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Assault on the Constitution: Why the Southern District of California Got it Right

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ASSAULT ON THE CONSTITUTION: WHY THE SOUTHERN DISTRICT OF CALIFORNIA GOT IT RIGHT

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INTRODUCTION

In 1992, city-wide riots and looting consumed the streets of Los Angeles, California.[1] During this six-day period of violence, at least 2,200 Korean-owned businesses were harmed, causing millions of dollars in damages; more than sixty people would die, and the police were nowhere to be found.[2] While the city burned, Korean-American

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[†] As a preliminary matter, the terms "assault weapon" and "mass shooting" must be addressed. The term "assault weapon" is a political term with no single definition. Most commonly, it is a pejorative term used by those seeking to instill fear in an uninformed electorate or to vilify semiautomatic rifles such as the commonly owned AR-15 ("AR" stands for ArmaLite Rifle, named for the company that designed the rifle). *Modern Sporting Rifle: Introduction, Understanding America's Rifle*, NSSF, https://www.nssf.org/msr/ (last visited May 30, 2020). Given the focus of this Note, use of this term is unavoidable. However, the author wishes to convey his displeasure in using this term. This term has no place in legitimate discourse surrounding firearms and should not be perpetuated as a legitimate term, which refers to semiautomatic rifles that bear a resemblance to fully automatic weapons used by military and police forces. *Id.* The term "mass shooting" is another term with no single definition. While two different definitions are explained *infra* at note 17, these are not the only two out there. Further, the FBI does not define the term "mass shooting," although Congress passed legislation that defines "mass killing" simply as any single incident in which "3 or more people" are killed. 28 U.S.C. § 530C(b)(1)(M)(i) (2018).

1. Kyung Lah, *The LA Riots Were a Rude Awakening for Korean-Americans*, CNN (Apr. 29, 2017, 1:11 PM), https://www.cnn.com/2017/04/28/us/la-riots-korean-americans/index.html [https://perma.cc/L8MZ-FNLU]. As one Korean-American would later recount, "The LAPD powers that be decided to protect the 'haves' and the Korean community did not have any political voice or power. They left us to burn." *Id.*

2. *Id.* (recounting the experience of Chang Lee, who would not see police "for three days" while he and his fellow Korean-Americans protected themselves and their businesses "like armed militia in what appeared to be a guerrilla race war on the streets"); *see also* Agnes Constante, *25 Years After LA Riots, Koreatown Finds Strength in 'Saigu' Legacy*, NBC NEWS (Apr. 25, 2017, 8:44 AM), https://www.nbcnews.com/news/asian-america/25-years-after-la-riots-koreatown-finds-strength-saigu-legacy-n749081 [https://perma.cc/U2WP-ZGND] (quoting a Korean-American as saying, "We felt betrayed by our local law enforcement that's supposed to protect and serve. They literally abandoned us and left us pretty much on our own."); Carolina A. Miranda, *Of the 63 People Killed During '92 Riots,*

store owners took their safety into their own hands, wielding a variety of firearms to protect themselves and their businesses—many of these weapons would be banned two years later by the federal government in the name of public safety.[3]

In 1994, the 103rd Congress enacted what is commonly referred to as the federal Assault Weapons Ban of 1994.[4] Among other things, the law made illegal the "manufacture, transfer, and possession of certain semiautomatic assault weapons" in addition to "large capacity ammunition feeding devices."[5] Such a ban, proponents argued, was necessary to address the problems of everyday gun violence across the country.[6] Opponents, however, were quick to point out that according to FBI statistics, "rifles of any description are used in only 3.1 percent of homicides, while knives are used in 14.5 percent of homicides . . . [and that is] all rifles, not just rifles banned in this

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23 Deaths Remain Unsolved—Artist Jeff Beall Is Mapping Where They Fell, L.A. TIMES (Apr. 28, 2017, 2:15 AM), https://www.latimes.com/entertainment/arts/miranda/la-et-cam-la-riots-jeff-beall-los-angeles-uprising-20170427-htmlstory.html [https://perma.cc/86XD-BHG9].

3. Luis Valdes, *Koreatown Twenty-Six Years Ago: The Guns of the L.A. Riots*, TRUTH ABOUT GUNS (Apr. 29, 2018), https://www.thetruthaboutguns.com/koreatown-twenty-six-years-ago-the-guns-of-the-l-a-riots/ [https://perma.cc/4B6J-M8ZN] (examining the types of firearms being used by members of the community protecting themselves and their businesses as documented in photographs). Among the types of firearms are semiautomatic rifles, shotguns, and pistols with large capacity magazines that would be banned in the federal ban of 1994. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1996 (specifically enumerating several weapons used to defend Koreatown in the 1992 riots); 140 CONG. REC. 9337–38 (1994) (statement of Rep. Derrick); Valdes, *supra*.

4. 108 Stat. at 1996.

5. *Id.* Although the title of the Act would seem to prohibit the possession of all firearms the Act defines as assault weapons, those possessed prior to the enactment of this law were grandfathered in. *Id.* at 1997. Thus, the law did not actually reduce the number of those firearms currently in circulation. *Id.* Under this law, an "assault weapon" is defined, in pertinent part, as

> a semiautomatic rifle that has an ability to accept a detachable magazine and has at least [two] of (i) a folding or telescoping stock; (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon; (iii) a bayonet mount; (iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and (v) a grenade launcher.

Id. at 1997–98. The law alternatively defines an "assault weapon" by listing twenty specific models of firearms and banning those as well as "copies or duplicates . . . in any caliber." *Id.* Similarly, a "large capacity ammunition feeding device" is defined as "a magazine, belt, drum, feed strip, or similar device manufactured after the date of enactment of [this law] that has a capacity of, or that can be readily restored or converted to accept, more than [ten] rounds of ammunition[.]" 108 Stat. at 1999.

6. 140 CONG. REC. 9337–38.

bill."[7] Ten years later in 2004, Congress repealed the law as a result of a Sunset Provision.[8]

Since the expiration of the 1994 ban, the Supreme Court dramatically altered the landscape of Second Amendment jurisprudence with its decisions in *District of Columbia v. Heller* and *McDonald v. City of Chicago*.[9] In the wake of these cases, the question of whether or not a federal assault weapons ban could pass constitutional muster has been the subject of countless pages.[10] Today, at least one bill has been introduced that would reenact an "updated" nationwide ban on assault weapons.[11] Unlike the bill introduced in 1994, the primary motivation voiced by proponents seems to be addressing the problem of mass shootings.[12] The new bill

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7. *Id.* at 9339 (statement of Rep. Solomon). Representative Solomon went on to point out that "fists and feet are used in 5 percent of all homicides . . . blunt objects are used in another 5 percent" and that in Washington, D.C., "which has the highest per capita [murder rate] of any major city in the United States, between 1980 and 1993 there [were] only four rifle related homicides out of a total of more than 4,200." *Id.*

8. 108 Stat. at 2000. Although Congress could have reenacted the law, they chose not to do so. As a result, the law was automatically repealed (the Sunset Provision). *Id.* Upon the expiration of the ban, groups like the Brady Campaign to Prevent Gun Violence attacked the lack of a second ban by pointing "to some particularly vicious shootings in which military-style weapons were used—including the 10 killings in the sniper shooting spree that terrorized residents in Maryland, Virginia and Washington, D.C., in 2002." *Congress Lets Assault Weapons Ban Expire*, NBC NEWS (Sept. 13, 2004, 8:28 PM), http://www.nbcnews.com/id/5946127/ns/politics/t/congress-lets-assault-weapons-ban-expire/ [https://perma.cc/C5KY-PTH6]. Those engaged in the business of selling firearms, conversely, expected the "[s]ales of formerly banned gun accessories, such as flash suppressors and folding stocks . . . to take off." *Id.*

9. McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (holding that the Fourteenth Amendment's Due Process Clause makes the Second Amendment rights announced in *Heller* fully applicable to the states); District of Columbia v. Heller, 554 U.S. 570, 635–36 (2008) (holding that the Second Amendment protects an individual's right to keep and bear arms unconnected from service in a militia and specifically protects the right to use commonly-owned firearms for the legal purpose of self-defense).

10. *See, e.g.*, Philip Casey Grove, Note, *Common Use Under Fire:* Kolbe v. Hogan *and the Urgent Need for Clarity in the Mass-Shooting Era*, 59 ARIZ. L. REV. 773, 775–78 (2017); Brian Roth, Note, *Reconsidering a Federal Assault Weapons Ban in the Wake of the Aurora, Oak Creek, and Portland Shootings: Is It Constitutional in the Post-*Heller *Era?*, 37 NOVA L. REV. 405, 410–11 (2013).

11. Press Release, Dianne Feinstein, U.S. Senator for Cal., Feinstein Statement on House Assault Weapons Ban Hearing (Sept. 25, 2019), https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=0FC188C8-3FF7-4C15-9345-D1ABC07BEE16 [https://perma.cc/M32E-36UX].

12. 165 CONG. REC. S104 (daily ed. Jan. 9, 2019) (statement of Sen. Feinstein) ("I will keep doing this every Congress. This legislation must constantly be before us until Republicans finally decide to join me in the effort to stop mass shootings. This legislation is not perfect, but it is part of the solution.").

includes a broader definition of assault weapon and dramatically increases the amount of enumerated firearms that would be banned.[13]

Most federal courts of appeals that have heard cases challenging state provisions similar to the proposed federal law have upheld bans under the courts' interpretations of *Heller*. However, there are several factors that suggest the Supreme Court would not follow suit were it to hear such a case. Accordingly, this Note will address the question of whether or not the federal Assault Weapons Ban of 2019, if passed, would be upheld by the current Supreme Court.[14] In so doing, this Note will examine and analyze the tests applied by federal courts that have heard similar cases, culminating with the recent decision in the Southern District of California, *Duncan v. Becerra*.[15] In Part I, this Note provides the context surrounding the current bill being considered by Congress and examines Supreme Court and federal circuit court cases addressing this issue. Part II provides analysis of application of the tests applied by the federal courts. Part III argues that the Supreme Court should adopt Judge Benitez's reasoning laid out in *Duncan* and apply his test to any Second Amendment challenge to an assault weapons ban.

I. Background

According to data compiled by Mother Jones, 118 mass shootings have taken place in the United States since 1982.[16] Like the terms assault weapon and "large capacity magazine" (LCM), however, there is no single definition of what constitutes a mass shooting.[17]

13. *Id.*

14. Assault Weapons Ban of 2019, S. 66, 116th Cong. (2019).

15. Duncan v. Becerra, 366 F. Supp. 3d 1131, 1142 (S.D. Cal. 2019), *appeal docketed*, No. 19-55376 (9th Cir. Apr. 4, 2019).

16. Mark Follman, Gavin Aronsen & Deanna Pan, *US Mass Shootings, 1982–2019: Data from Mother Jones' Investigation*, MOTHER JONES (Feb. 26, 2020, 4:15 PM), https://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/ [https://perma.cc/6WSU-2XHF] [hereinafter *US Mass Shootings*].

17. Mark Follman, Gavin Aronsen & Deanna Pan, *A Guide to Mass Shootings in America*, MOTHER JONES (Feb. 26, 2020, 4:15 PM), https://www.motherjones.com/politics/2012/07/mass-shootings-map/ [https://perma.cc/3FJA-FYLM] (defining a "mass shooting" as an incident (1) in which at least four people are killed, not including the perpetrator; (2) that is committed by a "lone shooter," excepting the "Columbine massacre and the Westside Middle School killings, which involved two shooters"; and (3) in which the shootings happened in a "public place" with two exceptions). This definition was adjusted

Depending on how the term is defined, there have been anywhere from 8 to 375 mass shootings in the United States so far in 2019.[18] Speaking from the Senate floor, Senator Feinstein declared her intent in introducing the Assault Weapons Ban of 2019: to prevent future mass shootings.[19] In the same speech, Senator Feinstein declared that this ban would be constitutional, based on the fact that "[t]o date, every court that has considered a ban on assault weapons or [LCMs] has upheld the law."[20] While the 1994 ban was challenged on several grounds, it does not appear to have been challenged on Second Amendment grounds.[21] As such, there is only guidance from lower courts as to how such a ban would fare in the *Heller* era.[22]

A. The Right to Bear Arms: Heller *Lays the Groundwork*

The Supreme Court's landmark decision in *District of Columbia v. Heller* marked a new era of Second Amendment jurisprudence.[23] Justice Scalia, writing for the majority, declared in *Heller* that the

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in regard to incidents occurring from January 2013, lowering the threshold number of victims to three from four pursuant to federal guidelines. *Id.* Mother Jones also included a "handful" of "spree killings" in which the incident took place in more than one location over a short period of time, and *excluded* those incidents "primarily related to gang activity," armed robbery, or killings related to domestic violence within the home that would otherwise fulfill the above criteria. *Id. But see General Methodology*, GUN VIOLENCE ARCHIVE, https://www.gunviolencearchive.org/methodology [https://perma.cc/BN23-LRXP] (last visited Apr. 16, 2020) (defining "mass shooting" as *any* incident in which "[four] or more [people are] *shot or killed*, not including the shooter" without the removal of "any subcategory of shooting" such as gang related violence or "defensive gun use") (emphasis added).

18. *Past Summary Ledgers*, GUN VIOLENCE ARCHIVE, https://www.gunviolencearchive.org/past-tolls [https://perma.cc/BK2J-XEL4] (last visited May 15, 2020); *US Mass Shootings*, *supra* note 16.

19. 165 CONG. REC. S104 (daily ed. Jan. 9, 2019) (statement of Sen. Feinstein) (imploring members of the Republican party to "join [her] in the effort to stop mass shootings . . . [by] reducing the supply of the weapons of war that are used to take the lives of our loved ones"). Senator Feinstein tried to assuage those who protest such a ban on the grounds of its effect on "hunting or sporting firearms," stating that the exemption of "2,258 firearms" for those purposes would render such an argument moot. *Id.*

20. *Id.* This statement would not hold true just two months later when the Southern District of California struck down that state's ban on large capacity magazines in *Duncan v. Becerra*. *See* 366 F. Supp. 3d 1131, 1186 (S.D. Cal. 2019), *appeal docketed*, No. 19-55376 (9th Cir. Apr. 4, 2019).

21. VIVIAN S. CHU, CONG. RESEARCH SERV., R42957, FEDERAL ASSAULT WEAPONS BAN: LEGAL ISSUES 7–11 (2013) (discussing the challenges to the 1994 ban under the Commerce Clause and Equal Protection Clause and the fact that future challenges to such bans will likely rest largely on Second Amendment issues under *Heller*).

22. *See Duncan*, 366 F. Supp. 3d at 1131 (citing exclusively, with exception of Supreme Court precedent ending in 2010 with *McDonald v. City of Chicago*, lower court cases hearing similar issues).

23. District of Columbia v. Heller, 554 U.S. 570, 639 (2008) (Stevens, J., dissenting) (describing the majority's decision as creating a "dramatic upheaval in the law").

Second Amendment protects an individual's right to "possess and carry weapons" for self-defense.[24] Beginning with a textual analysis of the Amendment itself, Justice Scalia held that the right codified was one "of the people"[25] and that it extended "prima facie" to modern weapons.[26]

However, relying on the Court's opinion in *United States v. Miller*, Justice Scalia restricted the protection of the Second Amendment to those weapons "in common use at the time."[27] In reaching the merits particular to *Heller*, the Court declared that the District's "handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American[s]" for the lawful purpose of self-defense, an inherent right central to the Second Amendment.[28] The Court, however, failed to announce the appropriate level of scrutiny, if any, or any other standard under which to examine a law's ability to pass "constitutional muster" when challenged on Second Amendment grounds.[29]

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24. *Id.* at 592 (majority opinion).

25. *Id.* at 579–81. In so holding, Justice Scalia examines other instances in which the Constitution refers to "the people," specifically in the First Amendment, the Fourth Amendment, and the Ninth Amendment. *Id.* These uses, according to Justice Scalia, "unambiguously refer to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body." *Id.*

26. *Id.* at 582 (rejecting the argument, "bordering on the frivolous," that only weapons as they existed at the time the Bill of Rights was ratified are protected by the Second Amendment). In supporting this conclusion, Justice Scalia uses the analogy of the First Amendment's protection of "modern forms of communications" and the Fourth Amendment's application "to modern forms of search." *Heller*, 554 U.S. at 582.

27. *Id.* at 627; United States v. Miller, 307 U.S. 174, 178 (1939) (holding that "a shotgun having a barrel of less than eighteen inches in length" is not protected by the Second Amendment, as the Court did not hear evidence showing that it "is any part of the ordinary military equipment or that its use could contribute to the common defense").

28. *Heller*, 554 U.S. at 628. In deciding the "inherent right of self-defense" was central to the Second Amendment, Justice Scalia relied heavily on historical interpretation of both English common law and analogous state constitutional provisions, among other sources. *Id.* He specifically mentioned, among other things, twelve states that included a Second Amendment analogy, which protected the right of the people to "bear arms in defense of [themselves or himself] and the state." *Id.* at 584.

29. *Id.* at 628–29 (holding that "[u]nder *any of the standards of scrutiny* that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family' *would fail constitutional muster*") (emphasis added) (citation omitted). The Court's failure to specify a standard by which to evaluate Second Amendment challenges may only be rivaled in significance by what later became known as the "common use test" that emerged from *Heller*. *See, e.g.*, Kolbe v. Hogan, 813 F.3d 160, 174 (4th Cir. 2016) (deciding that assault weapons fall into the category of "in common use at the time").

B. The Lower Courts Create a Test

In *Heller*'s immediate aftermath, lower courts struggled to apply its holdings.[30] In 2010, both the Seventh and Third Circuits heard challenges under *Heller*.[31] In writing for the Seventh Circuit, Judge Easterbrook declined to adopt a formal test from *Heller*, instead reading the opinion narrowly for the proposition that handguns cannot be banned within the home.[32] The Third Circuit, however, took the opposite approach and set out to find *Heller*'s hidden test in *United States v. Marzzarella*.[33]

In the *Marzzarella* court's opinion, *Heller* "suggests a two-pronged approach."[34] "First, we ask [if] the challenged law imposes a burden on conduct falling within the scope of the Second Amendment[] . . . ."[35] Then, the second prong is to apply the "appropriate [level] of constitutional scrutiny."[36] In interpreting

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30. *See, e.g.*, *Kolbe*, 849 F.3d at 132 ("The lower courts have grappled with *Heller* in a variety of Second Amendment cases.").

31. United States v. Marzzarella, 614 F.3d 85, 87 (3d Cir. 2010) (upholding a conviction for "possession of a handgun with an obliterated serial number" over a Second Amendment challenge); United States v. Skoien, 614 F.3d 638, 639 (7th Cir. 2010) (en banc) (deciding whether a guilty plea to a misdemeanor domestic violence subjected Skoien to a prohibition on carrying "firearms in or affecting interstate commerce"). Multiple other circuits also heard challenges under the new *Heller* precedent. *See, e.g.*, United States v. Chester, 367 F. App'x 392, 393 (4th Cir. 2010); United States v. White, 593 F.3d 1199, 1200–02 (11th Cir. 2010).

32. *Skoien*, 614 F.3d at 640.

> We do not think it profitable to parse these passages of *Heller* as if they contained an answer to the question . . . . They are precautionary language. Instead of resolving questions such as the one we must confront, the Justices have told us that the matters have been left open. The language we have quoted warns readers not to treat *Heller* as containing broader holdings than the Court set out to establish: that the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense. What other entitlements the Second Amendment creates, and what regulations legislatures may establish, were left open. The opinion is not a comprehensive code; it is just an explanation for the Court's disposition. Judicial opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration.

Id.

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

34. *Id.*

35. *Id.* (citing United States v. Stevens, 533 F.3d 218, 233 (3d Cir. 2008)). The Second Amendment analysis should mirror that of a First Amendment challenge, in that the "preliminary issue in a First Amendment challenge is whether the speech at issue is protected or unprotected." *Id.*

36. *Id.* at 95 (noting that "*Heller* did not prescribe the standard applicable to the District of Columbia's handgun ban" merely holding that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights [the ban] . . . would fail constitutional muster") (alterations

Heller, the court decided that "the Second Amendment can trigger more than one particular standard of scrutiny" and that the law should not be held to "a less stringent standard than the one that would have applied to the [District's ban]."[37]

The levels of constitutional scrutiny referred to by the *Marzzarella* court are products of First Amendment doctrine.[38] The two relevant levels here are strict and intermediate scrutiny.[39] Strict scrutiny requires "a compelling governmental interest, narrow tailoring between that interest and a given law, and that a law must be the least restrictive means possible to achieve the goals of the specified interest."[40] Intermediate scrutiny, "more lenient" than strict scrutiny, merely requires that the law in question be "narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of the information."[41]

After *Marzzarella*, courts across the country began applying this two-prong test to Second Amendment cases.[42] Of special note is what became known as *Heller II*, heard by the Court of Appeals for the District of Columbia, in which current Supreme Court Justice Brett Kavanaugh was the sole dissenter.[43] In *Heller II*, the D.C. Circuit decided a challenge to D.C.'s own version of an assault weapons ban.[44] In deciding the case, the court used the two-prong test to analyze the statute at issue.[45] Applying that test, the court held that while the ban does "impinge upon a Second Amendment right, [it] warrant[s] intermediate rather than strict scrutiny."[46] Under this framework, the court upheld D.C.'s assault weapons ban.[47]

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in original).

37. *Id.* at 97.

38. Matthew D. Bunker, Clay Calvert & William C. Nevin, *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349, 357 (2011).

39. *Marzzarella*, 614 F.3d at 97.

40. Bunker, Calvert & Nevin, *supra* note 38.

41. *Id.* at 358.

42. *See* Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017) (en banc) (collecting cases).

43. Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (arguing that *any* form of scrutiny is not the proper analysis under *Heller*, but that the entirety of any Second Amendment "test" should be "based wholly on text, history, and tradition").

44. *Id.* at 1249 (majority opinion).

45. *Id.* at 1252.

46. *Id.* at 1252–53, 1256 (stating that while *Heller* did reject "any kind of 'rational basis' or

Importantly, the court mentioned *Heller*'s suggestion that "'M[]16 rifles and the like' may be banned because they are 'dangerous and unusual.'"[48] The court proceeded to compare the AR-15 with the M16, although it did not decide whether the AR-15 is dangerous and unusual in the sense relevant to *Heller*.[49] This comparison of semiautomatic firearms to "weapons of war," found in testimony from the Brady Center, a gun control organization, plays a large role in courts upholding such bans.[50]

Eleven years after *Heller*, the Southern District of California broke from the chain of courts that upheld bans on assault weapons and LCMs under *Heller*'s two-prong test.[51] As opposed to most other courts hearing the issue, Judge Benitez declared that the LCM ban at issue would fail "under any level of scrutiny."[52] The court did not

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reasonableness test," it did leave the door open for lower courts to decide on a level of scrutiny). The court in *Heller II* further acknowledged that while the "Supreme Court often applies strict scrutiny to legislation that impinges on a fundamental right," such as the Second Amendment, "it does not logically follow that strict scrutiny is called for whenever a fundamental right is at stake." *Id.* at 1256.

47. *Id.* at 1261–62 (reasoning that "[u]nlike the law held unconstitutional in *Heller*, the laws at issue here do not prohibit the possession of 'the quintessential self-defense weapon,' to wit, the handgun."). The court further held that the Government satisfied its burden of "showing there is a substantial relationship or reasonable 'fit' between, on one hand, the prohibition on assault weapons and magazines holding more than ten rounds and, on the other, its important interests in protecting police officers and controlling crime." *Heller II*, 670 F.3d at 1262.

48. *Id.* at 1263.

49. *Id.*

50. *Id.* at 1262–63; *see also* Kolbe v. Hogan, 849 F.3d 114, 124, 136 (4th Cir. 2017) (en banc) ("*Heller* also presents us with a dispositive and relatively easy inquiry: Are the banned assault weapons and large-capacity magazines 'like' 'M[]16 rifles,' i.e., 'weapons that are most useful in military service,' and thus outside the ambit of the Second Amendment?"); 165 CONG. REC. S104 (daily ed. Jan. 9, 2019) (statement of Sen. Feinstein) ("We must start with reducing the supply of the weapons of war that are used to take the lives of our loved ones."); *A Comprehensive Approach to Preventing Gun Violence*, BRADY UNITED, https://brady-static.s3.amazonaws.com/globals/BradyPolicyApproach.pdf [https://perma.cc/5P86-CBZG] (last visited Apr. 17, 2020) ("Weapons of war, including military-style assault rifles and high-capacity magazines, have no place on America's streets."). The Brady Center to Prevent Gun Violence, or "Brady United," describes itself as "America's oldest and boldest gun violence prevention group[]" and has evolved to advocate for all forms of gun control after being founded as the "National Council to Control Handguns" in 1974. *History of Brady*, BRADY UNITED, https://www.bradyunited.org/history [https://perma.cc/XZ4U-ET2V] (last visited Apr. 17, 2020).

51. District of Columbia v. Heller, 554 U.S. 570, 570 (2008); Duncan v. Becerra, 366 F. Supp. 3d 1131, 1142 (S.D. Cal. 2019), *appeal docketed*, No. 19-55376 (9th Cir. Apr. 4, 2019) (holding that California's ban on LCMs violates the Second Amendment). While this case does not directly address an assault weapons ban, the logic and analysis would apply equally to such a ban. *Duncan*, 366 F. Supp. 3d at 1142.

52. *Duncan*, 366 F. Supp. 3d at 1147, 1156 ("*Heller* says the core of the Second Amendment is the right of law-abiding, responsible citizens to use arms in defense of their home" and "[a] law that

leave the issue there but instead progressed through the levels of scrutiny and explained why each would fail.[53] The court rejected the State's argument that *Kolbe v. Hogan* should guide the court's decision.[54] In the course of the opinion, the court referred to a dissent from a denial of certiorari filed by Justice Thomas.[55] This dissenting opinion helps to support the court's reading of *Heller* to require a "simple test."[56] This test boils down to whether or not a firearm or magazine is "commonly used" and is "not unusual."[57]

While most courts seem to, at the very least, assume that a law infringes on the Second Amendment right, the crux of the opinions often lie in deciding and applying the correct level of scrutiny.[58] However, it would seem under both Judge Benitez's and now-Justice Kavanaugh's reading of *Heller* that such an inquiry should be moot and regulations should be analyzed on the basis of "text, history, and tradition, not by a balancing test."[59]

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imposes such a severe restriction on the fundamental right of self-defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny. . . . This is the case here.") (citations omitted).

53. *Id.* at 1156, 1160 ("Even if [the law's] complete ban did not amount to a destruction of Second Amendment rights, it would still merit the application of strict scrutiny. . . . Even under the lowest formulation of heightened scrutiny, intermediate scrutiny, [the law] fails because it is not a reasonable fit.").

54. *Id.* at 1173–74 ("*Kolbe* concluded that large capacity magazines were beyond the protection of the Second Amendment . . . . based on the thought that such magazines are 'most useful' in military service."); *see Kolbe*, 849 F.3d at 137.

55. *Duncan*, 366 F. Supp. 3d at 1143 (quoting Friedman v. City of Highland Park, 136 S. Ct. 447, 449 (2015)). In *Friedman*, Justices Thomas and Scalia chided the lower courts for ignoring and misinterpreting *Heller*, stating that "*Heller* asks whether the law bans types of firearms commonly used for a lawful purpose—regardless of whether alternatives exist." *Friedman*, 136 S. Ct. at 449. In the final line of the dissent from denial of certiorari, Justice Thomas states, "I would grant certiorari to prevent the Seventh Circuit from relegating the Second Amendment to a second-class right." *Id.* at 450.

56. *Duncan*, 366 F. Supp. 3d at 1143.

57. *Id.*

58. *See, e.g.*, *Kolbe*, 849 F.3d at 121, 137 (taking the time to "alternatively" write out the reasoning for upholding the law under intermediate scrutiny after declaring the case could be decided by declaring the "banned assault weapons and large-capacity magazines [are] 'like' 'M[]16 rifles.'"); *Duncan*, 366 F. Supp. 3d at 1155–73 (spending the vast majority of the decision working through levels of scrutiny and the arguments accompanying each).

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

> [T]he issue with respect to what test to apply to gun bans and regulations is this: Are gun bans and regulations to be analyzed based on the Second Amendment's text, history, and tradition (as well as by appropriate analogues thereto when dealing with modern weapons and new circumstances [ ])? Or may judges re-calibrate the scope of

II. Analysis

"The Second Amendment 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.'"[60] While *Heller* established these twenty-seven words protect an individual right to bear arms, just how far that right extends has been the province of the lower courts since 2008.[61] *Marzzarella*, *Heller II*, *Kolbe*, and *Duncan* all illustrate the lower courts' positions on Second Amendment jurisprudence.[62] A thorough examination of these cases provides insight into how the Supreme Court might decide a challenge to the Assault Weapons Ban of 2019.[63]

A. The Right to Bear Arms: Heller *Revives the People's Right*

When the decision came down in June 2008, *Heller* resolved, legally, an ongoing debate over the meaning of the Second Amendment.[64] Writing for the five-to-four majority, Justice Scalia held, unequivocally, that the Second Amendment protects an

> the Second Amendment right based on judicial assessment of whether the law advances a sufficiently compelling or important government interest to override the individual right? And if the latter, is the proper test strict scrutiny or intermediate scrutiny? In my view, *Heller* 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.

Id.

60. District of Columbia v. Heller, 554 U.S. 570, 576 (2008).

61. Adam M. Samaha & Roy Germano, *Is the Second Amendment a Second-Class Right?*, 68 DUKE L.J. ONLINE 57, 57–58 (2018) (stating that the "[l]ower federal courts and state courts have now fielded more than a thousand Second Amendment claims . . . ."). Samaha and Germano also point out the fact that the lower federal courts "usually reject gun rights claims when they reach the merits." *Id.*

62. *Kolbe*, 849 F.3d at 137 (upholding Maryland's Firearm Safety Act of 2013); *Heller II*, 670 F.3d at 1247–48 (upholding the District of Columbia's assault weapons ban); *id.* at 1269 (Kavanaugh, J., dissenting) (finding the District of Columbia's "ban on semi-automatic rifles . . . unconstitutional under *Heller*"); United States v. Marzzarella, 614 F.3d 85, 87 (3d Cir. 2010) (upholding a conviction for "possession of a handgun with an obliterated serial number" over a Second Amendment challenge); *Duncan*, 366 F. Supp. 3d at 1142 (striking down California's ban on magazines that hold more than ten rounds of ammunition).

63. Assault Weapons Ban of 2019, S. 66, 116th Cong. (2019) (banning a cornucopia of semiautomatic rifles and pistols defined as assault weapons under the guise of preventing mass shootings).

64. *Heller*, 554 U.S. at 570; *The* Heller *Ruling, Five Years On*, CATO INST. (June 4, 2013, 12:00 PM), https://www.cato.org/events/heller-ruling-five-years [https://perma.cc/DZ2X-85RZ] ("The Court finally confronted a long-simmering controversy over the scope of the Second Amendment . . . .").

individual right to own and carry firearms for lawful purposes—most notably the purpose of self-defense.[65] In so holding, the Court rejected the argument made by both the District of Columbia and the dissent that the Amendment protected the right to keep and "'bear arms' . . . only in the service of an organized militia."[66]

1. Text, History, and Politics: Justice Scalia Defines the Right

Heller came before the Court as a challenge to D.C.'s gun laws, which, among other things, prohibited the possession of any unregistered firearm.[67] Further, the law prohibited the registration of handguns by private citizens after 1976.[68] Finally, D.C. law required that any lawfully owned firearms be stored in an inoperable state in any sense relevant for self-defense.[69] This combination of laws, amounting to a "total ban on handguns," set the stage for a new era of

65. *Heller*, 554 U.S. at 592 (finding the text of the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation"). While many insist that *Heller* only held the right to apply within the home, the Court made its position quite clear two years later in *McDonald v. City of Chicago* when Justice Alito began his majority opinion by stating "[t]wo years ago, in [*Heller*], we held that the Second Amendment protects the right to *keep and bear arms for the purpose of self-defense* . . . ." McDonald v. City of Chicago, 561 U.S. 742, 749–50 (2010) (emphasis added). Notably, there is no restriction on location here. *Id.* The Seventh Circuit made note of this fact as well two years after *McDonald* when Judge Posner wrote his opinion in *Moore v. Madigan*, striking down an Illinois law banning the carrying of firearms in public. Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012).

66. *Heller*, 554 U.S. at 586.

67. D.C. CODE § 6-2311 (1993), *amended by* D.C. CODE § 7-2502.01 (2019) ("[N]o person or organization in the District of Columbia . . . shall possess or control any firearm, *unless the person or organization holds a valid registration certificate for the firearm*.") (emphasis added).

68. D.C. CODE § 7-2502.01(a)(4) ("A registration certificate *shall not be issued* for a . . . [p]istol not validly registered to the current registrant in the District prior to September 24, 1976 . . . .") (emphasis added).

69. *Heller*, 554 U.S. at 576 (describing the D.C. laws as requiring "that firearms in the home be kept nonfunctional even when necessary for self-defense"); *see also* D.C. CODE § 7-2507.02 ("[E]ach registrant [shall] keep any firearm in his or her possession unloaded and either disassembled or secured by a trigger lock, gun safe, locked box, or other secure device."). The type of firearm that might be legally possessed includes a narrow scope of firearms "such as registered long guns" not otherwise prohibited—i.e., so-called assault weapons. *Heller*, 554 U.S. at 575. No matter the type or model of firearm, however, the fact that any firearm must be kept "unloaded and either disassembled or secured by a trigger lock, gun safe, locked box, or other secure device" means that in the event the firearm is needed for self-defense, the owner must retrieve the firearm and either unlock the "secure device" or assemble the firearm, load the magazine into the weapon (or load bullets into the cylinder of a revolver), and load a round into the chamber before it would be made operable. D.C. CODE § 7-2507.02.

Second Amendment jurisprudence.[70] The lead plaintiff in this case, Dick Heller, sought to register a handgun to keep within his home.[71] When the District denied his request, the "special police officer" sued D.C. "to enjoin the city from enforcing" its restrictive gun laws.[72]

The holdings from the *Heller* decision, amidst pages of textual and historical analysis (or argument), boil down to a few points of black letter law.[73] First, as stated above, *Heller* held that the Second Amendment protects the "*pre-existing*" individual right "to possess and carry weapons" for lawful purposes unconnected with service in a militia.[74] Second, "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."[75] Third, D.C.'s effective ban on handguns, in addition to the requirement that all firearms in the home be inoperable, violated the Second Amendment.[76] Finally, and importantly, the Court held that in "evaluating Second Amendment restrictions," courts *shall not use* an "interest-balancing inquiry."[77]

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70. *Heller*, 554 U.S. at 576.

71. *Id.* at 575.

72. *Id.* at 575–76. Dick Heller was employed as a "D.C. special police officer," and as such was "authorized to carry a handgun while on duty at the Thurgood Marshall Judiciary Building." *Id.* at 575. It is worth mentioning that *Heller* was a challenge conceived by attorneys Clark Neily, Steve Simpson, and Bob Levy and funded by the Cato Institute. *The Right to Keep and Bear Arms: 10 Years After* Heller, CATO POL'Y REP., Sept.–Oct. 2018, at 16, 16, https://www.cato.org/policy-report/septemberoctober-2018/right-keep-bear-arms-10-years-after-heller [https://perma.cc/9F4W-UDW4]. The attorneys located a total of six plaintiffs described as "ordinary citizens who simply wanted the ability to defend themselves and their loved ones." *Id.*

73. *See* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 267 (2009) (arguing that *Heller*, "under the guise of an originalist inquiry, came perilously close to recreating [*Roe v. Wade*'s] fundamental misapprehension—namely that law is politics pursued by other means").

74. *Heller*, 554 U.S. at 584, 592, 625.

75. *Id.* at 582.

76. *Id.* at 635.

77. *Id.* at 634–35 ("Justice Breyer . . . . proposes [that the court evaluate Second Amendment claims using] 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.'").

2. *Broadly Defined*—Heller*'s Lack of Clarity*

Unfortunately, *Heller* left many important issues undecided or vague.[78] Perhaps the most important is the level of scrutiny, if any, lower courts should apply to a law that implicates the Second Amendment.[79] What Justice Scalia did state quite clearly is that "[u]nder *any* of the standards of scrutiny that we have applied to enumerated constitutional rights[,]" D.C.'s prohibition of handguns in the home was held unconstitutional.[80] In a footnote, however, Justice Scalia seemed to rule out the use of "rational-basis scrutiny," stating that such a test "could not be used to evaluate the extent to which a legislature may regulate a *specific, enumerated right*."[81] This lack of guidance from the Court led to federal appellate courts upholding state assault weapon bans, nearly unanimously, from the time of *Heller* until today.[82]

The other major issue left unresolved by *Heller* is the scope of the Second Amendment.[83] The Court left only a trail of breadcrumbs for lower courts to follow in this regard, describing the scope of the right as protecting broadly "arms 'in common use at the time' for lawful purposes like self-defense."[84] Alternatively phrased, "the Second

78. *Id.* at 635 ("Justice Breyer chides us for leaving so many applications of the right to keep and bear arms in doubt . . . . But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . . [T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.").

79. *Id.*

80. *Heller*, 554 U.S. at 628–29 (emphasis added) ("The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [the lawful purpose of self-defense]. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute.").

81. *Id.* at 628 n.27 (emphasis added). Examining the levels of scrutiny in the First Amendment context, Bunker, Calvert & Nevin note that the "strict scrutiny standard allows virtually no content-based speech restriction to survive . . . ." Bunker, Calvert & Nevin, *supra* note 38, at 358. The "content-based speech" component that mandates strict scrutiny could be analogous to a restriction based on the type of firearm, but as will be discussed in later sections, the level of scrutiny applicable to First Amendment cases should not be imposed on a law restricting ownership of a type of firearm that is in "common use." *Heller*, 554 U.S. at 627–28 n.27.

82. *See, e.g.*, Kolbe v. Hogan, 849 F.3d 114, 137 (4th Cir. 2017) (en banc) (upholding Maryland's Assault Weapons Ban after 3 judge panel previously struck down the same law).

83. *Heller*, 554 U.S. at 624–27.

84. *Id.* at 624. For an argument that the "common use" test of *Heller* is inapposite given that, in the author's view, early colonial militia laws mandated very specific firearms to be owned by private citizens for militia service, see Saul Cornell, *Guns Have Always Been Regulated*, ATLANTIC (Dec. 17,

Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes."[85] The Court narrowed this slightly by clarifying the right "is not unlimited" and stating that *Heller* does not render unconstitutional "longstanding prohibitions" such as those applying to "felons and the mentally ill."[86]

It was in defining the outermost boundaries of the right that the Court offered those interpreting *Heller* a confusing bit of guidance. The Court stated that "dangerous and unusual weapons" may be regulated without violating the Second Amendment and that "weapons that are most useful in military service—M[]16 rifles and the like"—fall into this category without "completely detach[ing] [the right] from the prefatory clause."[87] It is this aspect that the Fourth Circuit seized upon in its en banc rehearing of *Kolbe* to uphold Maryland's prohibition on assault weapons.[88]

3. Heller*'s Immediate Aftermath:* McDonald *Incorporates the Second Amendment*

In the hours and days following the decision in *Heller*, an "avalanche of Second Amendment claims" began in earnest.[89] Gun rights advocates could not wait another minute to press their good

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2015), https://www.theatlantic.com/politics/archive/2015/12/guns-have-always-been-regulated/420531/ [https://perma.cc/PD6A-H5X3]. *But see Militia Laws of New York as Colony and State 1775–1783*, FORT PLANK, https://www.fort-plank.com/1775_Militia_Law.html [https://perma.cc/2WFY-7QZA] (last visited Apr. 17, 2020) ("[E]very person . . . shall . . . provide himself at his own expense with a good musket or firelock fit for service . . . [and] not less than sixteen cartridges suited to the bore of the [firearm].").

85. *Heller*, 554 U.S. at 625.

86. *Id.* at 626.

87. *Id.* at 627–28. Justice Scalia explains this by returning to his textual analysis of the "prefatory clause." *Id.* Here, he addresses the issue of "weapons that are most useful in military service." *Id.* Although he recognizes that modern citizen militias, "to be as effective as militias in the 18th century . . . would require sophisticated arms that are highly unusual in society at large," he maintains that the Court's interpretation of the Second Amendment cannot be changed by the "limited . . . degree of fit" resulting from "modern developments." *Id.* It is further worth noting, for those unfamiliar with firearms, that the "M[]16 rifle" is a fully automatic rifle used by the U.S. military. DEP'T OF THE ARMY, OPERATOR'S MANUAL FOR RIFLE, 5.56-MM, M16 (1005-00-856-6885) RIFLE, 5.56-MM, M16A1 (1005-00-073-9421), at 1 (1987), https://ia800207.us.archive.org/35/items/OperatorsManualForM16M16a1/OperatorsManualForM16M16a1_text.pdf [https://perma.cc/69TR-C3CM] [hereinafter OPERATOR'S MANUAL FOR ARMY].

88. Kolbe v. Hogan, 849 F.3d 114, 131, 137 (4th Cir. 2017) (en banc).

89. Wilkinson, *supra* note 73, at 282.

fortune, with suits filed against the City of Chicago the same day as *Heller*'s announcement.[90] One of these suits would have a tremendous impact just two years later and would only increase the volume of this avalanche.[91]

Filed the same day as *Heller*'s decision, *McDonald v. City of Chicago* sought to challenge, among other things, the city's ban on handguns while arguing that "the Second Amendment right is incorporated as against the states and their political subdivisions."[92] Upon reaching the Supreme Court, Justice Alito wrote for the majority, which held that indeed, "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*."[93] As a result, there now exists a constitutional foothold for suits seeking to strike down gun control laws on the state level on Second Amendment grounds.[94]

4. Some Much Needed Guidance, Eight Years Later

In 2016, the Court heard another Second Amendment case: *Caetano v. Massachusetts*.[95] In *Caetano*, the Court reversed the Massachusetts Supreme Court's ruling and struck down a state law "prohibiting the possession of stun guns."[96] While this case reaffirmed *Heller*'s holding that the Second Amendment right applies "prima facie[] to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," it also provided some insight into how the Court may address a hypothetical challenge to a ban on assault weapons.[97]

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90. *Id.*

91. *Id.*

92. Complaint at 1, 9–10, McDonald v. City of Chicago, 2008 WL 5111112 (N.D. Ill. 2008) (No. 08 C 3645).

93. McDonald v. City of Chicago, 561 U.S. 742, 791 (2010). Justice Alito also made a point to reassert both that the Second Amendment right, as described in *Heller*, is a "*fundamental right*" and the fact that an "interest-balancing test" has been flat out rejected by the court. *Id.* at 790–91.

94. *See, e.g.*, Caetano v. Massachusetts, 136 S. Ct. 1027, 1028 (2016); United States v. Marzzarella, 614 F.3d 85, 87 (3d Cir. 2010).

95. *Caetano*, 136 S. Ct. at 1028.

96. *Id.* at 1027–28.

97. *Id.* at 1027.

In his concurring opinion, Justice Alito (joined by Justice Thomas) illuminated the contours of *Heller*'s "dangerous and unusual" exception.[98] First, Justice Alito made clear that "[a] weapon may not be banned unless it is *both* dangerous *and* unusual."[99] Next, Justice Alito addressed the definition of "dangerous."[100] In doing so, he made clear the idea that "a weapon is 'dangerous per se' if it is 'designed and constructed to produce death or great bodily harm' and 'for the purpose of bodily assault or defense'" is a nonstarter, calling such "relative dangerousness" "irrelevant" as long as the weapon "belongs to a class of arms commonly used for lawful purposes."[101] Importantly, he stated that *Heller* proscribes "categorically [prohibiting]" firearms "just because they are dangerous."[102]

Justice Alito also addressed what is meant by common use.[103] Brushing aside the state court's reasoning based on comparing ownership of stun guns to firearms, Justice Alito stated the "relevant statistic" is the number of total owners and that "hundreds of thousands" of sales render stun guns in common use.[104] While thousands of suits were filed and decided before *Caetano* made its way to the Supreme Court, this insight should prove valuable for lower courts going forward. [105]

In those cases decided before *Caetano*, judges in each circuit tasked with interpreting Justice Scalia's *Heller* opinion used varying methodologies in evaluating laws implicating the Second Amendment right.[106] While the "two-part test" discussed below

98. *Id.* at 1031 (Alito, J., concurring).

99. *Id.*

100. *Id.*

101. *Caetano*, 136 S. Ct. at 1031 (Alito, J., concurring) (stating that "*Heller* defined the 'Arms' *covered by* the Second Amendment to include 'anything that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another'").

102. *Id.*

103. *Id.* at 1032.

104. *Id.* ("[T]he [fact that the] number of Tasers and stun guns is dwarfed by the number of firearms . . . is beside the point. Otherwise a State would be free to ban *all* weapons *except* handguns, because 'handguns are the most popular weapon chosen by Americans for self-defense in the home.'").

105. *See* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433, 1458 (2018) (describing the construction of a "dataset" which would include more than one thousand Second Amendment opinions between *Heller* and February 2016).

106. Duncan v. Becerra, 366 F. Supp. 3d 1131 (S.D. Cal. 2019), *appeal docketed*, No. 19-55376 (9th

seems to "predominate[] throughout the lower courts," some courts seem to hew closer to what Justice Scalia had in mind when he wrote *Heller*.[107]

B. Marzzarella *Creates a Two-Part Test*

Only two years after *Heller*, the Third Circuit created the two-part test that would come to "predominate[] throughout the lower courts."[108] In *United States v. Marzzarella*, Judge Anthony Scirica addressed a Second Amendment challenge to a criminal defendant's conviction under federal law for "possession of a handgun with an obliterated serial number."[109] In upholding the conviction, Judge Scirica created a two-pronged test under which Second Amendment challenges could be analyzed:[110]

> First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.[111]

In reaching the merits of the case, Judge Scirica decided that the law in question (requiring serial numbers on firearms) did not infringe on the Second Amendment right.[112]

More importantly, the court analogized the Second Amendment with the First and declared that "[s]trict scrutiny does not apply automatically any time an enumerated right is involved."[113] However,

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Cir. Apr. 4, 2019).

107. *See*, *e.g.*, Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012); Ruben & Blocher, *supra* note 105, at 1452.

108. David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 204 (2017); Ruben & Blocher, *supra* note 105, at 1452.

109. United States v. Marzzarella, 614 F.3d 85, 87 (3d Cir. 2010).

110. *Id.* at 89.

111. *Id.* (citations omitted).

112. *Id.* at 95.

113. *Id.* at 96.

Judge Scirica did note that, while this was the case for First Amendment issues, the "standards of scrutiny and how they apply may differ under the Second Amendment."[114] In applying the second prong of the test in this case, the court reasoned that the law here "should merit a less stringent standard than the one that would have applied [in *Heller*]" as the ban at issue in *Heller* was "at the far end of the spectrum of infringement."[115]

Since the law here did not have "the effect of prohibiting the possession of any class of firearms" and was "more accurately characterized as a regulation of the *manner* in which persons may lawfully exercise their Second Amendment rights," the court decided to apply intermediate scrutiny.[116] The court then synthesized the varying applications of intermediate scrutiny in the First Amendment context and required the "asserted governmental end to be more than just legitimate, either 'significant,' 'substantial,' or 'important.'"[117] Further, "the fit between the challenged regulation and the asserted objective [must] be reasonable, not perfect."[118] And finally, "[t]he regulation need not be the least restrictive means of serving the interest, but may not burden more speech than is reasonably necessary."[119]

The two-part test announced by Judge Scirica in *Marzzarella* became the basis upon which circuit courts across the nation addressed Second Amendment challenges.[120] In the context of challenges to bans on assault weapons, every federal circuit court to hear such a challenge upheld the law when all was said and done.[121]

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114. *Id.* at 96 n.15.

115. *Marzzarella*, 614 F.3d at 97.

116. *Id.* (emphasis added) (analogizing the application of scrutiny here to the context of the First Amendment by comparing regulating the "exercise of protected conduct"—i.e., "[d]iscrimination against particular messages in a public forum"—to "regulation of the form in which that conduct occurs"—e.g., the "time, place, and manner doctrine").

117. *Id.* at 98.

118. *Id.*

119. *Id.*

120. Kopel & Greenlee, *supra* note 108.

121. *See* Kolbe v. Hogan, 813 F.3d 160, 183 (4th Cir. 2016), *rev'd*, 849 F.3d 114 (4th Cir. 2017) (en banc) (applying strict scrutiny to a ban on assault weapons and LCMs, and strongly suggesting that the law is unconstitutional, although not deciding that issue but instead remanding for the district court to apply the correct level of scrutiny). *But see* 165 CONG. REC. S104 (daily ed. Jan. 9, 2019) (statement of

While the D.C. Circuit did not break from this pattern, *Heller v. District of Columbia* is relevant to this discussion for the very important reason that then-Judge Kavanaugh wrote a dissent that greatly illuminates his Second Amendment jurisprudence in the post-*Heller* era.[122]

C. Text, History, and Tradition Ignored—Heller II *and Now-Justice Kavanaugh's Dissent*

Filed a month after *Heller* was decided, *Heller v. District of Columbia* sought to challenge, among other things, D.C.'s ban on assault weapons.[123] In addressing this challenge, the D.C. Circuit "adopt[ed], as have other circuits," *Marzzarella*'s two-prong test.[124] Reaching the merits of D.C.'s ban, the court held that because the law "[does] not prohibit the possession of 'the quintessential self-defense weapon'" and allows for the possession of *some* "suitable and commonly used weapon for protection in the home or for hunting," the law probably does not "impinge at all upon the core right," and even if it does, it does "not impose a substantial burden upon that right."[125] As such, the court applied intermediate scrutiny to the law and determined that it did not fail constitutional muster under its analysis.[126]

Sen. Feinstein) (stating that every challenge to laws banning assault weapons had been unsuccessful). The Fourth Circuit would not wait for the case to come back up from the District Court, however, and upheld the law on a rehearing en banc. *Kolbe*, 849 F.3d at 114.

122. Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

123. Second Amended Complaint at 18–19, Heller v. District of Columbia, 698 F. Supp. 2d 179 (D.D.C. 2010) (No. 1:08-cv-01289) (challenging D.C.'s prohibition on "three classes of items which are commonly possessed by law-abiding persons throughout the United States for lawful purposes: pistols that are not on the California Roster of Handguns Certified for Sale; firearms the District pejoratively calls assault weapons; and magazines that have the capacity to accept more than 10 rounds of ammunition.").

124. *Heller II*, 670 F.3d at 1252 (stating that *Heller* held that "there are certain types of firearms regulations that do not govern conduct within the scope of the [Second] Amendment," and laying out the framework for *Marzzarella*'s two-prong test).

125. *Id.* at 1261–62 (citing a 1995 journal article for the proposition that "revolvers and semi-automatic pistols are together used almost 80% of the time in incidents of self-defense with a gun" and a Treasury Department study from 1998 for the proposition that "semi-automatic assault rifles studied are 'not generally recognized as particularly suitable for or readily adaptable to sporting purposes'").

126. *Id.* at 1264 (stating that the court "conclude[s] the District has carried its burden of showing a

While the majority opinion in *Heller II* won the day, the current Supreme Court Justice Kavanaugh may win the war.[127] In his dissenting opinion, Judge Kavanaugh broke sharply from his brethren on the D.C. Circuit and reframed the question entirely.[128] Instead of simply picking up where other circuits left off and applying *Marzzarella*'s two-prong test, Judge Kavanaugh proclaimed that *Heller* provides "fairly precise guidance" by instructing lower courts to "assess gun bans and regulations based on *text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny*."[129]

In reaching this conclusion, Judge Kavanaugh stated that as he reads *Heller*, the Court *explicitly rejected* the use of intermediate scrutiny in Justice Scalia's response to Justice Breyer's reference to intermediate scrutiny based on a First Amendment analogy.[130] Further, Judge Kavanaugh posited that the Court in *Heller* was unlikely to reject intermediate scrutiny while embracing strict scrutiny, again citing Justice Breyer's dissent.[131] Finally, Judge Kavanaugh reiterated the fact, noted by Justice Breyer in *Heller*, that under the Court's "history- and tradition-based test" a "slew of gun laws" have been approved that likely would not pass muster under a strict scrutiny analysis.[132]

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substantial relationship between the prohibition of both semiautomatic rifles and magazines holding more than ten rounds and the objectives of protecting police officers and controlling crime"). In reaching its conclusion, the court relied heavily on testimony of Brian J. Siebel of the Brady Center to Prevent Gun Violence—an ardent gun-control group—provided to D.C.'s Committee on Public Safety as part of a report recommending the law at issue. *Id.* at 1261. The Committee determined that "assault weapons 'have no legitimate use as self-defense weapons, and would in fact increase the danger to law-abiding users and innocent bystanders if kept in the home or used in self-defense situations.'" *Id.*; *see also* Alex Gangitano, *Brady Gun Control Group Gets Rebranding*, HILL (Feb. 26, 2019, 8:01 PM), https://thehill.com/business-a-lobbying/business-a-lobbying/431718-brady-gun-control-group-gets-rebranding [https://perma.cc/5D7M-FAJE].

127. *Heller II* was decided in 2011, and Justice Kavanaugh was confirmed by the Senate as President Trump's second Supreme Court justice, replacing Justice Anthony Kennedy, on October 6, 2018. Clare Foran & Joan Biskupic, *Where Brett Kavanaugh Stands on Key Issues*, CNN (Oct. 6, 2018, 4:24 PM), https://www.cnn.com/2018/07/09/politics/kavanaugh-on-the-issues/index.html [https://perma.cc/UA6Y-NG7K].

128. *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting).

129. *Id.* (emphasis added).

130. *Id.* at 1278.

131. *Id.*

132. *Id.*

In reaching the merits and applying "*Heller*['s] history- and tradition-based approach," Judge Kavanaugh would hold the laws at issue in *Heller II* unconstitutional.[133] Focusing on the history of semiautomatic rifles, the difference between semiautomatic and automatic rifles, Supreme Court precedent recognizing semiautomatic rifles as having been "traditionally . . . widely accepted as lawful possessions," and the fact that such firearms are in common use, Judge Kavanaugh stated that, while bans on automatic firearms are still valid, bans on semiautomatic weapons are not.[134]

D. Judicial Opposition—Kolbe*'s Break from the Use of Scrutiny*

Decided in 2017, *Kolbe v. Hogan* represents the epitome of what scholars have referred to as "a deep judicial opposition to gun rights."[135] After the Fourth Circuit issued a ruling that directed the lower court to apply strict scrutiny to the laws at issue, the court granted a rehearing en banc.[136] *Kolbe* involved a challenge to Maryland's Firearm Safety Act of 2013 (FSA), which banned LCMs and firearms classified as "assault weapons."[137]

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133. *Id.* at 1285.

134. *Heller II*, 670 F.3d at 1287–88 (Kavanaugh, J., dissenting) (quoting Staples v. United States, 511 U.S. 600 (1994)) (examining the history of both semiautomatic rifles and automatic rifles).

135. Samaha & Germano, *supra* note 61 (suggesting that there is "an allegedly deep judicial opposition to gun rights" currently acting as an impetus for gun rights supporters to argue for "renewed Supreme Court attention" to Second Amendment issues).

136. Kolbe v. Hogan, 813 F.3d 160, 192 (4th Cir. 2016); Kolbe v. Hogan, 636 F. App'x 880 (4th Cir. 2016) (order granting rehearing en banc).

137. MD. CRIM. LAW § 4-301 (2013) (defining "assault weapon" as "an assault long gun; an assault pistol; or a copycat weapon."). Section 4-301 defines "assault pistol" by enumerating specific firearms and specifying the definition extends to firearms made by other manufacturers if it is "a copy." *Id.* A "copycat weapon" is defined as:

> [1.] a semiautomatic centerfire rifle that can accept a detachable magazine and has any two of the following: [(a) a folding stock; (b) a grenade launcher or flare launcher; or (c) a flash suppressor;] [2.] a semiautomatic centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds; [3] a semiautomatic centerfire rifle that has an overall length of less than 20 inches; [4] a semiautomatic pistol with a fixed magazine that can accept more than 10 rounds; [5] a semiautomatic shotgun that has a folding stock; or [6] a shotgun with a revolving cylinder.

Id. § 4-301(h)(1). Finally, the statute specifies that a "copycat weapon does not include an assault long gun or an assault pistol." *Id.* § 4-301(h)(2). To find the definition of an "assault long gun," one must locate MD PUB. SAFETY § 5-101(r)(2), which lists forty-five specific models of firearms, including the "AK-47 in all forms"; any and all semiautomatic rifles made by Bushmaster; and any "and all

Although it went through the motions and declared the FSA would survive intermediate scrutiny, the court in *Kolbe* rested its holding on its decision that "the banned assault weapons and [LCMs are] 'like' 'M[]16 rifles,' i.e., 'weapons that are most useful in military service,' and thus outside the ambit of the Second Amendment[.]"[138] The court found it glaringly obvious that "AR-15-type rifles are 'like' M16 rifles under any standard definition of [the word like]."[139]

Comparing the AR-15 and the M16, the court stated (without citing any source) that the rate of fire for the automatic M16 allows the weapon to "empty a thirty-round magazine" in "two seconds," while the AR-15 takes "as little as five seconds" to do the same.[140] The U.S. Army, however, issued an operator's manual for the M16, which states that its rate of fire is between one hundred fifty and two hundred rounds per minute.[141] Simple math allows one to determine that the M16, according to the U.S. Army, fires at a rate (assuming two hundred rounds per minute) of three and one-third rounds per second or six and two-thirds rounds in two seconds—a far cry from the nine hundred rounds per minute the court in *Kolbe* believed to be true.[142] Further, the same manual states that when firing in the semiautomatic setting, the M16 can fire up to sixty-five rounds per minute; in the five seconds the court believed it took for the AR-15 to fire thirty rounds, the M16 fires 5.4166 rounds—not thirty.[143] Assuming the AR-15 does not fire any faster as a semiautomatic rifle

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imitations" of the "Colt AR-15." MD PUB. SAFETY § 5-101(r)(2) (2017).

138. *Kolbe*, 849 F.3d at 136–37. The court, in addressing which level of scrutiny it would apply, stated that the banning of the semiautomatic rifles listed in the statute "does not severely burden the core protection of the Second Amendment, i.e., the right of law-abiding citizens to use arms for self-defense in the home." *Id.* Reaching this conclusion, the court described the firearms at issue as "military-style weapons" that are likely not actually "possessed, or even suitable, for self-protection." *Id.*

139. *Id.* at 136 (defining "'like' as '[h]aving the same, or nearly the same, appearance, qualities, or characteristics; similar'"(citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 1431 (2d ed. 1948))).

140. *Id.*

141. OPERATOR'S MANUAL FOR ARMY, *supra* note 87, at 1–6.

142. *Kolbe*, 849 F.3d at 136 (stating the M16 can fire thirty rounds in two seconds—thirty rounds times thirty seconds (or fifteen times sixty seconds) is nine hundred); OPERATOR'S MANUAL FOR ARMY, *supra* note 87 at 1–4.

143. *Kolbe*, 849 F.3d at 136 (stating the AR-15 can fire thirty rounds within five seconds—sixty-five rounds divided by sixty seconds is 1.083333, times five is 5.416666); OPERATOR'S MANUAL FOR ARMY, *supra* note 87 at 1–4.

than does the M16 firing in the same capacity, the court's logic here is flawed at best and disingenuous at worst.

E. Breaking Ranks: Judge Benitez's Hardware Test and Duncan v. Becerra

Although the majority of courts apply *Marzzarella*'s two-prong test, which routinely results in the application of intermediate scrutiny and the upholding of the law, Judge Roger Benitez of the Southern District of California followed now-Justice Kavanaugh's lead and struck down the state's ban on LCMs.[144] While decided eight years after *Heller II* and in the face of courts across the country applying *Marzzarella*'s test, *Duncan* represents an opportunity for the Supreme Court to finally settle the issue based on now-Justice Kavanaugh's reasoning.[145]

In the eyes of Judge Benitez, *Heller* calls for a "simple test."[146] It is not one that calls for any level of constitutional scrutiny, but is what he refers to as "a hardware test."[147] That test provides: "Is the firearm hardware commonly owned . . . by law-abiding citizens . . . for lawful purposes? If the answer[] [is] 'yes,' the test is over. The hardware is protected."[148] However, in staying true to Ninth Circuit precedent, Judge Benitez acknowledged that the appellate court would apply "a tripartite binary test with a sliding scale and a reasonable fit. In other words, there are three different two-part tests, after which the sliding scale of scrutiny is selected."[149]

Applying the Ninth Circuit's "sliding scale," Judge Benitez held that "under any level of scrutiny" the LCM ban would fail

144. Duncan v. Becerra, 366 F. Supp. 3d 1131, 1142 (S.D. Cal. 2019), *appeal docketed*, No. 19-55376 (9th Cir. Apr. 4, 2019).

145. *See* Friedman v. City of Highland Park, 136 S. Ct. 447, 447 (2015) (Thomas, J., dissenting from denial of cert.) (suggesting that a ban on assault weapons is unconstitutional as they are one of "the most commonly owned semiautomatic firearms . . . ."). Justice Thomas was joined by Justice Scalia in his dissent from denial of certiorari. *Id.*; *see also Duncan*, 366 F. Supp. 3d at 1142 (citing then-Judge Kavanaugh's dissent in *Heller II* as providing the correct approach to assessing "gun bans and regulations"); *id.* at 1173 (addressing the *Kolbe* decision).

146. *Duncan*, 366 F. Supp. 3d at 1142.

147. *Id.*

148. *Id.*

149. *Id.* at 1155.

constitutional muster.[150] Judge Benitez proceeded to work through both strict and intermediate scrutiny in addressing the LCM ban and determined that in fact it would fail "under any level of scrutiny."[151] In applying intermediate scrutiny, the court addressed the State's argument that the law "is 'narrowly tailored to further [the asserted] substantial government interest.'"[152]

In this case, the State argued that the LCM ban was designed to address the problems of mass shootings.[153] The court examined the history of mass shootings in both the U.S. and in California and determined that "over the last 36 years, 17 took place in California."[154] Further, the court took the State to task for relying on "news articles and interest group surveys" to support its position that "mass shootings are a problem made worse by [LCMs]."[155] Instead, the court asked, "Where are the actual police investigation reports? . . . Constitutional rights are being subjected to litigation by inference about whether a pistol or a rifle in a news story might have had [a LCM]."[156] In the end, the court held that the "fit" of the LCM ban at issue "is, at best, ungainly and very loose."[157]

Describing the State's rationale and actions as "turn[ing] the Second Amendment on its head," the court stated that "[l]awful arms do not become unprotected merely because they resemble unlawful arms."[158] Judge Benitez's ruling is on appeal and may very well be overturned by the Ninth Circuit.[159] No matter the outcome, it seems

150. *Id.* at 1156 ("A law that imposes such a severe restriction on the fundamental right of self-defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny.").

151. *Id.* at 1156–72.

152. *Duncan*, 366 F. Supp. 3d at 1170.

153. *Id.* at 1162, 1170.

154. *Id.* at 1163.

155. *Id.* at 1165.

156. *Id.*

157. *Id.* at 1170–71 (citing the fact that the law offers no exception for home defense; for military personnel, "specially trained to expertly use firearms" in a state with "numerous military bases;" or for concealed carry permit holders while offering exceptions for "movie props."). Judge Benitez also points out the fact that "[t]en years of a federal ban on [LCMs] did not stop mass shootings nationally [and] [t]wenty years of a California ban . . . have not stopped mass shootings in California." *Duncan*, 366 F. Supp. 3d at 1170.

158. *Id.* at 1173.

159. Duncan v. Becerra, 366 F. Supp. 3d 1131 (S.D. Cal 2019), *appeal docketed*, No. 19-55376 (9th

likely that the Ninth Circuit's ruling will be appealed to the Supreme Court, and should the Court hear the case, it seems likely that Judge Benitez's opinion will carry the day.

III. Proposal

Since *Heller* and *McDonald* were decided, the Court has remained practically silent on the Second Amendment.[160] While the Court stands idly by, lower courts continue to abrogate the "right of the people to keep and bear [a]rms."[161] Consistently, lower courts uphold laws that infringe on the right protected by the Second Amendment, and consistently, the Court denies certiorari.[162] It is high time the Court takes a case and lays down the law.

A. Give Them What They Want—Give Them a Test

When the Court eventually takes a case, logic should dictate that the Court will either endorse *Marzzarella*'s two-part test, announce a new test of its own making, or adopt a view like that espoused in now-Justice Kavanaugh's dissent in *Heller II*.[163] No matter what it does, the Court must spell out, in minute detail, the manner in which

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Cir. Apr. 4, 2019).

160. With the exception of *Caetano v. Massachusetts*, a per curiam opinion consisting of five paragraphs, in which the Court chided the Supreme Judicial Court of Massachusetts for its total disregard of the *Heller* decision. Caetano v. Massachusetts, 136 S. Ct. 1027, 1027–28 (2016).

161. U.S. CONST. amend. II. The cases upholding laws that infringe upon the Second Amendment right are numerous, and many have been discussed in this Note. *See supra* Sections II.B–D.

162. *See, e.g.*, Peruta v. California, 137 S. Ct. 1995, 1996 (2017) (Thomas, J., dissenting from denial of cert.) ("Neither party disputes that the issue is one of national importance or that the courts of appeals have already weighed in extensively. I would therefore grant the petition for a writ of certiorari."); Friedman v. City of Highland Park, 136 S. Ct. 447, 447 (2015) (Thomas, J., dissenting from denial of cert.) ("Despite [*Heller* and *McDonald*], several appellate courts—including the Court of Appeals for the Seventh Circuit in the decision below—have upheld categorical bans on firearms that millions of Americans commonly own for lawful purposes. Because noncompliance with our Second Amendment precedents warrants this Courts attention as much as any other of our precedents, I would grant certiorari in this case.") (citations omitted); Jackson v. City of San Francisco, 135 S. Ct. 2799, 2799–2800 (2015) (Thomas, J., dissenting from denial of cert.) ("Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it."); Kolbe v. Hogan, 849 F.3d 114, 125–36 (4th Cir. 2017) (en banc).

163. Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

lower courts should address Second Amendment challenges. It seems that, unless the Court holds unsympathetic judges accountable, lower courts will continue to relegate the Second Amendment to its status as a "second class right."[164]

Although now-Justice Kavanaugh's *text, history, and tradition* assessment is likely along the lines of what Justice Scalia envisioned for the Second Amendment when he wrote *Heller*, given the lower courts implementation of that decision, the Court is going to have to be more specific.[165] To prevent judges from infringing upon the right protected by the Second Amendment, it seems the Court must resort to a simply applied, bright-line test. It may be that judges are merely ignorant of the particulars of firearm knowledge needed to assess laws like bans on assault weapons.[166] There is also the distinct possibility that some are flat-out hostile to the idea that the Second Amendment would protect a semiautomatic rifle.[167]

1. The Right of the People

To facilitate the creation of a test to be used in Second Amendment challenges, the Court must specify the scope of the right itself. Although Justice Scalia stated that "the inherent right of self-defense has been central to the Second Amendment right," he also did not

164. *Friedman*, 136 S. Ct. at 450 (Thomas, J., dissenting from denial of cert.) (stating that certiorari should be granted "to prevent the Seventh Circuit from relegating the Second Amendment to a second-class right").

165. *See, e.g.*, *Kolbe*, 849 F.3d at 141 (ignoring *Heller*'s mandated "common use" test while proclaiming the decision upholding Maryland's ban on assault weapons is "entirely faithful to the *Heller* decision") ("At bottom, the dissent concludes that the *so-called popularity* of the banned assault weapons [renders them protected by the Second Amendment and thus, unable to be banned].") (emphasis added).

166. *See generally* Duncan v. Becerra, 366 F. Supp. 3d 1131 (S.D. Cal. 2019), *appeal docketed*, No. 19-55376 (9th Cir. Apr. 4, 2019).

167. *See Kolbe*, 849 F.3d at 137 (describing an AR-15 as "unquestionably most useful in military service" and stating that the design of the rifle along with some accessories "serve specific, combat-functional ends."). The majority goes on to impute almost magical abilities to LCMs, stating that they "enable a shooter to hit 'multiple human targets very rapidly' [and] 'contribute to the unique function of any assault weapon to deliver extraordinary firepower.'" *Id.* The majority ignores that the rifle it would not likely consider a "weapon of war"—the Henry lever action rifle—was in fact developed to allow a faster rate of fire in the Civil War. Jon Stokes, *Why Millions of Americans—Including Me—Own the AR-15*, VOX (June 20, 2016, 11:00 AM), https://www.vox.com/2016/6/20/11975850/ar-15-owner-orlando [https://perma.cc/NRT5-6DWR]. In fact, the author here refers to the lever action rifle as the "AR-15 of its day." *Id.*

limit the right to protect only that "core lawful purpose."[168] *Heller*'s language allows a logical inference that the right does not depend on the use of the firearm, only that the use must be lawful.[169] Justice Thomas gives this construction of the Second Amendment's scope more weight in his dissenting opinions from denials of certiorari. "The question under *Heller* is . . . whether the law bans types of firearms commonly used for a lawful purpose—regardless of whether alternatives exist."[170]

Further, the Court held in *Heller* and reaffirmed in *Caetano* that the Second Amendment applies to modern "arms."[171] However, the Court also stated that "the Second Amendment right, whatever its nature, extends only to certain types of weapons."[172] While not exactly winning any points for specificity, Justice Scalia does provide the guideposts for determining what weapons are protected: those "in common use . . . for lawful purposes," but not "dangerous and unusual weapons."[173]

So, the question then becomes, what is *in common use*? Justices Alito and Thomas provide a hint to answer that question in *Caetano*.[174] Although only serving as a baseline, "hundreds of thousands . . . sold to private citizens" seems to satisfy this requirement.[175] The follow-up question, what is *dangerous and unusual*, is answered in the same text. Dangerous and unusual merely

168. District of Columbia v. Heller, 554 U.S. 570, 628, 630 (2008).

169. *Id.*

170. Friedman v. City of Highland Park, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of cert.).

171. Caetano v. Massachusetts, 136 S. Ct. 1027, 1027–28 (2016); *Heller*, 554 U.S. at 582 ("Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment.").

172. *Heller*, 554 U.S. at 623.

173. *Id.* at 624–25, 627 (stating that *United States v. Miller* stands for the proposition that the Second Amendment protects weapons "in common use at the time" and the Court thinks "that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'"). The *Kolbe* en banc majority's position that *Heller* states that so-called assault weapons can be outlawed because they are "'like' the M16" is simply untenable, and given that the court is the only outlier to use this strategy—in order to achieve their desired result: the vilification and banning of semiautomatic rifles—this argument will not be addressed in detail. *Kolbe*, 849 F.3d at 136.

174. *Caetano*, 136 S. Ct. at 1032 (Alito, J. concurring); *see also supra* Section II.A.4.

175. *Caetano*, 136 S. Ct. at 1032.

describes a weapon not in common use for a lawful purpose.[176] Further, "*Heller* draws a distinction between [firearms commonly used for a lawful purpose] and weapons specially adapted to unlawful uses and not in common use, such as sawed-off shotguns."[177]

Finally, *Heller* and the Court's subsequent opinions, along with the dissents from denials of certiorari, make clear that banning one "class" of firearm is unconstitutional even though "the possession of other firearms . . . is allowed."[178] As long as a weapon is in common use for a lawful purpose, it is protected by the Second Amendment.[179]

2. "Shall Not Be Infringed"

Given the broad nature of the right just discussed, along with the text of the Second Amendment, the test proposed is fairly straightforward.[180] If the regulation purports to ban "an entire class of arms" that is "in common use at the time" for a lawful purpose, the law infringes on the Second Amendment.[181] And if a law infringes on the Second Amendment, it is unconstitutional, as the text of the Second Amendment—"shall not be infringed"—makes perfectly clear.[182]

As Justice Scalia pointed out in *Heller*, no "interest balancing tests" are applicable to the Second Amendment, and given the

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176. *Id.* at 1031 (quoting *Heller* for the proposition that "'dangerous and unusual weapons' that may be banned [is contrasted] with protected 'weapons . . . in common use at the time.'").

177. Friedman v. City of Highland Park, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of cert.).

178. *Heller*, 554 U.S. at 629.

179. *Friedman*, 136 S. Ct. at 447–48 (Thomas, J., dissenting from denial of cert.); *Heller*, 554 U.S. at 629. Justice Thomas made very clear that, in his view, the Second Amendment right encompasses all "arms" other than "those weapons not typically possessed by law-abiding citizens for lawful purposes." *Friedman*, 136 S. Ct. at 447–48.

180. *Heller*, 554 U.S. at 629. This ignores, of course, the issue of who is protected by the right. *Heller* makes clear that the right is held by "the people" as individuals, although laws restricting the right's application to "felons and the mentally ill" are presumptively valid. *Id.* at 626–27.

181. *Id.* at 624, 628 ("[T]he handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [a] lawful purpose.").

182. U.S. CONST. amend. II. This proposed test admittedly is a very narrow one. *See Heller*, 554 U.S. at 629. It does not address other laws that may implicate the Second Amendment and must be analyzed under a level of scrutiny but confines itself to wholesale bans on categories of firearms such as the handgun ban at issue in *Heller*. *Id.*

following quote from *Heller*, now-Justice Kavanaugh likely hit close to home when he suggested the test must be based on "text, history, and tradition."[183]

> The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad . . . . Like the First, [the Second Amendment] is the very *product* of an interest balancing by the people . . . . And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.[184]

While some may argue for at least applying strict scrutiny to laws implicating the Second Amendment right, this test is unlikely to protect the right as defined by *Heller*.[185] Even in the First Amendment context, where scrutiny was born, strict scrutiny is no longer protecting speech to the extent it once did.[186] Further, lower courts unsympathetic, morally opposed, or plainly hostile to the

183. Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

184. *Heller*, 554 U.S. at 634–35.

185. *Id.*; *Heller II*, 670 F.3d at 347–48 (Kavanaugh, J., dissenting). Now-Justice Kavanaugh cites both Justice Breyer's dissent and Justice Scalia's majority opinion in *Heller* in answering his own question of whether or not it is "possible . . . that the *Heller* Court was ruling out intermediate scrutiny but leaving open the possibility that strict scrutiny might apply[.]" *Id.* at 348. In answering the question, now-Justice Kavanaugh stated that such a result "seems highly unlikely." *Id.*

186. Bunker, Calvert & Nevin, *supra* note 38 ("[C]racks in [the] structure [of strict scrutiny] are evident. For instance, empirical evidence suggests strict scrutiny is not as fatal as once advertised . . . . [F]rom 1990 to 2003 . . . governmental regulation of free speech survived strict scrutiny in 22% of First Amendment cases.").

Second Amendment have already found ways to work around the system of scrutiny to substitute their own views for the Second Amendment's guarantee.[187]

B. The Test and the Assault Weapons Ban of 2019

If Senator Feinstein's law passed and was signed by President Trump, there would undoubtedly be a challenge filed on Second Amendment grounds. If that case made it before the current Supreme Court, it seems more likely than not that the law would be held unconstitutional.[188]

1. The Court

The positions of Justices Kavanaugh, Thomas, and Alito have been made clear in their dissenting and concurring opinions—all three would strike down this law.[189] Justice Gorsuch joined in Justice Thomas's dissent from denial of certiorari in a case about "the right to carry firearms in public" in which Justice Thomas again laments the relegation of the Second Amendment to "disfavored" status.[190] This suggests that Justice Gorsuch would vote with the aforementioned Justices in striking down this law.[191] The only question then is Chief Justice Roberts. While he voted with the majority in *Heller*, *McDonald*, and *Caetano*, would he vote to strike

187. *See, e.g.*, Kolbe v. Hogan, 849 F.3d 114, 125–36 (4th Cir. 2017) (en banc) (avoiding the question of scrutiny altogether by deciding that the Second Amendment does not even apply to assault weapons because they are "like" the "M16"). The en banc majority in *Kolbe* did go through the motions of addressing scrutiny but determined that intermediate scrutiny would apply because the law banning semiautomatic rifles "does not severely burden the core protection of the Second Amendment, i.e., the right of law-abiding, responsible citizens to use arms for self-defense in the home." *Id.* at 138.

188. *See infra* pp. 42–43.

189. Caetano v. Massachusetts, 136 S. Ct. 1027, 1031 (2016) (Alito, J., concurring); Friedman v. City of Highland Park, 136 S. Ct. 447, 447 (2015) (Thomas, J., dissenting from denial of cert.); *Heller II*, 670 F.3d at 1269–70 (Kavanaugh, J., dissenting).

190. Peruta v. California, 137 S. Ct. 1995, 1996, 1999–2000 (2017).

191. *NRA Applauds Neil Gorsuch's Nomination to the U.S. Supreme Court*, NAT'L RIFLE ASS'N (Jan. 31, 2017), https://www.nraila.org/articles/20170131/nra-applauds-neil-gorsuchs-nomination-to-the-us-supreme-court [http://perma.cc/78NH-TTWV]. Justice Gorsuch's appointment to the Supreme Court was also celebrated by gun-rights groups such as the NRA, further suggesting that his Second Amendment Jurisprudence will align with the late Justice Scalia. *Id.*

down the ban on assault weapons? If he votes based on the Court's Second Amendment precedent, the answer must be yes.

2. The Test Applied

The test outlined above, if applied by the Court, would result in the Court holding that the Assault Weapons Ban of 2019 is unconstitutional.[192] The law bans an entire class of arms that are in common use for lawful purposes today.[193] One of those reasons is self-defense, identified by *Heller* as the "core lawful purpose" under the right protected by the Second Amendment.[194] As such, a law banning assault rifles would fail the hardware test laid out above and described by Judge Benitez in *Duncan*.[195]

Even were the Court to apply strict scrutiny, the law would not pass constitutional muster.[196] The fundamental flaw with the Assault Weapons Ban of 2019 and other laws like it is that it focuses on aesthetic factors that in no way contribute to solving the problem such laws are said to target.[197] The *fit* required to pass muster under

192. Assault Weapons Ban of 2019, S. 66, 116th Cong. (2019).

193. *See, e.g.*, Jon Schuppe, *America's Rifle: Why So Many People Love the AR-15*, NBC NEWS (Dec. 27, 2017 1:19 AM), https://www.nbcnews.com/news/us-news/America-s-rifle-why-so-many-people-love-ar-15-n831171 [https://perma.cc/YK2Z-8A5E]. This article describes the popularity of the AR-15 rifle, only one of many types of rifles pejoratively described as assault weapons by gun control proponents. *Id.* The article states that "one out of every five firearms purchased in this country is an AR-15" and that "Americans now own an estimated 15 million AR-15s." *Id.* Another article puts the number of Americans that own AR-15s (as opposed to the number of actual rifles sold) at five million. Stokes, *supra* note 167.

194. *See, e.g.*, Mairead Mcardle, *Pregnant Florida Woman Kills Home Intruder with AR-15*, NAT'L REV. (Nov. 4, 2019 8:58 AM), https://www.nationalreview.com/news/pregnant-florida-woman-kills-home-intruder-with-ar-15/ [https://perma.cc/YYR5-GL3U]. This article describes how two men broke into a family's home, armed with handguns, and violently attacked an eleven-year-old girl and her father. *Id.* The mother, seven months pregnant, was able to fight back with an AR-15 rifle and saved the lives of the family. *Id.*

195. Duncan v. Becerra, 366 F. Supp. 3d 1131, 1142 (S.D. Cal. 2019).

196. Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1285 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("Whether we apply the *Heller* history- and tradition-based approach or strict scrutiny or even intermediate scrutiny, D.C.'s ban on semi-automatic rifles fails to pass constitutional muster.").

197. Senator Feinstein claims her law is designed to prevent "mass shootings." 165 CONG. REC. S104 (daily ed. Jan. 9, 2019) (statement of Sen. Feinstein). First, as shown by FBI data, a mere 2.4% of all homicides in the United States are committed with rifles of any type, not just "assault weapons." John Schoen, *Owned by 5 Million Americans, AR-15 Under Renewed Fire After Orlando Massacre*, CNBC (June 13, 2016 2:31 PM), https://www.cnbc.com/2016/06/13/owned-by-5-million-americans-ar-15-under-renewed-fire-after-orlando-massacre.html [https://perma.cc/RWF6-J9YJ]. Second, the law targets semiautomatic rifles that "have one military feature," such as a pistol grip, forward grip, adjustable

strict scrutiny cannot be held to satisfy the strict scrutiny test in this hypothetical, just as Judge Benitez found the fit in *Duncan* more akin to "a burlap bag" than "narrowly tailored."[198] Even though the end of preventing mass shootings is a laudable and worthy cause, infringing upon the rights of millions of Americans by prohibiting possession of an entire class of firearms—that constitutes but a mere fraction of the 2.4% of all homicides committed with a *rifle*—could not by any stretch be described as a "narrow fit" or the least restrictive means to achieve the end.[199] Just as the LCM ban in *Duncan*, the Assault Weapons Ban of 2019 "strikes at the core of the inalienable Constitutional right and disenfranchises [millions of U.S.] residents."[200] And it does so while failing to actually solve the problem the legislation purports to solve.[201]

CONCLUSION

When *Heller* came down in 2008—the last decision on the last day of the term—the Court injected new life into a right long relegated to second-class status.[202] Since then, the lower courts have done their best to shove the rediscovered right back into the box in which it was stuffed for centuries.[203] However, it is time for the Supreme Court to give teeth to the right rediscovered over ten years ago.

In *Duncan*, Judge Roger Benitez took Justice Kavanaugh's dissent in *Heller II* and put flesh on the bones.[204] "It is a hardware test. Is the firearm hardware commonly owned? Is the hardware commonly owned by law-abiding citizens? Is the hardware owned by those

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stock, or a threaded barrel (to accept a suppressor or other accessory). Assault Weapons Ban of 2019, S. 66, 116th Cong. (2019); 165 CONG. REC. S104 (statement of Sen. Feinstein). None of these affect the actual operation of the firearm, and merely make the firearm more comfortable for the operator. *See* James B. Jacobs, *Why Ban "Assault Weapons"?*, 37 CARDOZO L. REV. 681, 682–83 (2015).

198. *Duncan*, 366 F. Supp. 3d at 1159.

199. *Id.*; Schoen, *supra* note 197.

200. *Duncan*, 366 F. Supp. 3d at 1153.

201. 165 CONG. REC. S104 (statement of Sen. Feinstein); Jacobs, *supra* note 197, at 707–09.

202. Joyce Lee Malcolm, *Defying the Supreme Court: Federal Courts and the Nullification of the Second Amendment*, CHARLESTON L. REV. 295, 314 (2018).

203. *See, e.g.*, Friedman v. City of Highland Park, 136 S. Ct. 447, 447 (2015) (Thomas, J., dissenting from denial of cert.); Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017) (en banc).

204. *Duncan*, 366 F. Supp. 3d at 1142.

citizens for lawful purposes? If the answers are 'yes,' the test is over. The hardware is protected."[205] This is the type of simplicity the Court must provide. No more doubt that the right is real, strong, and inalienable. "[T]he right of the people to keep and bear Arms, shall not be infringed."[206]

205. *Id.*
206. U.S. CONST. amend. II.