Banning High Capacity Magazines: Heller and the Right to Bear Arms

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ABSTRACT: The debate over gun control, once moribund, is now on the topic of political conversation in state legislatures and in Congress. The massacre of 20 schoolchildren and 6 school employees at Sandy Hook Elementary School has made gun control a very real possibility. One target of recent gun control measures is a prohibition on the sale and manufacture of detachable high-capacity magazines for semiautomatic weapons. Presently, at the state and federal level, legislation has been proposed, or is in the process of being implemented, that would prohibit the sale and manufacture of detachable high-capacity magazines for semiautomatic weapons. Such proposals implicate the Second Amendment right to bear arms and are almost certain to be challenged on constitutional grounds.

This paper assesses the constitutionality of a prohibition on the manufacture and sale of high-capacity magazines, in light of the Second Amendment principles recently announced in District of Columbia v. Heller. This paper first sets out the scope and strength of the Second Amendment right to bear arms. While the outer boundary of the right to bear arms is uncertain, the right is clearly implicated by a prohibition on the sale and manufacture of high-capacity magazines. This paper then tries to fit a prohibition on high-capacity magazines into some of the ‘exceptions’ to Second Amendment protection identified in Heller. Although the prohibition fits within some of the exceptions, this paper finds that courts are unlikely to accept that argument.

This paper then assesses the constitutionality of a prohibition on high-capacity magazines, using the two-step process that courts have used to test laws that burden the Second Amendment right to bear arms. Drawing on a range of sources, the paper finds that a prohibition on high-capacity magazines is unlikely to be effective. However, its ineffectiveness is also its virtue. While courts discuss the level of scrutiny applied to laws that burden the right to bear arms as a form of intermediate scrutiny, practice suggests that the standard is much closer to rational basis scrutiny. Because the prohibition is unlikely to have much of an effect, it is also very unlikely to burden the Second Amendment right to bear arms, and is therefore constitutional, because although it is unlikely to have any salutary effect, it is nevertheless a rational legislative judgment that might, if just slightly, reduce the terrible toll of gun violence.

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I. INTRODUCTION: A RENEWED DEBATE

Despite a string of mass shootings in recent years,1 conventional wisdom has been that because of significant opposition,2 gun control laws had little, if any, realistic chance of enactment.3 Sandy Hook changed all that. Early on a Friday morning, Adam Lanza, armed with a Bushmaster rifle and two handguns,4 shot his way into Sandy Hook Elementary School and killed 26 people.5 Of the dead, 20 were children,6 all of them just 6 or 7 years old.7 For a nation

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1 Recent mass shootings have occurred at a military base in Fort Hood, Texas; at a community center in Binghamton, New York; and a hair salon in Seal Beach, California. See Patt Morrison, Discussing Gun Control After 'The Dark Knight Rises' Shooting, 89.3 KPCC (July 20, 2012), http://www.scpr.org/programs/patt-morrison/2012/07/20/27511/gun-control-in-light-of-colorado-shooting/ (recapping discussion with Professor Adam Winkler regarding string of recent mass shootings).


3 See Adam Winkler, Why Don’t Mass Shootings Lead to Gun Control?, THE DAILY BEAST (July 20, 2012), http://www.thedailybeast.com/articles/2012/07/20/why-dont-mass-shootings-lead-to-gun-control.html (“Over the past twenty years, it’s become increasingly clear that mass shootings, no matter how tragic, don’t lead to reforms of gun laws.”).


inured to gun violence, the reaction to the shooting was palpably different than shootings past.\textsuperscript{8}

The death of so many schoolchildren even led to a marked international response.\textsuperscript{9}

The political reaction seemed different as well. In an address to the nation in the hours after the shooting, a visibly distraught\textsuperscript{10} President Obama vowed: “We're going to have to come together and take meaningful action to prevent more tragedies like this, regardless of the politics.”\textsuperscript{11} At a memorial service the day after the shooting, Obama reaffirmed what he hinted at the day before and promised to “use whatever power this office holds” to prevent similar

\textsuperscript{6} Id.


tragedies. In the days that followed, Obama promised to make gun control a “central issue” during his second term of office. The response was a marked departure from what had become routine after mass shootings. Previous mass shootings had engendered calls for new gun control laws. But such calls met with little success. The reaction after Sandy Hook seemed different.

In the months since the Sandy Hook massacre, state and federal legislators have weighed in on what kinds of gun control measures to implement, with some going so far as to introduce multifaceted policy solutions to address gun violence. Id.


legislation. In particular, a number of state and federal proposals call for the prohibition of high-capacity magazines. Such prohibitions have been attempted in the past. Under the 1994 Federal Assault Weapons Ban (AWB), high-capacity magazines were illegal to manufacture or sell. But, since the expiration of the AWB in 2004, high-capacity magazines have proliferated. Now, since the Sandy Hook shooting, new prohibitions seem imminent. Indeed, in addition to a new wave of state laws to ban high-capacity magazines, there is a renewed effort to enact a federal ban on high-capacity magazines.

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21 See id. §110103(b)(31)(A) (banning the manufacture and import of magazines holding more than ten rounds).

22 The Act was allowed to expire through a sunset provision. See VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994, PUB. L. NO. 103-122, 108 STAT. 1796 §110105.


24 See e.g., ASSAULT WEAPONS BAN OF 2013, 113 CONG. S. RES. 150 (Jan. 24, 2013).
But, whether a prohibition on the manufacture and sale of high-capacity magazines would pass constitutional muster is very much an open question. In *Heller*, the Court announced a new Second Amendment doctrine that potentially jeopardize laws seeking to limit magazine capacity. In *McDonald*, the Court made the Second Amendment applicable to the states. This Paper will proceed in four Parts. Part I details the recent push to enact a federal prohibition of high-capacity magazines. Part II briefly explores *Heller* to determine the constitutional standard for assessing laws that burden the right to bear arms. Part III analyzes a prohibition on high-capacity magazines in light of the factors the Court identified in *Heller*: longstanding regulations, lawful purpose, common use, dangerous and unusual. Part IV concludes that while a prohibition on the manufacture and sale of high-capacity magazines will likely prove ineffective, it nevertheless does not meaningfully implicate the core constitutional right identified in *Heller*, and such a regulation would therefore likely be constitutional. In short, the ineffectiveness of such a ban makes it constitutional. Because it is unlikely to have any meaningful effect, it is unlikely to burden any core constitutional rights. Likewise, the small but not insignificant

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25 For purposes of this paper, unless specifically noted, the term “high-capacity magazine” is defined to mirror the most recently proposed federal legislation on the issue. See *Assault Weapons Ban of 2013*, 113 Cong. S. Res. 150 (Jan. 24, 2013) (defining “any semiautomatic rifle or handgun with a fixed magazine that accepts more than 10 rounds” as an assault weapon and prohibiting its manufacture). The regulation would prohibit the manufacture, sale, transfer, import, and possession of high-capacity magazines. Like the 1994 AWB, the prohibition on the sale, transfer, and possession would not apply to the possession of devices otherwise lawfully possessed within the United States on or before the date of the enactment of the proposed legislation. *Id.*

26 To the extent *McDonald* announced a new doctrine, it was that the Second Amendment was incorporated against the States. While the Court reiterates its holding in *Heller*, nothing new was added to the emerging body of Second Amendment jurisprudence by *McDonald*. 
chance it might be effective is likely sufficient to convince a court that the means-end fit is ‘good enough.’

II. THE LEGAL STANDARD: HELLER AND THE RIGHT TO BEAR ARMS

In 2008, in *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an individual right to possess a firearm and to use that firearm for traditionally lawful purposes, like self-defense in the home. The decision represented a stark departure from the Court’s precedent on the Second Amendment. Yet in so doing, the Court failed to clearly define how to implement that right in subsequent cases. Indeed, the failure to articulate a very clear standard, or for that matter, a standard of review, makes *Heller’s* application to any potential prohibition on the manufacture and sale of high-capacity magazines

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28 *Id.* at 625.

29 The Court’s last major Second Amendment decision was *United States v. Miller*, 307 U.S. 174 (1939). In *Miller*, the Court determined that the Second Amendment protected a collective right to bear arms. *Id.* The Court reaffirmed the decision in *Miller* in 1980. *See Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980).

30 *See* Calvin Massey, *Second Amendment Decision Rules*, 60 HASTINGS L.J. 1431 (2009) (noting that while the Court “announced a constitutional rule -- the Second Amendment guarantees a right of individuals to keep and bear arms,” it “offered little guidance concerning the decision rules”) (citations omitted); *see also* Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1569 (2009) [hereinafter Winkler, *Catch-22*] (noting the ways in which *Heller* represents a “confusing set of contradictions”).

31 *See* Glenn H. Reynolds and Brannon P. Denning, *Heller’s Future in the Lower Courts*, 102 NW. U. L. REV. 2035 (2008) (noting that the Court “declined to give a detailed accounting of the proper standard of review to be used in subsequent Second Amendment cases”).
hard to predict. Nonetheless, enough is said in *Heller* to begin an analysis of how courts might scrutinize the regulation of high-capacity magazines.

The narrow issue in *Heller* concerned the constitutionality of a series of laws in Washington D.C. that banned handgun possession and required other firearms to be rendered inoperable when stored in the home. But, the broader issue proved to be even more significant: to what extent the Second Amendment secures an individual, as opposed to a collective, right to bear arms. The Court began with an assessment of the language of the Second Amendment itself: “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.” The Court determined that the operative clause of the Second Amendment, “the right of the people to keep and bear Arms, shall not be

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33 *Heller*, 554 U.S. at 572. The regulations on handgun possession, among the strictest in the nation, included a ban on handgun possession and a requirement that legally owned firearms in the home be kept unloaded and disassembled, or bound by a trigger lock device. See D.C. Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4), 7-2507.02 (2001).


35 U.S. CONST. AMEND. II.
infringed,” defined the scope of the right.\textsuperscript{36} According to the Court, the clause left “no doubt . . . that the Second Amendment conferred an individual right to keep and bear arms,”\textsuperscript{37} regardless of the capacity in which the right is exercised.\textsuperscript{38} This individual right was linked to the natural right of self-defense, which is “central to the Second Amendment right.”\textsuperscript{39} Therefore, the Court concluded, at a bare minimum, the right to bear arms includes the right to carry firearms for the “defense of self, family, and property.”\textsuperscript{40}

In assessing the challenged regulations, the Court determined that the District’s ordinances were incompatible with the natural right of self-defense, because “[t]he handgun ban amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose.”\textsuperscript{41} Even though the Second Amendment permitted some regulation of firearms, the District’s ban clearly ran afoul, because it amounted to an “absolute prohibition of handguns held and used for self-defense in the home.”\textsuperscript{42} That the regulation permitted the possession of other types of firearms did not save the handgun ban. Handguns, the

\textsuperscript{36} Heller, 554 U.S. at 592.

\textsuperscript{37} Id. at 595.

\textsuperscript{38} Id. at 584.

\textsuperscript{39} Id. at 628; see also David B. Kopel, The Natural Right of Self-Defense: Heller’s Lesson for the World, 59 SYRACUSE L. REV. 235, 236 (2008) (interpreting Heller to reaffirm that “[t]he right to arms . . . is not a right which is granted by the Constitution,” but rather “[i]t is a pre-existing natural right which is recognized and protected by the Constitution”).

\textsuperscript{40} Heller, 554 U.S. at 628.

\textsuperscript{41} Id.

\textsuperscript{42} Id.
Court explained, are quintessential weapons of self-defense.\textsuperscript{43} Therefore, the Court concluded that the District’s prohibition on the possession of handguns did not pass constitutional muster.

Likewise, the requirement that firearms be rendered inoperable at all times also ran afoul of the natural right of self-defense. The requirement, the Court concluded, made it “impossible for citizens to use [firearms] for the core lawful purpose of self-defense.”\textsuperscript{44} Like the prohibition on handgun possession, the Court again focused on the effect of the regulation as it related to home, which for the Court is the place where the “core lawful purpose of self-defense” is most acute.\textsuperscript{45} The Court made clear that regulations that burden the right of self-defense implicate rights guaranteed by the Second Amendment. Since the Court identified the right to bear arms for “individual self-defense” as “the central component of the right itself,”\textsuperscript{46} the implication is that the right extends beyond the home.\textsuperscript{47} Given all of this, it seems certain that any prohibition on magazine capacity will be scrutinized in light of \textit{Heller}.

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\textsuperscript{43} Id. at 629. The Court explained the virtues of handguns, as opposed to long guns, thusly: “It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police.” \textit{Id.}

\textsuperscript{44} Id. at 630.

\textsuperscript{45} Id. at 628-30.

\textsuperscript{46} Id. at 599.

\textsuperscript{47} See Michael P. O’Shea, \textit{The Right to Defensive Arms After District of Columbia v. Heller}, 111 W. VA. L. REV. 349, 378 (2009) (arguing that “the most natural reading of \textit{Heller}’s discussion of weapons carrying is that the Second Amendment right to ‘bear arms’ does include an individual right to carry weapons for defense outside the home”) [hereinafter O’Shea, \textit{Defensive Arms}]; Michael C. Dorf, \textit{Does Heller Protect a Right to Carry Guns Outside the Home?}, 59 SYRACUSE L. REV. 225, 228 (2008) (“[T]he logic and language of Heller extend to the possession and use of firearms outside of the home.”).\end{flushright}
III. ANALYSIS: HIGH-CAPACITY MAGAZINES

While the Court in *Heller* made clear that the Second Amendment protected an individual right to bear arms, lower courts were left with the task of determining just how to implement that right. What has emerged is a two-step framework: first, it must be determined whether the regulated activity or firearm falls within the scope the Second Amendment guarantee as defined in *Heller*; second, if the regulated activity falls within the scope of the Second Amendment, it must be determined whether the regulation survives the appropriate level of means-ends scrutiny for laws that burden Second Amendment rights. The first step might be called the “categorical” inquiry, because it seeks to determine whether the category of regulated firearm is

48 See Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185 (5th Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Heller v. District of Columbia, 670 F.3d 1244, 1252 (D.C. Cir. 2011) (*Heller II*); 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, 614 F.3d 85, 89 (3d Cir. 2010). But see United States v. Skoien, 614 F.3d 638, 641-42 (7th Cir. 2010) (en banc), cert. denied 131 S. Ct. 1674 (U.S. 2011) (dismissing the two-step framework to avoid “levels of scrutiny quagmire,” but nevertheless applying intermediate scrutiny to challenged categorical restriction).

49 See, e.g., *Chester*, 628 F.3d at 680 (“[T]his historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification.”). Although some courts, like *Chester*, characterize the inquiry as an historic one, for the reasons discussed in Part III.B, *infra*, I believe that the scope inquiry is not limited to “the time of ratification.” See also note 53, *infra*, and accompanying text.

50 Courts and commentators have termed the appropriate level of scrutiny in different ways – e.g., rational-basis with bite, intermediate scrutiny, heightened scrutiny, reasonable regulation. In practice, what courts have adopted is a lenient form of intermediate scrutiny.

51 See, e.g., *Marzzarella*, 614 F.3d at 89.
or is not within the scope of the Second Amendment.\textsuperscript{52} The second step might be called the “balancing” inquiry, because although it ostensibly takes place in the context of a heightened standard of review, the inquiry involves a very pragmatic weighing of interests, not unlike what Justice Breyer proposed in his dissent.\textsuperscript{53} This framework will likely govern Second Amendment challenges to restrictions on high-capacity magazines. Thus, to determine whether a regulation of high-capacity magazines would pass constitutional muster, it is first necessary to determine whether and to what extent the right to use high-capacity magazines is categorically protected (or not protected).\textsuperscript{54}

A. Defining the Scope of the Right

\textsuperscript{52} See Joseph Blocher, \textit{Categoricalism and Balancing in First and Second Amendment Analysis}, 84 N.Y.U. L. REV. 375, 405-12 (2009) [hereinafter Blocher, \textit{Categoricalism and Balancing}].

\textsuperscript{53} See Allen Rostron, \textit{Justice Breyer’s Triumph in the Third Battle over the Second Amendment}, 80 GEO. WASH. L. REV. 703, 708 (2012) [hereinafter Rostron, \textit{Justice Breyer’s Triumph}] (“[Courts] have steered . . . toward a more pragmatic consideration of contemporary public policy considerations, with a strong dose of deference to legislative determinations about complex empirical issues. That approach is much like the analysis that Justice Breyer encouraged in his \textit{Heller} and \textit{McDonald} dissents.”); see also Lawrence Rosenthal and Joyce Lee Malcolm, \textit{McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?}, 105 NW. U. L. REV. 437, 446 (2011) (arguing that “the historical acceptance of concealed-carry prohibitions cannot be explained by anything other than . . . interest-balancing.”).

\textsuperscript{54} There is some question as to how the specific the category of high-capacity magazines should be drawn. For instance, is there a difference between a handgun (recognized as a quintessential weapon of self-defense) equipped with a high-capacity magazine, and an AR-15 rifle equipped with a high capacity magazine? Courts have largely avoided delving into the thicket of subcategorization. See Blocher, \textit{Categoricalism and Balancing}, supra note 52, at 422-23. For the present examination, the category is drawn to a relatively high level of abstraction.
In *Heller*, the Court made clear that the Second Amendment does not protect all weapons in all places.\(^{55}\) At its strongest, the Second Amendment protects the right to possess a handgun for purposes of self-defense in the home.\(^{56}\) Yet it is also clear that the scope of that right is not unlimited. In brief, the Court articulated a number of limitations on the scope of the Second Amendment’s right to bear arms, which will be discussed and analyzed in turn: (i) first, some longstanding regulations are presumptively lawful and therefore do not implicate the right;\(^{57}\) (ii) second, the right articulated in *Heller* only extends to lawful purposes; (iii) and, third, the right does not extend to unusually dangerous weapons, especially those (iv) not in common use. These limitations determine whether a regulation of high-capacity magazines must be justified under the appropriate level of scrutiny.

1. Are Regulations of High-Capacity Magazines Longstanding?

The *Heller* Court’s discussion of “presumptively lawful regulatory measures,”\(^{58}\) while admittedly dicta,\(^{59}\) is perhaps the most consequential part of the entire decision.\(^{60}\) In sketching the limits of the right to bear arms, the Court said:

\(^{55}\) *Heller*, 554 U.S. at 626.

\(^{56}\) Id. 626-27.

\(^{57}\) Of course, as will be explored in Part III.A.1, *infra*, the Court fails to explain why it approved certain categories of regulations. *See* Wilkinson, *Of Guns, Abortions*, *infra* note 173, at 273 ("[T]he Court does not explain why these restrictions are embedded in the Second Amendment."); Winkler, *Catch-22*, *supra* note 30, at 1564 ("It is entirely unclear why the mere fact that these laws have been on the books for a long time suffices to save them from legal defeat . . . . That a constitutional violation is longstanding hardly seems good reason to uphold it.").

\(^{58}\) See *Heller*, 554 U.S. at 626-27 n.26.

\(^{59}\) *Contra* United States v. Rozier, 598 F.3d 768, 771 n.6 (11th Cir. 2010), *cert. denied*, 130 S. Ct. 3399 (U.S. 2010) ("[I]t is not dicta.").
Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and 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.61

The passage is significant for at least two reasons. First, it signals that the broad Second Amendment right enunciated in *Heller* is not absolute. Some of the presumptively lawful regulatory measures, like those disabling felons and the mentally ill, certainly interfere with the core right of self-defense in the home.62 But, the Court said, such regulations are nevertheless presumptively lawful. It is less clear why they are presumptively lawful, however.63 One reading is that the presumptively lawful regulatory measures reflect a collective judgment as to

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60 Commentators have described the *Heller* Court’s dicta as “dicta of the strongest sort.” See 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, 1372 (2009); Winkler, *Catch-22*, supra note 30, at 1567 (“[I]n the upside down universe of *Heller* . . . the dicta are what really matter.”). Indeed, “Supreme Court dicta controls when it is on point and it is the only available authority.” United States v. Chester, 367 F. App’x 392, 397, *reh’g* granted (Dec. 30, 2010), *opinion vacated on reh’g*, 628 F.3d 673 (4th Cir. 2010). Lower courts have generally relied on the *Heller* dicta to reject various challenges to gun regulations. See United States v. McCane, 573 F.3d 1037, 1050 n.3 (10th Cir. 2009) (“By my count, at least six other circuits have rejected post-*Heller* challenges to the 18 U.S.C. § 922(g)(1) felon dispossession statute. Almost all of these decisions cursorily cite the *Heller* dictum, and almost all are unpublished.”); Reynolds and Denning, *supra* note 31, at 1248 (noting that “lower court judges have employed Justice Scalia’s categorical exclusions . . . with gusto, expanding them in some cases”).

61 *Heller*, 554 U.S. at 626-27.

62 See Blocher, *Categoricalism and Balancing*, *supra* note 52, at 426 (observing the oddity in excluding felons because felons in particular “are likely to move in circles where self-defense is an imperative”).

63 See Nat’l Rifle Ass’n of Am., Inc., 700 F.3d 185 (5th Cir. 2012) (“It is difficult to discern whether [longstanding prohibitions] . . . either “(i) presumptively fail to burden conduct protected by the Second Amendment, or (ii) presumptively trigger and pass constitutional muster under a lenient level of scrutiny.”).
how to weigh the right to bear arms against public policy considerations like safety.\textsuperscript{64} Under this reading, challenged regulations may be deemed lawful if they bear a passing resemblance to the presumptively lawful regulations identified in \textit{Heller}, since both the challenged regulation and the presumptively lawful regulation vindicate the same societal interest.\textsuperscript{65}

Second, and more significantly for the present examination, the passage has given courts cover to shoehorn all manner of gun regulations into the framework of “presumptively lawful regulatory measures.”\textsuperscript{66} In reflecting on the list of presumptively lawful regulations, the Court in \textit{Heller} stressed that this list is meant to be illustrative and that it “does not purport to be exhaustive.”\textsuperscript{67} Courts have taken this language to mean that other regulatory measures may also be presumptively lawful, especially if they are similar to the regulatory measures that the Court in \textit{Heller} approved. To do so, courts often reason by analogy and ask whether a statutory restriction is similar to the one presumed to be lawful. \textsuperscript{68} This is consistent with the

\textsuperscript{64} See Rostron, supra note 53, at 740.

\textsuperscript{65} It’s not clear here if the “longstanding regulations” are completely outside the scope of the Second Amendment, or if the regulations are just presumed to survive whatever standard of scrutiny is appropriate given the burden. That the regulations are “presumptively” lawful would seem to indicate the latter, because presumptions can be rebutted, for instance, in an as-applied challenge. See United States v. Barton, 633 F.3d 168, 173 (3d Cir. 2011). For the present analysis, the theoretical distinction is not terribly relevant.

\textsuperscript{66} See Winkler, Catch-22, supra note 30, at 1567 (noting that lower courts have “stretch[ed] [the \textit{Heller} dicta] far and wide to capture every conceivable type of gun restriction”). Indeed, as of 2009, “[n]early every case [since \textit{Heller}] has been decided solely on the basis of [the dicta].” Id. at 1566.

\textsuperscript{67} \textit{Heller}, 554 U.S. at 627 n.26.

\textsuperscript{68} See e.g., United States v. Booker, 570 F. Supp. 2d 161, 163 (D. Me. 2008) (rejecting a challenge to a statutory prohibition against the possession of firearms by felons and the mentally ill because it is similar to the statutory prohibition against the possession of firearms by persons convicted of the misdemeanor crime of domestic violence).
understanding that the regulations reflect a longstanding judgment on how best to balance the right to bear arms with public safety.\textsuperscript{69} For the present examination, the threshold question is whether a prohibition of high-capacity magazines embodies the same underlying collective judgment that makes the “longstanding prohibitions” presumptively lawful. If it does, then consistent with the two-step approach mapped out in \textit{Heller}, the regulation would be deemed presumptively lawful.\textsuperscript{70} If it does not, then the regulation would then need to either fit within another scope exception or be subjected to the appropriate level of scrutiny.

a. Historic and Longstanding Gun Regulations

Historically, the right to keep and bear arms has always been subject to regulation, before and after the Founding.\textsuperscript{71} Since the Founding, states and municipalities have exercised the government’s inherent police powers\textsuperscript{72} to regulate the possession and use of firearms in order to

\textsuperscript{69} There is disagreement that using the passage in this manner is correct. \textit{See}, e.g., United States v. Skoien, 614 F.3d 638, 647-48 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (“But my colleagues [in the majority opinion] are not clear about how this limiting dicta should inform the constitutional analysis. The court thinks it not . . . profitable to parse these passages of \textit{Heller} as if they contained an answer to the question whether [the statute] is valid, but proceeds to parse the passages anyway.” (citation and quotation omitted)).

\textsuperscript{70} It remains possible to rebut the presumption. \textit{See Heller II}, 670 F.3d at 1253 (“A plaintiff may rebut this presumption by showing the regulation does have more than a de minimis effect upon his right.”).


\textsuperscript{72} Chief Justice Marshall recognized as much: “The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States.” \textit{Brown v. State of Maryland}, 25 U.S. 419, 443 (1827). The modern Supreme Court has likewise recognized the state’s longstanding plenary police power. \textit{See} Gonzales v. Oregon, 546 U.S. 243, 270 (2006) (“[T]he structure and limitations of federalism . . . allow
enhance public safety.\textsuperscript{73} During the Revolution, Pennsylvania went so far as to require a person to take a loyalty oath, or else “he was not permitted to carry any arms about his person or keep any arms or ammunition in his ‘house or elsewhere.’”\textsuperscript{74} Short of outright prohibitions, states also regularly limited the amount of gunpowder and ammunition that could be stored in the home out of public safety concerns.\textsuperscript{75} Such safe storage laws became quite common by the close of the eighteenth century.\textsuperscript{76} Gun laws that date back to the founding make clear that “when public safety demanded that gun owners do something, the government was recognized to have the authority to make them do it.”\textsuperscript{77} What is clear, then, is that regulation of ammunition, be it how much a person could carry or store, has longstanding roots in American history.

Colonial and early state governments went so far as to routinely prohibit entire classes of weapons,\textsuperscript{78} which, like the high-capacity magazines, were seen as threats to public safety.\textsuperscript{79} As the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.”) (citation omitted).


\textsuperscript{75} Winker, \textit{Scrutinizing}, supra note 71, at 710.

\textsuperscript{76} Cornell and DeDino, supra note 74, at 510-11. Such regulations were not limited to large cities, where the danger was most acute, but also included new towns. Id.

\textsuperscript{77} ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 115 (2011).

\textsuperscript{78} Robert H. Churchill, \textit{Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment}, 25 L. & Hist. Rev. 139, 162 (2007). What is more, these regulations also included restrictions on time, place, and manner, with respect to the use of firearms. Id.

\textsuperscript{79} Id.
far back as 1837, Alabama taxed the sale or giving of knives that were considered especially dangerous. 80 Tennessee went so far as to enact an outright ban on the wearing, sale, or giving of these weapons. 81 These statutes survived numerous constitutional challenges, 82 albeit in the context of “right to bear arms” provisions in state constitutions. 83 The twentieth century is little different. States have routinely and repeatedly upheld all manner of gun regulations. 84 Restrictions and regulations on entire classes of weapons, then, have at least some longstanding roots in American history. 85

80 The knives were termed, colorfully, Bowie Knives or Arkansas Tooth-picks. See An Act to Suppress the Use of Bowie Knives (1837), reprinted in CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC 146 (1999).

81 See id. at 148-49.

82 See e.g., Aymette v. State, 21 Tenn. 154, 159-61 (1840) (recognizing that while the right to keep weapons is unqualified, the right to bear arms for purposes other than the common defense can be regulated); State v. Chandler, 5 La. Ann. 489, 489-90 (1850) (rejecting challenge to concealed weapons ban that was “absolutely necessary to counteract a vicious state of society”); State v. Jumel, 13 La. Ann. 399, 400 (1858) (upholding law regulating concealed weapons that only prohibited a “particular mode of bearing arms which is found dangerous to the peace of society”).

83 Commentators have repeatedly recognized that “the state experience is instructive.” Winkler, Scrutinizing, supra note 71, at 703 (referencing scholars and citing state constitutions).

84 Id. at 719-20 (noting that courts have “uniformly uph[eld] bans on possession of firearms by felons; total bans on the possession of particular types of firearms, including short-barreled (or ‘sawed-off’) shotguns, machine guns, stun guns, assault weapons, semiautomatic weapons, and even handguns”) (citing cases).

85 Justice Breyer recognized as much in his dissent in Heller, where he cited numerous examples of gun regulations that he argued are consistent with the right to bear arms. See Heller, 554 U.S. at 682-687 (Breyer, J., dissenting). However, except for one law cited by Justice Breyer, the majority dismissed the examples as “provid[ing] no support for the severe restriction in the present case.” Heller, 554 U.S. at 632 (majority opinion).
So what does this mean for restrictions on high-capacity magazines? So far, not much. In *Heller v. District of Columbia*, the named plaintiff in *Heller* challenged a number of newly enacted firearm regulations. Among the provisions challenged were registration and licensing requirements, a prohibition of “assault weapons,” and a ban of magazines holding more than ten rounds of ammunition. The court in *Heller II* assessed the challenge to the high-capacity magazine ban using the same two-step process outlined in Part III. The court first determined that the District’s prohibition on high-capacity magazines was not “longstanding and thereby deserving of a presumption of validity.” The court came to this conclusion despite the fact that there were two such “longstanding” prohibitions: the District had, since 1932, banned all semi-automatic firearms shooting more than twelve rounds, and, Michigan had, since 1928, banned all firearms shooting more than sixteen rounds. Thus, the prohibition of high-capacity magazines was in some sense “longstanding.”

Nevertheless, notwithstanding the history of such prohibitions, the court determined it was “not aware of evidence that prohibitions on either semi-automatic rifles or large-capacity

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87 *Heller II*, 670 F.3d at 1248-49.

88 See id. at 1252-53.

89 Id. at 1260.

90 Id. at 1296 (*citing* Act of July 8, 1932, ch. 465 §§ 1, 8, 47 Stat. 650, 650, 652) (prohibiting “any firearm which shoots . . . semi-automatically more than twelve shots without reloading”).

91 Id. at 1260 n.* (*citing* Act of June 2, 1927, No. 372, § 3, 1927 Mich. Laws 887, 888) (prohibiting any “firearm which can be fired more than sixteen times without reloading.”).
magazines are longstanding,” as outlined in *Heller.*”92 Because the court was clearly aware there was *some* evidence that such prohibitions are longstanding, presumably what the court meant is that there was not *enough* evidence that bans on high-capacity magazines are sufficiently longstanding to warrant the presumption of validity.93 By contract, in assessing Heller’s challenge to the District’s basic handgun registration requirements, the court determined that such regulations are sufficiently longstanding to be presumptively valid.94 What made the handgun registration requirements different is that such regulations had been “accepted for a century in *diverse states and cities* and [was] now applicable to more than one fourth of the Nation by population.”95

Thus, at least for the court in *Heller II*, a challenged firearm regulation must have a sufficient number of historic analogs for the regulation to be deemed presumptively valid.

92 *Id.*

93 It may be argued that the other problem with the history of limiting magazine capacity is that it is not sufficiently rooted in history to warrant the presumption of validity – that is, it is not old enough. However, the “presumptively lawful” regulations cited in *Heller* do not suggest that a regulation needs to be precisely equivalent to founding-era regulations. *See Skoien*, 614 F.3d at 641 (“[W]e do take from *Heller* the message that exclusions need not mirror limits that were on the books in 1791.”). Indeed, laws limiting firearm possession for the mentally ill, which the Court in *Heller* explicitly listed as presumptively lawful, are, like the magazine restrictions in *Heller II*, “of 20th Century vintage.” *Id.* at 641.

94 *Heller II*, 670 F.3d at 1253-54 (citing statutes and concluding registration requirements are longstanding).

95 *Id.* at 1254 (emphasis added). The dissent disagrees on this point. *See id.* at 1292-96 (Kavanaugh, J., dissenting) (arguing that the District improperly analogizes its registration requirements to licensing requirements and that the only longstanding registration requirements apply to *sellers* of guns not *owners*). This shows that the level of abstraction chosen when categorizing and comparing modern regulations to historic regulations will determine how “similar” the regulations look. *See supra* note 54 and accompanying text.
Presently, six states restrict the manufacture, sale, import, or possession of high-capacity magazines: California, Hawaii, Maryland, Massachusetts, New Jersey, and New York. Numerous cities and municipalities also restrict the sale or import, or otherwise regulate the use of a high-capacity weapon. But, while there is some diversity in the cities and states where such bans have been enacted, the laws are of relatively recent vintage. It is not

96 CAL. PEN. CODE §§ 16740(a), 32310 (West) (no more than ten) (prohibiting sale and manufacture).
97 HAW. REV. STAT. § 134-8(c) (West) (applying restriction only to handguns) (no more than ten) (prohibiting sale, manufacture, and possession).
98 MD. CODE ANN. CRIM. LAW § 4-305 (West) (no more than twenty) (prohibiting sale and manufacture).
99 MASS. GEN. LAWS ch. 140 §§ 121, 131M (West) (no more than ten) (prohibiting sale and possession).
100 N.J. STAT. ANN. §§ 2C: 39-9(h), 2C: 39-1(y), 2C: 39-3(j) (no more than fifteen) (prohibiting sale, manufacture, and possession).
101 N.Y. PENAL LAW §§ 265.00 (23), 265.02(8) (West) (no more than ten) (prohibiting sale, manufacture, and possession).
102 See e.g., D.C. OFFICIAL CODE § 7-2506.01 (West) (no more than ten); Chicago, Ill. Municipal Code §§ 8-20-030(i), 8-24-025 (West).
103 See e.g., OHIO REV. CODE § 2923.11 (West) (defining a gun that fires thirty or more rounds without reloading to be a “machine gun,” the possession of which is a Class 5 felony).
104 Interestingly, the states that have enacted more recent restrictions on high-capacity magazines are, with a few exceptions, some of the same states cited by the court in Heller II as places that have enacted longstanding basic handgun registration laws. See Heller II, 670 F.3d at 1253-54.
105 It would seem strange to require a precise historical analog of a much earlier vintage, because the first semi-automatic handgun with a detachable magazine did not become popular until 1893. STEPHEN BULL, ENCYCLOPEDIA OF MILITARY TECHNOLOGY AND INNOVATION 45 (2004) (describing Borchardt C-93). Moreover, the semiautomatic pistol only became popular among civilians in the early 1980s. See Robert J. Spitzer, Assault Weapons in GUNS IN
clear how many historic analogues are necessary to demonstrate that a regulation is presumptively valid. But, the number is apparently greater than two.\textsuperscript{106}

b. Reasoning by Analogy

Having determined that there was insufficient evidence of longstanding regulations of magazine capacity, the court in \textit{Heller II} did not do what a number of courts have done with the list of presumptively lawful regulations: reason by analogy. Some courts, in the wake of \textit{Heller}, have reasoned by analogy to uphold restrictions on firearms, by pointing to a footnote in \textit{Heller} that states that the list of “presumptively lawful” regulations is not meant to be “exhaustive.”\textsuperscript{107}

Following this, the Seventh and Eleventh Circuits have upheld bans on gun possession for those convicted of domestic violence misdemeanors, often reasoning by analogy to prohibitions for the mentally ill or felons.\textsuperscript{108} The Eleventh Circuit, for example, reasoned that laws prohibiting domestic violence misdemeanants from possessing weapons, although of recent vintage, were

\textsc{American Society} (2012) (describing history of semiautomatic pistol). In the end, the court in \textit{Heller II} observed, “[a] requirement of newer vintage is not, however, presumed to be valid.” \textit{Heller II}, 670 at 1253.

\textsuperscript{106} In responding to Justice Breyer’s examples of colonial-era gun regulation, the Court in \textit{Heller} at least hints that the number must be sufficiently large and diverse, although how large and diverse remains an open question. \textit{See Heller}, 554 U.S. at 632 (“[W]e would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense of the home.”).

\textsuperscript{107} \textit{Heller}, 554 U.S. at 626 n.26.

passed to address the same concern that Congress sought to remedy with laws prohibiting felons from possessing guns.\textsuperscript{109} Thus, because the justifications for domestic violence prohibitions are sufficiently similar to other longstanding prohibitions, there is no reason not to include such laws with \textit{Heller}'s list of “presumptively lawful” regulations.\textsuperscript{110}

Admittedly, the fit is not perfect, but in assessing a possible prohibition of high-capacity magazines there is at least a plausible analogy to be made to longstanding regulations that banned or heavily restricted entire classes of weapons and ammunition.\textsuperscript{111} Such laws were designed to address concerns about public safety.\textsuperscript{112} Likewise, the District’s regulations on high capacity magazines, which were challenged in \textit{Heller II}, were also enacted to address concerns about public safety.\textsuperscript{113} As with cases upholding restrictions for domestic violence misdemeanants, the analogy is structurally similar: because there are longstanding regulations on classes of weapons for purposes of public safety, then there is no reason why regulations on

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\textsuperscript{109} \textit{White}, 593 F.3d at 1206.

\textsuperscript{110} \textit{Id.}; contra \textit{United States v. Skoien}, 587 F.3d 803, 806 (7th Cir. 2009) \textit{reh’g en banc granted, opinion vacated}, 08-3770, 2010 WL 1267262 (7th Cir. Feb. 22, 2010) and \textit{on reh’g en banc}, 614 F.3d 638 (7th Cir. 2010) (“[The government] has premised its argument almost entirely on Heller's reference to the presumptive validity of felon-dispossession laws and reasoned by analogy that § 922(g)(9) therefore passes constitutional muster. That's not enough.”); \textit{Chester}, 628 F.3d at 679 (4th Cir. 2010) (rejecting the "safe harbor" approach because it "approximates rational-basis review, which has been rejected by \textit{Heller}").

\textsuperscript{111} See discussion of such laws in Part III.A.1.a, \textit{supra}.

\textsuperscript{112} See Churchill, \textit{supra} note 78.

\textsuperscript{113} \textit{Heller II}, 670 F.3d at 1263-64. In passing the regulation, the District relied on testimony that asserted that high-capacity magazines increase the firepower of mass shooters; that high-capacity magazines result in risk to bystanders; and that they pose a risk to police officers. \textit{Id.}
high-capacity magazines should not also be considered “presumptively lawful.” Indeed, the Court in *Heller* explicitly referenced longstanding “laws imposing conditions and qualifications on the commercial sale of arms” as presumptively lawful. Thus, like the decisions upholding laws banning domestic violence misdemeanants from possessing firearms, if a court were to uphold a restriction on high-capacity magazines by analogizing to historic analogs, no further independent justification of the restriction under the appropriate standard of scrutiny would be necessary. If, however, courts were to find the analogy unpersuasive, then restrictions on high-capacity magazines will need to either fall under another exception, or be justified under the appropriate standard of scrutiny.

### 2. Are High-Capacity Magazines in Common Use?

In addition to identifying “presumptively lawful regulatory measures,” the Court in *Heller* also stated that the Second Amendment does not protect all weapons. The Court determined that the Second Amendment permitted strict regulation, up to and including outright prohibition, on the possession of “dangerous and unusual weapons,” especially those that were not “in common use at the time.” However, the Court declined to define what exactly it meant by “dangerous and unusual weapons,” or “in common use at the time.” On the one hand,

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114 Some courts have made a different analogy to another longstanding prohibition: the Court’s assurance in *Heller* that the Second Amendment also does not protect “dangerous and unusual” firearms. This will be discussed in Part III.A.1., infra.

115 *Heller*, 554 U.S. at 626-27.

116 *Id.* at 627.

117 *Id.* (citing *United States v. Miller*, 307 U.S. 174 (1939) and numerous treatises).

118 The phrase is admittedly a strange one, since, by definition, all firearms are necessarily dangerous. *See* Massey, *supra* note 30, at 1433 (noting there is “some circularity to [the Court’s] formulation”). Justice Breyer, in his
the Court found that handguns unquestionably qualify as protected under the Second Amendment, because they are “the most popular weapon chosen by Americans for self-defense in the home.”120 On the other hand, the Court suggested that machine guns and sawed-off shotguns did not, because such weapons were not in common use among civilians.121 Whether or not high-capacity magazines may be restricted under the Second Amendment depends in part on what types of weapons are considered “dangerous and unusual” and “not in common use.” If dissent, also noted that what makes guns especially useful is that they are especially dangerous. Heller, 554 U.S. at 711 (Breyer, J., dissenting) (“[T]he very attributes that make handguns particularly useful for self-defense are also what make them particularly dangerous.”).

119 Nor do the sources cited by the Court shed light on the meaning of this phrase. 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, 1481 (2009) (noting that “the sources Heller cites – some of which say “dangerous and unusual weapons” and some of which say “dangerous or unusual weapons” – don’t really discuss what sorts of weapons could historically be possessed.”) (citing William Blackstone, 4 Commentaries).

120 Heller, 554 U.S. at 629.

121 Id. at 623-29. The reasoning here is somewhat circular, because it is the prohibition on machine guns that makes them so rare. See Winkler, Catch-22, supra note 30, at 1560-61 (2009) (“But why are machine guns so rare? Because federal law has effectively prevented civilians from purchasing them for the past seventy-five years.”). In a recent decision, the Ninth Circuit circularly argued along the same lines, noting that since Congress had long banned machine guns, they were “dangerous and unusual” under Heller. United States v. Henry, 688 F.3d 637, 639-40 (9th Cir. 2012) (involving homemade machine gun). In a recent case, a plaintiff challenging a federal ban on armor piercing ammunition argued that the court should ask whether the ammunition would be commonly used in the absence of a ban. See Kodak v. Holder, 342 F. App'x 907, 908-09 (4th Cir. 2009). Somewhat unpersuasively, the court reasoned that the ammunition would be rare notwithstanding the ban, “considering the great risk such ammunition poses to law enforcement officers.” Id. at 909.
high-capacity magazines fall into either of these categories, then regulations to restrict the manufacture and sale will not be subject to the appropriate level of scrutiny.

Looking at how courts have understood the “in common use” construction, it seems likely that the regulation of high-capacity magazines would have to withstand the appropriate level of scrutiny, because such magazines are almost certainly in common use. For example, in *Heller II*, the D.C. Circuit determined that large-capacity magazines are in common use in the United States today. The court noted that, in 1994, 18 percent of all firearms owned by civilians were equipped with magazines holding more than ten rounds, and, moreover, between 1995 and 2000, approximately 4.7 million more such magazines were imported into the United States. Therefore, because high-capacity magazines are in common use, the District’s restriction must be justified under the appropriate level of Second Amendment scrutiny. Here, the court’s determination is almost certainly correct. Although there is a lack of hard data on gun sales, the Glock-17 for example, which is one of the most popular handguns in the United States,

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122 It is unclear if the two categories are mutually exclusive, though they appear to be calibrated against one another. See Craig S. Lerner and Nelson Lund, *Heller and Nonlethal Weapons*, 60 HASTINGS L.J. 1387, 1392 (2009) (“The *Heller* opinion also included dicta endorsing legislative bans on weapons that are ‘dangerous and unusual,’ a category that appears to include all weapons that are not in common use by civilians today.”).

123 The court in *Heller II* used the term “large-capacity” magazines to describe what this Paper has characterized as “high-capacity magazines.” The terms are functionally the same.

124 *Heller II*, 670 F.3d at 1261.

125 *Id.*

126 *Id.*
comes equipped with a standard 17-round (i.e., high-capacity) magazine. Likewise, the AR-15, which is one of the most popular semiautomatic rifles in the United States, comes equipped with a standard 20 to 30-round magazine. Even before the 1994 AWB, estimates put the number of high-capacity magazines at some 25 million in the United States. Thus, the “common use” inquiry practically necessitates the determination that because high-capacity magazines are now popular accessories, weapons equipped with such magazines are “in common use” today.

3. Are High-Capacity Magazines Commonly Used for Lawful Purposes?

In addition to asking whether a particular firearm is “in common use,” courts also ask whether the regulated firearm is commonly used for lawful purposes. This is consistent with the language in Heller, where the Court repeatedly stressed that the Second Amendment only protected the right to bear arms for lawful purposes.


128 O'Shea, Defensive Arms, supra note 47, at 389.

129 Koper, Assessment of Weapons Ban, supra note 139, at 67.

130 Justice Breyer recognized the dilemma in his dissent: “On the majority's reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so.” Heller, 554 U.S. at 721 (Breyer, J., dissenting); cf Winker, Catch-22, supra note 30, at 1572-73 (arguing common use inquiry is “silly”).

131 See Heller, 554 U.S. at 577 (majority opinion) (“Respondent argues that [the Second Amendment] protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.”); id. at 620 (“We described the right protected by the
defense as the core purposes of the right to bear arms, it described that right in terms of lawful self-defense.\textsuperscript{132} Thus, if the regulated activity is not a traditionally lawful activity, then the regulation does not implicate the Second Amendment. For any potential limitation on the manufacture or sale of high-capacity magazines, the key question, then, is whether high-capacity magazines are typically used for lawful purposes.

Again, \textit{Heller II} is instructive as to how courts might decide whether high-capacity magazines are “in common use” for lawful purposes. In \textit{Heller II}, the plaintiff argued that high-capacity magazines are “commonly possessed for self-defense and other lawful purposes,” and therefore the District’s prohibitions imposed a burden that must be justified under the Second Amendment.\textsuperscript{133} The District argued that high-capacity magazines are not useful for self-defense or hunting; that they are generally used for offensive use; that they “have no legitimate use” for lawful purposes like self-defense; and that they are disproportionately involved in murder of police officers and mass shootings.\textsuperscript{134} Presented with these arguments, the Court of Appeals

\textsuperscript{132} See e.g., United States v. Jackson, 555 F.3d 635, 636 (7th Cir. 2009) (“The Court said in \textit{Heller} that the Constitution entitles citizens to keep and bear arms for the purpose of \textit{lawful} self-protection, not for \textit{all} self-protection.”).

\textsuperscript{133} \textit{Id.} at 1260-61.

\textsuperscript{134} \textit{Id.} at 1261 (\textit{citing} Testimony of Brian J. Siebel, Brady Center to Prevent Gun Violence (Oct. 1, 2008); Committee of Public Safety Report on Bill 17-843, at 7 (Nov. 25, 2008)).
declined to decide the issue, noting that there was simply insufficient evidence in the record to accurately determine for what purpose high-capacity magazines are used and thus whether their prohibition implicates the right to bear arms.\textsuperscript{135}

Although the court stated it could not resolve the threshold issue of whether the regulated activity is within the scope of the Second Amendment, the court proceeded, for the sake of argument, under the assumption that the prohibition is a burden on a protected right.\textsuperscript{136} The court then upheld the regulation under intermediate scrutiny.\textsuperscript{137} The lesson here is that even if gun regulations burden the core Second Amendment right of self-defense, the regulation may still survive the appropriate level of scrutiny.\textsuperscript{138} More importantly, the decision here suggests that the scope inquiry might be moot, since high-capacity magazines might otherwise survive the appropriate level of means-end scrutiny. Ultimately, it remains an open question as to whether high-capacity magazines are (or are not) “in common use for lawful purposes.”

As it stands, there is some evidence to suggest that high-capacity magazines are linked, albeit not disproportionately, to gun-related crimes. According to a study conducted on data from before the 1994 AWB, high-capacity magazines were used in roughly 14\% to 26\% of most

\textsuperscript{135} Id. More specifically, the court wanted to know “whether these weapons are commonly used or are useful specifically for self-defense or hunting.” Id.

\textsuperscript{136} Id.

\textsuperscript{137} Id. This is an example of the two-step approach detailed in Part III, supra. The court first determines whether the regulated conduct implicates the Second Amendment, then determines whether the regulation survives Second Amendment scrutiny.

\textsuperscript{138} Whether and to what extent the regulation of high-capacity magazines survives the appropriate level of scrutiny will be examined in Part III.B, infra.
gun crimes.\textsuperscript{139} This number corresponds with estimates of civilian-owned high-capacity magazines from the same period.\textsuperscript{140} This suggests that for the period prior to 1994, high-capacity magazines were not disproportionately linked to crimes. On the other hand, the same study reported that while assault weapons\textsuperscript{141} were used in only 1\% of violent crimes, high-capacity magazines were linked to about 25\% of violent crimes.\textsuperscript{142} Beyond the numbers, gun control advocates continue to assert that firearms equipped with high-capacity magazines are only suitable, and thus commonly used for, criminal purposes.\textsuperscript{143}

Because of congressional limitations on the release of federal crime data, there is paucity of good information regarding how often and to what extent high-capacity magazines are used in crimes.\textsuperscript{144} Consequently, gun control advocates are left to argue without much more than assertions that high-capacity magazines are not commonly used for lawful purposes.\textsuperscript{145}

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\textsuperscript{140} Id.
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\textsuperscript{141} The defining characteristic of assault weapons is that they share largely cosmetic military features. See generally David B. Kopel, Clueless: The Misuse of BATF Firearms Tracing Data, 1999 L. REV. MICH. ST. U. DET. C.L. 171, 180 (1999).
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\textsuperscript{142} Koper, Assessment of Weapons Ban, supra note 139.
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\textsuperscript{145} See e.g., High Capacity Magazines, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE (last visited Dec. 2 2012), http://www.bradycampaign.org/legislation/msassaultweapons/highcapacity (citing one limited study and quoting
Ultimately, the question of whether high-capacity magazines are overwhelmingly used for lawful or unlawful purposes might be difficult to answer with certainty.\textsuperscript{146} In the absence of more convincing evidence, courts are likely to do as the court in \textit{Heller II} did: decide the issue on other grounds.\textsuperscript{147} Thus, courts are very likely to conclude, consistent with \textit{Heller II}, that while high-capacity magazines are “in common use,” there is simply a lack of data as to the purpose to which they are commonly put.\textsuperscript{148}

\begin{footnotesize}
\begin{enumerate}
\item There is a paucity of quality data on the issue, because, in part, Congress has prohibited the public release of federal firearm crime tracing data. James V. Grimaldi and Sari Horwitz, \textit{Industry Pressure Hides Gun Traces, Protects Dealers from Public Scrutiny}, WASH. POST (Oct. 24, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/10/23/AR2010102302996.html. Moreover, with respect to extant gun data, pro-gun and anti-gun advocates have long been engaged in a vigorous debate over what the data demonstrates, with both sides employing similar methods to reach very different results. \textit{See e.g.,} Dan Black \& Daniel Nagin, \textit{Do 'Right to Carry' Laws Deter Violence Crime}, 27 J. LEGAL STUD. 209 (1998) (using data collected by opponents of gun control to reach contrary result).
\item And as discussed in Part III.B, \textit{infra}, restrictions of high-capacity magazines likely survive the appropriate level of scrutiny, as defined by the Court in \textit{Heller}.
\item Both Heller and the District argued using much of the same data cited in the preceding paragraph. \textit{See} Appelle’s Brief, 2010 WL 5108973 (C.A.D.C.); Brief for Appellant’s, 2010 WL 5108968 (C.A.D.C.). The court was clearly underwhelmed by the evidence. \textit{See supra}, note 135. Demonstrating how little data there is to work with, both sides even cited to the Koper study, \textit{supra} note 139, and essentially argued over whether certain crime data showed a “disproportionate effect.” \textit{Supra}, note 133.
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4. Are High-Capacity Magazines Dangerous and Unusual?

Like the other “exceptions” to the Second Amendment, if high-capacity magazines are “dangerous and unusual,” then the regulation of such magazines would not implicate the right to bear arms. Again, though, like the other elements the Court in Heller identified as meaningful to the Second Amendment inquiry, the meaning of the phrase is unclear.\textsuperscript{149} With respect to “dangerous and unusual” weapons, there are at least two plausible interpretations. One is that some weapons may be so “unusually dangerous” compared to other weapons that the danger outweighs any defensive utility.\textsuperscript{150} Another interpretation is that the terms “dangerous”\textsuperscript{151} and “unusual”\textsuperscript{152} have independent strength, and that a weapon may be so unusual that its regulation

\textsuperscript{149} The historical sources cited by the Court are also of little help. The sources do little to define the term. Nelson Lund, \textit{The Second Amendment, Heller, and Originalist Jurisprudence}, 56 UCLA L. REV. 1343, 1362-1365 (2009). What is more, Nelson Lund accuses the Court of stretching the sources, which, “at most,” support the proposition that “there is a tradition of prohibitions on the carrying of certain arms, not on their possession.” \textit{Id.} at 1362.

\textsuperscript{150} See Mark Tushnet, \textit{Heller and the Perils of Compromise}, 13 \textit{LEWIS & CLARK L. REV.} 419, 427 (2009) (“Why do M-16s fall within the category of “dangerous and unusual weapons”? Again, the answer, at least as to dangerousness, has to come from some policy analysis and balancing: perhaps, for example, dangerous weapons are those that, while admittedly more effective in providing defense against assaults, pose significantly higher risks of harm when misused, and their greater effectiveness is outweighed by the higher risk.”); Massey, \textit{supra} note 30, at 1433 (“All firearms are dangerous, so we must suppose that dangerousness is a relative matter.”).

\textsuperscript{151} Here, again, dangerousness is relative.

\textsuperscript{152} Here, a particular difficulty arises: is the limiting principle applied to weapons that are “unusual” for all purposes, or “unusual” for lawful purposes? See Volokh, \textit{Implementing}, \textit{supra} note 119, at 1479 (arguing that the more natural reading of the phrase focuses on whether the weapon is unusual for lawful purposes). Courts have, to some extent, agreed with Professor Volokh. See \textit{e.g.}, \textit{United States v. Hatfield}, 376 F. App’x 706 (9th Cir. 2010) (rejecting defendant’s Second Amendment challenge because sawed-off shotguns are not typically possessed for lawful purposes today); \textit{United States v. Majid}, No. 4:10cr303, 2010 WL 5129297, at *1 (N.D. Ohio Dec. 10, 2010)
is permissible under the Second Amendment, regardless of dangerousness. Here, the term “unusual” does some of the work that the “in common use” inquiry seems intended to accomplish. In any case, courts have struggled to adopt a rigorous framework with which to determine what qualifies as “dangerous and unusual.”

In the wake of Heller, courts have rejected a number of challenges to existing gun regulations on the premise that the weapons at issue are “unusual and dangerous.” United States v. Fincher is instructive. In Fincher, the Eighth Circuit upheld defendant’s conviction for illegal possession of a machine gun, finding that the Second Amendment did not protect machine guns, because machine guns are “not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use.” The court may be correct, but it arrives at this conclusion with very little analysis of why they are “dangerous and unusual.” What is more, the court endorses the construction that because the weapons are “not commonly used by civilians,” then they are therefore “dangerous and unusual.” Fincher is typical of the post-Heller cases upholding weapon regulations under the “unusual and dangerous” exception. It also typifies (finding that short-barreled AR-15 rifles are not commonly used by law-abiding citizens for lawful purposes). But as the discussion of the common use inquiry shows, some courts seem to find unusualness for all purposes sufficient.

153 This formulation seems less persuasive. See discussion, supra note 152.

154 538 F.3d 868 (8th Cir. 2008).

155 Id. at 874.

156 For a discussion of why this is theoretically questionable, see Winkler, Catch-22, supra note 121, and accompanying text.

the step-one “categorical” inquiry into whether certain weapons are (or are not) protected by the Second Amendment.\textsuperscript{158}

The common thread among these cases, if there can be said to be a common thread, is that the weapon are thought to be “unusually dangerous” compared to commonly owned civilian weapons.\textsuperscript{159} But, beyond referencing Heller’s approval of banning such weapons, lower courts have by and large failed to engage with the question of how the weapons are more dangerous

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  \item F. App'x 706, 707 (9th Cir. 2010);
  \item Hamblen v. United States, 591 F.3d 471, 474 (6th Cir. 2009), cert. denied, 130 S. Ct. 2426 (2010);
  \item United States v. Artez, 290 F. App'x 203, 208 (10th Cir. 2008);
  \item United States v. Ross, 323 F. App'x 117, 119-20 (3d Cir. 2009);
  \item United States v. Gilbert, 286 F. App'x 383, 386 (9th Cir. 2008); see also Fincher, 538 F.3d at 874 (8th Cir. 2008). These cases involve machine-guns and short barreled shotguns, which might be considered easier cases in light of Heller. However, there are a number of cases upholding prohibitions on more exotic weapons, including: ice picks, Mack v. United States, 6 A.3d 1224, 1235-36 (D.C. 2010); silencers, grenades, directional mines, and pipe bombs, United States v. Tagg, 572 F.3d 1320, 1326-27 (11th Cir. 2009); assault weapons and .50 caliber rifles, People v. James, 94 Cal. Rptr. 3d 576, 578-86 (Ct. App. 2009); switchblades, Lacy v. State, 903 N.E.2d 486, 491-92 (Ind. Ct. App. 2009); silencers, United States v. Perkins, No. 4:08CR3064, 2008 WL 4372821, at *4 (D. Neb. Sept. 23, 2008).

\textsuperscript{158} For an outline of the two-step inquiry, see Part III, supra.

\textsuperscript{159} What courts seem to do with the “dangerous and unusual” language in Heller is similar to what Eugene Volokh calls the “unusual dangerousness” test. See Volokh, Implementing, supra note 119, at 1481-83. That is, what defines a weapon that is not protected by the Second Amendment is that it is unusually dangerous compared to weapons already in common use. This formulation has the benefit of taking into consideration the common use inquiry, since if a weapon is in common use, it cannot by definition be unusually dangerous. Whether that is good policy is another matter entirely. See supra note 130. As a practical matter, courts generally arrive at the conclusion that weapons are unusually dangerous without much analysis or discussion. See supra, note 152.
than what is commonly used by civilians.\textsuperscript{160} Therefore, the key unanswered question, with respect to high-capacity magazines, is whether they are in fact more dangerous than what is commonly used by civilians.\textsuperscript{161}

Although arguments have been made that high-capacity magazines are unusually dangerous compared to normal-capacity magazines,\textsuperscript{162} there is evidence to suggest that high-capacity magazines are no more dangerous than a non-high-capacity magazine. The defining feature of a high-capacity magazine is that it contains more ammunition than a normal-capacity magazine. Put another way, what would make a high-capacity magazine dangerous is that it would allow someone to fire more shots before being forced to reload.\textsuperscript{163} Yet a normal-capacity

\textsuperscript{160}See cases cited and accompanying text, supra note 157. Another interesting and related question is whether such weapons would in fact be “unusual” and “not in common” use in the absence of such regulations. See discussion note 121, supra, and accompanying text.

\textsuperscript{161}Of course, as the discussion of the “in common use” inquiry demonstrates, high-capacity magazines might in fact be commonly used. Which would seem to foreclose the possibility that they can be deemed “dangerous and unusual.”

\textsuperscript{162}See e.g., Sen. Frank Lautenberg and Rep. Carolyn McCarthy, The Blog: Why We Must Ban High-Capacity Gun Magazines, HUFFINGTON POST (Apr. 6, 2011) (“High-capacity magazines . . . dramatically boost a weapon's firing power;” “[G]uns are used to murder more than 9,500 people in our country in a single year;” “These deadly devices are the weapon of choice for the deranged [in mass shootings;]” “[T]he only reason to supersize a handgun to two or three times its original bullet capacity is because you want to kill a lot of people very quickly;” “Even Dick Cheney is open to restoring the ban.”).

\textsuperscript{163}Since fully automatic weapons are exceedingly rare, most high-capacity magazines would be attached to semi-automatic weapons. Semi-automatic weapons have a rate-of-fire nearly as fast as a fully automatic weapon, so the difference in danger, regardless of magazine capacity, is negligible. See Heller II, 670 F.3d at 1263 (noting that “semi-automatics still fire almost as rapidly as automatics”) (citing Testimony of Brian J. Siebel, Brady Center to Prevent Gun Violence, at 1 (Oct. 1, 2008) (“30-round magazine” of UZI “was emptied in slightly less than two
magazine is potentially just as dangerous. Removing a magazine and inserting a new one only takes, at most, two seconds.\textsuperscript{164} The difference between a normal-capacity magazine and high-capacity magazine, in terms of danger, is theoretically negligible. In practice, supporters of a ban on high-capacity magazines often point to mass shootings as a reason to ban the magazines. But, again, mass shootings typically develop over the course of several minutes, or at least over a time span longer than the mere seconds it takes to change guns or magazines.\textsuperscript{165} Thus, for example, in the Aurora shooting, although James Holmes’ high-capacity semi-automatic rifle jammed during the rampage,\textsuperscript{166} he was still able to inflict a serious toll.\textsuperscript{167} After the gun jammed, he simply switched weapons.\textsuperscript{168} Theoretically, having to switch magazines might, in some cases,

\textsuperscript{164}See David B. Kopel, \textit{Rational Basis Analysis of “Assault Weapon” Prohibition}, 20 \textit{J. CONTEMP. L.} 381, 391 (1994) (“Changing a magazine takes only a second or two. A person simply hits the magazine release button and the empty magazine falls to the ground.”).

\textsuperscript{165}See KLECK, TARGETING GUNS, supra note 163, at 125 (“None of the mass killers maintained a sustained rate of fire that could not also have been maintained - even taking reloading time into account - with either multiple guns or with an ordinary six-shot revolver and the common loading devices known as ‘speedloaders.’); see also \textit{id.} at 144 (summarizing in table sampling of mass shootings to show that most developed over timespan of ten minutes).

\textsuperscript{166}It should also come as little surprise that the 100-round drum magazine jammed; magazines that large are prone to jam. \textit{See America’s Gun Laws: Colorado’s Dark Night, THE ECONOMIST} (July 28, 2012), http://www.economist.com/node/21559617.

\textsuperscript{167}See discussion in Part I, \textit{supra}.

\textsuperscript{168}Healy, \textit{supra} note 68.
introduce enough friction into the situation to allow someone to disarm or otherwise incapacitate the shooter. Such instances are rare, however.\textsuperscript{169}

Based on the foregoing, it is unlikely that high-capacity magazines would be deemed “unusually dangerous” when compared to magazines that are in common use.\textsuperscript{170} At most, a smaller magazine requires someone to reload more often. It does not reduce the number of rounds that someone can shoot. That is a factor of how many magazines (or guns) a person can carry. The danger posed by fifty rounds of ammunition is little different whether it comes from five magazines of ten rounds or one magazine of fifty rounds. What is more, there is significant evidence that high-capacity magazines are so commonly owned that it may be difficult to make the assertion that high-capacity magazines are “unusually dangerous.” Because it seems unlikely a court would find high-capacity magazines to be unusually dangerous, or for that matter not in common use,\textsuperscript{171} a potential prohibition on high-capacity magazines would thus have to survive the appropriate level of scrutiny.

\textbf{B. STANDARD OF REVIEW}

If a reviewing court determines that high-capacity magazines do not fall within the scope of the exceptions identified by the \textit{Heller} Court,\textsuperscript{172} then such a regulation would be subject to some form of heightened Second Amendment scrutiny. However, just what heightened scrutiny

\textsuperscript{169} But not nonexistent. \textit{See infra} note 214 and accompanying text.

\textsuperscript{170} Assuming arguendo that high-capacity magazines are not “common.” They very likely are.

\textsuperscript{171} \textit{See} discussion in Part III.A.4, \textit{supra}. Although there is some question about lawful use, for the reasons discussed in Part III.A.3, \textit{supra}, the question about lawful use is difficult to definitely answer. And for reasons discussed in Part III.B, \textit{infra}, it likely does not matter in the main, because intermediate scrutiny is not all that demanding.

\textsuperscript{172} That is: not in common use, not possessed for lawful purposes, unusually dangerous, or subject to longstanding regulation. \textit{See} Part III.A, \textit{supra}. 
looks like is an open question, because *Heller* declined to articulate a standard of review for Second Amendment cases. But, the Court did lay down several markers. First, the Court rejected rational basis scrutiny. Thus, the Court signaled that the standard of review must be more demanding than the rational basis test. Second, the Court explicitly rejected Justice Breyer’s interest-balancing approach as inconsistent with the recognition that the Second Amendment embodied a fundamental right. In rejecting the interest-balancing approach, the Court signaled that some standard of review would apply to a Second Amendment analysis.

173 Judge Wilkinson has speculated the Court sidestepped the issue largely because it was such an easy decision. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 280 (2009) (“Because the District of Columbia’s laws at issue were some of the strictest in the country, and in the Court’s mind clearly unconstitutional, the actual holding of the opinion does not provide much guidance for future cases.”) (citation omitted).

174 *Heller*, 554 U.S. at 628 n.27 (“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.”).

175 Under a rational basis test, laws are presumptively valid, subject to the condition that the statute is rationally related to a legitimate state interest. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Because rational basis scrutiny is so deferential, under that test, “almost all laws” will be upheld. *Heller*, 554 U.S. at 628 n.27. Of course, under intermediate scrutiny as courts have construed it post-*Heller*, almost all laws are nevertheless upheld. See Part III.B.2, infra.

176 Under the interest balancing approach, one asks: “whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.” *Heller*, 554 U.S. at 689-90 (Breyer, J., dissenting).

177 *Id.* at 634 (majority opinion).

178 The Court criticizes the interest balancing approach as inconsistent with traditional constitutional levels of scrutiny, and in so doing, make clear that the Second Amendment would be governed by some standard of review.
Third, in discussing the District’s handgun ban, the Court noted that the ban would “fail constitutional muster” under “any of the standards of scrutiny” typically applied to “enumerated constitutional rights.”¹⁷⁹ This suggests that some bans, like the one under consideration in *Heller*, would fail even strict scrutiny. Finally, in a footnote in *Heller*, the Court quoted a passage from *Carolene Products*,¹⁸⁰ which suggests that some sort of heightened review is appropriate.¹⁸¹ Given the markers the Court has laid down, courts can freely conclude that either strict scrutiny or immediate scrutiny applies to Second Amendment claims.¹⁸² Consistent with the lack of direction in *Heller*, the lower courts have produced a “a morass of . . . opinions

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¹⁷⁹ *Heller*, 554 U.S. at 628-29.

¹⁸⁰ United States v. Carolene Prods. Co., 304 U.S. 144 (1938). The passage quoted in *Heller* reads: “There may be narrower scope for operation of the presumption of constitutionality [i.e., narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments.” *Heller*, 554 U.S. at 628 n.27.


regarding the proper analysis to apply to challenged firearms regulations.”\textsuperscript{183} The only consistent result is that the “challenged gun laws almost always survive.”\textsuperscript{184}

1. The Balancing Inquiry: Hybrid Scrutiny

Since \textit{Heller} was decided, Courts have articulated several different standards against which gun regulations are to be measured. The prevailing standard\textsuperscript{185} to emerge in the federal circuits is what might be termed “hybrid scrutiny.”\textsuperscript{186} Under hybrid scrutiny, the level of scrutiny “depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.”\textsuperscript{187} Here, a “severe burden on the core Second Amendment right of armed self-defense should require a strong justification,” whereas “less severe burdens” and “laws that do not implicate the central self-defense concern of the Second Amendment[] may be more easily justified.”\textsuperscript{188} Thus, under this formulation, a severe regulation on the core Second Amendment right to keep and to bear arms and concluding that the ban on gun shows did not substantially burden that right).

\textsuperscript{183} \textit{Chester}, 628 F.3d at 688-89 (Davis, J., concurring).

\textsuperscript{184} Mehr and Winkler, \textit{infra} note 186, at 20.

\textsuperscript{185} The standard has been adopted by circuit panels in the Third, Fourth, Fifth, and D.C. Circuits. See \textit{Marzzarella}, 614 F.3d 85 (3d Cir. 2010), \textit{cert denied} 131 S. Ct. 958 (2011); \textit{Masciandaro}, 638 F.3d 458 (4th Cir. 2011), \textit{cert. denied}, 132 S. Ct. 756 (2011); \textit{Heller II}, 670 F.3d 1244 (D.C. Cir. 2011); Nat’l Rifle Ass’n of Am., Inc., 700 F.3d 185 (5th Cir. 2012).


\textsuperscript{187} See \textit{Chester}, 628 F.3d at 683.

\textsuperscript{188} \textit{Id.} (citation and quotation omitted); see also Nordyke v. King, 664 F.3d 776, 786, 788 (9th Cir. 2011) (holding that heightened scrutiny of a law regulating firearms is triggered only when the law substantially burdens the Second Amendment right to keep and to bear arms and concluding that the ban on gun shows did not substantially burden that right).
Amendment right identified in *Heller*, such as the right to self-defense, demands a more exacting means-end test. Conversely, a regulation that is less severe requires a less exacting means-end test.

a. The Burden Inquiry

The first step, then, is to determine whether a high-capacity magazine regulation impinges upon any of the core rights identified in *Heller*. *Heller II* is once again instructive. Recall that the court in *Heller II* declined to determine whether the use of high-capacity magazines fall within the scope of the core Second Amendment right identified in *Heller*, stating that the evidence on the record was insufficient to establish definitively whether the prohibition implicates that right. The court went on to hold that the prohibition on high-capacity magazines nevertheless survived intermediate scrutiny. This is significant because it suggests that the first inquiry into whether the regulation implicates a Second Amendment right is of little consequence, because, as will be described in Part III.B.1.b, the means-end fit is very likely to be seen as “good enough.”

The court first determined that intermediate scrutiny, rather than strict scrutiny, was appropriate. Reasoning that D.C. residents still had suitable means of self-defense, the court

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189 See *Heller II*, 670 F.3d at 1244 (“[A] regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification.”); see also *Ezell*, 651 F.3d at 703 (observing level of scrutiny “will depend on how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on the right”).

190 *Id.* (“[A] regulation that imposes a less substantial burden should be proportionately easier to justify.”).

191 See Part IIIA.3 and IIIA.5, supra.

192 *Heller II*, 670 F.3d at 1261.

193 *Id.* at 1262.
determined that the burden of the magazine prohibition does “not impose a substantial burden upon [the core Second Amendment right].”\textsuperscript{194} Analogizing to First Amendment law, the court determined that the prohibition on large-capacity magazines “does not effectively disarm individuals or substantially affect their ability to defend themselves.”\textsuperscript{195} Therefore, intermediate, not strict scrutiny, was appropriate.

Under hybrid scrutiny,\textsuperscript{196} an assessment of a high-capacity magazine prohibition would very likely conclude that the burden on law-abiding citizens is not substantial, because such a ban would not materially interfere with the core Second Amendment right of self-defense. Estimates of the number of guns used in self-defense by the National Crime Victimization Survey (NCVS) put the total at approximately 108,000 per year.\textsuperscript{197} Of that number, the vast majority of defensive gun uses per year involve brandishing the gun, without a shot ever being

\textsuperscript{194}\textit{Id.} at 1261. Although admitting that it “cannot be confident the prohibitions impinge at all upon the core right protected by the Second Amendment,” the court nevertheless found intermediate scrutiny to be appropriate. \textit{Id.}

\textsuperscript{195}\textit{Id.}

\textsuperscript{196}Under so-called “hybrid scrutiny,” because the burden is minimal, intermediate scrutiny will control. The inquiry, as discussed at the beginning of Part III, also looks a lot like Justice Breyer’s interest balancing approach.

\textsuperscript{197}Philip J. Cook et al., \textit{The Gun Debate's New Mythical Number: How Many Defensive Uses Per Year?}, 16 J. POL'Y ANALYSIS & MGMT. 463, 468 (1997). The survey includes not only incidents where guns were fired in self-defense, but also those in which guns were merely brandished. \textit{Id.} There is considerable disagreement as to how many defensive gun uses there are per year. See Gary Kleck and Marc Getz, \textit{Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun}, 86 J. CRIM. L. & CRIMINOLOGY 150, 164 (1995) (estimating as many as 2.5 million defensive gun uses per year).
fired. Thus, it is difficult to conclude that a limit on magazine capacity would materially interfere with American’s use of guns in self-defense. Even if the number of defensive gun uses is considerably higher, as some have asserted, the proportion of defensive gun uses that involve merely brandishing a weapon remains the same. Whether someone’s magazine capacity is five or fifty, if the weapon is never fired in self-defense, then a prohibition on capacity does not substantially burden the core Second Amendment right of self-defense. For those situations that do require firing a gun, ten rounds should, in all but the rarest of cases, suffice. Similarly, while the Court in Heller also suggested hunting is a core Second Amendment right, it is even less likely that prohibition of high-capacity magazines would substantially burden the right to hunt.

b. Means-End Fit

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199 See Barrett, *Glock*, infra note 215, at 126 (noting that "it's not obvious why a civilian handgun owner requires seventeen rounds in the magazine of a Glock pistol," when "[t]en bullets, with the opportunity to reload swiftly, provide adequate firepower for most self-defense emergencies").

200 See Kleck, *The Frequency of Defensive Gun Use*, supra note 198, at 160-75 (asserting that the NCVS estimate dramatically understates the actual number of defensive gun uses).

201 See *Heller*, 554 U.S. at 599.

In *Heller II*, after assuming for the sake of analysis that the high-capacity magazine prohibition burdened the core Second Amendment right, the court then turned to analyze the prohibition under intermediate scrutiny, asking if there is a “substantial relationship or reasonable ‘fit’” between the prohibition on high-capacity magazines and the “important interests” in “protecting police officers and controlling crime.” Here, the court highlighted the testimony of two witnesses and two studies, which, all told, demonstrated a “substantial” relationship between the government’s interest and the regulation. Thus, the District’s prohibition on high-capacity magazines survived intermediate scrutiny. The court’s analysis is typical of the line of cases upholding gun regulations under intermediate scrutiny. First, unlike strict scrutiny, the fit need not be perfect, only reasonable. Second, there is considerable

203 *Heller II*, 670 F.3d at 1262.

204 The testimony of Brian Siebel established that “[t]he threat posed by military-style assault weapons is increased significantly if they can be equipped with high-capacity ammunition magazines” because, “[b]y permitting a shooter to fire more than ten rounds without reloading, they greatly increase the firepower of mass shooters.” *Id.* at 1263. The testimony of the Chief of Police established that the “‘2 or 3 second pause’ during which a criminal reloads his firearm ‘can be of critical benefit to law enforcement.’” *Id.* at 1264. Siebal also testified that “the tendency [with high-capacity magazines used in self-defense] is for defenders to keep firing until all bullets have been expended, which poses grave risks to others in the household, passersby, and bystanders.” *Id.* at 1263-4.

205 The two studies showed that guns used in shootings are 16% to 26% more likely to have high capacity magazines than gunfire cases resulting in no wounded victims. *Id.* at 1261-62. The other study suggested that attacks with semi-automatic weapons and semi-automatic weapons equipped with high capacity magazines “result in more shots fired, persons wounded, and wounds per victim than do other gun attacks.” *Id.*. Note that this statistic includes non-high-capacity magazines, which suggests that the evidence supporting the means-end fit needn’t be conclusive.

206 See e.g., Nat’l Rifle Ass’n of Am., 700 F.3d at 185; Marzzarella, 614 F.3d at 98; accord Chester, 628 F.3d at 683; see also Masciandaro, 638 F.3d at 470.
deference granted to legislative judgments, which is not surprising.\footnote{See Mark Tushnet, \textit{Permissible Gun Regulations supra}, note 32, at 378 (noting that “weaker standards of review ask courts to assess the degree to which regulations promote (important) public policies, with somewhat greater deference to legislative judgments about importance and efficacy under intermediate scrutiny than under rational basis with bite”).}

Finally, courts almost never, if at all, question the asserted government interest in public safety.\footnote{See \textit{e.g.}, \textit{Schall v. Martin}, 467 U.S. 253, 264 (1984) (“The ‘legitimate and compelling state interest’ in protecting the community from crime cannot be doubted.”).}

However, even assuming that the government interest in public safety is compelling, and it surely is, there is considerable evidence to suggest that a prohibition on high-capacity magazines would have little appreciable effect on furthering that interest. First, the majority of gun deaths in the United States involve suicides,\footnote{In 2007, including homicides, suicides, and accidental deaths, 31,224 Americans died by gunfire. Of those, 17,352 deaths were by suicide. \textit{See Ctrs. for Disease Control \& Prevention, Nat’l Ctr. for Injury Prevention \& Control, WISQARS Injury Mortality Reports, 1999-2007, available at http://webappa.cdc.gov/sasweb/ncipc/mortrate10sy.html (last visited Dec. 4, 2012). The number of nonfatal injuries resulting from violent use of firearms was 55,5544 in 2011. \textit{See Ctrs. for Disease Control \& Prevention \& Nat’l Ctr. for Injury Prevention \& Control, WISQARS Nonfatal Injuries: Nonfatal Injury Reports, available at http://webappa.cdc.gov/sasweb/ncipe/nfirates.html (last visited Dec. 4, 2012). Admittedly, that number might be nontrivially affected by a prohibition.)} which presumably do not progress to the point where more than ten rounds are fired. Second, only a small portion of gun homicides and attacks on armed police involve more than ten shots fired.\footnote{See \textit{Kleck}, \textit{Targeting Guns supra} note 163 (“[G]un assaults usually involve either no shots . . . or only a few shots being fired, typically fewer than the six rounds that ordinary revolvers hold.”); GARY KLECK, \textit{POINT BLANK: GUNS AND VIOLENCE IN AMERICA} 79 (2009) ("Even in a sample of gun attacks on armed police officers, where the}
suggests that during the period of 1994 to 2004, when the AWB made the manufacture or transfer of high-capacity magazines illegal, the ban had no effect nationally on the criminal use of high capacity magazines.²¹¹ Admittedly, a different study did suggest that, at least in Virginia, the high-capacity magazine ban might have had an effect on their use in crimes.²¹² Given that the number of high-capacity magazines since the ban expired has only increased, there is little to suggest that a new ban would do much, if anything, to meaningfully reduce the market for such magazines.²¹³

Mass shootings, which are often cited as a justification for prohibiting high-capacity magazines, also offer little support. Gun control advocates argue that a ban would further the government’s compelling interest in reducing the toll from these shootings. For instance, even in the brief moment it takes a mass shooter to reload, there might be time for someone to intervene and stop the attack.²¹⁴ Again, here, the evidence is at best mixed. First, it is very likely that incidents are more likely to be mutual combat gunfights with many shots fired, the suspects fired an average of only 2.55 times.”).

²¹¹ See Koper, Assessment of Weapons Ban, supra note 139, at 14.

²¹² In Virginia, the number of high-capacity magazines seized by police during the course of criminal investigations went from a low of 10 percent in 2004, to a high of 22 percent in 2010. David S. Fallis and James V. Grimaldi, In Virginia, High-Yield Clip Seizures Rise, WASH. POST (Jan. 23, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/01/22/AR2011012204046.html.

²¹³ See Koper, Assessment of Weapons Ban, supra note 139, at 22-3.

²¹⁴ The shooting rampage at a Tuscon shopping center on January 8th, 2011 is instructive. The rampage ended after onlookers tackled the shooter, Jared Loughner, to the ground, as he fumbled trying to reload his 9mm pistol, which had been equipped with a thirty-three-round ammunition clip. Marc Lacey and David M. Herszenhorn, In Attack’s Wake, Political Repercussions, N.Y. TIMES (Jan. 8, 2011), http://www.nytimes.com/2011/01/09/us/politics/09giffords.html?ref=arizonashooting2011.
mass shooters would still be able to acquire high-capacity magazines, as was the case during the last federal ban.\textsuperscript{215} There are simply too many high-capacity magazines in circulation.\textsuperscript{216} Second, the rare mass shooter would only need to carry more guns and ammunition.\textsuperscript{217} Thus, it is not all that clear here that the means (prohibiting high capacity magazines) would even reasonably serve the end (public safety).

IV. CONCLUSION

How a court rules on the constitutionality of a ban on high-capacity magazine ban will likely depend on what quantum of evidence the reviewing court requires. Since it might be difficult, if not impossible, to marshal persuasive empirical evidence that a ban on high-capacity magazines will be effective,\textsuperscript{218} such a ban will have a better chance of passing constitutional muster if the reviewing court is more forgiving. For example, in \textit{Heller II}, in upholding the high-capacity magazine prohibition under intermediate scrutiny, the court largely relied on testimony

\textsuperscript{215}See Paul M. Barrett, Glock: The Rise of America’s Gun 127-29 (2012) (noting that the last federal ban on high-capacity magazines was “laughably easy” to evade) [hereinafter Barrett, Glock]

\textsuperscript{216}See Koper, Assessment of Weapons Ban, supra note 139, at 22-3.

\textsuperscript{217}For example, recall that the shooter in the Virginia Tech massacre used several guns: two semi-automatic guns, a 9mm Glock, and .22-caliber Walther. Police recovered 17 magazines from the scene, each capable of holding from between 10-15 magazines. Some 200 live ammunition cartridges were also recovered. Report of the Virginia Tech Panel, Chapter VIII: Mass Murder at Norris Hall 92 (Apr. 16, 2007), available at http://www.governor.virginia.gov/TempContent/techPanelReport.cfm.

\textsuperscript{218}In general, it is “difficult to show with any moderately persuasive social-science evidence that discrete and moderate gun regulations . . . do much if anything” to advance the public policy interests of whatever the gun regulations at issue are designed to advance. Tushnet, Permissible Gun Regulations, supra note 32, at 378. For a more detailed treatment of the difficulties in measuring the efficacy of gun control laws with empirical evidence, see Mark Tushnet, Out of Range: Why the Constitution Can’t End the Battle over Guns 77-85 (2007).
presented to the Council of the District of Columbia to determine that there was “likely” a “substantial relationship” between the government interest and the regulation.\textsuperscript{219} By contrast, in \textit{Skoien}, the court upheld the challenged gun regulation only after examining an array of empirical social science evidence.\textsuperscript{220} But, even here, the burden was slight: the majority supplied the empirical evidence themselves\textsuperscript{221} and, if the dissent is correct, misinterpreted the results.\textsuperscript{222}

Ultimately, it seems that even under an allegedly stronger intermediate scrutiny, courts are apt to credit the government’s compelling interest in public safety, so long as it is supported by some quantum of empirical (or testimonial) evidence.\textsuperscript{223} It is doubtful that a new ban on high-capacity magazines would have much, if any, salutary effect on public safety.\textsuperscript{224} Magazines holding more than ten-rounds are commonplace. If their manufacture were banned tomorrow,

\begin{footnotesize}
\begin{enumerate}
\item[219] \textit{Heller II}, 670 F.3d at 1263-64.
\item[220] 614 F.3d 638, 643-45.
\item[221] In the adversarial system, this prevents the opposing party from presenting counter evidence. \textit{See generally} Kirsten Debarba, \textit{Maintaining the Adversarial System: The Practice of Allowing Jurors to Question Witnesses During Trial}, 55 \textit{VAND. L. REV.} 1521, 1528 (2002). It also makes it strange to call it a “burden,” since the court apparently relieved the government of it.
\item[222] \textit{Skoien}, F.3d at 650-52 (Sykes, J., dissenting).
\item[223] That courts have largely deferred to the government’s judgment is hardly surprising, in light of state experience. \textit{See Heller}, 554 U.S. at 691 (Breyer, J., dissenting) (observing that “[c]ourts that do have experience in these matters have uniformly taken an approach that treats empirically-based legislative judgment with a degree of deference.”) (citing Winkler, \textit{Scrutinizing, supra} note 71, at 687, 716-18).
\item[224] This is especially so because the magazine-ban proposed earlier does not contemplate disarming Americans. \textit{See} Nicholas J. Johnson, \textit{Imagining Gun Control in America: Understanding the Remainder Problem}, 43 \textit{WAKE FOREST L. REV.} 837, 842 (2008) (“Our results have been disappointing because supply-side rules depend, ultimately, on cutting the inventory close to zero.”).
\end{enumerate}
\end{footnotesize}
the number of grandfathered magazines would still number in the tens-of-millions. That horse has left the barn. Yet even if such a ban is likely to prove ineffective, the law is unlikely to materially burden the core rights identified in *Heller*. A ten-round magazine limit would still permit Americans to hunt for sport, to participate in shooting competitions, and to defend themselves in hearth and home. In the end, it is conceivable courts will determine that the law is simply not reasonably calculated to accomplish its intended purpose. Yet it seems more likely that when faced this dilemma, courts will, unless the Supreme Court clarifies the appropriate standard of review, uphold the prohibition of high-capacity magazines.\footnote{\textit{See e.g., Masciandaro,} 638 F.3d at 475 (Wilkinson, J., concurring) (“[Expanding the scope of the Second Amendment] 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.”); \textit{Winkler, Scrutinizing, supra} note 71, at 715 (observing that because of concerns about institutional competence “all courts . . . are properly hesitant to presume the unconstitutionality of laws in an area where there is a conceded need for governmental regulation and where no other courts apply heightened scrutiny”).}