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The Scope of Regulatory Authority Under the Second Amendment

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The Second Amendment to the U.S. Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *District of Columbia v. Heller*,[1] the Supreme Court ruled that Washington, D.C.'s prohibition on handguns and requirement that long guns in the home be kept inoperable at all times violated this provision. In *McDonald v. City of Chicago*,[2] the Court subsequently held that the Second Amendment applies equally to federal and state laws burdening the right to keep and bear arms.

The "inherent right of self-defense has been central to the Second Amendment," the Court explained in *Heller*, and D.C.'s "handgun ban amounts to a prohibition on an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute." "Few laws in the history of our Nation," the Court wrote, "have come close to the severe restriction of the District of Columbia's handgun ban." Nevertheless, the Court cautioned, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." Indeed,"[f]rom Blackstone through the 19th-century cases," the Court recounted, "commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." For example, "the majority of 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or its state analogues." The Court added that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons or the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." The Court characterized such firearms regulations as "presumptively lawful," while also noting its list of

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[1] 554 U.S. 570 (2008).
[2] 130 S. Ct. 3020 (2010).

presumptively permissible regulations "does not purport to be exhaustive." Accordingly, while the precise boundaries of the Second Amendment remain somewhat opaque, it is settled that many forms of gun control are consistent with the right of the people to keep and bear arms.

In this chapter, we consider the constitutionality under the Second Amendment of a number of gun control reforms that might be adopted in the wake of the tragic shooting at Sandy Hook Elementary School in Newtown, Connecticut. Discussion to date has focused on a number of potential reforms, such as universal background checks for gun purchasers, restrictions on "assault weapons," and restrictions on high-capacity ammunition magazines. While the permissibility of any reform hinges on its details, we can nevertheless begin to identify what sorts of laws are likely to be constitutional under the Second Amendment.

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Since the decision in *Heller*, the lower courts have ruled on hundreds of Second Amendment challenges to a wide variety of laws. While the overwhelming majority of these cases have upheld the challenged laws, the courts have invalidated a few laws held to be unusually severe burdens on the right to possess or use a firearm for self-defense. From the reasoning and language of *Heller*, *McDonald*, and the subsequent cases, we can discern an emerging jurisprudential framework for analyzing the constitutionality of gun-control laws.

This emerging framework involves what the courts have called a "two-pronged approach to Second Amendment challenges."[3] The first question courts must ask is whether a challenged law burdens conduct within the scope of the Second Amendment.[4] In *Heller*, the Court defined the right to "keep" arms as the right to possess them,[5] and the right to "bear" arms as the right to "carry[] for a particular purpose—confrontation."[6] The Court offered no explicit definition of what amounted to an unconstitutional infringement of these rights, but treated as unconstitutional laws that effectively nullified the core interest at the heart of the Second Amendment—the right of a law-abiding citizen to have in his or her home a functional firearm suitable for personal protection. To determine if other conduct is within the ambit of the Second Amendment, the lower courts have since *Heller* looked to the limitations recognized in *Heller* and the historical tradition of gun rights and gun regulation.

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[3] United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012) (quoting United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010)).

[4] *See, e.g.*, Nat'l Rifle Ass'n of Am., Inc. v. BATFE, 700 F.3d 185, 194 (5th Cir. 2012); GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *Greeno*, 679 F.3d at 518; Heller v. District of Columbia, 670 F.3d 1244, 1252 (D.C. Cir. 2011); Ezell v. City of Chicago, 651 F.3d 684, 701-04 (7th Cir. 2011); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800-01 (10th Cir. 2010); United States v. Marzzarella, 634 F.3d 85, 89 (3d Cir. 2010); People v. Alvarado, 964 N.E.2d 532, 547 (Ill. App. Ct. 2011); Pohlabel v. State, 268 P.3d 1264, 1266-67 (Nev. 2012); Johnston v. State, 2012 WL 6595935 * 6 (N.C. App. Ct. Dec. 18, 2012).

[5] 554 U.S. at 582.

[6] *Id.* at 584.

When a law burdens conduct within the scope of the Second Amendment, courts then ask a second question: does the government have adequate justification for the law? Not all regulations restricting guns burden the right to keep and bear arms, and not all regulations that do burden the right are unconstitutional.

A. Scope of the Second Amendment

The threshold inquiry asks whether a gun law burdens conduct within the scope of the Second Amendment. Although, as we have seen, the Second Amendment protects a right to possess and carry "Arms," *Heller* also makes clear that not every regulation is an unconstitutional infringement of the right to keep and bear arms.

There is a well-established historical tradition of gun regulation, which has been a prominent feature of the law since the birth of America. In the framing era, not only were portions of the population barred from owning guns—including law-abiding citizens unwilling to swear allegiance to the Revolution, in addition to slaves and free blacks—but the founding generation also had laws requiring the safe storage of firearms and gunpowder.[7] In the 1820s and 30s, laws prohibiting the carrying of concealed firearms became commonplace;[8] as the Court in *Heller* recognized, a majority of 19th century courts upheld these laws.

After the Civil War, the same Congress that drafted the Fourteenth Amendment, which was designed in part to make the Second Amendment applicable to state and local laws, abolished the militia in most southern states because such armed groups had proven "dangerous to the public peace and to the security of Union citizens in those states."[9] This legislation was one of a series of gun control measures undertaken at the time in an effort to suppress violence in the then-turbulent South. In the early twentieth century, Congress in the National Firearms Act of 1934 severely restricted access to machine guns and sawed-off shotguns.[10] Meanwhile, many states passed laws restricting the public possession of firearms, imposed waiting periods on the purchase of certain firearms, and barred violent felons from possessing guns.[11] Thus, the right to keep and bear arms has

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[7] *See, e.g.*, ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 115-17 (2011); Saul Cornell & Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 506-08, 510-12 (2005).

[8] *See, e.g.*, SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 138-44 (2006); CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM 2-3, 139-41 (1999); WINKLER, *supra* note 7, at 166-69.

[9] CONG. GLOBE, 39th Cong., 1st Sess. 1849 (1866) (Sen. Lane). *Accord id.* at 1848-49 (Sen. Wilson). *See* Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 STAN. L. & POL'Y REV. 615, 621-23 (2006).

[10] *See* Pub.L. 474, 48 Stat. 1236 (1934).

[11] *See* WINKLER, *supra* note 7, at 209-12; C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 698-728 (2009).

been understood to permit lawmakers considerable leeway to regulate.

It seems equally clear that in determining the scope of the Second Amendment right, lawmakers are not restricted to enacting only the regulations in place when the Second Amendment was adopted. For example, the laws characterized as presumptively valid in *Heller*—bans on possession by felons and the mentally ill, restrictions on guns in sensitive places like schools and government buildings, and commercial sale qualifications—did not exist at the time of ratification.[12] Instead, the history of innovation in firearms regulation since the framing has led courts to conclude that legislatures are not limited to framing-era regulations.[13] One approach to assessing the permissibility of regulation is to inquire whether the challenged law comports with historical traditions broadly defined. For example, the ban on possession by felons and the mentally ill reflects a longstanding tradition of restricting access to firearms by people deemed dangerous to public safety. So, too, do laws barring possession of firearms by people convicted of domestic violence misdemeanors or subject to a domestic violence restraining order, which have been consistently upheld even though no such restrictions existed at the framing.[14]

Nothing in the text of the Second Amendment suggests that the government's power to regulate guns is limited to those regulations common in the framing era, or even of long standing. As we have seen, its preamble contemplates a "well regulated Militia," which *Heller* explained meant not a formal military organization but rather "the body of all citizens capable of military service, who would be expected to bring the sorts of lawful weapons that they possessed at home to militia duty." The Court wrote that the Second Amendment's preamble is properly consulted to clarify the meaning of the Second Amendment, adding that "well regulated" meant "the imposition of proper training and discipline." The Second Amendment therefor contemplates a body of citizens that is subject to whatever regulations are warranted to impose proper discipline on those qualified to keep and bear arms. Accordingly, the Second Amendment's preamble offers textual support for a variety of limitations on the ability of individuals to possess or carry firearms that are justified in terms of contemporary exigencies.[15]

If after examining the history and tradition of gun regulation, a court determines a challenged law burdens only conduct outside of the protection of the Second Amendment, the inquiry is over and the law upheld. Only if a challenger can show that

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[12] *See, e.g.*, 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, 1373-79 (2009); Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1356-62 (2009); Marshall, *supra* note 11 at 698-728.

[13] *See, e.g.*, Nat'l Rifle Ass'n, Inc. v. BATFE, 700 F.3d 185, 196-97 (5th Cir. 2012); United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (en banc).

[14] *See, e.g.*, United States v. Chapman, 666 F.3d 220, 227-31 (4th Cir. 2012); United States v. Staten, 666 F.3d 154, 160-67 (4th Cir. 2012); United States v. Booker, 644 F.3d 12, 25 (1st Cir. 2011) (same); United States v. Reese, 627 F.3d 792, 800-04 (10th Cir. 2010); *Skoien*, 614 F.3d at 641–42.

[15] On the role of the preamble in determining permissive gun regulation, *see* Lawrence Rosenthal, *Second Amendment Plumbing after* Heller*: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 80-81 (2009).

the law does create such a burden will the courts proceed to the next step: scrutiny of the law's burdens and justifications.

B. Judicial Scrutiny of Burdens and Justification

The second step of the emerging Second Amendment jurisprudence asks whether a challenged regulation can be sufficiently justified in light of the burden it imposes on the interests protected by the Second Amendment.

In *Heller*, the Court declined to decide what types of justification are required to sustain a challenged regulation on access to or use of firearms. Nonetheless, it did hold that rational basis review, the weakest and most deferential level of judicial scrutiny, was inappropriate, as was the "freestanding 'interest-balancing' approach" proposed in Justice Stephen Breyer's dissent.[16] The Court's rejection of Justice Breyer's approach, however, does not be mean that no standard of review is ever appropriate in Second Amendment cases. The Court explicitly distinguished Justice Breyer's unique formulation from "the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis)."[17]

The most rigorous form of judicial scrutiny is strict scrutiny, which requires that a challenged law be "justified by a compelling government interest" and "narrowly drawn to serve that interest."[18] Because of the requirement of narrow tailoring, strict scrutiny forbids regulations that are overinclusive—covering more conduct than necessary—or underinclusive—covering less.[19] The vast majority of courts to consider strict scrutiny have rejected it as inconsistent with the language and reasoning of *Heller*.[20] After all, *Heller* characterizes a wide variety of prophylactic regulations as presumptively lawful, which is contrary to strict scrutiny's traditional presumption of unconstitutionality. Moreover, the Second Amendment's text explicitly contemplates at least some regulation. At the same time, *Heller* also explains that the most severe burdens on the core right of armed self-defense on the part of law-abiding persons are invalid on their face. Second Amendment jurisprudence must accommodate both points.

The prevailing view in the lower courts is that a form of intermediate scrutiny, inquiring whether a challenged law is substantially related to an important governmental objective, is appropriate for laws that impose something less than the most serious burdens on the core right of armed-self defense recognized in *Heller*.[21] Other courts have

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[16] *See id.* at 629 n.27, 634-35.

[17] *Id.* at 634.

[18] Brown v. Entertainment Merchants Association, 131 S. Ct. 2729, 2738 (2011).

[19] *See, e.g., id.* at 2738-42; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993); Arkansas Writers' Project, Inc, v. Ragland, 481 U.S. 221, 231-32 (1987); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786, 792-94 (1978).

[20] *See, e.g.*, Heller v. District of Columbia, 670 F.3d 1244, 1252, 1256-57 (D.C. Cir. 2011).

[21] *See, e.g.*, Schrader v. Holder, 2013 WL 135246 * 8-10 (D.C. Cir. Jan. 11, 2013) (upholding prohibition on possession of firearms by individuals convicted of misdemeanors punishable by more than two years' imprisonment); *Heller*, 670 F.3d at 1260-64 (upholding ordinance prohibiting possession of semi-automatic rifles and large-capacity magazines); United States v. Staten, 666 F.3d 154, 160-67 (4th Cir. 2012) (upholding statute prohibiting possession of firearms by individuals convicted of misdemeanor

taken something of a "sliding scale" approach, concluding that laws imposing more onerous burdens on the right to keep or bear firearms should be subject to concomitantly more demanding scrutiny.[22]

These two approaches are united by consideration of the aggregate burden imposed by a challenged regulation rather than its impact on a particular individual. Laws prohibiting convicted felons from possessing firearms, for example, impose an absolute burden for the affected individuals on their right to keep and bear arms; yet they were treated as presumptively valid in *Heller*, and such laws have been consistently sustained, even when they also reach other categories of high-risk individuals such as convicted domestic violence misdemeanants or those subject to a domestic violence order of protection.[23] Similarly, a statute prohibiting individuals from caryring handguns in public unless they could demonstrate a special need entitling them to a carry permit was sustained even those it imposed an absolute prohibition on those unable to qualify for the permit.[24]

Most gun control laws to date have satisfied the requirement that they be substantially related to government's objective of enhancing of public safety.[25] As the Supreme Court explained in the context of the First Amendment, where this same test often applies, "substantial deference to the predictive judgments" of the legislature is warranted.[26] Yet courts do not require lawmakers to have irrefutable proof before they act; reliable studies may not always be available, especially for innovative reforms. Courts ordinarily look to the legislative record and available empirical data to assess whether there is sufficient reason to credit the legislature's judgment.[27]

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domestic violence); United States v. Booker, 644 F.3d 12, 25 (1st Cir. 2011) (same); United States v. Reese, 627 F.3d 792, 800-04 (10th Cir. 2010) (upholding statute prohibiting possession of firearms by individuals under a domestic violence order of protection); United States v. Skoien, 614 F.3d 638, 641–42 (7th Cir. 2010) (en banc) (upholding statute prohibiting possession of firearms by individuals convicted of misdemeanor domestic violence); United States v. Marzarella, 614 F.3d 85, 95-99 (3d Cir. 2010) (upholding statute prohibiting possession of firearms with obliterated serial number).

[22] *See, e.g.*, Moore v. Madigan, 2012 WL 6156062 *6-7 (7th Cir. Dec. 11, 2012) (invalidating a statute prohibiting carrying readily operable firearms in public); Kachalsky v. County of Westchester, 701 F.3d 81, 93-97 (2d Cir. 2012) (upholding statute prohibiting carrying firearms absent a permit issued on a showing of special need); Nat'l Rifle Ass'n, Inc. v. BATFE, 700 F.3d 185, 195-98 (5th Cir. 2012) (upholding statute prohibiting the sale of handguns to persons under age 21); United States v. DeCastro, 682 F.3d 160, 166-68 (2d Cir. 2011) (upholding statute prohibiting purchasing firearms in another state and transporting them to state of residence); Ezell v. City of Chicago, 651 F.3d 684, 707-09 (7th Cir. 2011) (granting preliminary injunction against ordinance prohibiting firing ranges within city).

[23] *See, e.g.*, United States v. Chapman, 666 F.3d 220, 227-31 (4th Cir. 2012); United States v. Staten, 666 F.3d 154, 160-67 (4th Cir. 2012); United States v. Booker, 644 F.3d 12, 25 (1st Cir. 2011) (same); United States v. Reese, 627 F.3d 792, 800-04 (10th Cir. 2010); United States v. Skoien, 614 F.3d 638, 641–42 (7th Cir. 2010) (en banc).

[24] *See* Kachalsky v. County of Westchester, 701 F.3d 81, 99-101 (2d Cir. 2012).

[25] For a representative sample, see cases cited *supra* at notes 21-22.

[26] Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997).

[27] *See, e.g.*, *Kachalsky*, 701 F.3d at 97-99.

In the wake of the Newtown shooting, a number of different types of gun control laws have been proposed to reduce the likelihood of mass shootings and gun crime more generally. In this section, we consider the constitutionality of some particular reforms: universal background checks for gun purchases and regulation of trafficking; and restrictions on "assault weapons" and high-capacity magazines. In our assessment, most of the types of reforms being considered are capable of surviving judicial review under the prevailing standards.

A. Universal Background Checks and Regulation of Dealers

Under current federal law, background checks are only required on people who seek to purchase a firearm from a federally licensed gun dealer. Yet because people without a federal license are permitted to sell firearms, a significant percentage of gun transfers occur with no background check. A law designed to close this loophole, and to ensure that firearms are transferred only by licensed dealers who can perform background checks and are subject to regulatory oversight, would almost certainly be constitutional. The Supreme Court has already made clear that prohibiting felons and the mentally ill from possessing arms is not an infringement of the right to keep and bear arms. Background checks are preventative measures designed for a compelling governmental interest: to ensure that people prohibited from possessing firearms cannot lawfully purchase them. Universal background checks and comprehensive regulation of firearms sales substantially further this governmental interest. Moreover, given the instantaneous verification offered by the federal National Instant Criminal Background Check System, or NICS, a background check imposes only a minor, incidental burden on lawful gun purchasers. This is no more of a burden than we impose on numerous other fundamental rights including the right to vote, which allows states to require pre-registration, and the right to marry, which allows states to require a marriage license. Using the moment of sale to confirm the eligibility of a person to possess firearms is also appropriate given the Supreme Court's approval of "laws imposing conditions and qualifications on the commercial sale of arms."

B. "Assault Weapons"

One measure Congress may consider is the reenactment of the federal ban on the sale of "assault weapons." Although this terminology has been controversial, for purposes of this paper we'll accept the definition included in the 1994 assault weapons law, which applied generally to semi-automatic firearms with a detachable ammunition magazine and military-style features, like a bayonet fitting or a pistol grip.[28]

A restriction on the sale or possession of assault weapons would likely be constitutional because such firearms may not be "Arms" under the meaning of the Second Amendment. In *Heller*, the Court held that the Second Amendment preserves access to firearms that are "in common use" and are not "dangerous or unusual." The

[28] *See* 18 U.S.C. § 921(a)(30)(B) (1994), *repealed by* Pub. L. No. 103-322, tit. XI, § 11015(2), 108 Stat. 2000 (1994).

"Arms" protected include "weapons that were not specifically designed for military use and were not employed in a military capacity," including those arms "typically possessed by law-abiding citizens for lawful purposes" such as "self-defense within the home." This construction is consistent with historic traditions, in which "dangerous and unusual weapons" have long been subject to heavy restriction. Handguns, by contrast, were held to be constitutionally protected because they "are the most popular weapon chosen by Americans for self-defense in the home."

Arguably, assault weapons do not meet *Heller*'s definition of a protected arm. While such firearms may be commonplace, they are primarily used for recreational purposes, not self-defense. Because of their size, they can be difficult to maneuver in a tight space and they propel bullets with such force as to travel easily through residential walls, endangering family members or neighbors. Of course, one can use an assault weapon, like any firearm, for self-defense. Yet more is required under the Second Amendment. Just as "dangerous and unusual weapons" like machine guns, which can also be used for self-defense, can be restricted consistent with the Second Amendment, so can assault weapons.

Heller's language may be read to compel an alternate conclusion. On one reading, *Heller* protects any arm that is typically used for any "lawful purpose," even if that purpose isn't personal protection. While assault weapons are not primarily used for self-defense in the home, they may be typically used for other lawful purposes, like recreational shooting and hunting. Yet, there are reasons to believe this reading is too broad; machine guns, too, can be used for lawful purposes, like recreational shooting.

Another potential constitutional difficulty with an assault weapons ban is that it may not meet the requirements of means-ends scrutiny. The 1994 law was easily evaded by manufacturers who in response to the law simply eliminated the distinguishing military-style features, like bayonet fittings and pistol grips, and sold what were essentially the same guns. These legal firearms may have been just as dangerous as the prohibited assault weapons, with the same lethality and firepower. Unless lawmakers can show that military-style features like bayonet fittings and pistol grips make a weapon unusually dangerous, and a sufficiently comprehensive law is enacted that limits the possibility of evasion, it will be difficult to prove that the government's interest in public safety is substantially furthered when effectively similar guns remain legal.

Even so, the emerging jurisprudential framework provides reason to believe an assault-weapon ban could be sustained. In light of the availability of many other firearms, including handguns, characterized by *Heller* as the "quintessential self-defense weapon," it may be that a prohibition on assault-type weapons places a sufficiently modest burden on the right of armed self-defense that it would require only modest justification. Indeed, the U.S. Court of Appeals for the District of Columbia Circuit recently held that a ban on assault rifles was constitutional. In that case, the court ruled that while assault rifles may be "in common use," a prohibition on such firearms "does not effectively disarm individuals or substantially affect their ability to defend themselves." Furthermore, the court wrote, "the evidence demonstrates a ban on assault

weapons is likely to promote the Government's interest in crime control in the densely populated urban area that is the District of Columbia."[29]

C. High-Capacity Ammunition Magazines

An analysis similar to that for assault weapons applies to high-capacity ammunition magazines. The District of Columbia Circuit that upheld the ban on assault weapons also upheld D.C.'s prohibition on magazines that carry more than ten rounds of ammunition. Although the court said that high-capacity magazines may be in common use, a prohibition on such magazines does not significantly burden self-defense. In fact, the court held that high-capacity magazines may be unusually dangerous when used in self-defense because so many rounds can be fired unnecessarily.[30] As with a prohibition on assault weapons, the burden imposed on the core right of armed self-defense by this type of restriction is modest.

Moreover, restricting ammunition magazines substantially furthers the government's important interest in public safety. Mass shooters and criminals prefer high-capacity magazines in order to maximize the threat they pose without having to reload. While people with malicious intent can carry multiple magazines and reload their weapons, magazine size restrictions can force them to take the two or three seconds pause necessary to reload. Even this short pause, the D.C. Circuit held, can be a "critical benefit to law enforcement," affording officers, potential victims, or bystanders the opportunity to intercede. Requiring mass shooters to pause even an instant can be the difference between life and death for intended victims; indeed, bystanders stopped the man who shot Rep. Gabrielle Giffords when he was forced to reload his weapon. Thus, a restriction on high-capacity magazines may substantially serve the government's interest in public safety without significantly burdening the ability of law-abiding individuals to defend themselves.

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The Second Amendment leaves Congress and the state and local governments significant regulatory power, at least when they do not compromise the core right recognized in *Heller* and regulate with substantial justification. Indeed, in conducting this inquiry, there is a strong case to be made for judicial modesty. As one federal appellate tribunal put it: "This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights."[31]

[29] Heller v. District of Columbia, 670 F.3d 1244, 1262-63 (D.C. Cir. 2011).
[30] *Id.* at 1263-64.
[31] United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011).