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Constitutional Law—Large-Capacity Magazine Bans and the Second Amendment

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CONSTITUTIONAL LAW—LARGE-CAPACITY MAGAZINE BANS AND THE SECOND AMENDMENT

I. INTRODUCTION

After taking office in 2021, President Biden and the Democratic majority in Congress announced their intention to pursue a national prohibition on firearm magazines holding more than ten rounds, renewing the debate on this controversial firearm component[1] While there was once a temporary ban on the manufacture and import of such magazines from 1994–2004, a total nationwide ban on their mere possession would be unprecedented.[2] However, four states and the District of Columbia have taken this radical step of total prohibition.[3] Prohibitions like these, though well-intentioned, seriously implicate fundamental rights guaranteed by the Second Amendment.[4]

In *District of Columbia v. Heller* (hereinafter *Heller I*), the Supreme Court of the United States confirmed that the Second Amendment protects an

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1. *See, e.g.*, *Statement by the President Three Years After the Parkland Shooting*, THE WHITE HOUSE BRIEFING ROOM (Feb. 14, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/14/statement-by-the-president-three-years-after-the-parkland-shooting/ ("Today, I am calling on Congress to enact commonsense gun law reforms, including . . . banning assault weapons and high-capacity magazines . . . [.]"); *see also Menendez, Deutch Renew Push to Ban High-Capacity Gun Magazines*, SENATOR BOB MENENDEZ (Apr. 14, 2021), https://www.menendez.senate.gov/newsroom/press/menendez-deutch-renew-push-to-ban-high-capacity-gun-magazines ("U.S. Senator Bob Menendez (D-N.J.) and Congressman Ted Deutch (D-Fla.-22) today reintroduced the Keep Americans Safe Act, renewing a concerted effort to ban the importation, sale, manufacturing, transfer, or possession of gun magazines that hold more than ten rounds of ammunition.").

2. Elke C. Meeus, Note, *The Second Amendment in Need of a Shot in the Arm: Overhauling the Courts' Standards of Scrutiny*, 45 W. ST. L. REV. 29, 34 (2017).

3. *Large Capacity Magazines*, GIFFORDS LAW CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/large-capacity-magazines/ (last visited Mar. 19, 2021). California, Colorado, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, New York, Vermont, and D.C. ban possession of new large capacity magazines, while only New York, New Jersey, Hawaii, and D.C. declined to "grandfather" magazines purchased before the ban was enacted. *Id.* California's law revoking the legal status of previously "grandfathered" magazines is stayed pending the outcome of *Duncan v. Becerra*. *Id.*; *see also* Duncan v. Becerra, 265 F. Supp. 3d 1106 (S.D. Cal. June 29, 2017); Duncan v. Bonta, 2021 U.S. App. LEXIS 37558 (9th Cir. 2021).

4. *See* U.S. CONST. amend. II; Duncan v. Becerra, 970 F.3d 1133, 1156 (9th Cir. 2020), *vacated*, 988 F.3d 1209 (9th Cir. 2021) ("California['s magazine ban] substantially burdens core Second Amendment rights . . . .").

individual's right to bear arms.[5] However, the Supreme Court has not decided whether restrictions on magazine capacity violate the Second Amendment,[6] and there is disagreement among the U.S. Circuit Courts of Appeals on the proper analytical framework for issues involving magazine bans.[7]

Circuit courts have increasingly taken an interest balancing approach, either applying intermediate or strict scrutiny depending on whether the court believes the prohibition burdens core Second Amendment activity as defined in *Heller I*.[8] Most courts have ruled that magazine restrictions do not burden core Second Amendment rights and therefore have applied intermediate scrutiny.[9] In contrast, a three-judge panel in the Ninth Circuit (hereinafter *Duncan* panel) recently held that magazine restrictions burden core Second Amendment rights and therefore applied strict scrutiny, ultimately finding California's large-capacity magazine (LCM) ban unconstitutional.[10]

This *Duncan* panel decision is the best reasoned circuit-level opinion on the topic of magazine bans to date.[11] However, it is no longer good law. Following the panel decision, the Ninth Circuit granted the State of California's motion to rehear the case *en banc*.[12] In a 7-4 decision, the *en banc* majority instead chose to apply intermediate scrutiny and uphold the statute.[13]

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5. District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 627–28 (2008); *see* U.S. CONST. amend. II.

6. *See, e.g.,* Kolbe v. Hogan, 138 S. Ct. 469 (2017) (denying a petition for writ of certiorari in a case challenging Maryland's magazine restriction regime); U.S. CONST. amend. II.

7. *Compare Duncan*, 970 F.3d 1133, *with* Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J. (*N.J. Rifle II*), 974 F.3d 237 (3d Cir. 2020), *and* Friedman v. City of Highland Park, 784 F.3d 406 (7th Cir. 2015).

8. Meeus, *supra* note 2, at 48; *see also* Lindsay Colvin, Note, *History, Heller, and High-Capacity Magazines: What is the Proper Standard of Review for Second Amendment Challenges?*, 41 FORDHAM URB. L.J. 1041, 1044–45 (2014); *Duncan*, 970 F.3d at 1146.

9. *See, e.g., N.J. Rifle II*, 974 F.3d at 243.

10. *Duncan*, 970 F.3d at 1152, 1164. As explained below, this decision has now been vacated. *See infra* notes 12–13 and accompanying text. Lawmakers, courts, and commentators often refer to magazines holding more than ten rounds as "large capacity magazines" and use the abbreviation "LCM." *See, e.g.*, Duncan v. Becerra, 970 F.3d 1133, 1141 n.1 (9th Cir. 2020), *vacated*, 988 F.3d 1209 (9th Cir. 2021). It is worth noting, however, that these magazines come standard with many commonly used firearms and are more aptly called "standard capacity." *See Standard Capacity Magazines*, CONG. SPORTSMEN'S FOUND., http://congressionalsportsmen.org/policies/state/full-capacity-magazines (last visited Nov. 16, 2020). Because the term "large capacity magazine" and the abbreviation "LCM" are used so often in this field of law, this Note will use them for convenience.

11. *See infra* Sections IV, VI.

12. Order to Rehear Case En Banc, Duncan v. Becerra, 988 F.3d 1209 (9th Cir. 2021) (No. 19-55376). At the time of writing this Note, the court had granted this order but had not held oral arguments or published a decision. However, shortly before publication of this Note, the Ninth Circuit released its *en banc* opinion. *See* Duncan v. Bonta, 19 F.4th 1087, 1100–01 (9th Cir. 2021).

13. *Duncan v. Bonta*, 19 F.4th at 1100–01. To briefly summarize this opinion, the *en banc* court used the two-step analysis described later in this Note. *Id.*; *see also infra* Section II(C).

However, the now-vacated *Duncan* panel decision is worth analyzing both because it is well reasoned and because it contrasts with decisions from other circuits that applied intermediate scrutiny.[14]

Courts of appeals have yet to adopt the better analytical framework suggested by Supreme Court Justice Brett Kavanaugh when he sat on the D.C. Circuit Court of Appeals.[15] There, then-Judge Kavanaugh wrote a dissenting opinion in the second *Heller v. District of Columbia* case (hereinafter "*Heller II*"). [16] He noted that the Supreme Court had specifically rejected interest balancing tests in the Second Amendment context.[17] Instead of applying any kind of heightened scrutiny, Kavanaugh would have applied the analytical framework used by the Supreme Court in *Heller I* and analyzed the law in light of the "text, history, and tradition" of the Second Amendment.[18] At least one district court has since adopted Kavanaugh's reasoning, though none has decided a magazine-size restriction case using this framework.[19] However, some scholars have argued that LCM restrictions would be unconstitutional under Kavanaugh's framework.[20]

This Note argues that a faithful application of the Second Amendment will reveal that bans on magazines holding more than ten rounds are unconstitutional, no matter which test is used. Section II of this Note details the history of Second Amendment jurisprudence.[21] Section III covers the relevant

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For the first step, the *en banc* court assumed without deciding, that California's magazine ban implicated Second Amendment interests. *Duncan v. Bonta*, 19 F.4th at 1100–01; *see also infra* Section IV(B)(1). For the second step, the *en banc* court first determined that intermediate scrutiny was appropriate since, in its view, the law only minimally burdened the core Second Amendment right of self-defense within the home. *Duncan v. Bonta*, 19 F.4th at 1100–01. Applying intermediate scrutiny, the *en banc* court held that California's magazine ban was a "reasonable fit, even if an imperfect one[]" to the State's important interest of public safety. *Id.* at *17.

14. *See infra* Sections IV, VI.

15. *See* Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); *see also* Colvin, *supra* note 8, at 1083.

16. *Heller II*, 670 F.3d at 1269 (Kavanaugh, J., dissenting).

17. *Id.* at 1277; *see also* Colvin, *supra* note 8, at 1044; Nicholas Gallo, Comment, *Misfire: How the North Carolina Pistol Purchase Permit System Misses the Mark of Constitutional Muster and Effectiveness*, 99 N.C. L. REV. 529, 540–41 (2021) (arguing that balancing tests like intermediate scrutiny contradict *Heller*).

18. *Heller II*, 670 F.3d at 1071 (Kavanaugh, J., dissenting); *see also* Colvin, *supra* note 8, at 1044.

19. Colvin, *supra* note 8, at 1044 (citing Gowder v. City of Chicago, 923 F. Supp. 2d 1110, 1118–19 (N.D. Ill. 2012)); *but see* Ezell v. City of Chicago, 651 F.3d 684, 702–03 (7th Cir. 2011) In *Ezell*, the United States Court of Appeals for the Seventh Circuit adopted a "text, history, and tradition" analysis to determine whether, as a threshold matter, the conduct at issue fell within the scope of the Second Amendment. *Id.* Deciding that it did, the court then moved to a tiered scrutiny analysis. *Id.* at 706.

20. Colvin, *supra* note 8, at 1082.

21. *See infra* Section II.

history of firearm magazine technology.[22] Section IV discusses two U.S. Courts of Appeals decisions that neatly illustrate the current split on magazine bans: the Ninth Circuit's decision in *Duncan v. Becerra* and the Third Circuit's decision in *Ass'n of New Jersey Rifle and Pistol Clubs v. Att'y Gen. New Jersey*.[23] Section V analyzes then-Judge Kavanaugh's dissent in *Heller II*, arguing that his historical approach is superior to either form of heightened scrutiny.[24] Section VI argues that, in light of the history and effects of magazine restrictions, a faithful application of the Second Amendment unequivocally means that the Second Amendment protects magazines holding more than ten rounds.[25] Section VII concludes the Note, urging courts to adopt either Justice Kavanaugh's framework from *Heller II* or the Ninth Circuit panel's reasoning from *Duncan* when deciding magazine capacity restriction cases.[26]

II. HISTORY OF SECOND AMENDMENT LAW

A. *District of Columbia v. Heller*: Application of History

Heller I is the seminal case in Second Amendment law.[27] In *Heller I*, the Supreme Court of the United States recognized the Second Amendment as an individual right rather than a collective right tied to militia service.[28] The *Heller I* Court grounded its reasoning in the history of the Second Amendment,[29] focusing especially on how ordinary members of the public would have understood the Second Amendment at the time of its ratification.[30] Importantly, the Court held that the Second Amendment was not understood to confer a new right but rather to recognize a preexisting right inherited from English law.[31]

To fully understand the Second Amendment as law, one must examine English history. The roots of the English right to bear arms are planted in classical Greek and Roman philosophy, as well as the English experience

22. *See infra* Section III.
23. *See infra* Section IV.
24. *See infra* Section V.
25. *See infra* Section VI.
26. *See infra* Section VII.
27. *See* District of Columbia v. Heller (*Heller I*), 554 U.S. 570 (2008).
28. *Id.* at 592.
29. *Id.* at 592–95; *see also* Colvin, *supra* note 8, at 1047.
30. *Heller I*, 554 U.S. at 576 ("[W]e are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'") (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)).
31. *Id.* at 592–93.

under oppressive rulers.[32] For the sake of brevity, this Note will focus on the English experience.

After a string of Catholic monarchs systematically disarmed much of Protestant England, the monarchs William and Mary declared that no English Protestant would be denied the right to possess arms for defense.[33] This promise was later codified in the English Bill of Rights.[34] It was this codified promise that was "the predecessor to our Second Amendment[,]"[35] and Sir William Blackstone considered it among the fundamental rights of Englishmen by 1765.[36] In his *Commentaries on the Laws of England*, Blackstone described the right as the individual "'right of having and using arms for self-preservation and defence [sic].'"[37]

As Englishmen, the American colonists believed they too possessed this fundamental right to keep arms.[38] In fact, when King George III began confiscating their arms, many colonists said that the Crown had violated "a natural right which the people have reserved to themselves."[39] Early American legal commentaries associated the right to bear arms with personal self-defense, not just defense of the community.[40] One commentator stated that "the 'right of self-preservation' . . . permit[s] a citizen to 'repe[l] force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'"[41]

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32. LES ADAMS, THE SECOND AMENDMENT PRIMER: A CITIZEN'S GUIDEBOOK TO THE HISTORY, SOURCES, AND AUTHORITIES FOR THE CONSTITUTIONAL GUARANTEE OF THE RIGHT TO KEEP AND BEAR ARMS 20 (1996) ("Stephen Halbrook . . . expresses it this way: 'The two categorical imperatives of the Second Amendment . . . derive from the classical philosophical texts concerning the experiences of ancient Greece and Rome and seventeenth-century England. . . . In this sense, the people's right to have their own arms was based on the philosophical and political writings of the greatest intellectuals of the past two thousand years.'") (quoting STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 8 (1984)).

33. *Heller I*, 554 U.S. at 593; *see also* Duncan v. Becerra, 970 F.3d 1133, 1144 (9th Cir. 2020), *vacated*, 988 F.3d 1209 (9th Cir. 2021).

34. *Heller I*, 554 U.S. at 593.

35. *Id.*

36. *Id.* at 593–94 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 136, 139–40 (1765)).

37. *Id.* at 594 (quoting BLACKSTONE, *supra* note 36, at 140).

38. *Id.* at 593–94.

39. *Id.* at 594 (quoting *A Journal of the Times: Mar. 17*, NEW YORK JOURNAL (Apr. 13, 1769), *in* BOSTON UNDER MILITARY RULE 1768–1769 AS REVEALED IN A JOURNAL OF THE TIMES 79 (O. Dickerson ed. 1936) (reprinted 1970)).

40. *Heller I*, 554 U.S. at 595.

41. *Id.* (quoting 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 145–46, n.42 (1803)).

The historical record indicates that the English right to bear arms was understood to be an individual right at the time of the American founding.[42] When the founders drafted the Second Amendment, the public would have understood it within this context.[43] The Supreme Court in *Heller I* recognized this, stating that "[t]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."[44]

However, the *Heller I* Court held that the right to bear arms is not unlimited.[45] The Court stated that a weapon must not be unusual and must be in common use for lawful purposes in order to qualify for Second Amendment protections.[46] The "common use" requirement is rooted in the 1939 case *United States v. Miller,* which noted that militiamen in the founding era were "expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[47]

The *Miller* articulation of the "common use" requirement requires defining the phrases "in common use" and "at the time." *Heller I* indicates that the "time" in question is the modern era.[48] The *Heller I* Court clearly stated that the Second Amendment is not limited to founding era technology.[49] It also cited modern ownership statistics in deciding that handguns are commonly used for self-defense within the home.[50] These holdings considered together indicate that the proper reference point for common use analysis is the present.[51]

However, the meaning of "common use" is much less clear.[52] In *Heller I*, Justice Scalia wrote that the Second Amendment was designed to protect "the sorts of lawful weapons" citizens possessed.[53] Defining "in common use"

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42. *Id.*; *see also* ADAMS, *supra* note 32, at 66–67 (arguing that the Second Amendment was intended to, and still does, protect a right to bear arms both for common defense and individual defense).

43. ADAMS, *supra* note 32, at 69–71 (quoting Ex parte Grossman, 267 U.S. 87, 108–09 (1925)) ("The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted.").

44. *Heller I*, 554 U.S. at 595.

45. *Id.* at 626; *see also* Colvin, *supra* note 8, at 1048.

46. Duncan v. Becerra, 366 F. Supp. 3d 1131, 1142 (S.D. Cal. 2019) (citing *Heller I*, 554 U.S. at 624) (summarizing the factors from *Heller I*).

47. United States v. Miller, 307 U.S. 174, 179 (1939)); *see also* Colvin, *supra* note 8, at 1045.

48. *Heller I*, 554 U.S. at 582, 628–29*; see also* Colvin, *supra* note 8, at 1049–50.

49. *Heller I*, 554 U.S. at 582.

50. *Id.* at 628–29.

51. *See* Meeus, *supra* note 2, at 37; *see also Duncan*, 970 F.3d 1133, 1146–47 (9th Cir. 2020), *vacated*, 988 F.3d 1209 (9th Cir. 2021).

52. Colvin, *supra* note 8, at 1050.

53. *Heller I*, 554 U.S. at 627.

with reference to "lawful weapons" does not provide lower courts with much guidance, especially since Second Amendment cases are almost always litigated over a law presuming to make a weapon unlawful.[54] Besides, the "common use" paradigm could allow legislatures to proactively ban new weapons technology to keep them out of "common use."[55] Generally, lower courts have framed the "common use" standard with reference to use for self-defense, which *Heller I* recognized as part of the "core" of the Second Amendment.[56]

B. The Second Amendment Incorporated

In 2010, the Supreme Court heard another landmark Second Amendment case: *McDonald v. City of Chicago*.[57] In this case, the Court incorporated the right to bear arms to the states through the Fourteenth Amendment's Equal Protection Clause.[58] While *Heller I* had recognized the Second Amendment as an individual right, the Court's holding resolved Second Amendment law only with respect to federal action.[59] The *McDonald* Court found that the Second Amendment was so "deeply rooted in this Nation's history and tradition" that the Fourteenth Amendment's guarantee of due process bound state and local governments to follow it.[60] The *McDonald* Court did not lay out any new framework for interpreting the Second Amendment: it simply affirmed *Heller I*'s reasoning and incorporated it to apply to state and local governments.[61]

C. Circuit-Crafted Balancing: *United States v. Marzzarella* and its Mirrors

Since *Heller I* and *McDonald,* most lower courts have analyzed Second Amendment cases using a framework first crafted in *United States v. Marzzarella*.[62] There, the court laid out a two-pronged test, first determining "whether the challenged law imposes a burden on conduct falling within the

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54. *See* Ass'n N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J. (*N.J. Rifle I*), 910 F.3d 106, 116, 116 n.15 (3d Cir. 2018) ("[W]eapons illegal at the time of a lawsuit would not be (or at least should not be) in common use and yet still may be entitled to protection."); Kolbe v. Hogan, 849 F.3d 114, 135–36 (4th Cir. 2017) (discussing potential ambiguities in the phrase "common use").

55. Colvin, *supra* note 8, at 1051.

56. *Id.* at 1050–52 (citing Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1143 (2011)).

57. 561 U.S. 742 (2010).

58. *Id.* at 775–78; U.S. CONST. amend. XIV.

59. District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 627–28 (2008); *see also* Colvin, *supra* note 8, at 1052.

60. *McDonald*, 561 U.S. at 768 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

61. *McDonald*, 561 U.S. at 791; *see* Colvin, *supra* note 8, at 1054.

62. 614 F.3d 85 (3d Cir. 2010); *see also* Colvin, *supra* note 8, at 1057.

scope of the Second Amendment . . . ."[63] If not, the court's inquiry would conclude, but if so, the court would "evaluate the law under some form of means-end scrutiny."[64] Courts have disagreed over which standard of scrutiny to apply in Second Amendment cases, particularly those involving magazine restrictions.[65]

III. "WHAT IS A MAGAZINE?" RELEVANT HISTORY OF THE TECHNOLOGY

Though many may think of periodicals rather than firearms when they hear the word "magazine," the word has been associated with weapons technology far longer than publishing.[66] In the context of firearms, a magazine is a device that holds ammunition and feeds it into a weapon.[67] Modern firearm magazines are either fixed, most commonly as a tube attached under the gun's barrel, or removable, most commonly as a metallic box inserted under the firearm's action.[68]

The number of rounds a magazine holds varies based on the magazine's design, the caliber[69] of round it holds, the type of firearm it attaches to, and the user's preference. For example, both the Mossberg 500 pump action 12 gauge shotgun and the Marlin Model 60 .22 caliber rifle have fixed tubular magazines.[70] However, the Mossberg's standard magazine only holds six shotshells while the Marlin's holds fourteen .22 caliber rounds.[71] The Ruger 10/22, another common .22 rifle, has removable box magazines ranging in size from the standard ten rounds up to 110.[72] The most common variants of

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63. *Marzzarella*, 614 F.3d at 89.

64. *Id.*

65. *See generally* Robert B. McNeill II, Note, *Second Amendment Jurisprudence: Challenges, Background, and Current Issues*, 43 AM. J. TRIAL ADVOC. 185, 196 (2019); Colvin, *supra* note 8, at § II.

66. *See Magazine,* WEBSTER'S DICTIONARY 1828, http://webstersdictionary1828.com/Dictionary/Magazine (last visited Mar. 19, 2021) (stating that the first English periodical called a "magazine" was not published until 1731).

67. Kyle Wintersteen, *9 Commonly Misused Gun Terms*, GUNS & AMMO (Nov. 21, 2018) https://www.gunsandammo.com/editorial/9-misused-gun-terms/249625.

68. *Id.*

69. "Caliber is the nominal bore diameter of a firearm. It is measured in inches or millimeters. The term also applies to the diameter of a bullet." Alice Jones Webb, *What is Caliber?*, THE LODGE (Aug. 15, 2019), https://www.ammunitiontogo.com/lodge/what-is-caliber/.

70. *See* Mike Ramientas, *Mossberg 500 Series: A Complete Analysis*, GUN NEWS DAILY https://gunnewsdaily.com/mossberg-500-series-review/ (last visited Jan. 1, 2022); *see also Model 60SB*, MARLIN FIREARMS, https://www.marlinfirearms.com/rimfire/model-60/model-60sb (last visited Jan. 1, 2022).

71. Ramientas, *supra* note 70; *Model 60SB*, *supra* note 70.

72. Alex Joseph, *The Ultimate Survival Rifle: Ruger 10/22*, GUN NEWS DAILY, https://gunnewsdaily.com/ruger-10-22-rifle/ (last visited Jan. 6, 2022).

the Glock nine-millimeter handgun, perhaps the most popular handgun in America,[73] come standard with a fifteen-round magazine.[74]

A. Magazine Fed Firearms Predate the United States

Despite popular perception, the founding generation knew of firearm magazines holding more than ten rounds.[75] The first magazine-fed flintlock repeater was invented in the early 1600s in Florence, Italy.[76] In the American colonies, gunsmith John Shaw made a twelve-shot, magazine-fed repeater in Boston during the 1750s.[77] Various gunsmiths produced these repeaters in the United States up until 1849.[78] These repeaters existed in addition to the multitude of other multi-shot firearms in existence at the time that used multiple barrels loaded with individual ball and powder loads instead of a magazine.[79]

B. Self-Contained Cartridge Made Magazines Holding More Than Ten Rounds Ubiquitous

Modern self-contained cartridges made magazine-fed firearms standard in the industry.[80] These cartridges with the powder, bullet, and primer in one unit first appeared in 1846 and were "almost universal" in firearms by 1870.[81] Consequently, modern firearms holding as many as twenty to thirty-two rounds have been in widespread use by the American public since at least the late 1890s.[82] For example, the Winchester M1866, a lever-action with a

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73. Duncan v. Becerra, 970 F.3d 1133, 1142 (9th Cir. 2020), *vacated*, 988 F.3d 1209 (9th Cir. 2021) (citing PAUL M. BARRETT, GLOCK: THE RISE OF AMERICA'S GUN (2012)).

74. Mike Ramientas, *Handgun Showdown Round 7: Glock 19 Gen 3 vs. Glock 19 Gen 4*, GUN NEWS DAILY, https://gunnewsdaily.com/glock-19-gen-3-vs-glock-19-gen-4/ (last visited Jan. 6, 2022).

75. *Duncan*, 970 F.3d at 1147; *see also* Chris Eger, *This Repeater Predates the Constitution, and It's Not the Only One That Did*, GUNS (Mar. 6, 2018, 2:00 PM), https://www.guns.com/news/2018/03/06/this-repeater-predates-the-constitution-and-its-not-the-only-one-that-did-videos.

76. Richard C. Rattenbury, *Repeating Rifle*, ENCYCLOPEDIA BRITANNICA https://www.britannica.com/technology/repeating-rifle (last revised Feb. 20, 2015).

77. Eger, *supra* note 75; *see also* Rattenbury, *supra* note 76.

78. *Cookson Volitional Repeating Flintlock*, NAT'L RIFLE ASS'N MUSEUMS, http://www.nramuseum.org/the-museum/the-galleries/the-road-to-american-liberty/case-22-the-paper-cartridge/cookson-volitional-repeating-flintlock.aspx (last visited Mar. 19, 2021).

79. Duncan v. Becerra, 970 F.3d 1133, 1147–48 (9th Cir. 2020), *vacated*, 988 F.3d 1209 (9th Cir. 2021); *see also* Rattenbury, *supra* note 76.

80. Rattenbury, *supra* note 76.

81. Sam Bocetta, *The Complete History of Small Arms Ammunition and Cartridges*, SMALL WARS J. (Oct. 15, 2017, 2:54 AM), https://smallwarsjournal.com/jrnl/art/complete-history-small-arms-ammunition-and-cartridges.

82. *Duncan*, 970 F.3d at 1148.

seventeen-round magazine, became incredibly popular in the civilian market after the Civil War.[83]

IV. THE DEVELOPING DISAGREEMENT ON MAGAZINE BANS

While there have been several challenges to city and state laws limiting magazine capacity,[84] two recent cases challenging California's and New Jersey's respective bans are especially illustrative of the developing law.[85] Plaintiffs in *Duncan v. Becerra*[86] challenged California's magazine capacity restriction, and plaintiffs in *Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Att'y Gen. N.J.* (hereinafter *N.J. Rifle II*)[87] challenged New Jersey's restriction. The California and New Jersey statutes are very similar, both banning the importation, manufacture, sale, and possession of LCMs.[88] Both require citizens in possession of LCMs to either modify them to hold only ten rounds, remove them from the state, or transfer them to law enforcement or a licensed firearms dealer before a set date.[89] Both prescribe criminal penalties for non-compliance.[90]

Despite the similarity of these two bans, the *Duncan* panel and the Third Circuit in *NJ Rifle II* came to very different conclusions on the appropriate level of scrutiny to apply to LCM bans.[91] The *Duncan* panel applied strict scrutiny and held that California's ban was unconstitutional, further determining that the law would still fail under intermediate scrutiny.[92] In contrast, the Third Circuit held that New Jersey's ban survived under intermediate scrutiny.[93] With such divergent conclusions on similar statutes, these opinions provide an ideal lens through which to examine Second Amendment law as applied to magazine restrictions.

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83. Brief of Amicus Curiae Everytown For Gun Safety in Support of Appellees, at 9, Fyock v. City of Sunnyvale, 779 F.3d 991 (2015) (No. 5:13-cv-05807).

84. *See* Kolbe v. Hogan, 849 F.3d 114, 121 (4th Cir. 2017); Fyock v. Sunnyvale, 779 F.3d 991, 994–95 (9th Cir. 2015); *see also* Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1247–48 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

85. *See* Duncan v. Becerra, 970 F.3d 1133 (9th Cir. 2020), vacated, 988 F.3d 1209 (9th Cir. 2021); Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Att'y Gen. N.J., 974 F.3d 237 (3d Cir. 2020).

86. 970 F.3d 1133 (9th Cir. 2020), *vacated*, 988 F.3d 1209 (9th Cir. 2021).

87. 974 F.3d 237 (3d Cir. 2020).

88. *See* CAL. PENAL CODE § 32310 (2016); *see also* N.J. STAT. ANN. §§ 2C:39-1(y), 2C:39-3(j) (2020).

89. *See* CAL. PENAL CODE § 32310; N.J. STAT. ANN. §§ 2C:39-1(y), 2C:39-3(j).

90. *See* CAL. PENAL CODE § 32310; N.J. STAT. ANN. §§ 2C:39-1(y), 2C:39-3(j).

91. *Compare Duncan*, 970 F.3d 1133, 1163–64 (9th Cir. 2020), *vacated*, 988 F.3d 1209 (9th Cir. 2021), *with N.J. Rifle II*, 974 F.3d at 243.

92. *Duncan*, 970 F.3d at 1164–65.

93. *N.J. Rifle II*, 974 F.3d at 243.

A. *Duncan v. Becerra* and The Ninth Circuit Three-Judge Panel Decision

As stated previously, the *Duncan v. Becerra* three-judge panel decision was vacated when the Ninth Circuit voted to rehear the case *en banc*.[94] However, this panel's reasoning was the best of any circuit-level opinion on this topic to date. This three-judge panel fully analyzed the threshold question of whether a magazine ban implicated Second Amendment interests, whereas most other circuits have merely "assumed without deciding" that it did.[95] Furthermore, the panel correctly applied strict scrutiny to the magazine ban issue, noting fatal flaws in other circuits' formulation of intermediate scrutiny.[96] For these reasons, the panel decision is still relevant. From this point forward, any analysis or reference to *Duncan* will refer to the three-judge panel opinion, not the later *en banc* opinion.[97]

The *Duncan* Plaintiffs filed suit against California Attorney General Xavier Becerra, challenging the constitutionality of California Penal Code § 32310.[98] When first enacted in 2000, the law barred the sale, manufacture, and importation of new magazines holding more than ten rounds, but not the possession of existing ones.[99] California amended the law in 2013 to criminalize purchasing or receiving LCM holding more than ten rounds but still allowed anyone who had previously legally purchased one to retain it.[100]

That changed in 2016 when the California legislature again amended Cal. Penal Code §32310, this time prohibiting any possession of an LCM, regardless of when the owner previously acquired it.[101] That same year, California voters approved Proposition 63 that increased the penalty for possession of an LCM to up to a misdemeanor fine of $100 and/or one year in jail.[102] The law gave Californians until July 1, 2017 to either "(1) Remove the large-capacity magazine from the state; (2) Sell the large-capacity magazine to a licensed firearms dealer . . . (3) Surrender the large-capacity magazine to a law enforcement agency for destruction[,]" or permanently modify it to hold only ten rounds.[103]

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94. 970 F.3d 1133, 1156 (9th Cir. 2020), *vacated*, 988 F.3d 1209 (9th Cir. 2021); *see supra* notes 12–13 and accompanying text.

95. *Compare Duncan*, 970 F.3d at 1145–52; *N.J. Rifle II*, 974 F.3d at 243; Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1260–61 (D.C. Cir. 2011), *with* Duncan v. Bonta, 19 F.4th 1087, 1100–01 (9th Cir. 2021).

96. *Duncan*, 970 F.3d at 1158–59, 1162–64.

97. *See supra* notes 12–13 and accompanying text.

98. *Duncan*, 970 F.3d at 1141–42; *see also* CAL. PENAL CODE § 32310.

99. *Duncan*, 970 F.3d at 1141.

100. *Id.*

101. *Id.* at 1142.

102. *Id.*; *see also* CAL. PENAL CODE § 32310(c).

103. CAL. PENAL CODE § 32310(d); *see Duncan*, 970 F.3d at 1142.

The United States District Court for the Southern District of California granted the *Duncan* plaintiffs a preliminary injunction enjoining enforcement two days before the law took effect.[104] The State filed an interlocutory appeal, and the Court of Appeals for the Ninth Circuit affirmed the District Court's injunction.[105] However, before the Court of Appeals ruled on that appeal, the Plaintiffs moved for summary judgment before the District Court.[106] The District Court granted the motion, finding Cal. Penal Code § 23120 unconstitutional and permanently enjoined its enforcement.[107] The State appealed this final decision to the Ninth Circuit, leading to the three-judge panel decision.[108]

1. *First Prong on the Ninth Circuit* Marzzarella *Style Test: Are Second Amendment Rights Implicated?*

The *Duncan* panel applied the Ninth Circuit's *Marzzarella* style two-prong test to determine whether California's LCM ban violated the Second Amendment.[109] The Ninth Circuit's formulation of this test requires courts first to determine whether the statute in question regulates Second Amendment-protected conduct.[110] If it does, the court will determine whether to apply strict or intermediate scrutiny.[111]

a. Question one: Does the law regulate protected "arms"?

Looking at the first prong of the *Marzzarella* test, the *Duncan* panel asked four questions to determine whether a challenged statute burdens the Second Amendment.[112] First, the court asked "whether the law regulates 'arms' for purposes of the Second Amendment."[113] The *Duncan* court held that "[f]irearm magazines are 'arms' under the Second Amendment[]" since a firearm would be useless for its intended purpose without one.[114] As the court put it, "a regulation cannot permissibly ban a protected firearm's components critical to its operation."[115]

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104. Duncan v. Becerra, 265 F. Supp. 3d 1106, 1139–40 (S.D. Cal. 2017).
105. Duncan v. Becerra, 742 F.App'x 218, 220 (9th Cir. 2018).
106. *See Duncan*, 970 F.3d at 1143.
107. *Duncan*, 366 F. Supp. 3d at 1186.
108. *See Duncan*, 970 F.3d at 1143.
109. *Id.* at 1145; *see supra* Section II.C.
110. *Duncan*, 970 F.3d at 1145.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 1146.
115. *Id.* (citing District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 630 (2008)). Importantly, the *Duncan* panel also cited to the Third Circuit case analyzed in this Note, *N.J. Rifle I*. *See Duncan*, 970 F.3d at 1146 (citing Ass'n N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.

b. Question two: Is the weapon dangerous or unusual?

The second question of the first prong of the Ninth Circuit's *Marzzarella* style test is whether the arm in question is dangerous or unusual, a standard laid out in *Heller I*.[116] The *Duncan* panel emphasized that "dangerous and unusual" are elements, not factors, quoting Justice Samuel Alito's concurring opinion in *Caetano v. Massachusetts*: "'[a] weapon may not be banned unless it is *both* dangerous *and* unusual.'"[117] Also, if a weapon is "commonly used today for lawful purposes[,]" it is not unusual and may not be excluded from Second Amendment protection.[118] The court noted that the question of commonality, though relying heavily on statistics, cannot be purely statistical, since a law outlawing certain arms would necessarily make that arm less common.[119]

Using this framework, the *Duncan* panel found that LCMs are in common use for lawful purposes and thus are not dangerous or unusual.[120] The panel stated that not only do "nearly half of all magazines in the United States today hold more than ten rounds of ammunition[,]" but magazines of this size "have been in existence—and owned by American citizens—for centuries."[121] According to the *Duncan* panel, this longstanding history, combined with the overwhelming number of LCMs currently in circulation, went well "beyond what is necessary under *Heller* [*I*]."[122]

(*N.J. Rifle I*), 910 F.3d 106, 116 (3d Cir. 2018)). There, the Third Circuit found that magazines are Second Amendment protected arms. *N.J. Rifle I*, 910 F.3d at 116 ("Because magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines are 'arms' within the meaning of the Second Amendment.") *Id.* However, the Third Circuit implied that LCMs belong to a separate sub-class of magazines, potentially leaving them open to regulation. *Id.* ("First, we consider whether the regulation of a specific type of magazine, namely an LCM, 'imposes a burden on conduct falling within the scope of the Second Amendment's guarantee.'"). *Id.* Ultimately, the Third Circuit left the issue undecided, choosing to "assume without deciding" that LCMs are Second Amendment protected arms and moving on to the question of the appropriate level of scrutiny. *Id.* at 117. The *Duncan* three-judge panel agreed with the Third Circuit that magazines are bearable arms protected by the Second Amendment but did not agree that a magazine's capacity can put it into a separate sub-class of arms that can be regulated differently. *Compare* Duncan v. Becerra, 970 F.3d 1133, 1146 (9th Cir. 2020), *vacated*, 988 F.3d 1209 (9th Cir. 2021), *with N.J. Rifle I*, 910 F.3d at 116–17. *See also infra* Section IV.A.1.b.

116. *Duncan*, 970 F.3d at 1146; *see also* District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 627 (2008).

117. *Duncan*, 970 F.3d at 1146 (quoting from Caetano v. Massachusetts, 577 U.S. 411, 417 (2016) (Alito, J., concurring) (emphasis in original)).

118. *Duncan*, 970 F.3d at 1147–48.

119. *Id*. at 1147 (citing *N.J. Rifle I*, 910 F.3d at 116 n.15).

120. *Id.*

121. *Id. See infra* Section III.

122. *Duncan*, 970 F.3d at 1147.

c. Question three: Is the regulation longstanding?

The third question under the first prong of the Ninth Circuit's *Marzzarella* style test is whether the regulation in question is longstanding.[123] A longstanding regulation is presumptively constitutional.[124] The Ninth Circuit has found that a regulation must date back to the "founding-era or Reconstruction-era" to be longstanding.[125]

The Ninth Circuit noted that neither Cal. Penal Code § 21320 nor any other magazine size restriction dates back to these eras.[126] The earliest a state passed a magazine size restriction was during the Prohibition era, and all laws (but D.C.'s) from that era were repealed over the next fifty years.[127]

d. Question four: Is there any historical evidence that the right in question falls outside the Second Amendment?

The fourth and final question the Ninth Circuit asks for the first prong of its *Marzzarella* style test is "whether there is any persuasive historical evidence in the record showing that the regulation affects rights that fall outside the scope of the Second Amendment."[128] The *Duncan* panel dealt with this question rather quickly, noting that the historical analysis from the previously discussed questions revealed that no such evidence existed.[129] Having answered this and the previous questions, the panel held that Cal. Penal Code § 21320 did burden protected Second Amendment conduct.[130]

2. *Second Prong of the* Marzzarella *Style Test in the Ninth Circuit: Determining and Applying the Correct Level of Scrutiny*

a. Choosing strict over intermediate scrutiny

For the second prong of the *Marzzarella test,* the *Duncan* panel determined the appropriate standard of scrutiny.[131] Ninth Circuit precedent requires the court to apply strict scrutiny if a regulation substantially burdens the "core" of the Second Amendment, defined in *Heller I* as self-defense within

123. *Id.* at 1149.
124. *Id.*
125. *Id.* at 1150.
126. *Id.*
127. *Id.* (quoting Ass'n N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J. (*N.J. Rifle I*), 910 F.3d 106, 117 n.18 (3d Cir. 2018) ("LCMs were not regulated until the 1920s, but most of those laws were invalidated by the 1970s.").
128. *Id.* at 1145.
129. *Id.* at 1151.
130. *Id.*
131. *Id.* at 1152.

the home.[132] Since the statute at issue banned the ownership of LCMs for all Californians, even within the home, the panel found that it did implicate core Second Amendment rights.[133] Furthermore, the law burdened those rights substantially since it categorically banned protected arms.[134] In light of this, the Ninth Circuit held that strict scrutiny was appropriate.[135]

b. Applying strict scrutiny and critiquing intermediate scrutiny

Applying strict scrutiny, the panel found that the State's interest in reducing violence was compelling, but the LCM ban was not narrowly tailored to advance that interest.[136] The Court emphasized the fact that this was a blanket ban on possession, referring to *Heller I*'s decision that a blanket ban on a class of protected arms was unconstitutional.[137]

The panel went further, though, arguing that California's ban on LCMs would be unconstitutional even under intermediate scrutiny.[138] It accused other Circuits of applying a "watered down" form of intermediate scrutiny that more closely resembled rational basis review, noting that intermediate scrutiny should have "bite" and requires a "healthy dose of skepticism" as to the challenged law's constitutionality.[139] With this in mind, the panel held that California's ban was not reasonably targeted at the important governmental interest of public safety, emphasizing that the State relied on "remarkably thin" evidence that banning LCMs would have any effect on public safety.[140] In other words, the mere assertion that some of these magazines would be misused cannot justify "restrict[ing] the people's liberties under the guise of protecting them."[141]

B. *Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Att'y Gen. N.J.* and The Third Circuit

In contrast, the Court of Appeals for the Third Circuit applied intermediate scrutiny and upheld New Jersey's similar ban on LCMs.[142] The

132. *Id.* (citing District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 635 (2008)).
133. *Duncan*, 970 F.3d at 1152.
134. *Id.* at 1156.
135. *Id.* at 1164.
136. *Id.* at 1164–65.
137. *Id.* at 1164; *see also* District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 629 (2008).
138. *Duncan*, 970 F.3d at 1165.
139. *Id.* at 1166.
140. *Id.* at 1168.
141. *Id*.
142. *See* Ass'n N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J. (*N.J. Rifle II*), 974 F.3d 237, 243 (3d Cir. 2020).

Association of New Jersey Rifle and Pistol Clubs, Inc. ("ANJRPC") filed suit in 2018 on behalf of its members challenging N.J. STAT. ANN. §§ 2C:39-1(y) and 2C:39-3(j).[143] Passed that same year, § 2C:39-1(y) defined any magazines holding more than ten rounds as "large capacity ammunition magazine[s.]"[144] Section 2C:39-3(j) made possession of these magazines a crime of the fourth degree,[145] which is a felony equivalent.[146] The law gave New Jersey residents until December 10, 2018 to either modify their LCMs to hold only ten rounds, register any weapons that could not be modified, or transfer their magazines or firearm to law enforcement or a registered dealer.[147] Prior to this, New Jersey had already banned all magazines holding more than fifteen rounds—this law simply lowered the cap to ten.[148]

The plaintiffs argued that the law violated not just their Second Amendment rights but their Fifth Amendment right to just compensation and Fourteenth Amendment right to due process.[149] They filed a motion for preliminary injunction to enjoin enforcement of the law pending litigation on the merits.[150] The District Court denied the motion, and the plaintiffs appealed to the Court of Appeals for the Third Circuit.[151]

On appeal, the Third Circuit went beyond the question before it on the motion and held in a two-to-one panel decision that the plaintiffs' case failed on the merits.[152] The Third Circuit applied the two-prong balancing test from *Marzzarella*, the case from which the doctrine originated.[153]

1. *First Prong of* Marzzarella*: Are Second Amendment Rights Implicated?*

The first prong of the *Marzzarella* test requires the court to determine "whether the type of arm at issue is commonly owned . . . and 'typically

143. *Id.* at 241.
144. N.J. STAT. ANN. § 2C:39-1(y).
145. N.J. STAT. ANN. § 2C:39-3(j).
146. *See What is a Fourth Degree Crime in New Jersey?*, THE TORMEY LAW FIRM, LLC., https://www.morristowncriminallaw.com/fourth-degree-crimes-in-new-jersey-penalties/ ("A fourth degree crime is an indictable offense in New Jersey, often called a felony. In other states there are misdemeanors and felonies but in New Jersey we have disorderly persons offenses and indictable crimes. . . . [A] fourth degree crime is the least serious of the [indictable crimes].") (last visited Dec. 16, 2020).
147. Ass'n N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J. (*N.J. Rifle II*), 974 F.3d 237, 241 (3d Cir. 2020).
148. Ass'n N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J. (*N.J. Rifle I*), 910 F.3d 106, 126 (3d Cir. 2018) (Bibas, J., dissenting).
149. *Id.*
150. *Id.*
151. *Id.* at 243.
152. *Id.* at 243 (citing *N.J. Rifle I*, 910 F.3d at 110).
153. *See N.J. Rifle I*, 910 F.3d at 116.

possessed by law-abiding citizens for lawful purposes.'"[154] The court admitted that LCMs are commonly owned and used for lawful purposes like "hunting and pest control" and "self-defense."[155] The court also held that magazines generally are protected arms within the meaning of the Second Amendment and that banning magazines, including LCMs, burdened Second Amendment interests.[156]

Despite these findings the court chose not to hold that LCMs are protected arms.[157] The court speculated that LCMs might be distinguishable from magazines as a whole, potentially removing their protection.[158] However, the court did not rule on this prong of the test, instead it "assum[ed] without deciding" that LCMs are protected and moved on to choice of scrutiny.[159]

2. *Second Prong of* Marzzarella*: Determining and Applying the Correct Level of Scrutiny*

a. Choosing intermediate scrutiny

Having assumed that magazines are protected arms, the court moved on to the second prong of the *Marzzarella* test: choosing and applying the appropriate level of heightened scrutiny.[160] A court will apply either strict scrutiny if the law burdens the "core" of the Second Amendment or intermediate scrutiny if the law does not.[161] The Third Circuit limits the "core" of the Second Amendment to only the scenario explicitly dealt with in *Heller I*, self-defense within the home.[162]

Under this framework, the *N.J. Rifle I* court held that New Jersey's ban did not implicate the "core of the Second Amendment."[163] The court reasoned that:

> (1) it does not categorically ban a class of firearms but is rather a ban on a subset of magazines; (2) it is not a prohibition of a class of arms overwhelmingly chosen by Americans for self-defense in the home; (3) it does not disarm or substantially affect Americans' ability to defend themselves; (4) New Jersey residents can still possess and use magazines, just with fewer rounds; and (5) it cannot be the case that possession of a firearm in

154. *N.J. Rifle I*, 910 F.3d at 116 (quoting District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 625 (2008)) (citing United States v. Marzzarella, 614 F.3d 85, 90–91 (3d Cir. 2010)).
155. *N.J. Rifle I*, 910 F.3d at 112.
156. *Id.* at 116; *N.J. Rifle II*, 974 F.3d at 241.
157. *N.J. Rifle I*, 910 F.3d at 116–17.
158. *Id.*
159. *Id.* at 117.
160. *Id.*
161. *Id.*
162. *Id.*
163. *N.J. Rifle I*, 910 F.3d at 117.

> the home for self-defense is a protected form of possession under all circumstances. By this rationale, any type of firearm possessed in the home would be protected merely because it could be used for self-defense.[164]

The Third Circuit thus found intermediate scrutiny appropriate.[165]

b. False intermediate scrutiny: Rational basis in disguise

The *N.J. Rifle I* court found that New Jersey's ban reasonably fit the important state interest of public safety.[166] The court reasoned that banning all magazines holding more than ten rounds could give victims more opportunities to escape or fight back if a mass shooter pauses to reload.[167] The court noted several shootings where the perpetrator was restrained or potential victims escaped during a pause caused by either the perpetrator reloading or the firearm malfunctioning.[168] Since the court believed that core Second Amendment rights were not implicated by New Jersey's ban and that potentially increasing delays in a shooting could protect public safety, it upheld the prohibition, reasoning that it was "reasonably related" to public safety.[169]

However, the majority did not apply true intermediate scrutiny.[170] Instead, as noted by Circuit Judge Bibas in his dissent and by the *Duncan* panel, the Third Circuit majority used a "watered-down" version of review much closer to the rational basis test.[171] Judge Bibas noted that the majority relied on expert testimony that even the District Court stated was "'of little help.'"[172] The majority decided the case on only this unhelpful evidence combined with additional anecdotes.[173] As Judge Bibas stated, this "watered down" version of intermediate scrutiny "flips the burden of proof onto the challengers, treating both contested evidence and the lack of evidence as conclusively favoring the government."[174]

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164. Ass'n N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J. (*N.J. Rifle II*), 974 F.3d 237, 243 (3d Cir. 2020) (citations and internal quotations omitted).

165. *Id.*

166. *N.J. Rifle I*, 910 F.3d at 119.

167. *Id.* at 120.

168. *Id.* The cited examples include the 2017 Las Vegas shooting, the Navy Yard shooting, the Arizona shooting targeting Gabby Giffords, as well as others. *Id.*

169. *Id.* at 120, 122.

170. *N.J. Rifle I*, 910 F.3d at 126 (Bibas, J., dissenting).

171. *Id.*; *Duncan v. Becerra*, 970 F.3d at 1166–67 ("Whatever its precise contours might be, intermediate scrutiny cannot approximate the deference of rational basis review. *Heller* forecloses any such notion.").

172. *N.J. Rifle I*, 910 F.3d at 126 (Bibas, J., dissenting) (quoting Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Grewal, 2018 U.S. Dist. LEXIS 167698 at *8 (D.N.J. Sept. 28, 2018)).

173. *See id.*

174. *Id.*

Indeed, the majority opinion in *N.J. Rifle I* reads like an application of a rational basis review. Its basic chain of logic could be summarized as follows: The State has an important interest in protecting public safety. Reducing magazine capacity might cause mass shooters to pause more often during a shooting. Though there is notably little evidence to support this claim, some reasonable legislator could conclude that more pauses might save some lives during a shooting. Therefore, the ban is reasonably related to the important public interest.[175]

This analysis takes classic rational basis logic and dresses it in the vocabulary of intermediate scrutiny, since it "does not insist that such a connection exist in fact, but only that the legislature could reasonably have believed that there was such a connection."[176] If the words "important interest" and "reasonably related" were replaced with "legitimate interest" and "rationally related," respectively, one would hardly notice the difference. The Third Circuit should have required the State to submit more convincing evidence to justify the reasonableness of its ban.[177]

3. *Subsequent History of* N.J. Rifle

Since the *N.J. Rifle I* decision was on a motion for preliminary injunction, the Third Circuit remanded the case back to the district court.[178] The district court, bound by the circuit panel's decision on the merits, granted summary judgment to the State.[179] The plaintiffs appealed this ruling, but a second Third Circuit panel found that the prior panel had jurisdiction to decide the case on its merits and upheld the earlier ruling.[180] One dissenting judge disagreed, noting that the prior panel did not fully apply the *Marzzarella* test.[181]

V. A THIRD APPROACH: TEXT, HISTORY, AND TRADITION

As exemplified in both *Duncan* and *N.J. Rifle I* and *II*, many Circuit Courts of Appeals that have dealt with magazine capacity restrictions have engaged in some form of interest balancing test, applying either strict, intermediate, or some different level of scrutiny called by one of those names.[182]

175. *See N.J. Rifle I*, 910 F.3d at 119–20.

176. Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court From the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 359 (1999).

177. *See N.J. Rifle I*, 910 F.3d at 126–27 (Bibas, J., dissenting).

178. Ass'n N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J. (*N.J. Rifle II*), 974 F.3d 237, 240 (3d Cir. 2020).

179. *Id.*

180. *Id.* at 245–47.

181. *Id.* at 248 (Matey, J., dissenting).

182. *Id.* at 126 (Bibas, J., dissenting).

However, a non-interest balancing approach would be the most consistent with the *Heller I* decision.[183] In his dissent in *Heller I*, Justice Breyer advocated for an interest balancing framework similar to intermediate scrutiny.[184] The majority explicitly rejected this proposal, stating that the affected rights should instead be analyzed in light of the "historical tradition" of the Constitution and firearm regulations.[185] Despite this clear directive, most courts have applied an interest balancing test based on the Third Circuit's formulation in *Marzzarella*.[186]

However, at least one United States district court and a growing number of scholars have rejected the use of interest balancing tests on Second Amendment issues altogether, noting the *Heller* Court's rejection of it.[187] Those with this view lean heavily on then-D.C. Circuit Judge Brett Kavanaugh's dissent in *Heller II*.[188]

After the Supreme Court decided *Heller I* in 2008, D.C. enacted sweeping new gun regulations in response[189] These regulations included mandatory registration of handguns (but no blanket ban) as well as a ban on possession of LCMs, among other prohibitions.[190] Since the D.C. law prohibited possession and sale of LCMs, it is comparable to California's ban considered in *Duncan* and New Jersey's ban considered in *N.J. Rifle*.[191]

The majority in *Heller II* upheld D.C.'s ban on magazines holding more than ten rounds.[192] The court, like many others, applied a *Marzzarella* style balancing test.[193] Despite admitting, that it was "clear enough" that LCMs and semi-automatic rifles were in common use, much like the Third Circuit would later admit in *N.J. Rifle II*,[194] the court declined to specifically hold that they

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

184. *Heller I*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting) ("I would simply adopt such an interest-balancing inquiry explicitly.").

185. *See Heller I*, 554 U.S. at 634–35, 689.

186. *See* Meeus, *supra* note 2, at 48; *see also* United States v. Marzzarella, 614 F.3d 85, 90–91 (3d Cir. 2010).

187. *See* Gowder v. City of Chicago, 923 F. Supp. 2d 1110, 1118–19 (N.D. Ill. 2012); *see, e.g.,* Colvin, *supra* note 8, at 1059; Gallo, *supra* note 17, at 540–41; *Heller I*, 554 U.S. at 634–35.

188. Colvin, *supra* note 8, at 1044*;* s*ee Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting).

189. *Heller II*, 670 F.3d 1244, 1247–48 (D.C. Cir. 2011) (citing Firearms Registration Amendment Act, 2008 D.C. Sess. L. Serv. Law 17–372 (West)).

190. *Heller II*, 670 F.3d at 1248–49; Firearms Registration Amendment Act, 2008 D.C. Sess. L. Serv. Law 17–372 (West).

191. *See Duncan*, 970 F.3d at 1141–42; CAL. PENAL CODE § 32310; *N.J. Rifle II*, 974 F.3d at 241; N.J. STAT. ANN. § 2C:39-1.

192. *Heller II*, 670 F.3d at 1264.

193. *Id.* at 1252–53.

194. *See supra* Section IV.B.

were.[195] In the court's judgment, deciding that question explicitly was unnecessary since intermediate scrutiny was appropriate and the prohibition survived that level of scrutiny.[196]

Judge Kavanaugh dissented, reasoning that the court's use of the *Marzzarella* balancing test was incompatible with Supreme Court decisions *Heller I* and *McDonald*.[197] He noted that the *Heller* Court had set forth "precise guidance" that Second Amendment cases should instead be analyzed in light of the "text, history, and tradition" of the Second Amendment.[198]

Kavanaugh did not address D.C.'s ban on magazines holding more than ten rounds, choosing instead to focus on the semi-automatic rifle ban and gun registration requirements.[199] Kavanaugh noted that, even on First Amendment issues, the Supreme Court does not use balancing tests when considering bans on "categories of speech."[200] Kavanaugh stated that D.C.'s assault weapons ban is a ban on a category of arms, similar to a category of speech.[201]

On top of this, he noted that the *Heller I* Court specifically denounced the use of balancing tests.[202] While the Supreme Court did not explicitly denounce intermediate or strict scrutiny analysis, it did scrupulously avoid using any heightened scrutiny language.[203] Kavanaugh noted that the *Heller I* Court made no mention whatsoever of any "compelling" or even "important" interests.[204] Instead, the Court simply found that the regulation at issue was not traditional or longstanding and that the weapon being regulated was in common use for lawful purposes.[205] In fact, Kavanaugh noted that even when the *Heller I* Court approved of regulations on short-barreled shotguns and fully automatic firearms,[206] it "made no mention of strict or intermediate scrutiny . . . . Rather, the test the Court relied on—as it indicated by using terms such as 'historical tradition' and 'longstanding' and 'historical justifications'—was one of text, history, and tradition."[207]

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195. *Heller II*, 670 F.3d at 1261.
196. *Id.*
197. *Id.* at 1276–80 (Kavanaugh, J., dissenting).
198. *Id.* at 1271.
199. *Id.* at 1269.
200. *Id.* at 1283.
201. *Heller II*, 670 F.3d at 1285 (Kavanaugh, J., dissenting).
202. *Id.* at 1273.
203. *Id.* at 1273 n.5.
204. *Id.* at 1271, 1273.
205. *Id.*
206. For clarity, fully automatic firearms, also called "machine guns," are firearms that fire continuously as long as the shooter holds the trigger down. In contrast, semi-automatic weapons, like the so-called "assault weapons" D.C. was trying to regulate in this case, only fire one round each time the trigger is pulled. *See generally* Robyn Sandoval, *Semi-Auto vs. Full-Auto*, A GIRL & A GUN (Aug. 15, 2016), https://www.agirlandagun.org/semi-auto-vs-full-auto/.
207. *Heller II*, 670 F.3d at 1273 (Kavanaugh, J., dissenting). Judge Kavanaugh cites to and quotes from various scholarly works to support this point. *See, e.g.,* Eugene Volokh,

Judge Kavanaugh further said that the *Marzzarella* two-pronged test used by the majority was inconsistent with *Heller I* since it "subjects the individual right to balancing under the intermediate scrutiny test."[208] As Kavanaugh noted, the Supreme Court foreclosed such a route when it rejected Justice Breyer's proposed test, in which he "explicitly referred to intermediate scrutiny and relied on cases such as *Turner Broadcasting* that had applied intermediate scrutiny."[209] Judge Kavanaugh also pointed to *McDonald v. City of Chicago* where the Supreme Court reiterated its rejection of balancing.[210] He noted that the *McDonald* Court "expressly rejected judicial assessment of 'the costs and benefits of firearms restrictions' and stated that courts applying the Second Amendment thus would not have to make 'difficult empirical judgments' about the efficacy of particular gun regulations."[211]

Using the "text, history, and tradition" method, Judge Kavanaugh opined that D.C.'s ban on assault rifles was unconstitutional.[212] Not only have semi-automatic rifles not traditionally been banned, but they are also in common use for lawful purposes.[213] Following the precedent laid out in *Heller I*, D.C.'s outright ban of semi-automatic rifles was thus unconstitutional.[214] Judge Kavanaugh did not, however, address D.C.'s magazine ban, and no court has yet applied this framework in a magazine capacity restriction case.[215]

VI. ARGUING FOR JUDGE KAVANAUGH'S FRAMEWORK AND ANALYZING MAGAZINE BANS UNDER "TEXT, HISTORY, AND TRADITION" AND *MARZZARELLA*

Of the interpretive frameworks analyzed in this Note, Judge Kavanaugh's is most consistent with Supreme Court precedent and the text of the Second Amendment. As he noted, the Supreme Court has twice rejected

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Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L. REV. 1443, 1463 (2009) ("Absent here is any inquiry into whether the law is necessary to serve a compelling government interest in preventing death and crime, though handgun ban proponents did indeed argue that such bans are necessary to serve those interests and that no less restrictive alternative would do the job."); Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 405 (2009) (stating that the *Heller* case "neither requires nor permits any balancing beyond that accomplished by the Framers themselves.").

208. *Heller II*, 670 F.3d at 1276.
209. *Id.*
210. *Id.* at 1278.
211. *Id.* (quoting McDonald v. City of Chicago, 561 U.S. 742, 790–91 (2010)).
212. *Heller II*, 670 F.3d at 1269–70 (Kavanaugh, J., dissenting).
213. *Id.* at 1287.
214. *Id.*
215. *See generally id.*; Colvin, *supra* note 8, at 1044.

balancing inquiries when the Second Amendment was implicated.[216] Furthermore, the outcome of interest balancing inquiries is likely to vary widely based on how the judge hearing the case interprets the weight of various interests.[217] Kavanaugh's approach requires there be some evidence outside the mind of the court on how similar weapons have been regulated historically.[218] Even for new weapons technologies, his approach would force courts to "reason by analogy" to existing weapons and traditional regulations.[219] While courts must always utilize their judgment to some extent, Kavanaugh's approach provides a much more objective framework than the *Marzzarella* style test.[220] This framework would, in turn, provide greater legal stability and predictability for cases involving fundamental rights guaranteed by the Second Amendment.[221]

A. LCM Bans Under Judge Kavanaugh's Framework

Under Judge Kavanaugh's historical, *Heller*-based framework, blanket bans on magazines holding more than ten rounds (like California's and New Jersey's) would be unconstitutional. Firearm magazines holding more than ten rounds and other multi-shot firearms have existed on this continent longer than our nation.[222] Despite the longstanding history of LCMs in North America, there is no longstanding history of regulating firearm magazine capacity.[223] States did not begin regulating such magazines until the 1920s, and every state that did so repealed those laws in less than fifty years.[224] While the federal government briefly banned the sale or manufacture of new large-capacity magazines in 1994, this law expired in 2004 and was not renewed.[225] Furthermore, this federal ban on the sale of new LCMs included a grandfather clause for magazines owned before the ban, making it nowhere near as

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216. *Heller II*, 670 F.3d at 1278 (Kavanaugh, J., dissenting); *see also* Colvin, *supra* note 8, at 1048 ("By engaging in a textual, historical, and traditional method of analysis . . . *Heller* also implicitly rejected the application of intermediate or strict scrutiny to prohibition cases.").

217. Colvin, *supra* note 8, at 1059.

218. *Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting); *see also* Colvin, *supra* note 8, at 1059.

219. *Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting).

220. Colvin, *supra* note 8, at 1072 (stating that Kavanaugh's approach "allows the judiciary to remove personal politics from the equation and simply focus upon long-standing evidence.").

221. *Id*. at 1073 ("The Kavanaugh approach . . . goes further towards removing personal judicial predilection from the analysis of a particular Second Amendment case.").

222. *See supra* Section III; *see also* Duncan v. Becerra, 970 F.3d 1133, 1149 (9th Cir. 2020), *vacated*, 988 F.3d 1209 (9th Cir. 2021).

223. *Duncan*, 970 F.3d at 1150.

224. *Id*. (quoting Ass'n N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J. (*N.J. Rifle I*), 910 F.3d 106, 117 n.18 (3d Cir. 2018).

225. *Id.*

expansive as the total bans on possession considered in *Duncan*, *N.J. Rifle*, and *Heller II*.[226]

It is clear from these facts that total bans on magazines holding more than ten rounds could not be called, in any sense, traditional or longstanding and are thus not presumptively lawful.[227] Furthermore, magazines holding more than ten rounds are incredibly common in America for lawful purposes, as even the Third Circuit and D.C. Circuit majorities admit.[228] Because these magazines are in common use for lawful purposes and are not traditionally regulated, any law categorically banning possession of them would be unconstitutional under Kavanaugh's framework.

B. Bans on LCMs Still Fail a *Marzzarella* Test Under Both Forms of Heightened Scrutiny

1. *Strict Scrutiny is the Appropriate Level of Review Under* Marzzarella

If courts still choose to apply a *Marzzarella* type test in magazine cases, strict scrutiny is appropriate, and bans like New Jersey's and California's will not survive.[229] The panel decision in *Duncan v. Becerra* is the best-reasoned application of this balancing test to date.

a. Prong one: Does the item implicate Second Amendment interests?

On the first prong of the *Marzzarella* style test, the *Duncan* panel found that magazines holding more than ten rounds are not a category unto themselves but are a part of the broader protected class of magazines.[230] As such, they implicate Second Amendment rights in the same way all magazines do.[231] In contrast, the Third Circuit said it "assumed without deciding" that LCMs are protected arms, while nonetheless treating them as a distinguishable class that could be banned.[232]

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226. *See id.* at 1167 ("[G]randfather clauses are 'important[]' in reducing burdens generated by a restriction.").

227. *Id.* at 1151; *Heller II*, 670 F.3d 1244, 1280 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); *N.J. Rifle I*, 910 F.3d at 116–17.

228. *N.J. Rifle I*, 910 F.3d at 116; *see also Heller II*, 670 F.3d at 1261 ("We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use[]'. . .").

229. *See Duncan*, 970 F.3d at 1152; *N.J. Rifle I*, 910 F.3d at 127 (Bibas, J., dissenting).

230. *See Duncan*, 970 F.3d at 1146.

231. *See id.* A majority of Circuit Courts have held that magazines are bearable arms within the meaning of the Second Amendment. *See* Meeus, *supra* note 2, at 38.

232. *See N.J. Rifle I*, 910 F.3d at 117–18.

The *Duncan* panel's reasoning is more logical than the Third Circuit's arbitrary division of a protected class of arms. After all, what significantly distinguishes a magazine holding ten rounds from a magazine holding eleven, or even from one holding sixteen, which New Jersey had already banned?[233] As dissenting Judge Matey said in *N.J. Rifle II*, "The Second Amendment demands more than back-of-the-envelope math. At a minimum, it asks the government to explain, to offer but one example, why eleven rounds is too many while nine remains fine."[234] Avoiding this arbitrary division and treating all magazines as a protected class of arms within the meaning of the Second Amendment is the most reasonable position.[235]

Of course, this leaves the question of whether LCMs are dangerous and unusual.[236] It is worth remembering that this is an elemental test: a bearable arm must be both dangerous and unusual for a categorical ban on it to be presumptively lawful.[237] However, magazines are not unusual, even those holding more than ten rounds.[238] They are incredibly common and "are overwhelmingly owned and used for lawful purposes[.] . . . the antithesis of unusual."[239] Since magazines holding more than ten rounds are not unusual, categorical bans on them cannot be presumptively lawful under the "dangerous and unusual" test.[240]

As discussed previously, magazine capacity restrictions are not longstanding regulations.[241] This means that they are not presumptively lawful by means of tradition either.[242] With all this in mind, the answer to the first prong of a *Marzzarella* style test must be that magazines, even those holding more than ten rounds, are protected arms within the meaning of the Second Amendment.[243]

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233. *N.J. Rifle I*, 910 F.3d at 126 (Bibas, J. dissenting).

234. Ass'n N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J. (*N.J. Rifle II*), 974 F.3d 237, 260 (3d Cir. 2020) (Matey, J., dissenting).

235. *See id.*; *Duncan*, 970 F.3d at 1146.

236. *See Duncan*, 970 F.3d at 1146.

237. *See* Caetano v. Massachusetts, 136 S. Ct. 1027, 1031 (2016) (Alito, J., concurring) ("[A] weapon may not be banned unless it is *both* dangerous *and* unusual.") (emphasis in original).

238. *See N.J. Rifle I*, 910 F.3d 106, 116–17 (3d Cir. 2018); *Duncan*, 970 F.3d at 1146–47.

239. *Duncan*, 970 F.3d at 1147.

240. *Id.* at 1146.

241. *See supra* Section VI.A.

242. *See* District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 626–27 (2008); *see also Duncan*, 970 F.3d at 1149–51.

243. *See Duncan*, 970 F.3d at 1151.

b. Prong two: What level of scrutiny is appropriate?

The second prong of the *Marzzarella* style test is choice of scrutiny.[244] Blanket restrictions on magazines substantially burden the core of the Second Amendment: self-defense within the home.[245] Under a blanket restriction, citizens would be prohibited from using standard capacity magazines for commonly used self-defense handguns like the Glock, even within their own homes.[246] The sweeping, categorical nature of these laws significantly enhances the burden.[247] As the *Duncan* court put it,

> Half of all magazines in the United States are now illegal to own in California. It does not matter that these magazines are not unusual and are used commonly in guns for self-defense. Law-abiding citizens must alter or turn them over—or else the government may forcibly confiscate them from their homes and imprison them up to a year. The law's prohibitions apply everywhere in the state and to practically everyone. It offers no meaningful exceptions at all for law-abiding citizens. *These features are the hallmark of substantial burden*.[248]

Strict scrutiny would be more than appropriate under a *Marzzarella* style test.[249]

2. *Application of Strict Scrutiny to Magazine Bans*

Under strict scrutiny, statutes like California's and New Jersey's would fail. Protecting public safety is undoubtedly a compelling interest.[250] However, total prohibitions of all magazines holding more than ten rounds are not narrowly tailored to advance that goal by very nature of their sweeping, indiscriminate effect.[251] States must take more care to use the least "drastic means" of achieving public safety.[252]

244. United States v. Marzzarella, 614 F.3d 85, 95 (3d Cir. 2010).
245. *Id.* at 1140, 1157 ("[A] law that takes away a substantial portion of arms commonly used by citizens for self-defense imposes a substantial burden on the Second Amendment.").
246. *Duncan*, 970 F.3d at 1152. *See also supra* Section III; *supra* notes 70–75.
247. *Duncan*, 970 F.3d at 1152.
248. *Id.* at 1156 (emphasis added).
249. *Id.* at 1152.
250. *Id.* at 1164.
251. *Id.*
252. *Id.*

3. *Magazine Bans Also Fail Intermediate Scrutiny*

Even if intermediate scrutiny were appropriate, bans like California's and New Jersey's would still fail.[253] Undoubtedly, the Government's interest in curbing violence is "significant, substantial and important."[254] However, banning all magazines holding more than ten rounds goes beyond what is "reasonably necessary" to achieve that end.[255] Prohibiting all citizens within an entire state from possessing constitutionally protected arms is not "tailored" in any sense of the word.[256] Evidence that banning large-capacity magazines helps stop mass shootings is scanty at best.[257] Courts have consistently described what little evidence is offered for this purpose as "of little help"[258] or "remarkably thin."[259]

In contrast, there is evidence that many mass shooters bring multiple guns to their pre-planned slaughters.[260] Bringing multiple guns allows them to simply switch weapons should their first one run empty or malfunction, a tactic that is usually faster than a magazine change.[261] Meanwhile, self-defenders are likely to have only one firearm on them with only the number of rounds in one magazine. Even assuming that prospective mass shooters would not simply acquire banned LCMs illegally, prohibiting possession of magazines over ten rounds would have only a small effect on the deadliness of mass shootings while severely limiting the capabilities of responsible citizens in self-defense situations.[262]

Proponents of LCM bans often argue that magazines over ten rounds are not necessary because the average self-defense shooting only requires the use of 2.2 rounds.[263] This argument is unconvincing since this statistic is simply an average: it does not and cannot represent every situation a self-defender could reasonably face.[264] In reality, citizens face a very real chance of needing more than ten rounds to adequately defend themselves.[265] It would be

253. *See Duncan*, 970 F.3d at 1165; Ass'n N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J. (*N.J. Rifle II*), 974 F.3d 237, 260 (3d Cir. 2020) (Matey, J., dissenting).
254. *N.J. Rifle II*, 974 F.3d at 260–61 (Matey, J., dissenting).
255. *Id.*; *see Duncan*, 970 F.3d at 1167.
256. *N.J. Rifle II*, 974 F.3d at 260 (Matey, J., dissenting); *Duncan*, 970 F.3d at 1167.
257. *See Duncan*, 970 F.3d at 1168; Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Grewal, 2018 U.S. Dist. LEXIS 167698, at *8 (D.N.J. Sept. 28, 2018).
258. *Grewal*, 2018 U.S. Dist. LEXIS, at *8.
259. *Duncan*, 970 F.3d at 1168.
260. *Id.*
261. *Id.*
262. *See id.* at 1160–62.
263. *Id.* at 1160.
264. *Id.*
265. *Duncan*, 970 F.3d at 1160.

eminently reasonable for a citizen to prepare for that contingency by carrying a weapon loaded with more than ten rounds.

There are many documented cases of citizens firing a low-capacity weapon empty without resolving a deadly threat or firing more than ten rounds in legitimate self-defense. For example, on January 4, 2013, Melinda Herman defended herself and her two children against a home invader using a six-shot .38 special revolver.[266] When an unidentified man began prying open the front door with a crowbar, Mrs. Herman took her children through the upstairs master bedroom and bathroom and hid in their crawl space attic.[267]

The home invader wasted no time heading upstairs, prying open the locked master bedroom door, and entering the crawl space.[268] When he opened that door, Mrs. Herman opened fire, striking the invader five times while missing once.[269] With that, she was out of ammunition, and the invader was still very mobile.[270] Fortunately for her and her children, the intruder decided to flee instead of attack.[271] Still, he was able to drive his vehicle into another subdivision before finally wrecking his vehicle and collapsing.[272] The suspect survived and is currently serving a ten-year prison sentence.[273]

While Mrs. Herman was able to successfully defend herself and her children, had her attacker reacted in any way besides abject terror when shot, the situation could have ended quite differently. Even after emptying her weapon, her attacker was still able to leave the house on his own power and drive to another street before being incapacitated.[274] If he had responded with further violence, Mrs. Herman would have had no functional weapon with which to defend herself. Having a modern handgun equipped with a fifteen- or seventeen-shot magazine would have been an indispensable necessity in this alternate scenario, as there would have been little to no time for a reload.[275]

Another self-defense incident demonstrates that even sixteen rounds may not be enough to immediately incapacitate a single attacker. In 2004, pizza deliveryman Ron Honeycutt was forced to fire on an armed robber.[276] When the attacker pointed his weapon, Honeycutt drew his handgun, loaded with sixteen rounds, and fired.[277] When his attacker did not fall, Honeycutt

266. CHRIS BIRD, THANK GOD I HAD A GUN: TRUE ACCOUNTS OF SELF-DEFENSE 28 (2014).
267. *Id.* at 28–29.
268. *Id.* at 30–31.
269. *Id.* at 31.
270. *Id.* at 31–32.
271. *Id.*
272. BIRD, *supra* note 266, at 33.
273. *Id.* at 38.
274. *Id.* at 33–34.
275. *See* Duncan v. Becerra, 970 F.3d 1133, 1142 (9th Cir. 2020), *vacated*, 988 F.3d 1209 (9th Cir. 2021).
276. BIRD, *supra* note 266, at 317.
277. *Id.* at 320.

continued firing, hitting his attacker "more than ten times but less than fifteen."[278] Now with an empty gun, Honeycutt was still facing an armed attacker at point-blank range.[279]

As Honeycutt was deciding whether to rush the man or retrieve an extra magazine from his car, the attacker finally collapsed.[280] It was later determined that the robber had loaded his weapon's magazine but had forgotten to chamber a round.[281] If the robber had properly loaded his firearm, Honeycutt would likely not have survived.[282]

These examples are far from exhaustive: many more examples of citizens using more than ten rounds for legitimate self-defense exist.[283] While it is true that self-defense incidents like these are not as common as those involving three rounds or less, they do happen. A reasonable armed citizen cannot afford to ignore the genuine possibility that six, ten, or even sixteen rounds may not stop a deadly threat.[284] Prohibiting citizens from owning LCMs would deprive citizens of that capability, with little real effect on the deadliness of mass shootings.[285] Since LCM bans are not well fitted to the stated government interest, they fail intermediate scrutiny.[286]

VII. CONCLUSION

In the future, courts would do well to eschew *Marzzarella* style balancing tests in Second Amendment cases. The test contravenes explicit Supreme Court precedent rejecting balancing tests in this area of law.[287] Instead, courts should apply a "text, history, and tradition" approach as then-Circuit Judge Kavanaugh advocated for in *Heller II*.[288] This test removes a large amount of subjectivity from legal analysis and comports with the Supreme Court's decisions in *Heller I* and *McDonald v. City of Chicago*.[289]

Furthermore, laws prohibiting possession of magazines holding more than ten rounds are unconstitutional, no matter what standard a court uses.[290] Such laws do not have historical precedent on their side, and they

278. *Id.* at 325.
279. *Id.* at 320–21.
280. *Id.*
281. *Id.* at 323.
282. BIRD, *supra* note 266, at 323.
283. *See* Duncan v. Becerra, 366 F. Supp. 3d 1131, 1134–35 (S.D. Cal. 2019); Colvin, *supra* note 8, at 1076 n.235 and accompanying text.
284. *See Duncan*, 970 F.3d at 1156.
285. *Id.* at 1165–66.
286. *See Duncan*, 970 F.3d at 1168.
287. *See supra* Section V.
288. *See supra* Section V.
289. *See supra* notes 220–221 and accompanying text.
290. *See supra* Sections VI.A.1.a., VI.A.1.b.

categorically ban arms protected by the Second Amendment.[291] They are not narrowly tailored or reasonably necessary to secure public safety.[292] Whether a court uses a text, history, and tradition approach or a *Marzzarella* style test, laws prohibiting possession of magazines holding more than ten rounds are unconstitutional.

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291. *See supra* Sections VI.A.1.a., VI.A.1.b.

292. *See supra* Sections VI.A.1.a., VI.A.1.b.

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