with this advancement would prevent a more predictable and sophisticated product from becoming a weapon in “common use,” denying it Second Amendment protection under *Heller*. If courts do not label high-capacity magazines “dangerous” within the meaning of the *Heller* exception, laws banning the advanced magazines would impinge on the individual rights to keep and bear arms for self-defense. Consequently, courts would have to engage in an extensive case-by-case inquiry to evaluate the constitutionality of all legislation addressing all future magazine developments.

Conversely, if courts deem high-capacity magazines “dangerous,” banning the advanced magazines presents no constitutional problems under *Heller*, and laws banning such products could freely stand. Under this model, any technological advancements in magazine technology conceivably could *never* enjoy Second Amendment protection. As this example illustrates, high-capacity magazine restrictions present a unique and complicated constitutional problem, and one that has yet to be thoroughly analyzed by lower courts after *Heller*, *McDonald*, and *Heller II*.

### III. TEXT, HISTORY, AND TRADITION, NOT A TWO-STEP TEST

Since 2008, judicial interpretation of the Second Amendment has clearly undergone major change. Because the Supreme Court failed to articulate a clear standard of review for the individual right to keep and bear arms, courts have necessarily struggled to settle on a single method. As discussed in Part I, two primary analytical routes have emerged: the two-step test articulated in *Marzzarella*, and the “text, history, and tradition” test established in Judge Kavanaugh’s *Heller II* dissent and approved of in *Gowder*. This Note proposes that the Kavanaugh approach offers several advantages over the *Marzzarella* test, including increased judicial flexibility, predictability of result, ease of use, and adherence to established Supreme Court precedent. This Note then illustrates the benefits of the Kavanaugh approach over the *Marzzarella* two-step by applying both tests to high-capacity magazine restrictions, and determines that the Kavanaugh approach most readily provides a solution to the complications posed by such

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*Colorado Shooter’s Rifle Jammed During Rampage*, CNN (July 22, 2012), <http://www.cnn.com/2012/07/22/us/colorado-shooting-investigation/index.html>.



legislation. Finally, this Note acknowledges the flaws inherent in the Kavanaugh approach, raising questions for future research.

#### **A. The Kavanaugh Approach Permits Increased Judicial Flexibility**

The first benefit the Kavanaugh test provides over an interest-balancing analysis is increased judicial flexibility.<sup>213</sup> Under both intermediate and strict scrutiny, courts are bound to a set inquiry developed with an eye to constitutional provisions that have developed along far different jurisprudential lines than the Second Amendment. Conversely, under the Kavanaugh approach, judges are permitted to analyze the historical application and traditional roots of the precise legislation the state seeks to impose.<sup>214</sup> Contrary to the *Heller II* majority's argument that a text, history, and tradition approach would place too many gun laws in jeopardy, this approach actually permits courts to uphold *more* restrictions than they would under an interest-balancing test; the only restriction is that the challenged legislation finds some footing in American history.<sup>215</sup> This type of flexibility removes concern about judges legislating from the bench, because a case-by-case incorporation of traditional gun restrictions allows the judiciary to remove personal politics from the equation and simply focus upon long-standing evidence. As a result, the Kavanaugh approach gives judges a greater range of consideration than an interest-balancing approach, which would require them to categorize and compare state interests that are often nebulous and difficult to define.

#### **B. The Kavanaugh Approach Creates More Predictable Results**

While the Kavanaugh approach offers more flexibility, its emphasis on history and tradition yields far more predictable results than interest-balancing analysis. State legislatures will have a far better understanding of what types of restrictions are constitutionally permissible under a standard approach focusing on a well-established body of evidence. Further, observing text, history, and tradition does not require litigants to engage in predictive judicial mind reading when presenting a challenge to a particular restriction. While the three factors the Kavanaugh approach relies upon can be difficult to define in some circumstances, they are certainly easier to analyze than

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213. *See Heller II*, 670 F.3d 1244, 1274 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

214. *See id.* at 1272 (Kavanaugh, J., dissenting).

215. *See id.* at 1274 (Kavanaugh, J., dissenting).

the relative utility of a stated government interest. While under the *Marzzarella* approach judges only need to engage in interest-balancing if they determine that the challenged legislation infringes on a core Second Amendment right, such analysis requires some level of subjective judicial characterization at both junctures.<sup>216</sup> The Kavanaugh approach thus offers more predictable results as it goes further towards removing personal judicial predilection from the analysis of a particular Second Amendment case.

### C. The Kavanaugh Approach Offers Significant Ease of Use

In the same vein, the Kavanaugh approach offers the additional benefit of judicial ease of use. While certainly not all judges prefer to engage in extensive textual or historical analysis, Kavanaugh's test provides a simple formula for those that do. Rather than apply a two-prong test, courts could simply compare the historical background of the challenged regulation and the text of the Second Amendment. This approach thus avoids the problem of having to articulate an appropriate standard of review, which the Supreme Court declined to set in *Heller* and *McDonald*.<sup>217</sup> As Judge Kavanaugh explained,

In sum, our task as a lower court here is narrow and constrained by precedent. We need not squint to divine some hidden meaning from *Heller* about what tests to apply. *Heller* was up-front about the role of text, history, and tradition in Second Amendment analysis—and about the absence of a role for judicial interest balancing or assessment of costs and benefits of gun regulations.<sup>218</sup>

As such, this test allows reviewing courts to execute the “narrow task” presented to them, and avoid creating or adhering to a standard the Supreme Court did not intend. This immensely simplifies the judicial task, and creates a uniform choice for courts from all corners of the country that may face differing types of legislation. The test set

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216. See *Gowder v. City of Chicago*, 923 F. Supp. 2d 1110, 1117–18 (N.D. Ill. 2012). The problem of subjective analysis is compounded by the fact that some judges using the *Marzzarella* standard feel compelled to apply some level of interest-balancing analysis to challenged legislation, even if they do not feel that the statute infringes on a core Second Amendment right; this inserts unnecessary analysis and undercuts the possibility of purely objective application of this type of examination. See, e.g., *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol Tobacco Firearms & Explosives*, 700 F.3d 185, 205 (5th Cir. 2012). Some courts, like the Fourth Circuit in *Woollard v. Gallagher*, have dispensed with the first part of the *Marzzarella* test in its entirety and proceed to analyze Second Amendment cases solely under intermediate scrutiny. See 712 F.3d 865, 876 (4th Cir. 2013).

217. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (plurality opinion); *Heller I*, 554 U.S. 570, 628–29 (2008).

218. *Heller II*, 670 F.3d at 1285 (Kavanaugh, J., dissenting).

forth in *Marzzarella* creates complication in an area already plagued with uncertainty; the Kavanaugh approach, on the other hand, creates a relatively uniform standard. As Justice Breyer noted in dissent in *McDonald*, “judges do not know the answers to the kinds of empirically based questions that will often determine the need for particular forms of gun regulation. Nor do they have readily available ‘tools’ for finding and evaluating the technical material submitted by others.”<sup>219</sup> Instead of requiring judges to engage in this form of analysis, the Kavanaugh approach allows judges to examine readily available text and historical material.

#### D. The Kavanaugh Approach Is More Consistent with Supreme Court Precedent

Above all other benefits, the Kavanaugh approach is the most loyal to the standards articulated by the Supreme Court in both *Heller* and *McDonald*. As discussed in Part I, the Court in both instances seemed to reject a form of interest-balancing analysis for the Second Amendment.<sup>220</sup> While the Court has been criticized for failing to articulate a standard of scrutiny for gun legislation (even from within its own ranks),<sup>221</sup> the fact that it twice rejected the opportunity to do so indicates that such a standard is a poor fit.<sup>222</sup> At the very least, the Court’s reluctance to choose intermediate or strict scrutiny cannot be seen as an invitation for lower courts to self-select. What the Court did explicitly utilize in both cases, as Kavanaugh rightly focused upon, was the text, history, and tradition of the Second Amendment.<sup>223</sup> Nor would such a focus be out of bounds for constitutional analysis, as

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219. *McDonald*, 130 S. Ct. at 3128 (Breyer, J., dissenting).

220. *See id.* at 3047 (plurality opinion); *Heller I*, 554 U.S. at 634–35 (“A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.”).

221. *Heller I*, 554 U.S. at 687 (Breyer, J., dissenting) (“How is a court to determine whether a particular firearm regulation . . . is consistent with the Second Amendment? . . . The majority is wrong when it says the District’s law is unconstitutional ‘[u]nder any of the standards of scrutiny that we have applied to enumerated rights.’ How could that be?”) (internal citations omitted).

222. As described by Darrell A.H. Miller, one of the gravest problems facing the use of interest-balancing in Second Amendment cases is that

the quintessential government interest, public safety, has no special bearing on the scope of the right to keep and bear arms . . . . So, even if a court were to analyze a certain regulation using a forbidden balancing test, it is unclear what weight, if any, public safety adds to the scale.

Miller, *supra* note 39, at 865–66.

223. *Heller II*, 670 F.3d at 1285 (Kavanaugh, J., dissenting).

Seventh Amendment jurisprudence shows by analogy.<sup>224</sup> Indeed, the approach most consistent with Supreme Court precedent seems to be one that “depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor.”<sup>225</sup> The prime advantage of the Kavanaugh approach is its close adherence to the way the U.S. Supreme Court has consistently interpreted the Constitution.

### E. Applying the Kavanaugh Approach to High-Capacity Magazine Restrictions

As with any proposed method of analysis, practical application often reveals the realistic benefits and flaws of forms of judicial reasoning that theoretical discussion may not touch upon. As noted in Part II, high-capacity magazines present a variety of critical Second Amendment questions, and the constitutionality of laws restricting them remain far from clear. This Note proposes that comparing the results of both the Kavanaugh approach and the popular *Marzzarella* test to laws banning high-capacity magazines demonstrates that examination based on “text, history, and tradition” produces a clear, predictable conclusion most faithful to the principles articulated in *Heller* and *McDonald*.<sup>226</sup> Further, applying the Kavanaugh approach to the puzzling problems presented by high-capacity magazines presents an instructive example of the positive aspects of such analysis, as well as potential drawbacks and questions for future research.

Under either approach, courts must first determine whether high-capacity magazine restrictions impinge upon an individual’s Second Amendment right to bear arms. If such restrictions do not intrude on those rights, under either form of examination, the analysis ends. A particular regulation must impermissibly burden a Second Amendment right to be unconstitutional.<sup>227</sup> To make this determination, it is useful for the court to define a law prohibiting the possession of high-capacity magazines as prohibiting or limiting.<sup>228</sup>

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224. Miller, *supra* note 39, at 929.

225. *McDonald*, 130 S. Ct. at 3058 (Scalia, J., concurring).

226. As discussed in Part I, there is no clear legislative definition for how many rounds a high-capacity magazine must contain. For the purposes of consistency, this Note defines a ban on high-capacity magazines as a law prohibiting magazines exceeding the common standard of ten rounds.

227. *See, e.g., McDonald*, 130 S. Ct. at 3036 (plurality opinion).

228. *See Johnson, supra* note 11, at 1264.

Prohibiting statutes are far more likely to undercut an individual's fundamental right to keep and bear arms, and thus are immediately constitutionally suspect.<sup>229</sup> Bans on high-capacity magazines must almost certainly fall into the category of prohibiting statutes. Like the handgun ban in *Miller*, the absolute restriction on city firing ranges in *Ezell*, and the limitation on non-violent misdemeanor possession in *Gowder*, an embargo on magazines exceeding a certain size directly encroaches on an individual's ability to engage in self-defense.<sup>230</sup>

First, limitations on high-capacity magazines necessarily mean that no individual may possess a magazine exceeding as few as seven rounds.<sup>231</sup> Consequently, in an emergency situation that person would be impeded by having to stop and re-load to fend off an attacker.<sup>232</sup> Such legislation makes no distinction between the home, where the right to self-defense is at its apex, and the outside world, where the Second Amendment is more open to manipulation.<sup>233</sup> As such, laws banning magazines over a certain capacity—particularly when that number is low compared to the capacity of magazines in wide circulation in the United States—both directly affect and infringe upon an individual's right to protect him or herself in his or her domicile.<sup>234</sup> While it is certainly arguable that such legislation only adds “friction” to keeping and bearing firearms, this contention loses force when examined in light of the burden it places upon self-defense in the home. Certainly, it is unlikely that an individual will need more than ten bullets to defend his or her property, but the scenario is far from inconceivable.<sup>235</sup> Viewed in this light, laws restricting high-capacity magazines most assuredly place a greater burden on self-defense than other restrictions that courts have found constitutionally

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229. See *Heller I*, 554 U.S. 570, 628–29 (2008); *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) (“[B]roadly prohibitory laws restricting the core Second Amendment right . . . are categorically unconstitutional.”).

230. See *Heller I*, 554 U.S. at 628–29; *Ezell*, 651 F.3d at 708–09; *Gowder v. City of Chicago*, 923 F. Supp. 2d 1110, 1122 (N.D. Ill. 2012).

231. See Volokh, *supra* note 192, at 1489.

232. See *id.*

233. See *Heller I*, 554 U.S. at 628.

234. See *Heller II*, 670 F.3d 1244, 1260–61 (D.C. Cir. 2011); *Another Ban on “High-Capacity” Magazines?*, *supra* note 193.

235. See Yih-Chau Chang, *High Capacity Magazines and Their Critical Role in Lawful Self-Defense*, EXAMINER.COM (Mar. 10, 2011), <http://www.examiner.com/article/high-capacity-magazines-and-their-critical-role-lawful-self-defense> (describing a Tucson homeowner who successfully warded off four armed burglars using a high-capacity magazine); Stephen Hunter, *Why 33 Rounds Make Sense in a Defensive Weapon*, WASH. POST, Feb. 6, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/04/AR2011020407083.html>.

troubling, like the ban on local firing ranges in *Ezell*. Consequently, legislation eliminating the right to possess magazines of prevalent sizes<sup>236</sup>—like ten rounds—must be seen as prohibiting statutes impinging upon the Second Amendment.

The next step in determining whether a law prohibiting high-capacity magazines infringes upon individual Second Amendment rights is finding whether such legislation falls under one of the *Heller* exceptions. As a threshold matter, high-capacity magazine bans do not fall into the “presumptively lawful” exception, as there is no longstanding American tradition of limiting magazines of roughly ten rounds. While the Federal Assault Weapons Ban created such a magazine limit, it was not enacted until 1994, and expired without renewal only ten years later.<sup>237</sup> This is a far cry from the century-old types of restrictions discussed under the “presumptively lawful” exception, such as laws prohibiting gun possession by felons or the mentally ill.<sup>238</sup> While the list of “presumptively lawful” legislation in *Heller* was clearly not intended to be exhaustive, it was intended to exempt only well-established laws regulating firearms.<sup>239</sup> Because there is no historical pattern of outlawing magazines approximating ten rounds, such a prohibition cannot realistically be said to be “presumptively lawful” according to the Supreme Court.

The question of whether high-capacity magazines fall into the common use exception is a far more complex one. To enjoy Second Amendment protection, high-capacity magazines cannot be qualified as either “dangerous” or “unusual.”<sup>240</sup> Some form of objective assessment or comparison is necessary to determine whether magazines approximating ten rounds fall into one or both of these categories. The United States Army Judge Advocate General Corps (JAG) conducted a useful study for this endeavor in 1997, and compared the lethality of the traditional shotgun, the rifle, and the machine gun in order to guide equipment selection in future combat operations.<sup>241</sup> To a range of seventy-five yards, the shotgun clearly emerged as the deadliest of all options.<sup>242</sup> At a range of thirty yards,

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236. See *Heller II*, 670 F.3d at 1261.

237. VIVIAN S. CHU, CONG. RESEARCH SERV., R42957, FEDERAL ASSAULT WEAPONS BAN: LEGAL ISSUES (2013), available at <http://www.fas.org/sgp/crs/misc/R42957.pdf>.

238. *Heller I*, 554 U.S. at 626–27.

239. *Id.* at 627 n.26.

240. *Id.* at 627.

241. See W. Hays Parks, *Joint Service Combat Shotgun Program*, 1997 ARMY LAW. 16, 18.

242. See *id.*

the probability of hitting a man-sized target with a shotgun is twice as good as assault rifles, and nearly twice as good as machine guns.<sup>243</sup> Further, the use of a shotgun at close range “increases the probability that targeted enemy combatants may be struck by more than a single projectile.”<sup>244</sup> JAG concluded that even in the face of alternatives like the assault rifle and the machine gun, shotguns retain significant military necessity in the modern era.<sup>245</sup> Further studies have consistently confirmed that semi-automatic assault rifles are “demonstrably inferior” from a lethality standpoint to shotguns.<sup>246</sup>

Shotguns have enjoyed wide general approval from state legislatures; even the expansive ban imposed by the District in *Heller* permitted their use.<sup>247</sup> No court examining a Second Amendment challenge has ever permitted a law restricting individual possession of the traditional shotgun. Accordingly, it appears to be a valid conclusion that shotguns are not “dangerous” or “unusual” weapons to be prohibited by the common use test. Objective analysis reveals that the shotgun is significantly more deadly at a seventy-yard range than a semi-automatic assault rifle, the type of weapon used in the Newtown and Aurora shootings.<sup>248</sup> A traditional shotgun loaded with six rounds of 00 buckshot ammunition, which is both widely commercially available and commonly used for hunting,<sup>249</sup> sends nine 0.33-inch projectiles towards a target with a single trigger pull.<sup>250</sup> A semi-automatic rifle sends only one bullet towards a target per trigger

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243. *Id.* at 20.

244. *Id.*

245. *See id.*

246. *See* Johnson, *supra* note 68, at 1301; David B. Kopel, *Guns, Gangs and Preschools: Moving Beyond Conventional Solutions to Confront Juvenile Violence*, 1 BARRY L. REV. 63, 80 (2000).

247. *See Heller I*, 554 U.S. 570, 696 (2008) (Breyer, J., dissenting).

248. *See* Michael Pearson, *Gunman Turns “Batman” Screening Into Real-Life Horror Film*, CNN (July 20, 2012), <http://www.cnn.com/2012/07/20/us/colorado-theater-shooting/index.html>; *Sandy Hook Shooting: What Happened?*, CNN, <http://www.cnn.com/interactive/2012/12/us/sandy-hook-timeline> (last visited Mar. 15, 2014).

249. *See, e.g., Firearms & Ammunition*, WALMART, [http://www.walmart.com/browse/shooting/firearms-ammunition/4125\\_1107532\\_1088608/?refineresult=true&facet=category%3AShotgun+Ammunition](http://www.walmart.com/browse/shooting/firearms-ammunition/4125_1107532_1088608/?refineresult=true&facet=category%3AShotgun+Ammunition) (last visited Mar. 15, 2014); *Shotgun Ammunition*, CABELA’S, [http://www.cabelas.com/catalog/browse/shotgun-ammunition/\\_/N-1100191+4294751474/Ne-4294751474?WTz\\_1=SBC%3BBRprd734677&WTz\\_st=GuidedNav&WTz\\_stype=GNU](http://www.cabelas.com/catalog/browse/shotgun-ammunition/_/N-1100191+4294751474/Ne-4294751474?WTz_1=SBC%3BBRprd734677&WTz_st=GuidedNav&WTz_stype=GNU) (last visited Mar. 15, 2014).

250. *See Firearms Tutorial: Ballistics*, UNIV. UTAH SCH. MED., <http://library.med.utah.edu/WebPath/TUTORIAL/GUNS/GUNBLST.html>.

pull.<sup>251</sup> A shotgun loaded with six slugs sends fifty-four projectiles downrange with six trigger pulls; by contrast, a rifle loaded with a thirty-round magazine produces only thirty projectiles with thirty trigger pulls. Thus, from this standpoint, even a rifle equipped with a magazine far exceeding ten rounds sends fewer projectiles towards a target with greater effort than the shotgun, which has been consistently legislatively sanctioned. Though discussion of the relative lethality of shotguns and semi-automatic rifles loaded with any amount of ammunition may be difficult, states must make rational and constitutional discriminations when drafting gun laws. Because objective comparison demonstrates that even rifles equipped with very high-capacity magazines are less dangerous at close range than lawful shotguns, high-capacity magazines cannot logically fall into the “dangerous and unusual” category and out of the protective sphere of *Heller*.

Since high-capacity magazines do not fall under the exceptions delineated by the Supreme Court, laws limiting them must be examined under the core principles of *Heller* to determine any Second Amendment infringement. Under the Kavanaugh approach, this task is one both “narrow and constrained by precedent” for lower courts.<sup>252</sup> Since high-capacity magazine restrictions of the type recently passed in many states are qualified as prohibiting statutes, a court must simply determine whether they are “sufficiently rooted in text, history, and tradition [as to be] consistent with the Second Amendment individual right.”<sup>253</sup> Even cursory analysis reveals that legislative bans on ten-round magazines are hardly deeply rooted. The most significant recent regulation on high-capacity magazines was not passed until the 1994 Federal Assault Weapons Ban, which expired in 2004 and did little to curb the use of assault weapons in violent crimes.<sup>254</sup> Most states do not ban magazines with capacities as low as ten, and most firearms come factory-standard with magazines exceeding that size.<sup>255</sup> Indeed, the popular AR-15 rifle has come

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251. *See id.*

252. *Heller II*, 670 F.3d 1244, 1285 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

253. *Id.* The text of the Second Amendment is silent as to the permissibility of high-capacity magazines; thus, textual analysis is unnecessary in this instance. *See* U.S. CONST. amend. II.

254. *See* Rick Jervis, *Gun Control Advocates Target High-Capacity Magazines*, USA TODAY, Jul. 31, 2012, <http://usatoday30.usatoday.com/news/nation/story/2012-07-31/gun-control-colorado-theater-shooting/56621536/1>.

255. *See* Gene Hoffman, *High Capacity Magazines Are Needed for Self-Defense*, US NEWS & WORLD REPORT (Jan. 8, 2013), <http://www.usnews.com/debate->



equipped with a standard thirty-round magazine since its introduction in 1963.<sup>256</sup> Thus, as the *Heller II* majority had no trouble recognizing, there is no historical or traditional state restriction on magazines holding as few as ten rounds.<sup>257</sup> Absent any showing of text, history, or tradition supporting high-capacity magazine bans, these laws clearly infringe upon individual Second Amendment rights under the Kavanaugh approach, and are constitutionally impermissible.

#### F. Applying the *Marzzarella* Two-Step Test to High-Capacity Magazine Restrictions

Under the *Marzzarella* approach, the constitutionality of high-capacity magazine restrictions is far from clear, and hinges upon judicial discretion. Interestingly, precise application of the test's first step should be the end of the matter for high-capacity magazine restrictions, as they are prohibiting statutes that do not fall into a *Heller* exception and "impose[] a burden on conduct falling within the scope of the Second Amendment's guarantee."<sup>258</sup> Nevertheless, a court utilizing the *Marzzarella* test could easily advance the analysis to the second step. First, as discussed in Part I, high-capacity magazine bans can be framed as limiting statutes.<sup>259</sup> As such, they would fall outside analysis under the common use test, and not pose a significant Second Amendment burden. Second, many courts often advance challenged legislation to the second step when they are unsure about the statute's survival at step one, and in some circumstances even when they feel that the question is resolvable without proceeding to step two.<sup>260</sup> These factors combine to make it more likely than not that a court using the *Marzzarella* approach would subject high-capacity magazine restrictions to some form of heightened scrutiny.

By far the most popular option for step two of the *Marzzarella* test is intermediate scrutiny, which requires courts to identify whether the challenged statute is substantially related to an important government

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club/should-high-capacity-ammunition-magazines-be-banned/high-capacity-magazines-are-needed-for-self-defense.

256. *See id.*

257. *See Heller II*, 670 F.3d at 1261.

258. *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

259. *See Johnson*, *supra* note 11, at 1264.

260. *See Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol Tobacco Firearms & Explosives*, 700 F.3d 185, 205 (5th Cir. 2012). As discussed above, the Fourth Circuit seems to have dispensed with step one entirely. *See Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013).

interest.<sup>261</sup> Unlike the Kavanaugh approach, the issue of high-capacity magazine bans surviving intermediate scrutiny is largely unpredictable and highly dependent on the court's interpretation. Applying intermediate scrutiny in the Second Amendment context is particularly problematic because the test lacks the years of jurisprudence it has enjoyed in other contexts, such as the First Amendment or the Equal Protection Clause of the Fourteenth Amendment. Some judges seem to apply intermediate scrutiny with a thumb on the legislature's side of the scale, and some with an eye towards preservation of a strong Second Amendment right.<sup>262</sup> Accordingly, it is nearly impossible to say how a particular court would resolve a dispute over the constitutionality of high-capacity magazine restrictions when utilizing the *Marzzarella* approach.

### G. High-Capacity Magazine Restriction Hypotheticals Illustrate the Superiority of the Kavanaugh Approach

The Kavanaugh approach, with its demonstrable predictability of outcome, is not only favorable but more faithful to the principles articulated by the Supreme Court. First, and most importantly, the Court has twice rejected interest-balancing analysis for Second Amendment cases.<sup>263</sup> Judge Ginsburg addressed this obstacle in *Heller II* by concluding that intermediate scrutiny is not a form of interest-balancing, but a simple “assessment of whether a particular law will serve an important or compelling governmental interest.”<sup>264</sup> Despite this ready definition, analysis of the government's interest in enacting gun legislation is precisely the type of “judge-empowering interest-balancing inquiry” that the Supreme Court sought to actively bar.<sup>265</sup> Further, the *Heller* Court implicitly addressed and denied the application of intermediate scrutiny in Second Amendment cases by rejecting Justice Breyer's approval of the test: “[T]he very

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261. See Sobel, *supra* note 105, at 513–14.

262. Cf. *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 97–98 (2d Cir. 2012) (concluding that New York's substantial interest in crime prevention justified limiting handgun concealed carry licenses to individuals able to show “proper cause,” a group defined as those able to demonstrate a need to use the gun for hunting, target shooting, or actual and articulable self-defense); *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (requiring a “rigorous showing [of the government's asserted interest] . . . if *not quite* ‘strict scrutiny’ [to be] respectful of the individual rights at issue”) (emphasis added).

263. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (plurality opinion); *Heller I*, 554 U.S. 570, 634–35 (2008).

264. *Heller II*, 670 F.3d 1244, 1265 (D.C. Cir. 2011).

265. *Heller I*, 554 U.S. at 634 (internal quotation marks omitted); see *McDonald*, 130 S. Ct. at 3050 (plurality opinion).

enumeration of the 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. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."<sup>266</sup> The *Marzzarella* approach simply adds judicial discretion to an already sound evaluation of whether given legislation significantly impedes individual Second Amendment rights. Because *Heller's* approach takes interest balancing off the table, laws burdening the individual Second Amendment rights that do not fall into one of the two specified exceptions are impermissible. As the *Heller* Court would likely find high-capacity magazine restrictions unconstitutional, the clear directive of the Kavanaugh approach is demonstrably more consistent with the core of the Second Amendment interpretation established by the Supreme Court.

#### H. Unresolved Problems Surrounding the Kavanaugh Approach

The Kavanaugh approach is not without flaws. Because it is grounded in past interpretation of the Second Amendment, it fails to provide a clear roadmap for dealing with advancements in firearms technology. The most significant problem the Kavanaugh approach neglects is the circularity problem. Here, this Note returns to the hypothetical posed in Part II regarding after-market high-capacity magazines with a reduced probability of jamming. State legislatures are ostensibly free to ban these types of magazines, preventing them from emerging into common use among American citizens. Despite their similarity (or improvement over) traditional after-market magazines, laws regulating these products would qualify as limiting statutes out of the reach of the common use test.<sup>267</sup> While a court could theoretically stretch the Kavanaugh approach to encompass these types of magazines based on comparison to those in current use, they would certainly not enjoy the kind of protection that should be afforded to their outdated counterparts. Further, the point where technological advancement pushes a particular product into a new category—one fully distinguishable from what currently exists on the market—is an imprecise, easily manipulated line. For instance, is a seven-round magazine that can be constructed at home from a 3D printer permissible?<sup>268</sup> Is one imbued with laser target assistance or

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266. *Heller I*, 554 U.S. at 634.

267. See Johnson, *supra* note 11, at 1273.

268. See Peter Jensen-Haxel, *3D Printers, Obsolete Firearm Supply Controls, and the Right to Build Self-Defense Weapons Under Heller*, 42 GOLDEN GATE U. L. REV. 447, 448 (2012).

balancing technology sufficiently dissimilar to current magazines as to be capable of stricter regulation? Because the Kavanaugh approach focuses solely on the “text, history, and tradition” of the Second Amendment, it is not equipped to deal with the questions raised by new products, and could serve to stymie both courts and manufacturers through legal development in firearms technology.

### CONCLUSION

Despite the Kavanaugh approach’s analytical appeal, most federal courts have declined to accept it.<sup>269</sup> The Supreme Court’s consistent failure to articulate a standard for Second Amendment challenges has left lower courts floundering, reaching for questionable tests like the one articulated in *Marzzarella* to fill the void. By embracing interest-balancing, courts also embrace precisely the problems the *Heller* Court intended to ward against. In contrast, the Kavanaugh approach directly supports the text, history, and tradition of the Second Amendment that the Supreme Court intended to take into account. The puzzling problems raised by high-capacity magazine restrictions perfectly illustrate the benefits of the Kavanaugh approach, and pose important questions for the future. Through careful analysis and adherence to precedent, courts and legislatures will be able to most effectively approach the difficult issues raised by modern Second Amendment jurisprudence.

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269. See Lund, *supra* note 33, at 1636.