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GUN SAFETY IN THE AGE OF KAVANAUGH

*Joseph S. Hartunian**

INTRODUCTION

In 2008, the Supreme Court undertook a historical analysis of the Second Amendment to the United States Constitution, which provides: “A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹ In the landmark case *District of Columbia v. Heller* (*Heller I*), Justice Antonin Scalia wrote the majority opinion, holding that this amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.”² This redefinition of one of the first additions to the Constitution carried enormous implications for gun owners, manufacturers, and policymakers; however, in the ten years since the ruling, the case is perhaps most notable for what it did *not* do.

“Of course the right [is] not unlimited,” Justice Scalia wrote.³ But what exactly are those limits? And how exactly should courts interpret this dramatic change in Second Amendment jurisprudence? “[S]ince this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field,” opined the majority in response to this question.⁴ Indeed, this job has been left to the lower courts in the years since. Though *Heller I* explicitly identifies certain types of regulations undisturbed by its holding, new regulations have come in the crossfire, especially as *McDonald v. City of Chicago* made Second Amendment rights applicable against the states through the Due Process Clause of the Fourteenth Amendment.⁵

Just three years later, in *Heller v. District of Columbia* (*Heller II*), the identical plaintiff from the original *Heller* opinion challenged new

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1. U.S. CONST. amend. II.
2. 554 U.S. 570, 592 (2008).
3. *Heller I*, 554 U.S. at 595.
4. *Id.* at 635.
5. 561 U.S. 742, 791 (2010).

regulations adopted by the District in the wake of *Heller I*.⁶ On appeal to the Court of Appeals for the District of Columbia Circuit, then-Circuit Judge Brett Kavanaugh filed a dissenting opinion arguing that the measures taken by the District remained unconstitutional, applying a unique “history and tradition” based test that differs from the standards of review that other courts have applied to Second Amendment challenges since *Heller I*.⁷

With Kavanaugh’s nomination and ascension to the Supreme Court in fall 2018, Second Amendment jurisprudence remains in flux, but it will likely come to be clarified during his tenure—and possibly as soon as later this term. This Essay takes stock of the different approaches adopted and advocated for in evaluating constitutional challenges in Second Amendment opinions throughout the country. The author’s hope is that doing so will help highlight the contours for debate when the Supreme Court does finally start to define some of the limits purported to exist by Justice Scalia. Part I analyzes the paths explicitly rejected by *Heller I* by reviewing the limits considered allowable by Justice Scalia. Part II considers the ongoing debate between the courts on the application of “strict” or “intermediate” scrutiny for Second Amendment challenges. Part III examines then-Judge Kavanaugh’s *Heller II* opinion in comparison to the other options, and finally Part IV discusses the implications of Kavanaugh’s novel approach, particularly in light of the recent change in the Supreme Court’s Fourth Amendment jurisprudence and the Court’s grant of certiorari in *New York State Rifle & Pistol Ass’n v. City of New York*.⁸

I. THE ROAD NOT TAKEN

After declaring that the Second Amendment grants an individual a right to possess a firearm for self-defense, Part III of *Heller I* set out some of the limitations the Court was placing on its expansive new reading:

[N]othing 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.⁹

In the footnote to that passage, Justice Scalia noted that “[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”¹⁰

6. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011).

7. *See id.* at 1269.

8. 883 F.3d 45 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (mem.).

9. *Heller I*, 554 U.S. at 626–27.

10. *Id.* at 627 n.26.

In dissent, Justice Breyer took issue with the fact that the majority failed to outline the contours of this redefined right to bear arms. Specifically, Justice Breyer took issue with the majority's failure to adopt a level of scrutiny that could be used to analyze challenges to federal statutes.¹¹ Instead, the majority declared that "under any of the standards of scrutiny that we have applied to enumerated constitutional rights,"¹² the District of Columbia law challenged by Dick Heller that prevented D.C. residents from carrying useable firearms in the home was unconstitutional.

By holding the District of Columbia restriction to be unconstitutional, Justice Scalia explicitly rejected evaluating Second Amendment challenges under "rational basis scrutiny."¹³ Occasionally, constitutional rights of individuals are analyzed under this so-called "rational basis test," which requires a statute's disparate treatment to bear a rational relationship to some legitimate government purpose.¹⁴ Justice Scalia argued in *Heller I* that applying a rational basis test to Second Amendment challenges "would be redundant with the separate constitutional prohibitions on irrational laws," and therefore cannot be the test applied.¹⁵

The other potential test for Second Amendment challenges rejected by the *Heller I* court was Justice Breyer's "interest-balancing inquiry."¹⁶ Breyer believed that gun safety regulations advance two compelling government interests—one of the elements required under the traditional strict scrutiny analysis. Both the government's concern for the safety and lives of its citizens¹⁷ and the general government interest in preventing crime¹⁸ will almost always be applicable when considering the legitimacy of a gun safety regulation. Gun regulations have been adopted in recent years as a reaction to widespread school shootings and gun violence across the country, as officials attempt to find a way to stem the violence.¹⁹ Because of this, Justice Breyer argued, application of the strict scrutiny test will always jump to an analysis of whether the burden on the individual's Second Amendment rights outweighs the compelling

11. *Id.* at 687–91 (Breyer, J., dissenting). Until *McDonald*, the Second Amendment was only applied against the federal government.

12. *Id.* at 628 (majority opinion).

13. *Id.* at 628 n.27.

14. *See* *Armour v. City of Indianapolis*, 566 U.S. 673, 689 (2012); *see also* Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627 (2016).

15. *Heller I*, 554 U.S. at 628 n.27.

16. *Id.* at 689 (Breyer, J., dissenting).

17. *Id.* (citing *United States v. Salerno*, 481 U.S. 739, 755 (1987)).

18. *Id.* (citing *United States v. Salerno*, 481 U.S. 739, 750, 754 (1987)).

19. *See, e.g.*, Meghan Keneally, *How Gun Laws Have Changed in 4 States Since the Parkland Shooting*, ABCNEWS (Mar. 26, 2018), <https://abcnews.go.com/US/states-gun-laws-changed-parkland/story?id=53902445> [<https://perma.cc/F5KW-3K75>].

government interest in regulation. As a result, he argued, courts shouldn't get bogged down in the scrutiny tests and instead should just weigh the overall burden to the individual's right under the Second Amendment.²⁰

This interest-based test would determine whether a statute burdens the individual's Second Amendment rights in a way or to an extent that is out of proportion with the statute's salutary effects upon other important government interests.²¹ By advocating for this interest-balancing inquiry, Justice Breyer abandoned the traditional secondary component of strict scrutiny analysis, as described *infra*. Instead, the only evaluation left for the courts to determine under his test is "whether the regulation at issue impermissibly burdens the [interests protected by the Second Amendment] in the course of advancing" governmental public-safety concerns.²² There is no "tailoring" investigation for the regulatory approach pursued by the statute, as is typically done in strict scrutiny (where the regulation must be narrowly tailored) or in intermediate scrutiny (where it must be substantially related). Instead, the judge simply would make a determination on the weight of the burden to the plaintiff.²³ The majority explicitly rejects this approach as "judge-empowering," unique, and out of line with other enumerated constitutional- right inquiries.²⁴ By rejecting this approach, Justice Scalia criticized a test that was at least somewhat novel—specifically because it was in fact non-traditional or unique—even though Justice Breyer claimed that similar analyses exist elsewhere in constitutional analysis.²⁵ Instead, the Court expressed a clear general preference for using the "traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis)" for evaluative purposes.²⁶

The rejection of these two tests is important for one primary reason: the Court's preference for the traditional levels of scrutiny tests in evaluating Second Amendment challenges stands in stark contrast to then-Judge Kavanaugh's repeated assertions that the *Heller I* court implicitly adopted his own unique "history- and- tradition based test."²⁷

20. *Heller I*, 544 U.S. at 689–90 (Breyer, J., dissenting).

21. *Id.*

22. *Id.* at 689.

23. *See id.* at 689–90.

24. *See id.* at 634. (majority opinion) ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest balancing' approach.")

25. *Id.* at 690 (Breyer, J., dissenting) (citing *Mathews v. Eldridge*, 424 U.S. 319, 339–49 (1976)).

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

27. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1270 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

II. THE DIVIDING LINE

In the years since *Heller I*, the courts have taken to hashing out their own standards of review. As with other constitutional challenges,²⁸ the initial inquiry is whether the individual's rights are implicated by the statute or regulation at hand.²⁹ When an individual's Second Amendment rights are implicated, the courts apply their chosen method of evaluation. While the vast majority of circuit courts have adopted intermediate scrutiny as the appropriate standard at least in some contexts,³⁰ a small minority of opinions have challenged the status quo. These opinions have universally come either in the form of nonbinding concurrences,³¹ dissents,³² or in opinions subsequently reversed.³³ Some courts have further split the inquiry, holding that some restrictions, such as those affecting possession inside the home (most similar to those challenged in *Heller I*) are subject to strict scrutiny, while others should be subject to intermediate scrutiny.³⁴ This debate is relevant only so far as some restrictions

28. See *Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011) (noting the parallels between firearms and free speech threshold inquiries).

29. See, e.g., *Heller II*, 670 F.3d at 1252 (majority opinion).

30. *Binderup v. Attorney Gen.*, 836 F.3d 336, 346–47 (3d Cir. 2016) (en banc) (reaffirming the choice of intermediate scrutiny in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010)); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 260–61 (2d Cir. 2015) (upholding New York- and Connecticut-law bans on certain semi-automatic weapons and large-capacity magazines under intermediate scrutiny); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) (“If Second Amendment rights apply outside the home, we believe they would be measured by the traditional test of intermediate scrutiny.”); *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010) (rejecting the application of strict scrutiny desired by defendant-appellant); *United States v. Skoien*, 614 F.3d 638, 641–42 (7th Cir. 2010) (en banc) (avoiding a categorical answer to the scrutiny question but requiring “some form of strong showing”).

31. See *Tyler v. Hillsdale Cty. Sheriff's Dep't (Tyler II)*, 837 F.3d 678, 692 (6th Cir. 2016) (Boggs, J., concurring) (“The proper level of scrutiny is strict scrutiny, as with other fundamental constitutional rights . . .”); *United States v. Chovan*, 735 F.3d 1127, 1145–46, 1149–52 (9th Cir. 2013) (Bea, J., concurring) (“Categorical curtailment of constitutional rights based on an individual's status requires more rigorous analysis than intermediate scrutiny.”).

32. See *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 714 F.3d 334, 336 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc) (“[T]he level of scrutiny required [for the case] must be higher than [intermediate scrutiny.]”); *Heller II*, 670 F.3d at 1284 (Kavanaugh, J., dissenting from denial of rehearing en banc) (“Even if it were appropriate to apply one of the levels of scrutiny after *Heller I*, surely it would be strict scrutiny rather than . . . intermediate scrutiny . . .”).

33. See *Tyler v. Hillsdale Cty. Sheriff's Dep't (Tyler I)*, 775 F.3d 308 (6th Cir. 2014), *rev'd en banc*, 837 F.3d 678 (6th Cir. 2016) (en banc) [hereinafter *Tyler I*] (finding after an application of strict scrutiny to a mental health related prohibition that the prohibition violated the Second Amendment).

34. See *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Masciandaro*, 638 F.3d 458, 469–70 (4th

affect the “core” of the Second Amendment right, and therefore may implicate strict scrutiny, versus non-“core” restrictions, which should implicate intermediate scrutiny.³⁵ This breakdown is similar to First Amendment jurisprudence, where content-based restrictions trigger strict scrutiny, while more neutral time, place, or manner restrictions receive intermediate scrutiny.³⁶ Because the Supreme Court has not yet opined on the standard of review to be applied in *any* Second Amendment challenge, the “core”-“non-core” inquiry is secondary to the initial inquiry of exactly what test to apply.

In one of the only circuit court decisions to openly adopt strict scrutiny, the Sixth Circuit initially found that a commonly used federal gun safety statute, 18 U.S.C. § 922(g), violated an individual’s Second Amendment rights.³⁷ The individual was prohibited from purchasing a firearm under § 922(g)(4),³⁸ which blocks the sale of firearms to anyone “committed to a mental institution.”³⁹ Clifford Chase Tyler, the plaintiff, had been committed in 1986 when his daughters became concerned about his health following a divorce, and in 2012 he sought a declaratory judgment that § 922(g)(4) was unconstitutional as applied to him.⁴⁰ Over twenty-five years after his commitment, a 2012 psychological evaluation found no evidence of mental illness, but the state of Michigan still denied his attempt to purchase a firearm under § 922(g)(4).⁴¹ The initial panel found that because neither the federal government nor the state of Michigan provided any potential for relief from § 922(g)(4), the statute was not narrowly tailored and did not survive strict scrutiny.⁴² Upon rehearing en banc, however, a majority of the Sixth Circuit found that the inherent risk to others posed by the right of self-defense supported the use of intermediate scrutiny, a burden that the government still failed to meet.⁴³ In making their decision, the en banc court noted the majority of its sister circuits had adopted the intermediate scrutiny test for other § 922(g) challenges.⁴⁴

Cir. 2011); *see also* *Young v. Hawaii*, 896 F.3d 1044, 1068 (9th Cir. 2018) (“We treat this approach as a ‘sliding scale.’”).

35. *See Young*, 896 F.3d at 1068; *Chester*, 628 F.3d at 682–83.

36. *Chester*, 628 F.3d at 682.

37. *Tyler I*, 775 F.3d at 334.

38. *Id.* at 313.

39. 18 U.S.C. § 922(g)(4) (2012).

40. *Tyler I*, 775 F.3d at 311, 313–14.

41. *Id.* at 314–15.

42. *Id.* at 334, 343.

43. *Tyler v. Hillsdale Cty. Sheriff’s Dep’t (Tyler II)*, 837 F.3d 678, 692, 699 (6th Cir. 2016) (en banc).

44. *Id.* at 692.

One argument recently advanced is that after *McDonald*, which declared the right to own a firearm a “fundamental” right, the Second Amendment should be afforded the same protections as other fundamental rights, and therefore should trigger application of strict scrutiny.⁴⁵ This argument fails to account for the fact that there is almost always a threshold inquiry determining the scope of the infringement in question. In First Amendment cases, it is the type of restriction being challenged.⁴⁶ In privacy cases, particularly abortion cases, restrictions are not evaluated under strict scrutiny.⁴⁷ Further, the circuits that adopted the intermediate scrutiny standard in the wake of *Heller I* have had the opportunity to reconsider in light of *McDonald* and have rejected changing their applicable tests.⁴⁸ Finally, this argument is confronted head on by the majority in *Heller II*. Writing for the majority, Judge Douglas Ginsburg recognized that the court “often applies strict scrutiny to legislation that impinges upon a fundamental right”; however, he also noted that “it does not logically follow that strict scrutiny is called for whenever a fundamental right is at stake.”⁴⁹ The holding of *McDonald* that the right to bear arms is fundamental therefore does not resolve the evaluation-standards question.⁵⁰

Although his own test was rejected by the *Heller I* majority,⁵¹ Justice Breyer aptly noted that the majority, at least implicitly, also rejected strict scrutiny as the method of evaluation for all gun safety regulations.⁵² Strict scrutiny requires that a court determine whether the law at issue is

45. *Id.* at 702 (Boggs, J., concurring) (“The proper level of scrutiny is strict scrutiny, as with other fundamental rights . . .”).

46. *See* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339–41 (2010) (explaining restrictions allowed in the particular context of political speech).

47. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 901 (1992). In fact, one should note that the Ninth Circuit, at least at one point, considered a “substantial burden” standard similar to the undue burden standard as potentially applicable in the Second Amendment context. *See* *Nordyke v. King*, 644 F.3d 776, 785 (9th Cir. 2011), *reh’g en banc granted*, 915 F.3d 681 (mem.) (9th Cir. 2019). This did not hold as the applicable Ninth Circuit standard. *See* *Young v. Hawaii*, 896 F.3d 1044, 1068 (9th Cir. 2018).

48. *See* *Kolbe v. Hogan*, 849 F.3d 114, 138 (4th Cir. 2017) (reaffirming *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010), by applying intermediate scrutiny); *Binderup v. Attorney Gen.*, 836 F.3d 336, 341, 346 (3d Cir. 2016) (declining to follow the district court’s choice of strict scrutiny and instead applying intermediate scrutiny under *Marzzarella*); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) (reaffirming *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010)).

49. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1256 (D.C. Cir. 2011) (citations omitted).

50. *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 697–98, 700 (2007).

51. *District of Columbia v. Heller (Heller I)*, 554 U.S. 570, 634–35 (2008).

52. *Id.* at 688 (Breyer, J., dissenting).

“narrowly tailored to achieve a compelling governmental interest.”⁵³ But it appears on the face of the opinion that the *Heller I* majority rejected that approach by including substantial carve outs for existing regulations that it purported not “to cast doubt on.”⁵⁴ Widespread prohibitions on the possession of firearms by the mentally ill would almost certainly fail strict scrutiny, because such prohibitions are not “narrowly tailored.”⁵⁵ Nonetheless, several minority opinions have essentially argued that the *Heller I* footnote 26 is nonexistent, and even longstanding restrictions should fail because they do not specifically exist within the ambit of the prescribed *Heller I* majority’s exceptions.⁵⁶

If rational basis evaluation doesn’t apply, and strict scrutiny doesn’t always apply, and novel approaches like Justice Breyer’s have already been rejected, then it appears intermediate scrutiny is the standard under which most, if not all, Second Amendment challenges are analyzed.⁵⁷ Yet Justice Brett Kavanaugh selected “none of the above” when considering a Second Amendment challenge in *Heller II*.⁵⁸

III. THE KAVANAUGH APPROACH

Though he proclaimed that his opinion was “all about precedent”⁵⁹ and that “[m]any other judges . . . have agreed with the approach [he] set forth in that case”⁶⁰ in his Supreme Court confirmation hearings before the Senate Judiciary Committee, Justice Kavanaugh seems to be out on an island in his Second Amendment jurisprudence. This is important to note because it would not be the first time that Justice Kavanaugh adopted a

53. *Id.* (citing *Abrams v. Johnson*, 521 U.S. 74, 82 (1997)).

54. *Id.* at 626–27 (majority opinion).

55. *See Tyler v. Hillsdale Cty. Sheriff’s Dep’t (Tyler I)*, 775 F.3d 308, 334, 344 (6th Cir. 2014), *rev’d en banc*, 837 F.3d 678 (6th Cir. 2016) (finding after an application of strict scrutiny to a mental health related prohibition that the prohibition violated the Second Amendment).

56. *See Nat’l Rifle Ass’n. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 714 F.3d 334, 343 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc) (arguing that federal laws prohibiting individuals younger than 21 years of age are unconstitutional since they are not felons or mentally ill, as portrayed as constitutional in *Heller I*). But the *Heller I* majority explicitly states in footnote 26 that it selected those “presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.” *Heller I*, 554 U.S. at 627 n.26.

57. This Essay leaves for another day the “sliding scale” dispute at issue in *Young v. Hawaii*, 896 F.3d 1044, 1068 (9th Cir. 2018).

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

59. *The Nomination of Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Sept. 6, 2018).

60. *Id.*

unique interpretation of a constitutional amendment as a circuit court judge in a case and then saw that interpretation adopted by the Supreme Court.⁶¹

After the Court invalidated its prohibition on handguns in *Heller I*, the District of Columbia went back to the drawing board. “[T]he D.C. Council passed emergency legislation” in the wake of the decision in an attempt to bring the District’s laws in line with the holding.⁶² The Firearms Registration Amendment Act of 2008 required the registration of all firearms owned by residents in the District.⁶³ The registration requirements included mandatory ballistics testing,⁶⁴ limitations on the number of pistols registered,⁶⁵ and renewal of the registration certificate every three years.⁶⁶ The new requirements also banned “assault weapons,” as defined by the Act, which included certain brands and models of semi-automatic firearms, as well as semi-automatic firearms that possessed specific features.⁶⁷ Finally, the Act also prohibited possession of magazines with a capacity of more than ten rounds.⁶⁸ The plaintiffs⁶⁹ challenged these restrictions as violating their Second Amendment rights.⁷⁰

The majority, consisting of two Reagan appointees (Judges Douglas Ginsburg and Karen Henderson)⁷¹ took the restrictions in turn. They explicitly adopted the same analysis that the Third, Fourth, Seventh, and Tenth Circuits had already adopted at that point, first asking whether or not the provision falls within the scope of the amendment.⁷² The court concluded that basic registration requirements for handguns were

61. See *United States v. Jones*, 625 F.3d 766, 769–71 (D.C. Cir. 2010) (Kavanaugh, J., dissenting from denial of rehearing en banc), *panel decision aff’d on other grounds*, 565 U.S. 400 (2012).

62. *Heller II*, 670 F.3d at 1248.

63. 56 D.C. Reg. 1365, sec. 2 (Feb. 13, 2009) (codified at D.C. CODE § 2-1831.03).

64. *Id.* sec. 3(d)(2)(d), (repealed 2012).

65. *Id.* sec. 3(d)(2)(e), (codified at D.C. CODE § 7-2502.03(e)).

66. *Id.* sec. 3(g) (codified at D.C. CODE § 7-2502.07a(a)).

67. *Id.* sec. 3(a)(1) (codified at D.C. CODE § 7-2501.01(3A)(A)).

68. *Id.* sec. 3(n)(2) codified at D.C. CODE § 7-2506.01(b)(A).

69. Including the same Dick Anthony Heller at issue in *Heller I*.

70. See *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1250 (D.C. Cir. 2011).

71. Kevin Cope & Joshua Fischman, *It’s Hard to Find a Federal Judge More Conservative than Brett Kavanaugh*, WASH. POST (Sept. 5, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/09/05/its-hard-to-find-a-federal-judge-more-conservative-than-brett-kavanaugh/> [https://perma.cc/FK93-JHK9] (comparing the D.C. Circuit’s ideological leanings and ranking Henderson the second most conservative, behind only Kavanaugh); Jeffrey Rosen, *No Objection*, NEW REPUBLIC (Nov. 24, 2011), <https://newrepublic.com/article/97759/kozinski-ginsburg-gps-supreme-court> [https://perma.cc/4VKM-WYAS] (noting that Ginsburg’s “conservative credentials are impeccable”).

72. *Heller II*, 670 F.3d at 1252.

“longstanding” in light of multiple state statutes from the early twentieth century, and as such, presumptively outside the scope of the Second Amendment, as defined by *Heller I*, and constitutional.⁷³ But the majority found that the registration requirements for long guns were novel and fell within the protections afforded by the Second Amendment.⁷⁴ The court also concluded that semi-automatic rifles and magazines holding more than ten rounds were in “common use”⁷⁵ such that limitations on them implicated the plaintiffs’ Second Amendment rights.⁷⁶

After finding that these provisions implicated the plaintiffs’ Second Amendment rights, the majority had to pick a level of scrutiny. “As with the First Amendment,” the court said, “the level of scrutiny applicable under the Second Amendment surely ‘depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.’”⁷⁷ Because the court found that registration requirements do not severely limit the possession of firearms, it determined that intermediate scrutiny was appropriate.⁷⁸ Similarly, the court concluded that the semi-automatic rifle and large capacity magazine prohibitions neither prohibit the possession of a “quintessential self-defense weapon,” like those at issue in *Heller I*,⁷⁹ nor do they “effectively disarm individuals or substantially affect their ability to defend themselves,”⁸⁰ so intermediate scrutiny was appropriate there, too. The court left open the possibility that certain restrictions may require strict scrutiny analysis,⁸¹ but notably held that there was an insufficient record for the registration requirement to pass even intermediate scrutiny while upholding the prohibition on high capacity magazines and semi-automatic rifles.⁸²

Despite his colleagues’ skepticism for the registration requirements and their thorough application of the intermediate scrutiny test, which at that point had already been applied by four other circuits, Judge Kavanaugh objected. His dissent effectively begins and ends at the same point in *Heller I*: he argued that the majority’s rejection of Justice Breyer’s interest-balancing test foreclosed all the typical levels of scrutiny evaluations, and instead the *Heller I* court implicitly adopted a “history- and

73. *Id.* at 1254.

74. *Id.* at 1255.

75. *District of Columbia v. Heller (Heller I)*, 554 U.S. 570, 627 (2008).

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

77. *Id.* at 1257 (citing *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010)).

78. *Id.* (citing *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010)).

79. *Heller I*, 554 U.S. at 629.

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

81. *Id.* at 1257 (citing 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, 1471 (2009)).

82. *See id.* at 1264.

tradition-based test.”⁸³ In Kavanaugh’s view, “*Heller* [I] and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.”⁸⁴ Although he acknowledged that neither the court in *Heller I* nor the court in *McDonald* actually say this anywhere in the opinions,⁸⁵ he argued that the carveouts offered by Justice Scalia in *Heller I* are in line with the historical understanding of Second Amendment protections, and traditional restrictions inform us of the original public understanding of the right.⁸⁶ The *Heller I* majority said “longstanding” regulations were acceptable,⁸⁷ a limitation reaffirmed by *McDonald*,⁸⁸ which to Judge Kavanaugh meant that traditional regulations filled the full scope of Second Amendment limitations.⁸⁹ Kavanaugh argued that the court rejected the typical range of scrutiny options because it never asked whether the handgun ban at issue in *Heller I* would have passed strict or intermediate scrutiny,⁹⁰ and he instead classified *Heller I*’s emphatic pronouncement that the ban would have failed both tests as “a gilding-the-lily observation.”⁹¹

Judge Kavanaugh argued that by rejecting Justice Breyer’s unique interest-balancing test, the majority in *Heller I* was also rejecting both strict scrutiny and intermediate scrutiny (having already explicitly dismissed rational basis evaluation as nonviable).⁹² Kavanaugh argued that Justice Breyer advocated for an approach that was a form of intermediate scrutiny, which is the approach used as part of the majority’s explanation in *Heller II*.⁹³ Yet Justice Breyer did not “explicitly advocate” adopting any type of intermediate scrutiny standard.⁹⁴ Rather, Justice Breyer merely analogized First Amendment jurisprudence in passing, citing *Turner Broadcasting* to advocate for the general proposition that especially in thorny issue areas such as firearm regulation, legislators, not judges,

83. *Id.* at 1270–71 (Kavanaugh, J., dissenting) (arguing that it was a theory of “history and tradition that *Heller* [I] affirmed and adopted as determining the scope of the Second Amendment right.”).

84. *Id.* at 1271.

85. *Id.*

86. *Id.* at 1272.

87. *District of Columbia v. Heller (Heller I)*, 544 U.S. 626, 626–27 (2008).

88. *See McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010).

89. *See Heller II*, 670 F.3d at 1272–73 (Kavanaugh, J., dissenting) (citing *Heller I*, 544 U.S. at 626–27).

90. *Id.* at 1273.

91. *Id.* at 1277.

92. *Id.* at 1282.

93. *Id.* at 1280.

94. *See id.*

should be making determinations on the empirical evidence before them.⁹⁵

Like Justice Breyer in his *Heller I* dissent, Judge Kavanaugh attempted to use evaluative techniques from other individual-rights provisions of the Constitution to support his interpretation.⁹⁶ Since strict scrutiny and intermediate scrutiny were off the table, he said, the Court held that “the scope of the right was determined by text, history and tradition.”⁹⁷ Because, as noted in *McDonald*, “the traditions of our people [are] paramount” and “long standing regulatory measures” are permissible,⁹⁸ Kavanaugh argued that “[g]un bans and gun regulations that are not longstanding or sufficiently rooted in text, history, and tradition are not consistent with the Second Amendment individual right.”⁹⁹ The Second Amendment, Kavanaugh argued, therefore protects individuals from all regulation that is not “traditional” or that restricts usage of firearms that are “in common use today.”¹⁰⁰ In applying this new framework to the case at hand, both the majority (which undertook this analysis as part of their threshold inquiry)¹⁰¹ and Kavanaugh agreed that semi-automatic rifles were in common use, but because “most of the country [did] not” ban them already, the District’s new restriction violated Kavanaugh’s “history- and tradition-based” test.¹⁰² Similarly, but less convincingly, he concluded that the “fundamental problem with D.C.’s gun registration law is that registration of lawfully possessed guns is not ‘longstanding.’”¹⁰³ In doing so, he declined to analogize, and instead differentiated between longstanding record-keeping laws and licensing requirements.¹⁰⁴

Judge Kavanaugh responded to the claim that this approach might cast doubt on any restrictions not already adopted before the latter half of the twentieth century by arguing that his approach will somehow be more flexible in analyzing of new regulations because “history and tradition show that a variety of gun regulations have co-existed with the Second Amendment right.”¹⁰⁵ For those that are concerned that if a new

95. *District of Columbia v. Heller (Heller I)*, 544 U.S. 626, 704–05 (Breyer, J., dissenting) (citing *Turner Broad. Sys., Inc. v. Fed. Comm’n Comm’n*, 520 U.S. 180, 195 (1997)).

96. *Heller II*, 670 F.3d at 1283 (Kavanaugh, J., dissenting).

97. *Id.* at 1280.

98. *Id.* (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 792 (2010) (Scalia, J., concurring), and *McDonald*, 561 U.S. at 786 (Alito, J., concurring)).

99. *Id.* at 1285.

100. *Id.* at 1287.

101. *Id.* at 1260–61 (majority opinion).

102. *Id.* at 1287–88, 1290–91 (Kavanaugh, J., dissenting).

103. *Id.* at 1291.

104. *Id.* at 1291–92.

105. *Id.* at 1274–75. Judge Kavanaugh declined to mention any specific regulations other than those mentioned explicitly in *Heller I*.

firearm is created, it couldn't be regulated under this test, Judge Kavanaugh says that, like in the Fourth Amendment context, judges will have to "reason by analogy."¹⁰⁶ Yet for those concerned that a newly created firearm could come "into common use" before Congress gets around to regulating it, he offers little comfort.

IV. IMPLICATIONS

The implications of Justice Kavanaugh's writings are far-reaching for multiple reasons. If adopted by the Supreme Court as the appropriate evaluative technique for Second Amendment challenges, his approach would obviously alter the types of regulatory options available for legislatures attempting to combat gun violence. Second, and perhaps more important, is the simple fact that Justice Kavanaugh's unique jurisprudence has an uncanny ability to become law. In the Senate Questionnaire he submitted to the Senate Judiciary Committee in advance of his confirmation hearing to the Supreme Court, Justice Kavanaugh was asked to provide a summary of the ten most significant cases over which he presided. In nine of them he expressed a position later adopted by the Supreme Court.¹⁰⁷ One of these opinions in particular stands out.

In *Jones v. United States*, then-Judge Kavanaugh wrote a dissent from denial of rehearing en banc, in which he argued that the court should have considered the plaintiff's alternative argument that the district court improperly admitted evidence obtained through the installation of a GPS tracker on his vehicle.¹⁰⁸ The plaintiff's second argument was that the police violated his Fourth Amendment rights by trespassing on his property in order to install the tracker on the vehicle. Judge Kavanaugh believed that the officer in the case made a physical intrusion onto the defendant's car in order to install the GPS device. At the time, this theory ran contrary to longstanding Fourth Amendment doctrine, which typically relied on the "reasonable expectation of privacy" test from *Katz v. United States*.¹⁰⁹ Upon review, a plurality of the Supreme Court agreed with Judge Kavanaugh's property-based theory.

This is not to say that just because Chief Justice Roberts and Justice Thomas (the two Justices still on the bench that signed on to the Scalia *Jones* plurality opinion) signed on to *Jones* they would immediately sign

106. *Id.* In the same opinion, Judge Kavanaugh rejected analogies offered by the District between the registration provisions and licensing or sale log laws. *Id.* at 1291.

107. BRETT M. KAVANAUGH, S. COMM. ON THE JUDICIARY, PUBLIC QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT 43 (2018).

108. *United States v. Jones*, 625 F.3d 766 (D.C. Cir. 2010) (Kavanaugh, J., dissenting from denial of rehearing en banc), *panel decision aff'd on other grounds*, 565 U.S. 400 (2012).

109. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); *see United States v. Jones*, 565 U.S. 400, 405–06 (2012).

on to Kavanaugh's similarly novel Second Amendment test. However, it is important to note that the *Jones* plurality abandoned a traditional evaluative technique of constitutional jurisprudence and instead adopted then-Judge Kavanaugh's approach. It should not surprise anyone if the Chief Justice, Justice Thomas and now-Justice Gorsuch (who has readily adopted the property-based Fourth Amendment analysis) were prepared to sign on to a Justice Kavanaugh theory of Second Amendment jurisprudence, especially considering their longstanding penchant for originalism, history, and text-based jurisprudence in general.

CONCLUSION

After *Heller I* and *McDonald*, gun safety advocates and legislators are significantly limited in the options they can constitutionally advance in pursuit of their goals. If the vast majority of opinions at the circuit court level are an indication of the analysis regulations will face, we can expect thorough and substantive inspections by courts of both governmental motives and the remedies they choose to pursue. With his confirmation and the Supreme Court's grant of certiorari in *New York State Rifle & Pistol Ass'n v. City of New York*, Justice Kavanaugh has a chance to convince the rest of the Supreme Court that his reasoning in *Heller II* is the appropriate way to analyze Second Amendment challenges—if he succeeds, regulatory options could become dramatically more limited. With *New York State Rifle and Pistol Ass'n*, the Court has granted certiorari to a Second Amendment challenge for the first time in nine years. While the petition itself argues that the restrictions at issue cannot withstand any level of scrutiny, it also implicitly calls for the Court to clarify the applicable Second Amendment analysis for lower courts. One hopes that Justice Kavanaugh recognizes the novelty of his approach, like Justice Breyer's in *Heller I*, and the ramifications that a constitutional ruling on the merits could have on gun safety for generations to come.