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## *United States v. Reese* and Post-*Heller* Second Amendment Interpretation

### I. INTRODUCTION

In *United States v. Reese*, the Tenth Circuit ruled that 18 U.S.C. § 922(g)(8) (2006), a statute prohibiting an individual subject to a domestic protection order from possessing any type of firearm, was constitutional.<sup>1</sup> In coming to this conclusion, the court determined that § 922(g)(8) was subject to intermediate scrutiny, meaning the government had the burden of showing it had an important objective that was advanced by means substantially related to the objective.<sup>2</sup> The court's rationale behind applying intermediate scrutiny was based on its interpretation of the Supreme Court's decision in *District of Columbia v. Heller*<sup>3</sup> and is supported by other circuits.<sup>4</sup>

Despite intercircuit support for intermediate scrutiny and a two-step analysis in Second Amendment cases, the method is not followed uniformly, and there are questions as to whether the approach is actually supported by the Supreme Court's decision in *Heller*. In a challenge to the developing intermediate scrutiny standard, Judge Kavanaugh on the D.C. Circuit recently wrote a dissenting opinion asserting that the Supreme Court rejected application of balancing tests in Second Amendment challenges.<sup>5</sup>

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1. 627 F.3d 792 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 2476 (2011).

2. *Id.* at 802.

3. 554 U.S. 570 (2008).

4. *See* *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (weighing the relationship between the restriction and the governmental objective); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (applying intermediate scrutiny); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (same), *cert. denied*, 1315 S. Ct. 1674 (2011); *United States v. Skoien*, 614 F.3d 638, 641–42 (7th Cir. 2010) (en banc) (same), *cert. denied*, 1315 S. Ct. 1674 (2011).

5. *Heller v. District of Columbia*, No. 10-7036, 2011 WL 4551558, at \*21 (D.C. Cir. Oct. 4, 2011) (Kavanaugh, J., dissenting) [hereinafter *Heller II*].

According to Judge Kavanaugh, the Supreme Court created a framework for reviewing Second Amendment questions with a categorical test built on text, history, and tradition.

This Note compares the reasoning of the courts that applied intermediate scrutiny with the reasoning in Judge Kavanaugh's dissent and concludes that the Supreme Court's decision in *Heller* can be read to support either view. Because judicial balancing is commonplace in constitutional interpretation and pure categoricalism is rare, the Court will have to be more clear than it was in *Heller* if it wishes to establish a categorical approach to evaluating Second Amendment laws. Part II of this Note reviews developing Second Amendment jurisprudence by looking at the Supreme Court's decision in *Heller* and how circuit courts have interpreted it. Part III looks at the Tenth Circuit's decision in *United States v. Reese*. Part IV examines Judge Kavanaugh's interpretation of *Heller*, which contradicts the one adopted by most circuits. Part V considers the battle between categoricalism and balancing that appears to have arisen in Second Amendment jurisprudence. Part VI concludes.

## II. A BRIEF INTRODUCTION TO *HELLER* AND ITS PROGENY

In *Heller*, the Supreme Court held that the Second Amendment recognizes “the individual right to possess and carry weapons.”<sup>6</sup> Specifically, the Court held that a District of Columbia statute that banned handgun possession in the home and prohibited “rendering any lawful firearm in the home operable for the purpose of immediate self-defense” violated the Second Amendment.<sup>7</sup> Notwithstanding this holding, the Court noted that the Second Amendment does not establish an unlimited right:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive

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6. *Heller*, 554 U.S. at 592.

7. *Id.* at 635.

places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>8</sup>

In determining the constitutionality of statutes that restrict enumerated constitutional rights, the Court has historically applied differing levels of scrutiny.<sup>9</sup> While the *Heller* court definitively held that rational-basis scrutiny is insufficient for assessing infringements of an enumerated right like the right to keep and bear arms,<sup>10</sup> the Court did not specifically endorse the application of either intermediate or strict scrutiny for evaluating Second Amendment legislation. Instead it explained that “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, [the statute in question] would fail constitutional muster.”<sup>11</sup>

In his dissent, Justice Breyer criticized the majority for failing to clearly establish a level of scrutiny for future courts to apply<sup>12</sup> and strongly advocated against application of strict scrutiny.<sup>13</sup> Arguably, the Court’s failure to clearly establish a level of scrutiny was

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8. *Id.* at 626–27. In a footnote, the Court explained that this list “identif[ies] these presumptively lawful regulatory measures only as examples; [the] list does not purport to be exhaustive.” *Id.* at 627 n.26.

9. *Fourth Circuit Refuses to Uphold Federal Domestic Violence Gun Ban*, 79 U.S.L.W. 1899, 1899 (2011).

10. Responding to Justice Breyer’s assertion that rational-basis might apply, the majority wrote:

Justice Breyer correctly notes that this law, like almost all laws, would pass rational-basis scrutiny. But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. In those cases, “rational basis” is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.

*Heller*, 554 U.S. at 628 n.27 (citations omitted).

11. *Id.* at 628–29.

12. *Id.* at 687–91 (Breyer, J., dissenting).

13. *Id.* at 689 (“[A]doption of a true strict-scrutiny standard for evaluating gun regulations would be impossible. . . . [A]ny attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other . . .”).

intentional—an express rejection of all three traditional methods of scrutiny as “judge-empowering” and undesirable.<sup>14</sup> This argument is buttressed by the Court’s decision in *McDonald v. City of Chicago* where the Court clearly stated that “[i]n *Heller*, however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing.”<sup>15</sup>

Despite the anti-balancing language in *Heller* and *McDonald*, the Court’s failure to identify a test to apply in cases reviewing Second Amendment restrictions has almost uniformly led to application of intermediate scrutiny.<sup>16</sup> This fact is illustrated in the Tenth Circuit’s decision in *United States v. Reese*.

### III. UNITED STATES V. REESE

#### A. Reese’s Knowing Violation

In the summer of 2003, James Reese moved to Hawaii with his then-wife Jennifer and their three minor children.<sup>17</sup> After the couple separated, Jennifer filed a petition for a restraining order in Hawaii state court on behalf of herself and the children.<sup>18</sup> The petition alleged Reese “‘physically harmed, injured or assaulted’ [Jennifer] ‘by pushing, grabbing, [and] shoving her’ as well as ‘breaking [her] finger[,]’ . . . ‘point[ing] a handgun at [her]’ and threaten[ing] to kill her[,]’ . . . ‘subject[ing] her to extreme psychological abuse[,]’ . . . [and] threaten[ing] to take [the] children.”<sup>19</sup> Jennifer also said that Reese “‘was an alcoholic,’ ‘ha[d] a history of domestic violence,’ was ‘extremely controlling,’ ‘had a bad temper,’ and ‘di[d]

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

15. 130 S. Ct. 3020, 3047 (2010). In *McDonald*, the Court’s only definitive holding was that the Second Amendment applied to the states by virtue of the Fourteenth Amendment, but the Court’s discussion of *Heller* is instructive because it is the only Supreme Court case where *Heller*’s interpretation is considered. *Id.*

16. Every circuit but the 11th has expressly adopted intermediate scrutiny, although a few judges have advocated for strict scrutiny in dissents. *See supra* note 4.

17. *United States v. Reese*, 627 F.3d 792, 794 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 2476 (2011).

18. *Id.*

19. *Id.* (some alterations in the original and some alterations added by the Author) (quoting Aplt.App at 105–06).

not accept the separation.”<sup>20</sup> Finally, Jennifer “alleged that Reese owned firearms that could be used to threaten, injure or abuse another person.”<sup>21</sup> Shortly after filing the petition for the restraining order, Jennifer filed for divorce.<sup>22</sup>

Several months later in a family court hearing on Jennifer’s motion for a protective order, Reese denied Jennifer’s allegations of abuse “‘but nevertheless ‘agreed to [the imposition] of a restraining order. . . .’”<sup>23</sup> Accordingly, the court issued the protective order against Reese. In pertinent part, the order prohibited Reese from “(a) threatening or physically abusing Jennifer or their minor children, (b) contacting Jennifer or their minor children, and ‘(c) possessing, controlling, or transferring ownership of any firearm, ammunition, firearm permit or license’” while the order endured.<sup>24</sup> The order specifically indicated that it did not expire until the court so ordered and stated that its terms and conditions were explained to and understood by the parties.<sup>25</sup> Shortly thereafter, the couple divorced.<sup>26</sup>

Reese later remarried and relocated to New Mexico.<sup>27</sup> In the summer of 2009, police were involved in a domestic dispute involving Reese and his wife.<sup>28</sup> According to Reese’s wife, Danielle, she and Reese started arguing while they were driving and eventually pulled over to the side of the road to fight.<sup>29</sup> Danielle alleged Reese was physically violent and said she was afraid he might hurt her or the children.<sup>30</sup> During the investigation, Danielle told police there were guns located throughout their home, and that she had

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20. *Id.* (alterations in the original) (quoting Aplt.App. at 106).

21. *Id.*

22. *Id.*

23. *Id.* at 795 (alterations in the original) (quoting Aplt.App. at 109).

24. *Id.* (quoting Aplt.App. at 112).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 796.

30. *Id.*

purchased guns for Reese.<sup>31</sup> The home contained more than twenty firearms.<sup>32</sup> After formally arresting him, an officer asked Reese if he was “aware of a [protective] order that prohibit[ed] [him] from having firearms.”<sup>33</sup> Reese replied that he was not aware of any protective order.<sup>34</sup> While escorting Reese to the patrol car, the officer again asked Reese if he was “aware of a [protective] order out of Hawaii.”<sup>35</sup> This time Reese responded by asking the officer “Where did you get that?”<sup>36</sup> The officer then asked Reese if “[he] want[ed] to read the protective order.”<sup>37</sup> Reese responded, “No. I know what it says.”<sup>38</sup>

Reese was indicted by a federal grand jury on three counts of possessing a firearm in violation of § 922(g)(8).<sup>39</sup> Given Reese’s situation, i.e., a former spouse subject to a domestic protection order, he was exactly the kind of person the statute prevented from possessing firearms. In fact, it is likely that stories like his inspired the prohibitions enacted by the legislature. Nevertheless, Reese claimed “§ 922(g)(8) was unconstitutional on its face and as applied to him,” and moved to dismiss the indictment.<sup>40</sup> The district court granted Reese’s motion, finding the statute constitutional on its face, but unconstitutional as applied to Reese.<sup>41</sup> In so holding, the court reasoned the order was “not ‘narrowly tailored to serve the governmental interest of reducing domestic violence.’”<sup>42</sup>

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31. *Id.*

32. *Id.* at 797. In addition to the guns at the residence, police eventually seized around thirty-three firearms from Reese’s place of business. *Id.* at 798.

33. *Id.* at 796 (alterations in the original) (quoting Aplt.App. at 40).

34. *Id.*

35. *Id.* at 796–97 (alteration in the original) (quoting Aplt.App. at 41). (internal quotation marks and original brackets omitted).

36. *Id.* at 797 (alteration in the original) (quoting Aplt.App. at 41).

37. *Id.* (internal quotation marks omitted) (quoting Aplt.App. at 41).

38. *Id.* (internal quotation marks omitted) (quoting Aplt.App. at 41).

39. *Id.* at 798.

40. *Id.* at 798.

41. *Id.*

42. *Id.* at 799 (quoting the district court).

*B. The Tenth Circuit's Decision*

The Tenth Circuit reversed the district court's grant of the motion to dismiss.<sup>43</sup> Evaluating the constitutionality of § 922(g)(8) as applied to Reese, the court acknowledged *Heller* as the controlling precedent for Second Amendment cases, but noted that “[t]he Supreme Court did not specify in *Heller* precisely what level of scrutiny a reviewing court must apply to a challenged law.”<sup>44</sup> Accordingly, the court expressly “look[ed] to analogous cases for guidance on precisely what level to apply.”<sup>45</sup> Thus, the court discussed the Third Circuit's decision in *United States v. Marzzarella* and the Seventh Circuit's decision in *United States v. Skoien*.<sup>46</sup>

*United States v. Marzzarella* concerned 18 U.S.C. § 922(k) (2006), a prohibition on possession of firearms with obliterated serial numbers.<sup>47</sup> In its decision, the *Marzzarella* court reasoned that “[w]hether or not strict scrutiny may apply to particular Second Amendment challenges, it is not the case that it must be applied to all Second Amendment challenges.”<sup>48</sup> According to the *Marzzarella* court, “[s]trict scrutiny does not apply automatically any time an enumerated right is involved.”<sup>49</sup> The court supported this assertion by pointing out that “[w]e do not treat First Amendment challenges that way,” and by discussing First Amendment treatment of laws regulating speech.<sup>50</sup> Thus, as the *Reese* court later summarized, the “Third Circuit concluded that, ‘the Second Amendment can trigger

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43. *Id.* at 805. In reversing the lower court, the Tenth Circuit noted errors in the district court's decision that this Note does not address in order to focus on the court's Second Amendment analysis. E.g., “[T]he court erred in focusing on the underlying protective order issued by the Hawaii Family Court instead of the challenged federal statute.” *Id.*

44. *Id.* at 801.

45. *Id.*

46. *Id.* at 801–02.

47. *United States v. Marzzarella*, 614 F.3d 85, 87 (3d Cir. 2010), *cert. denied*, 1315 S. Ct. 958 (2011).

48. *Id.* at 96, *quoted in Reese*, 627 F.3d at 801.

49. *Marzzarella*, 614 F.3d at 96.

50. *Id.*

more than one particular standard of scrutiny,' depending, at least in part, upon 'the type of law challenged and the type of [Second Amendment restriction] at issue.'"<sup>51</sup> Continuing the analogy to First Amendment cases, "the Third Circuit framed the intermediate scrutiny inquiry in this way: whether the challenged law served a 'significant,' 'substantial,' or 'important' governmental interest, and, if so, whether the 'fit between the challenged [law] and the asserted objective [wa]s reasonable, not perfect.'"<sup>52</sup>

The Tenth Circuit also examined the reasoning in *United States v. Skoien*, a Seventh Circuit case concerning 18 U.S.C. § 922(g)(9), a statute prohibiting possession of firearms by any person who "has been convicted in any court of a misdemeanor crime of domestic violence."<sup>53</sup> In upholding the statute, the Seventh Circuit determined that *Heller* did not require firearms regulations to "mirror limits that were on the books in 1791."<sup>54</sup> Rather, the court concluded that "some categorical disqualifications are permissible: Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons, nor need these limits be established by evidence presented in court."<sup>55</sup> Like the *Marzzarella* court, the *Skoien* court buttressed its reasoning by citing cases concerning analogous constitutional rights and found that the prohibition was subject to intermediate scrutiny.<sup>56</sup> In the words of the *Reese* court, "the Seventh Circuit . . . framed the inquiry in this way: whether the statute was 'substantially related to an important governmental objective.'"<sup>57</sup>

In considering Reese's challenge to § 922(g)(8), the Tenth Circuit determined that the statute compared favorably to the statutes challenged in *Marzzarella* and *Skoien*.<sup>58</sup>

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51. *Reese*, 627 F.3d at 801 (quoting *Marzzarella*, 614 F.3d at 97) (alterations in original).

52. *Id.* at 801 (quoting *Marzzarella*, 614 F.3d at 98) (alterations in original).

53. 18 U.S.C. § 922(g)(9) (2006).

54. *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1674 (2011).

55. *Id.*

56. *Id.*

57. *Reese*, 627 F.3d at 802 (quoting *Skoien*, 614 F.3d at 641).

58. *Id.* at 802.

First, the court asked whether § 922(g)(8) imposed a burden on Reese's Second Amendment right to keep and bear arms.<sup>59</sup> Concluding that it obviously did, the court decided to review the infringement based on an intermediate scrutiny test. The court reasoned as follows:

To pass constitutional muster under intermediate scrutiny, the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective. Here, the government asserts that the objective of § 922(g)(8) is to keep firearms out of the hands of people who have been judicially determined to pose a credible threat to the physical safety of a family member, or who have been ordered not to use, attempt to use, or threaten to use physical force against an intimate partner or child that would reasonably be expected to cause bodily injury, because [s]uch persons undeniably pose a heightened danger of misusing firearms.<sup>60</sup>

After determining that the government's objective in § 922(g)(8)—restricting firearms possession by individuals likely to commit violent crimes—was important, the court held that application of § 922(g)(8) to Reese was appropriate given that the

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59. *Id.* at 800.

60. *Id.* at 802 (citations omitted) (internal quotation marks omitted). The court also referred to the following *Skoien* court findings in support of the government's objective:

That firearms cause injury or death in domestic situations also has been established. Domestic assaults with firearms are approximately twelve times more likely to end in the victim's death than are assaults by knives or fists. Part of this effect stems from the fact that some would-be abusers go buy a gun and much from the fact that guns are more lethal than knives and clubs once an attack begins. The presence of a gun in the home of a convicted domestic abuser is "strongly and independently associated with an increased risk of homicide." And for this purpose the victims include police as well as spouses, children, and intimate partners. Responding to a domestic-disturbance call is among an officer's most risky duties. Approximately 8% of officers' fatalities from illegal conduct during 1999 through 2008 arose from attempts to control domestic disturbances. Finally, the recidivism rate is high, implying that there are substantial benefits in keeping the most deadly weapons out of the hands of domestic abusers.

*Id.* at 802–03 (citations omitted) (quoting Arther L. Kellerman et al., *Gun Ownership as Risk Factor for Homicide in the Home*, 329 *New England J. Medicine* 1084, 1087 (1993)).

protective order against Reese from the Hawaii state court clearly satisfies the requirements in § 922(g)(8).<sup>61</sup>

In sum, the Tenth Circuit, relying heavily on reasoning from the Third and Seventh Circuits, determined that the Supreme Court's decision in *Heller* supported application of intermediate scrutiny in Second Amendment challenges and, in applying such a test, determined that Reese was correctly indicted under § 922(g)(8) for firearms possession.

#### IV. AN ALTERNATIVE INTERPRETATION

Despite the circuit courts' reliance on intermediate scrutiny and constitutional balancing, there is reason to doubt whether *Heller* should be read to authorize this standard of review. One scholar has argued that “[f]rom its central holding, which extends broad protection to the ‘individual’ right to bear arms unconnected from militia service, to its flat exclusions of felons, the mentally ill, and certain ‘Arms’ from constitutional coverage, the majority opinion in *Heller* was categorical in its approach.”<sup>62</sup> In fact, the *Heller* majority appeared to flatly reject balancing tests:

The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest balancing by the people—which Justice Breyer [advocating intermediate scrutiny in his dissent] would now conduct for them anew.<sup>63</sup>

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61. *Id.* at 804. By its terms, § 922(g)(8) prohibits someone subject to a court order that (a) was issued after a hearing of which the person was aware and at which the person was allowed to participate, (b) proscribes the person from harassing, intimidating, or stalking “an intimate partner . . . or child,” and (c) either includes a credible finding that the person is a threat to the safety of the intimate partner or child or “by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child” from possessing firearms. 18 U.S.C. § 922 (g)(8) (2006).

62. Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 405 (2009).

63. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

However, the majority's decision to avoid balancing tests has been either ignored or, more likely, unrecognized. Courts have interpreted *Heller* differently, including assertions that the *Heller* majority "consciously left the appropriate level of scrutiny for another day,"<sup>64</sup> "did not specify . . . precisely what level of scrutiny a reviewing court must apply to a challenged law,"<sup>65</sup> or definitively concluded "that some form of heightened judicial scrutiny is required; rational-basis review has been ruled out."<sup>66</sup> The inability to recognize the *Heller* Court's categorical language is likely born from the familiarity and comfort derived from reverting to the tiers of scrutiny often used in constitutional interpretation. However, "the search for the familiar may be leading courts and commentators astray."<sup>67</sup>

To date, only one opinion has identified the *Heller* majority's preference for categoricalism. Even then, the identification came in a dissenting opinion that was overruled by a majority that preferred intermediate scrutiny balancing.

In his *Heller II* dissent, Judge Kavanaugh suggested that the Supreme Court's decisions in *Heller* and *McDonald* established a precedent whereby "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."<sup>68</sup> He noted "the Supreme Court in *Heller* never asked whether the law was narrowly tailored to serve a compelling government interest (strict scrutiny) or substantially related to an important government interest (intermediate scrutiny). If the Supreme Court had meant to adopt one of those tests, it could have said so."<sup>69</sup> Instead, "the test the Court relied on—as it indicated by using terms such as 'historical tradition' and

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64. *United States v. Booker*, 570 F. Supp. 2d 161, 163 (D. Me. 2008).

65. *Reese*, 627 F.3d at 801.

66. *United States v. Skoien*, 614 F.3d 638, 651 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1674 (2011).

67. Blocher, *supra* note 62, at 379.

68. *Heller II*, No. 10–7036, 2011 WL 4551558, at \*23 (D.C. Cir. Oct. 4, 2011) (Kavanaugh, J., dissenting).

69. *Id.* at \*24.

‘longstanding’ and ‘historical justifications’—was one of text, history, and tradition.”<sup>70</sup> Kavanaugh points out that, in his *Heller* dissent, Justice Breyer advocated intermediate scrutiny review of the D.C. gun law, discussing the government’s interests and the fit between the D.C. statute and those interests, but the majority rejected a “judge-empowering ‘interest-balancing inquiry’ that ‘asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.’”<sup>71</sup> Judge Kavanaugh explained that the discord between the majority and dissent in *Heller* “was resolved in favor of categoricalism—with the categories defined by text, history, and tradition—and against balancing tests such as strict or intermediate scrutiny or reasonableness.”<sup>72</sup>

#### V. BALANCING VS. CATEGORICALISM

The difference between the *Reese* court’s application of a balancing test and Judge Kavanaugh’s advocacy of categoricalism is a matter of interpretation—not only interpretation of the Supreme Court’s decisions in *Heller* and *McDonald*, but also constitutional interpretation. Categoricalism and balancing “roughly track[] the familiar division between rules and standards: ‘Categorization corresponds to rules, balancing to standards.’”<sup>73</sup> The war between balancing and categorization has involved many battles throughout the history of American jurisprudence.<sup>74</sup> The issue strikes at the heart of judicial philosophy, pitting strong legal minds against one another. As one scholar put it:

The Justices of rules are skeptical about reasoned elaboration and suspect that standards will enable the Court to translate raw subjective value preferences into law. The Justices of standards are skeptical about the capacity of rules to constrain value choice and

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70. *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626–27, 635 (2008)).

71. *Id.* at \*27 (quoting *Heller*, 554 U.S. at 634) (internal quotation marks omitted).

72. *Id.* at \*32.

73. Blocher, *supra* note 62, at 381–82 (quoting Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 58 (1992)).

74. For a look at the historical conflicts between categoricalism and balancing, see Blocher, *supra* note 62.

believe that custom and shared understandings can adequately constrain judicial deliberation in a regime of standards.<sup>75</sup>

Perhaps epitomizing the Justices of rules, Robert Bork wrote: “Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.”<sup>76</sup> Under this view, the judiciary’s societal role is to make decisions based on the principles of the Constitution. Departure from principles-based judging, while sometimes convenient, opens the door to subjecting society to the values of individual judges. Justices of rules would argue that adherence to this method ensures the judiciary is limited to exercising the power expressly bestowed upon it by the people through the Constitution. If the government is to serve the people, it cannot be a source of power unto itself. According to Justice Scalia, adherence to rules is “the course of judicial restraint, ‘making’ as little law as possible in order to decide the case at hand.”<sup>77</sup> Refraining from “making” law allows for greater predictability, “a needful characteristic of any law worthy of the name.”<sup>78</sup> Justices of rules prefer the uniformity that comes with a categorical approach to adjudication.

Perhaps typifying the Justices of standards, Justice Souter has argued that “[t]he Constitution has a good share of deliberately open-ended guarantees” that “call for more elaborate reasoning to show why very general language applies in some specific cases but not in others, and over time the various examples turn into rules that the Constitution does not mention.”<sup>79</sup> Because the Constitution contains competing values, the Court often faces tough cases where

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75. Sullivan, *supra* note 73, at 27.

76. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971).

77. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

78. *Id.*

79. Justice David H. Souter, *Text of Justice David Souter’s Speech*, HARVARD GAZETTE, May 27, 2010, available at <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/>.

“[t]he court has to decide which of our approved desires has the better claim, right here, right now, and the court has to do more than read fairly when it makes this kind of choice.”<sup>80</sup> The facts of a given case often require the courts to weigh societal values against one another. In these cases, literal applications of the constitutional text have “only a tenuous connection to reality.”<sup>81</sup> Justice Frankfurter, the “chief spokesman”<sup>82</sup> for balancing, has also contended that “[a]bsolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules.”<sup>83</sup> Accordingly, constitutional guarantees are “better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.”<sup>84</sup>

The battle between rules and standards (along with the parallel conflict between categoricalism and balancing) will likely never be resolved. While we want our law to be objective, consistent, and to conform to cultural traditions (favoring rules), we also “expect the law to be flexible enough to adapt to a changing society, so that it may reflect contemporary notions of justice”<sup>85</sup> (favoring standards). Depending on the specific fact scenario in question or the ruling judge’s ideology, a court will rule in favor of one conflicting policy or the other. Another court, favoring the opposing policy or employing a conflicting ideology, will rule differently. Thus begins a judicial chasm that often subsists for generations, even after the Supreme Court has adopted one side’s viewpoint. Because the controversy over the interpretation of the Second Amendment reflects societal values that seem to conflict—the natural desire for personal protection from oppression and crime versus the aspiration for safe, peaceful neighborhoods—it is likely that the battle between rules and standards will subsist as Second Amendment jurisprudence develops.

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80. *Id.*

81. *Id.*

82. Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1424 (1961).

83. *Dennis v. United States*, 341 U.S. 494, 524 (1951) (Frankfurter, J., concurring).

84. *Id.* at 525.

85. WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* 16 (2d. ed. 2008).

## VI. SO WHAT'S THE DECISION AND WHO'S MAKING IT?

As it currently stands, litigators and scholars—along with individuals whose rights are directly affected by regulations related to the Second Amendment—have been left without a clear understanding of Second Amendment law. On the one hand, it is clear the sister circuits have decided to apply intermediate scrutiny review, a balancing test, in Second Amendment cases. The First, Third, Fourth, Seventh, Tenth, and D.C. Circuits have all applied intermediate scrutiny to Second Amendment challenges since the *Heller* decision in 2008.<sup>86</sup> On the other hand, support for intermediate scrutiny is hard to find in the text of *Heller*. Other than stating that the statute under review in *Heller* would have been invalid “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights”<sup>87</sup> and a footnote explaining why rational basis review was inappropriate,<sup>88</sup> the Court did not use any balancing language at all, let alone call for a balancing test. In fact, as Judge Kavanaugh pointed out, the Court overtly opposed balancing.<sup>89</sup> In other words, sister circuits may be settling on a method that runs counter to Supreme Court precedent.

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86. See *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (weighing the relationship between the firearm restriction and the governmental objective); *Heller II*, No. 10-7036, 2011 WL 4551558 (D.C. Cir. Oct. 4, 2011) (same); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010), *cert. denied* 131 S. Ct. 958 (2011) (applying intermediate scrutiny); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (same); *United States v. Skoien*, 614 F.3d 638, 641–42 (7th Cir. 2010), *cert. denied* 131 S. Ct. 1674 (2011) (en banc) (same); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010), *cert. denied* 131 S. Ct. 2476 (2011) (same). Also, the Eleventh Circuit recently held that there is “no reason to exclude” 18 U.S.C. § 922(g)(9), the statutory prohibition against the possession of firearms by persons convicted of the misdemeanor crime of domestic violence, “from the list of longstanding prohibitions on which *Heller* does not cast doubt.” *United States v. White*, 593 F.3d 1199, 1205–06 (11th Cir. 2010). In *Chester*, the Fourth Circuit rejected this approach as too deferential, saying it “approximates rational-basis review, which has been rejected by *Heller*.” *Chester*, 628 F.3d at 679, *quoted in Criminal Law—Firearms: Fourth Circuit Refuses to Uphold Federal Domestic Violence Gun Ban*, 79 U.S.L.W. 1899 (Jan. 18, 2011).

87. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

88. *Id.* at 628 n.27.

89. See *supra* text accompanying note 68.

But the fact that *Heller* does not specifically endorse intermediate scrutiny balancing is not necessarily an endorsement for a purely categorical approach. In fact, one could argue that it would be unreasonable to assume the *Heller* Court created a purely categorical approach since most instances of categoricalism in our jurisprudence ultimately devolve into some form of balancing anyway.<sup>90</sup>

A categorical approach is a plausible standard for Second Amendment interpretation, and as Judge Kavanaugh argued, there is evidence that the Court favored such an approach. However, in order to overcome the judicial inclination towards balancing tests, the Supreme Court needs to use stronger, clearer language than what is found in *Heller* and *McDonald* and explicitly adopt and articulate a categorical test that can be applied by lower courts.

As it stands, the Supreme Court has denied certiorari in *Marzzarella*, *Skoien*, and *Reese*. While denial of certiorari does not necessarily mean the Court approves of the reasoning in those cases,<sup>91</sup> it does mean the holdings remain precedent in their respective circuits. Unless the Court steps in and clarifies that *Heller* called for a more categorical approach, the circuits' near-uniform selection of intermediate scrutiny balancing will become the overarching rule for the Second Amendment.

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90. For example, while First Amendment law employs substantial categorization, even categories like content discrimination can potentially be justified under strict scrutiny balancing.

91. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (“It is, of course, sufficiently evident that the refusal of an application for [writ of certiorari] is in no case equivalent to an affirmance of the decree that is sought to be reviewed.”)

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