

NOTE

IT IS REALLY WORTH INSISTING UPON: A NEW TEST FOR THE SECOND AMENDMENT*

ABSTRACT

The scope of the Second Amendment is one of the most contested constitutional issues of the twenty-first century. While the Supreme Court clarified that the Second Amendment protects an individual right to possess a firearm in common use for lawful purposes in the landmark case *District of Columbia v. Heller* (*Heller I*), the debates over the constitutionality of assault weapon and large-capacity magazine bans continue. Five circuit courts have already heard challenges to these kinds of laws and found them constitutional. However, recent cases at the Supreme Court and the Ninth Circuit may reverse the trend. In 2022, the Supreme Court decided *New York State Rifle & Pistol Ass'n v. Bruen* and rejected interest balancing in Second Amendment cases. In 2021, the Ninth Circuit initially found California's large-capacity magazine ban unconstitutional. The California litigation is ongoing and has the potential to completely reshape the legal landscape as the first post-*Bruen* Second Amendment case. This Note examines both federal and California caselaw on assault weapon and large-capacity magazine bans and proposes a new test that incorporates *Heller I*'s "in common use" standard and *Bruen*'s "history and tradition" standard into a single comprehensive test.

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I. INTRODUCTION

In *District of Columbia v. Heller (Heller I)*, the U.S. Supreme Court ruled that the Second Amendment protected an individual

right to possess a firearm for lawful purposes.¹ Despite the Second Amendment's application to all fifty states and the District of Columbia,² a citizen's right to own an assault weapon³ or large-capacity magazine⁴ depends on where they live. Seven states have banned the purchase of assault weapons,⁵ and nine states have banned the purchase of large-capacity magazines.⁶ Even though these laws generate incredible amounts of argument and debate, the Supreme Court has so far remained silent on their constitutionality.⁷ Indeed, Justice Thomas has stated that the Second Amendment is treated as a "disfavored right."⁸ However, that may soon change as members of the Court have stated that it is time to take another Second Amendment case.⁹ The Court may soon have a prime opportunity to rule on the scope of the Second Amendment after the Ninth Circuit resolves current challenges to

1. District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 595 (2008) ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

2. McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

3. The definition of an assault weapon is both controversial and hard to nail down as states can define the term differently. Leslie Shapiro et al., *How Strictly Are Guns Regulated Where You Live?*, WASH. POST (Feb. 20, 2018), <https://www.washingtonpost.com/graphics/2017/national/assault-weapons-laws/> [<https://perma.cc/V33T-A4UM>]. Additionally, pro-gun advocates decry the term as "made up and ambiguous." Jeff Daniels, *Definition of What's Actually an 'Assault Weapon' Is a Highly Contentious Issue*, CNBC (Feb. 27, 2018, 8:29 AM), <https://www.cnbc.com/2018/02/21/definition-of-whats-an-assault-weapon-is-a-very-contentious-issue.html> [<https://perma.cc/WFP7-WKGL>]. For the purposes of this Note, "assault weapon" will use the same definition created under California's assault weapons ban statute. CAL. PENAL CODE §§ 30510, 30515 (Deering 2021).

4. The definition of large-capacity magazine also differs between states but is most often defined as a magazine holding more than ten rounds of ammunition. See *Large Capacity Magazines*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/large-capacity-magazines/> [<https://perma.cc/P3EM-LPS8>] (last visited July 12, 2022).

5. *Assault Weapons*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/assault-weapons/> [<https://perma.cc/7WA3-MTLW>] (last visited July 10, 2022).

6. *Large Capacity Magazines*, *supra* note 4.

7. See Tal Kopan, *If Congress, W.H. Wanted to Ban Assault Weapons, Could They?*, POLITICO (Aug. 8, 2012, 12:29 PM), <https://www.politico.com/blogs/under-the-radar/2012/08/if-congress-wh-wanted-to-ban-assault-weapons-could-they-131451> [<https://perma.cc/46FR-P5VW>] (describing how the Supreme Court has not heard a challenge to an assault weapons ban).

8. *Silvester v. Becerra*, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting).

9. Tyler Olson, *Thomas, Kavanaugh Lament 'Decade-Long Failure to Protect the Second Amendment'*, FOX NEWS (June 15, 2020, 1:15 PM), <https://www.foxnews.com/politics/thomas-kavanaugh-lament-decade-long-failure-to-protect-the-second-amendment> [<https://perma.cc/NWM6-P4GH>] ("Supreme Court Justices Clarence Thomas and Brett Kavanaugh on Monday admonished their fellow justices for letting Second Amendment cases languish in the lower courts in a dissent to the tribunal's decision not to take up a gun rights case.").

California's assault weapons and large-capacity magazine bans.¹⁰ The Court has stated that the Second Amendment is not a "second-class" right; accordingly the Court should take this opportunity to finally clarify the scope of the arms protected by the Constitution.¹¹

This Note will argue that assault weapons and large-capacity magazines are protected by the Second Amendment and laws prohibiting the purchase or possession of such weapons should be struck down. Part II begins by explaining the prior Court rulings on Second Amendment cases. Part II then provides an overview of the California assault weapon and large-capacity magazine laws. It will then discuss the state court challenges to those laws. Part III analyses the circuit court rulings on assault weapon and large-capacity magazine bans. It will include discussion on rulings and the standard of review used in cases from the D.C., First, Second, Fourth, and Seventh Circuits. Part III will then examine the cases challenging California's ban on assault weapons and large-capacity magazines pending in the Ninth Circuit. Part IV will argue that the appropriate test for Second Amendment cases is a two-part inquiry. First, the court should determine if the weapons in controversy are readily available to civilian consumers. Second, the court should apply strict scrutiny to the law at issue. Part IV will then apply the proposed standard to the California laws in controversy and argue that the laws fail under strict scrutiny.

II. THE STATE OF THE SECOND AMENDMENT

This part of the Note covers previous court decisions on the Second Amendment. Section II.A covers the Supreme Court's Second Amendment cases including *Miller*, *Heller I*, *McDonald*, *Caetano*, and *Bruen*. Section II.B covers California's restrictions on assault weapons and large-capacity magazines. Part C covers the state court challenges to the laws in *Kasler* and *Hyatt* and

10. See Maura Dolan, *U.S. Appeals Court Blocks Judge's Decision to Overturn State's Assault Weapons Ban*, L.A. TIMES (June 21, 2021, 7:25 PM), <https://www.latimes.com/california/story/2021-06-21/appeals-court-blocks-judges-decision-to-overturn-states-assault-weapons-ban> [<https://perma.cc/44PD-EEDA>] (discussing the pending legal challenges to California's assault weapon and large-capacity magazine laws).

11. *Silvester*, 138 S. Ct. at 952 (Thomas, J., dissenting) ("Nearly eight years ago, this Court declared that the Second Amendment is not a 'second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees'") (quoting plurality opinion in *McDonald v. City of Chicago*, 561 U.S. 742 (2010)).

briefly introduces the current federal court challenges to the laws in *Duncan* and *Miller*.

A. *The Second Amendment and the Supreme Court*

The first major consideration of the Second Amendment arose in the fascinating case of *United States v. Miller*.¹² Jack Miller, a bank-robbing gang member, challenged his conviction of unlawfully possessing and transporting a sawed-off twelve-gauge shotgun in violation of the National Firearms Act of 1934.¹³ Miller initially pled guilty but had his plea rejected by the district judge.¹⁴ The judge appointed Miller an attorney who demurred to the charges, challenging the National Firearms Act's constitutionality.¹⁵ The judge then sustained the demurrer and quashed the indictment, creating the perfect test case for assessing the Act's constitutionality.¹⁶ The Court did not hear oral arguments as neither Miller nor his attorney attended the argument.¹⁷ Miller never heard the outcome of his case because his bullet-ridden body was discovered on a riverbank in Oklahoma in April 1939, one month prior to the Court's decision.¹⁸

Miller may have died, but his case survived.¹⁹ The Court reversed the district court's quashing of the indictment and held that a sawed-off shotgun was not protected by the Second Amendment.²⁰ The ruling was of no importance to Miller, but it did contribute to laying the groundwork for *Heller I*. The *Miller* Court's discussion of the arms protected by the Second Amendment would later be cited in *Heller I*.²¹ The *Miller* Court indicated that protected arms were those that were in common use.²² The Court determined that the sawed-off shotgun at issue in the case was not "part of the ordinary military equipment or

12. *United States v. Miller*, 307 U.S. 174, 176 (1939).

13. Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J.L. & LIBERTY 48, 52–53, 60 (2008).

14. *Id.* at 59.

15. *Id.* at 59–60.

16. *Id.* at 60.

17. Robert Levy, *Second Amendment Haze*, CATO INST. (June 17, 2008), <https://www.cato.org/commentary/second-amendment-haze> [<https://perma.cc/682T-6G3X>].

18. Frye, *supra* note 13, at 67–68.

19. *See id.* (The charges were not dismissed despite Miller's death on April 4, 1931, and the Supreme Court announced its decision on May 15, 1931.)

20. *United States v. Miller*, 307 U.S. 174, 178, 183 (1939).

21. *Heller I*, 554 U.S. 570, 595, 623–25 (2008).

22. *Miller*, 307 U.S. at 179.

that its use could contribute to the common defense.”²³ However, the Court went on to state that “men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”²⁴ This statement would later be quoted by Justice Scalia’s opinion in *Heller I*.²⁵ It is hard to overstate the importance of *Miller* in the context of modern Second Amendment jurisprudence because it is impossible to say if *Heller I* would have happened without it.

The second major consideration of the Second Amendment was the landmark *Heller I* case in 2008. The case arose under the District of Columbia’s general prohibition on possessing handguns.²⁶ Dick Heller was a D.C. special police officer who sued the District after his application for a certificate to keep a handgun in his home was denied.²⁷ The Court granted certiorari to address the scope of the Second Amendment by answering the narrow question of “whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.”²⁸

The Court found that the District’s ban on handguns violated the Second Amendment.²⁹ While the question presented to the Court was narrow, the majority opinion was wider: addressing the character of the Second Amendment and providing a vague test for what arms are constitutionally protected.³⁰

A significant amount of Second Amendment debate has been spent on whether the nature of the right is individual or collective.³¹ The individual rights side argues that the Second Amendment grants every citizen the right to possess a firearm.³² The collective rights side argues that the Second Amendment granted a collective right for states to form their own militias to

23. *Id.* at 178.

24. *Id.* at 179.

25. *Heller I*, 554 U.S. at 624.

26. *Id.* at 573–74.

27. *Id.* at 575–76.

28. *Id.* at 573, 576.

29. *Id.* at 635.

30. See Andrew R. Gould, *The Hidden Second Amendment Framework Within District of Columbia v. Heller*, 62 VAND. L. REV. 1535, 1552 (2009) (“[I]f the *Heller* opinion is to be taken at face value, a general two-pronged test emerges: Does the challenged regulation (1) fall within the scope of the Second Amendment right, and (2) satisfy a deferential version of strict scrutiny?”).

31. See *Heller I*, 554 U.S. at 622; Michael Marshall, *The Second Amendment Is About an Individual Right, Not a Collective One*, UNIV. VA. (Feb. 8, 2002), https://www.law.virginia.edu/news/2001_02/amendment.htm [<https://perma.cc/V4QF-N5Y9>].

32. See Marshall, *supra* note 31.

resist national tyranny.³³ After a long and thorough review of the history of the Second Amendment, Justice Scalia’s majority opinion unequivocally took the individual rights side.³⁴ The majority opinion stated once and for all that “the Second Amendment confers an individual right to keep and bear arms.”³⁵

Heller I’s discussion of the type of arms protected by the Second Amendment is vague. In the narrowest reading, the Court held that handguns are protected by the Second Amendment and that complete bans against them are unconstitutional. This view has strong support, as the Court clearly stated that “handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid” and that answers the presented question.³⁶ However, the Court’s discussion went further and spoke about what kinds of weapons are protected by *Miller*.³⁷ The Court stated that the Second Amendment was limited to “the sorts of weapons . . . ‘in common use at the time.’”³⁸ *Heller I* also spoke on the types of weapons not protected, such as “dangerous and unusual weapons.”³⁹ Lower courts have adapted *Heller I* into a two-part test for Second Amendment cases that continues to be used today.⁴⁰

The third major consideration of the Second Amendment was the incorporation of the Second Amendment against the states in *McDonald v. City of Chicago*.⁴¹ Otis McDonald was a community

33. Shawn M. Griffiths, *Second Amendment: Individual Rights vs. Collective Rights*, INDEP. VOTER NEWS (Dec. 21, 2012), <https://ivn.us/2012/12/21/second-amendment-individual-rights-vs-collective-rights> [<https://perma.cc/BP6M-5PL2>].

34. Gould, *supra* note 30, at 1537–38, 1546–47.

35. *Heller I*, 554 U.S. at 622.

36. *Id.* at 629.

37. *Id.* at 627 (“We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those ‘in common use at the time.’”) (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

38. *Id.* (quoting *Miller*, 307 U.S. at 179).

39. *Id.* at 627.

40. See Michael Rogers, *The Bear Necessities: Good Cause Statutes and “Step Zero” of Second Amendment Analyses*, 80 OHIO ST. L.J. 159, 169–70 (2019) (“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.”); see also SARAH H. PECK, CONG. RSCH. SERV., R44618, POST-*HELLER* SECOND AMENDMENT JURISPRUDENCE 12–13, 15 (2019).

41. *McDonald v. City of Chicago*, 561 U.S. 742, 742, 798, 806, 841 (2010). An earlier Supreme Court case had held that the Second Amendment did not apply to the states. *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (“The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government.”).

activist in his late seventies living in a high-crime neighborhood in Chicago who wanted to keep a handgun in his home following violent threats from drug dealers.⁴² Unfortunately for McDonald, a Chicago city ordinance “effectively [banned] handgun possession by almost all private citizens who reside[d] in the [c]ity.”⁴³ McDonald filed a lawsuit alleging that Chicago’s effective prohibition of handguns violated the Second Amendment because it violated the Privileges and Immunities Clause of the Constitution and, alternatively, that the Second Amendment was incorporated against the states through the Fourteenth Amendment’s Due Process Clause.⁴⁴

The Court sided with McDonald and held that the Second Amendment was incorporated against the states.⁴⁵ The Court was not in total agreement on how the Second Amendment was incorporated, as the four Justices in the majority opinion relied on the Fourteenth Amendment’s Due Process Clause⁴⁶ and Justice Thomas relied on the Privileges and Immunities Clause.⁴⁷ Regardless of the specific rationale, the Court agreed that the Second Amendment applies to the states.⁴⁸

In addressing the question of whether the Second Amendment was incorporated, the Court framed the issue as “whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty” and “whether this right is ‘deeply rooted in this Nation’s history and tradition.’”⁴⁹ The Court relied heavily on its decision in *Heller I* in determining that the Second Amendment is fundamental to our scheme of ordered liberty because self-defense is a basic liberty.⁵⁰ The Court similarly relied

42. *McDonald*, 561 U.S. at 751.

43. *Id.* at 750.

44. *Id.* at 753.

45. *Id.* at 791.

46. Five Justices joined in Part III of the opinion that held that the Second Amendment was incorporated against the states. *Id.* at 748–49, 778, 791 (“In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”).

47. *Id.* at 858 (Thomas, J., concurring) (“I agree with the Court that the Second Amendment is fully applicable to the States. I do so because the right to keep and bear arms is guaranteed by the Fourteenth Amendment as a privilege of American citizenship.”).

48. *Id.* at 791 (“We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”).

49. *Id.* at 767 (first quoting *Duncan v. Louisiana* 391 U.S. 145, 149 (1968); and then quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

50. *Id.* (“Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller I*, we held that individual self-defense is ‘the central component’ of the Second Amendment right.”).

on *Heller I*'s findings on the long history of the right to bear arms in English and early American history to determine that the Second Amendment is deeply rooted in our nation's history.⁵¹ Having found that the Second Amendment is fundamental to our liberty and deeply rooted in our history, the Court reversed the circuit court's decision upholding the Chicago law.⁵² *McDonald* and *Heller I* continue to be the backbone of modern Second Amendment jurisprudence.⁵³

The fourth major consideration of the Second Amendment was in *Caetano v. Massachusetts*, where the Court reaffirmed that arms not in existence in 1789 can be protected by the Second Amendment.⁵⁴ Jaime Caetano was a domestic violence survivor who was convicted of violating a Massachusetts law prohibiting "electrical weapon[s]" after threatening her abusive ex-boyfriend with a stun gun.⁵⁵ In a short per curiam opinion, the Court vacated Caetano's conviction.⁵⁶ The Court held that the stun gun ban violated the Second Amendment because "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."⁵⁷ The Court went on to clarify that weapons that are "a thoroughly modern invention" are not "unusual" as the term was meant in *Heller I*.⁵⁸ Finally, the Court clarified that the Second Amendment protects arms that are not useful in war as "*Heller I* rejected the proposition 'that only those weapons useful in warfare are protected.'"⁵⁹ While *Caetano* is not a true shift in the state of the Second Amendment, it is notable in rejecting the borderline

51. *Id.* at 768 ("*Heller I* makes it clear that this right is 'deeply rooted in this Nation's history and tradition.'").

52. *Id.* at 791.

53. See *The Supreme Court & the Second Amendment*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/second-amendment/the-supreme-court-the-second-amendment/> [<https://perma.cc/A43X-4VP7>] (last visited July 22, 2022) ("There have been two landmark Supreme Court rulings on the Second Amendment in recent years: *District of Columbia v. Heller* and *McDonald v. City of Chicago*.").

54. *Caetano v. Massachusetts*, 577 U.S. 411, 411–12 (2016).

55. Mark Joseph Stern, *The Supreme Court Gets Really Close to Saying That Stun Guns Are Protected by the Second Amendment*, SLATE (Mar. 21, 2016, 3:35 PM), <https://slate.com/news-and-politics/2016/03/in-caetano-v-massachusetts-supreme-court-protects-stun-guns-as-second-amendment-weapons.html> [<https://perma.cc/AT68-YR2U>].

56. *Caetano*, 577 U.S. at 412.

57. *Id.* at 411–12 (quoting *Heller I*, 554 U.S. 570, 582 (2008)).

58. *Id.* at 412 ("By equating 'unusual' with 'in common use at the time of the Second Amendment's enactment,' the court's second explanation is the same as the first; it is inconsistent with *Heller I* for the same reason.").

59. *Id.*

frivolous argument that the Second Amendment only protects weapons as they existed in 1789.⁶⁰

As of this writing, the most recent consideration of the Second Amendment is *New York State Rifle & Pistol Ass'n v. Bruen*, concerning New York's proper-cause requirement for issuing permits to carry weapons outside the home.⁶¹ The Court struck down the New York law, noting that the “the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home.”⁶² The Court also rejected the two-part test in use by the circuit courts because means-end scrutiny is inappropriate for Second Amendment cases.⁶³ Instead, firearms regulations must be judged by “a test rooted in the Second Amendment's text, as informed by history,” and the “government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.”⁶⁴

This new test, rooted in history and tradition, will likely have a significant impact on future Second Amendment cases. One of the most significant aspects of *Bruen* is that it “appears to throw out any empirical test about whether laws and regulations actually protect Americans from gun violence.”⁶⁵ Predictions on the impact of *Bruen* have been mixed. Opponents of the ruling warn that “vast swaths of American gun laws are now in terrible danger.”⁶⁶ Supporters of the ruling claim that the Court sent “a strong signal to politicians and lower court judges that the day of trampling on the Second Amendment has come to an end” and are already planning additional challenges to laws regulating gun

60. *Heller I*, 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.”).

61. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2117, 2156 (2022).

62. *Id.* at 2122, 2156.

63. *Id.* at 2127.

64. *Id.*

65. Jacob D. Charles, *Are Gun Laws Constitutional? Courts Must Now Look at History to Decide.*, WASH. POST (June 30, 2022, 7:00 AM), <https://www.washingtonpost.com/politics/2022/06/30/bruen-clarence-thomas-supreme-court-second-amendment/> [https://perma.cc/CPV2-QHSN].

66. Ian Millhiser, *The Supreme Court's New Gun Ruling Means Virtually No Gun Regulation Is Safe*, VOX (June 23, 2022, 3:00 PM), <https://www.vox.com/2022/6/23/23180205/supreme-court-new-york-rifle-pistol-clarence-thomas-second-amendment-guns> [https://perma.cc/4HST-4AE6].

ownership.⁶⁷ Additional challenges to current gun laws are likely already underway as Paul Clement, who argued *Bruen* before the Court, left Kirkland & Ellis to continue working on Second Amendment cases.⁶⁸

B. California's Restrictions on Firearms and Large-Capacity Magazines

California enacted its assault weapons ban law in 1989, following the Stockton schoolyard shooting that left five children dead and twenty-nine others injured.⁶⁹ The Roberti-Roos Assault Weapons Control Act of 1989 (AWCA)⁷⁰ bans assault weapons in California by banning certain weapons by name,⁷¹ by features,⁷² or as being part of the AR and AK series of weapons.⁷³

The simplest component of the ban is the prohibition of named weapons. Some examples of the weapons banned by name are the Uzi, Franchi SPAS 12, and HK-91.⁷⁴ The ban on weapons by feature is more expansive and far reaching because it acts as a catchall ban on weapons that are not specifically listed as assault weapons but have certain features.⁷⁵ Semi-automatic centerfire rifles with the ability to accept a detachable magazine and any of the following features are banned: a pistol grip, a thumbhole stock, a folding or telescoping stock, a grenade launcher, a flash suppressor, or a forward pistol grip.⁷⁶ Semi-automatic pistols without fixed magazines that have any of the following features are banned: a threaded barrel, a second handgrip, a barrel shroud, or a magazine outside of the pistol grip.⁷⁷ Semi-automatic

67. *Supreme Court Ruling Bolsters Lawsuit Cases in WA, Says SAF*, SECOND AMEND. FOUND., <https://www.saf.org/supreme-court-ruling-bolsters-lawsuit-cases-in-wa-says-saf/> [https://perma.cc/KL6H-ZZ5U] (last visited Sept. 22, 2022).

68. Ariane de Vogue, *Paul Clement Wins Second Amendment Case at Supreme Court, Leaves Law Firm*, CNN (June 23, 2022, 7:39 PM), <https://www.cnn.com/2022/06/23/politics/paul-clement-erin-murphy-kirkland-ellis-second-amendment/index.html> [https://perma.cc/M289-W2KJ].

69. Abhinanda Bhattacharyya, *California's Complicated History with Assault Weapons*, S.F. CHRON. (Aug. 2, 2021, 4:00 AM), <https://www.sfchronicle.com/projects/2021/california-assault-weapons-ban/> [https://perma.cc/FGX9-TGCC].

70. CAL. PENAL CODE § 30500 (Deering 2021).

71. *Id.* § 30510.

72. *Id.* § 30515.

73. *Id.* § 30510. The AR and AK series of weapons prohibited by name are codified in CAL. CODE REGS. tit. 11, § 5499 (2021).

74. PENAL § 30510.

75. *Id.* § 30515.

76. *Id.*

77. *Id.*

shotguns with either a folding or collapsing stock and a pistol grip are banned.⁷⁸ The AR and AK series weapons list is codified in the California Code of Regulation § 5499 and includes weapons such as the Bushmaster XM 15, Norinco AK-47, and Colt Match Target rifles.⁷⁹

The assault weapons ban was revised in 2016 to include weapons that escaped the ban by using a bullet button.⁸⁰ Bullet buttons were a workaround for otherwise prohibited weapons to remain legal by modifying the magazine release to only work with the use of a tool, thereby avoiding the ban because the rifle did not have a detachable magazine.⁸¹ Other workarounds, such as partial disassembly of the weapon to reload, remain legal for now.⁸²

California has regulated large-capacity magazines since 2000.⁸³ California currently bans the manufacture, importation, sale, and lending of magazines that hold more than ten rounds of ammunition.⁸⁴ An interesting wrinkle to California's ban on new large-capacity magazines was the seven-day period between the law being ruled unconstitutional and the ruling being stayed.⁸⁵ During this period, known as "freedom week," over one million large-capacity magazines were legally brought into the state and possession of those magazines is currently legal.⁸⁶

78. *Id.*

79. CAL. CODE REGS. tit. 11, § 5499 (2021).

80. Bhattacharyya, *supra* note 69. The change was codified in CAL. PENAL CODE § 30900 (Deering 2021).

81. Bhattacharyya, *supra* note 69.

82. *Id.*

83. Fiona Kelliher, *Appeals Court Kills California's Ban on High-Capacity Magazines*, MERCURY NEWS (Aug. 14, 2020, 4:25 PM), <https://www.mercurynews.com/2020/08/14/court-ends-californias-ban-on-high-capacity-magazines/> [https://perma.cc/9RW8-RF EY].

84. CAL. PENAL CODE § 32310 (Deering 2021).

85. The large-capacity magazine ban was ruled unconstitutional by the district court and later stayed pending the appeal. *Duncan v. Becerra*, No. 17-cv-1017, 2019 WL 1510340, at *3 (S.D. Cal. Apr. 4, 2019), *staying in part*, 366 F. Supp. 3d 1131 (S.D. Cal. Mar. 29, 2019), *rev'd en banc, sub nom. Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *vacated*, 142 S. Ct. 2895 (2022) (mem.).

86. Matthias Gafni, *For One Week, High-Capacity Ammunition Magazines Were Legal in California. Hundreds of Thousands May Have Been Sold*, S.F. CHRON. (Apr. 11, 2019, 12:56 PM), <https://www.sfchronicle.com/bayarea/article/For-one-week-high-capacity-gun-magazines-were-13757973.php> [https://perma.cc/KUB6-66DA].

C. *Legal Challenges to California’s Assault Weapon and Magazine Bans*

California’s assault weapons law has faced legal challenges in *Kasler v. Lockyer*⁸⁷ and *Harrott v. County of Kings*.⁸⁸ Both *Lockyer* and *Harrott* upheld the law but with some changes to the identification of prohibited weapons.⁸⁹

The petitioners in *Lockyer* challenged the AWCA’s constitutionality on equal protection and separation of powers grounds.⁹⁰ The equal protection challenge was on the grounds that the law failed to “list certain weapons that are identical to, or indistinguishable from, listed weapons.”⁹¹ The simplified version of the separation of powers challenge was that by approving the Attorney General’s petition to add firearms to the banned list, the court was acting as a legislative body.⁹²

The California Supreme Court first addressed and rejected the equal protection argument.⁹³ The court first decided rational basis review should apply, over objections by the petitioners that intermediate or strict scrutiny should apply.⁹⁴ The court based its decision on its finding that the “AWCA does not burden a fundamental right under either the federal or the state Constitutions, the rational basis test applies.”⁹⁵ The court then applied rational basis review and found that the government’s desire to prevent mass shootings was a sufficient rational basis for the law.⁹⁶ Additionally, the law’s process of banning certain weapons and allowing the Attorney General to add additional

87. *Kasler v. Lockyer*, 2 P.3d 581, 583–84 (Cal. 2000).

88. *Harrott v. County of Kings*, 25 P.3d 649, 650 (Cal. 2001).

89. *See Lockyer*, 2 P.3d at 592–94, 597, 600 (holding that the Attorney General could petition courts to add a weapon to the banned list of assault weapons); *Harrott*, 25 P.3d at 652, 656 (holding that courts could not determine a weapon was an assault weapon until the Attorney General first publicly published his finding).

90. *Lockyer*, 2 P.3d at 584, 593.

91. *Id.* at 584.

92. *Id.* at 593. At the time section 12276.5 of the California Penal Code allowed the Attorney General to petition a superior court in a county with a population of over one million to declare that a weapon was part of the listed series of assault weapons and ban their manufacture, sale, distribution, transportation, importation, or lending. The weapon would then be added to the banned list. *Id.* (citing CAL. PENAL CODE § 12276.5 (repealed 2010)). The listing of AK and AR series weapons process has been revised and recodified as CAL. PENAL CODE § 30520 (Deering 2021).

93. *Lockyer*, 2 P.3d at 584.

94. *Id.* at 585–86 (“Therefore, as the AWCA does not burden a fundamental right under either the federal or the state Constitutions, the rational basis test applies.”).

95. *Id.* at 586.

96. *Id.* at 586–91.

weapons that were “manufactured or sold by another company under a licensing agreement, or which are new models manufactured or sold by any company with just minor modifications or new model numbers” did not violate equal protection.⁹⁷

The court then discussed and rejected the separation of powers argument against the Attorney General’s ability to petition a court to determine an unlisted weapon is an assault weapon.⁹⁸ The court reasoned that the petitioned court’s role in the procedure was small and the burden was on the Attorney General to prove by a preponderance of the evidence that the weapon at issue was an assault weapon.⁹⁹ The court further stated that the legislature had a reasonable reason, as it noted “[t]he task it delegated—amending the list of assault weapons to capture the protean modifications of the weapons—was one it could not reasonably be expected to perform itself.”¹⁰⁰ Having found that the legislature had “provide[d] adequate direction for the implementation of legislative policy” when delegating the Attorney General and the courts the power to determine if a weapon fell into a prohibited series of weapons, the court found no separation of powers violation.¹⁰¹

The challenge in *Harrott* was narrower and focused on the Attorney General add-on provision allowing the Attorney General to ask courts to determine if a weapon was a member of a prohibited series approved by the *Kasler* decision.¹⁰² Harrott sued the County of Kings to compel the sheriff’s department to turn over an AK rifle that had been given to him as payment for legal services.¹⁰³ The sheriff’s office did not want to turn over the rifle because it believed it was an illegal assault weapon due to being part of the prohibited AK series rifles, even though it was not listed.¹⁰⁴ The court recognized the precarious situation Harrott and other similarly situated people found themselves in; they could be charged with possessing an illegal assault weapon based

97. *Id.* at 590–92.

98. *Id.* at 593.

99. *Id.*

100. *Id.* at 597.

101. *Id.* at 593.

102. *Harrott v. County of Kings*, 25 P.3d 649, 651–52 (Cal. 2001).

103. *Id.* at 650, 651 n.2 (“Mr. Harrott identified the rifle as an ‘AK–47 2822,’ and the ‘AK47’ is one of the models of assault weapons specifically listed in section 12276, subdivision (a)(1)(A). However, the hearing [] proceeded on the assumption that the rifle was *not* one of the models specifically listed in section 12276, subdivision (a).”).

104. *Id.* at 650.

on being part of the prohibited AK and AR series rifles even if they diligently checked the Attorney General's assault weapon identification guide.¹⁰⁵

The California Supreme Court sided with Harrott and granted relief.¹⁰⁶ The court found that the legislative history strongly indicated that the legislature wanted law enforcement to know what weapons were prohibited.¹⁰⁷ Additionally, it found it was difficult for a citizen to know whether a weapon was part of the AK series because not all parts were interchangeable and appearances differed between weapons.¹⁰⁸ The court held that while the Attorney General could add weapons to the AK and AR series list, a trial court could not find an unlisted AK or AR series weapon to be an assault weapon unless the Attorney General had previously identified and included it in the list.¹⁰⁹

The entire assault weapons ban scheme was ruled unconstitutional in 2021 by the United States District Court for the Southern District of California in *Miller v. Bonta*.¹¹⁰ The large-capacity magazine ban was also ruled unconstitutional in 2021 by the same court in *Duncan v. Bonta*.¹¹¹ *Duncan* was overruled by the Ninth Circuit and appeals are ongoing.¹¹²

III. THE FEDERAL COURTS' FAILURE TO PROTECT THE SECOND AMENDMENT

The primary problem with current Second Amendment jurisprudence is that most of the recent caselaw is from the circuit courts, which all used the now invalid two-part test with means-end scrutiny. Much of the circuit courts' discussion in Second Amendment cases was deciding what level of scrutiny should apply. The circuit courts have applied intermediate

105. *Id.* at 652.

106. *Id.* at 652, 660 (“The question presented by this case, therefore, is whether the superior court had the authority to declare Mr. Harrott’s rifle an AK series assault weapon under section 12276 We conclude the answer to this question is *no*”).

107. *Id.* at 652.

108. *Id.* at 653–55.

109. *Id.* at 656.

110. *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1068 (S.D. Cal. 2021), *vacated*, No. 21-55608, 2022 WL 3095986 (9th Cir. Aug. 1, 2022).

111. *Duncan v. Becerra (Becerra I)*, 366 F. Supp. 3d 1131, 1185–86 (S.D. Cal. 2019), *rev'd en banc, sub nom. Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *vacated*, 142 S. Ct. 2895 (2022) (mem.).

112. *Duncan v. Bonta*, 19 F.4th 1087, 1113 (9th Cir. 2021), *vacated*, 142 S. Ct. 2895 (2022) (mem.).

scrutiny instead of strict scrutiny in most cases.¹¹³ The lowest level of scrutiny is rational basis review and requires only that the law “be rationally related to a legitimate governmental purpose.”¹¹⁴ Intermediate scrutiny is a higher standard and requires the law to be substantially related to an important government interest.¹¹⁵ Strict scrutiny is the highest standard and requires the law to be “narrowly tailored to serve a compelling governmental interest.”¹¹⁶ Strict scrutiny “is generally applied to statutes affecting fundamental rights.”¹¹⁷ Now that the Supreme Court has firmly rejected the two-part test in favor of the text-and-tradition test, laws restricting assault weapons and large-capacity magazines will likely be relitigated in the circuit courts.

Sections III.A–E of this Note cover the federal circuit courts’ decisions on state assault weapons and large-capacity magazine bans. Section III.F of this Note covers the pending federal court challenges to California’s ban on assault weapons and large-capacity magazines.

A. *The D.C. Circuit and Heller II*

Soon after his victory in *Heller I*, Dick Heller filed another lawsuit challenging the District of Columbia’s assault weapon and large-capacity magazine ban.¹¹⁸ The D.C. Circuit applied intermediate scrutiny based on its determination that handguns are the most common weapons used for self-defense and that a ban on semi-automatic rifles is similar to “a regulation of the manner in which persons may lawfully exercise their Second Amendment rights.”¹¹⁹ The court then held that the law survived intermediate scrutiny because assault weapons and large-capacity magazines are dangerous and banning them protected law enforcement officers and controlled crime.¹²⁰

The court’s application of intermediate scrutiny is flawed. The court begins its discussion on the issue by stating that “upon the record as it stands, we cannot be certain whether these weapons

113. Ronald K. Weekley, *This Powder Keg Is About to Explode: The Lack of Standards in Reviewing Second Amendment Cases*, 10 ALB. GOV’T L. REV. 496, 502 (2017).

114. *Id.*

115. *Id.*

116. *Id.*; *Abrams v. Johnson*, 521 U.S. 74, 91 (1997).

117. Weekley, *supra* note 113, at 502.

118. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1247 (D.C. Cir. 2011). This case is referred to as *Heller II* to avoid confusion with the *Heller I* Supreme Court case.

119. *Id.* at 1262.

120. *Id.* at 1264.

are commonly used or are useful specifically for self-defense or hunting and therefore whether the prohibitions of certain semi-automatic rifles and magazines holding more than ten rounds meaningfully affect the right to keep and bear arms.”¹²¹ The statistics accepted by the court show that assault weapons and large-capacity magazines are in common use.¹²² The court recognized that “[a]pproximately 1.6 million AR-15s alone have been manufactured since 1986” and that “fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000.”¹²³ Moreover, these weapons are commonly used for self-defense and sport shooting.¹²⁴ Accordingly, the weapons at issue clearly affect the right to keep and bear arms because bans on some of the most popular weapons in America burden the Second Amendment.

The court sidestepped finding whether the ban affected the right to keep and bear arms by applying intermediate scrutiny.¹²⁵ The court starts by quoting *Heller I*, stating that the law at issue does not ban the “quintessential self-defense weapon” because it bans semi-automatic rifles and not handguns or other rifles.¹²⁶ This reasoning seems flawed because whether a gun is the “quintessential self-defense weapon” does not mean it is the only self-defense weapon. The court then explains its decision by quoting statistics that revolvers and pistols are “used almost 80% of the time in incidents of self-defense with a gun” and that in “340,000 to 400,000 instances of defensive gun use in which the defenders believed the use of a gun had saved a life, 240,000 to

121. *Id.* at 1261.

122. *Id.*

123. *Id.* It is important to note that only focusing on AR-15 rifles fails to recognize the number of other types of assault weapons manufactured and imported for sale in the United States. Many assault weapons are not based on the AR-15. See John Hurst, *Imported Guns: Just What Is a Sports Weapon?*, L.A. TIMES (Feb. 26, 1989, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1989-02-26-mn-822-story.html> [<https://perma.cc/K26L-WRDK>] (“More than 88,000 AK-47s . . . were imported into the United States from January, 1985, through November, 1988, according to federal data. About 75,000 Uzi carbines have been imported from Israel since 1980 . . .”).

124. “Assault Weapons” | “Large” Magazines, NRA-ILA, <https://www.nraila.org/get-the-facts/assault-weapons-large-magazines/> [<https://perma.cc/AB56-5SMU>] (last visited Oct. 12, 2022) (“AR-15s are the most commonly used rifles in marksmanship competitions, training, and home defense.”).

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

126. *Id.* at 1261–62.

300,000 involved handguns.”¹²⁷ These statistics show that a significant amount of self-defense incidents involve people using firearms other than handguns, potentially including assault weapons or weapons with large-capacity magazines.¹²⁸

The court further rationalized its decision on the grounds that the ban only regulated the “manner in which persons may lawfully exercise their Second Amendment rights” as people are “free to possess any otherwise lawful firearm.”¹²⁹ The court derived this standard from a similar test for the First Amendment’s speech protection.¹³⁰ Comparing the District’s prohibition on assault weapons and large-capacity magazines to First Amendment protection demonstrates the court’s flawed reasoning. The law does not simply regulate the way a person may exercise their Second Amendment rights, it outright bans every weapon meeting the assault weapon definition.¹³¹ *Heller I* struck down the District’s handgun ban because handguns were overwhelmingly chosen for self-defense.¹³² Since that ruling, the AR-15 has surged in popularity for all purposes, including self-defense.¹³³ This is akin to a law banning unpopular opinions.¹³⁴ Continuing the First Amendment comparison, the “free to possess any otherwise lawful firearm” argument similarly falls apart.¹³⁵ It is hard to imagine a court would uphold a law that banned an opinion the legislature deemed too controversial and justified it on the grounds that a person was free to choose any other opinion. The District’s ban on

127. *Id.* at 1262.

128. Taking the low end of the studies the court used shows that 240,000 instances of a handgun being used in self-defense out of 340,000 total cases of a gun being used in self-defense, which translates to firearms other than handguns being used in 30% of self-defense cases. *Id.*

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

130. *Id.* (“[W]e agree with the reasoning of the Third Circuit in *Marzzarella*. The court there applied intermediate scrutiny to . . . firearms in part because it thought the ban was similar to a regulation ‘of the manner in which . . . speech takes place,’ a type of regulation subject to intermediate scrutiny . . .”).

131. *Id.* at 1249.

132. *Heller I*, 554 U.S. 570, 629 (2008).

133. “*Assault Weapons*” | “*Large*” *Magazines*, *supra* note 124 (“AR-15s are the most commonly used rifles in marksmanship competitions, training, and home defense.”).

134. *Heller I*, 554 U.S. at 635 (“The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrongheaded views.”).

135. Justice Scalia’s opinion in *Heller I* analogizes the Second Amendment to the First Amendment several times, which suggests that examples in First Amendment cases could apply to Second Amendment cases. *Id.* at 595, 606, 625–26. Lower courts have also used First Amendment analogies in Second Amendment cases. Weekley, *supra* note 113, at 503–05.

assault weapons and large-capacity magazines goes far beyond regulating the manner of expressing the Second Amendment: it denies constitutional protection to the weapons most in need of it.

B. The First Circuit and Worman v. Healey

In *Worman*, the First Circuit took up a challenge to Massachusetts's 2004 ban on assault weapons and large-capacity magazines modeled after the expired federal assault weapons ban.¹³⁶ The First Circuit followed the lower court's lead and avoided determining whether the law burdened weapons in common use and simply determined that the law "burdens conduct that falls somewhere within the compass of the Second Amendment."¹³⁷ The court then applied intermediate scrutiny because it stated the core of the Second Amendment is self-defense in the home and assault weapons are not as useful as handguns for that purpose.¹³⁸ The court cited as justification the plaintiff's failure to provide examples of assault weapons being used for self-defense in the home and its own colorful determination that using assault weapons for defense in the home is "tantamount to using a sledgehammer to crack open the shell of a peanut."¹³⁹ The court concluded that the law survived intermediate scrutiny because of the government's interest in public safety and the perceived dangerousness of the banned weapons.¹⁴⁰

The court's decision to avoid determining whether the banned weapons were in common use is unfortunate, as it minimizes *Heller I*, but it is ultimately more defensible than its determination that intermediate scrutiny applied. The court's first justification that the core of the Second Amendment is self-defense in the home and that handguns are more useful than assault weapons is wrong and is contradicted by its later justifications of public safety. Moreover, arguably the core of the Second

136. *Worman v. Healey*, 922 F.3d 26, 31 (1st Cir. 2019), *abrogated by* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

137. *Id.* at 35–36.

138. *Id.* at 36–38.

139. *Id.* at 37.

140. *Id.* at 39–40. The court also cited precedent on Second Amendment challenges from other circuit courts, noting that the "Act survives under intermediate scrutiny. This view comports with the unanimous weight of circuit-court authority analyzing Second Amendment challenges to similar laws." *Id.* at 39 (citing Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. New Jersey, 910 F.3d 106, 122 (3d Cir. 2018); *Kolbe v. Hogan*, 849 F.3d 114, 139 (4th Cir. 2017); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 261 (2d Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1262 (D.C. Cir. 2011)).

Amendment is self-defense in general, allowing citizens to defend from unlawful attack both inside and outside the home.¹⁴¹

Even accepting, arguendo, that the core of the right is self-defense in the home, logic would dictate that assault weapons with large-capacity magazines would provide for defense inside the home. If a person was attacked in the home and called the police, the responding officers would almost certainly be armed with large-capacity magazines¹⁴² and possibly assault weapons.¹⁴³ The plaintiff's lack of examples of these types of weapons being used for self-defense in the home is puzzling as there were publicized examples available at the time this case was heard.¹⁴⁴ Additionally, the reliance on provided examples feels hollow when the court goes on to accept that "rounds from assault weapons have the ability to easily penetrate most materials used in standard home construction, car doors, and similar materials" without providing any examples of that actually occurring.¹⁴⁵

The court's second justification for its use of intermediate scrutiny comes from reliance on the perceived additional danger of assault weapons and large-capacity magazines. It relies on two sources: examples of mass shootings¹⁴⁶ and testimony from a

141. Scholars have identified cases as far back as the Reconstruction Era where citizens were allowed to use deadly force in self-defense outside the home. Liz Mineo, *The Loaded History of Self-Defense*, HARV. GAZETTE (Mar. 7, 2017), <https://news.harvard.edu/gazette/story/2017/03/the-loaded-history-of-self-defense/> [<https://perma.cc/LS8S-PQYA>]. Additionally, several states have enacted Stand Your Ground laws removing the duty to retreat before using deadly force outside the home. *Self Defense and "Stand Your Ground,"* NCSL (Feb. 9, 2022), <https://www.ncsl.org/research/civil-and-criminal-justice/self-defense-and-stand-your-ground.aspx> [<https://perma.cc/T4YB-TQTW>].

142. Jack Hardy, *Why Law Enforcement Chooses Glock: The Glock Continues to Be the Top Choice*, GUNS TODAY, <https://gunstoday.com/why-law-enforcement-chooses-glock/> [<https://perma.cc/W3K5-TFES>] (last visited July 31, 2022).

143. Per a survey of fifty-three of the largest police agencies in the United States, 93% reported equipping "some of their officers with rifles or assault weapons." *Police Department Service Weapon Survey*, PERF, https://perf.memberclicks.net/assets/docs/Free_Online_Documents/Gun_Violence_Reduction/police%20department%20service%20weapon%20survey%202013.pdf [<https://perma.cc/624G-KZS3>] (last visited Sept. 23, 2022).

144. In 2017, an Oklahoma man used an AR-15 to kill three men breaking into his home. Fox News, *Homeowner's Son Kills Three Would-Be Burglars with AR-15*, N.Y. POST (Mar. 28, 2017, 12:39 AM), <https://nypost.com/2017/03/28/homeowners-son-kills-three-would-be-burglars-with-ar-15/> [<https://perma.cc/F34N-7R5V>]. In 2010, a Texas man used his father's assault rifle to fend off two burglars. *Investigators: 15-Year-Old Son of Deputy Shoots Burglary Suspect*, KHOU (June 29, 2010, 9:29 PM), <https://www.khou.com/article/news/investigators-15-year-old-son-of-deputy-shoots-burglary-suspect/413200682> [<https://perma.cc/7JX9-8C5S>].

145. *Worman v. Healey*, 922 F.3d 26, 37 (1st Cir. 2019) (quoting *Kolbe*, 849 F.3d at 127, *abrogated by* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022)).

146. Assault weapons and large-capacity magazines were used in mass shootings at "Pittsburgh (2018), Parkland (2018), Las Vegas (2017), Sutherland Springs (2017), Orlando (2016), Newtown (2012), and Aurora (2012)." *Id.*

surgeon that wounds from AR-15s are more severe than those of handguns.¹⁴⁷ Both of those things are true, but the issue is more nuanced than it appears.¹⁴⁸ The court described the plaintiff's argument that assault weapons are useful for self-defense as "facile" and then preceded to make its own facile argument based on mass shootings.¹⁴⁹ While it is true assault weapons are used to perpetrate mass shootings, they are also used to combat mass shootings by both law enforcement and private citizens.¹⁵⁰ Public safety is a matter of great concern for governments, but it is misguided to focus solely on the dangers of a type of weapons without also acknowledging the defensive capabilities of the same weapons.

The surgeon's testimony on the lethality of assault weapons, discussed in the case, also undercuts the court's decision. It again misses the nuance of the issue by first accepting the premise that rounds fired from an AR-15 are more deadly than handgun rounds without recognizing that the same is true of almost all rifles.¹⁵¹ It also undercuts the previous argument that assault weapons are less suitable than handguns for self-defense in the home. It stands to reason that a more lethal rifle is more suitable than a less lethal handgun. Even ignoring the nuance of the issue, it seems peculiar to use the testimony of a single surgeon to justify a sweeping limitation on a constitutional right.

C. *The Second Circuit and New York State Rifle and Pistol Ass'n v. Cuomo*

This case stands out more than the other circuit court cases because *New York State Rifle & Pistol Ass'n v. Cuomo* involved the court deciding challenges to two states' assault weapon and large-capacity magazine bans simultaneously.¹⁵² *Cuomo* involved

147. *Id.* at 39–40.

148. Assault weapons are also used to stop mass shootings. For example, the Sutherland Springs shooting was disrupted by a citizen intervening with an AR-15. Michael J. Mooney, *The Hero of the Sutherland Springs Shooting Is Still Reckoning with What Happened That Day*, TEX. MONTHLY (Nov. 2018), <https://www.texasmonthly.com/articles/st-ephen-willeford-sutherland-springs-mass-murder/> [<https://perma.cc/9P5R-PEVX>]. Injuries from all types of rifle rounds, not just AR-15s, are more damaging than handgun rounds. See *Wound Ballistics – Motion and Effects of Projectiles in the Human Body*, WHITE MOUNTAIN FORENSIC, <https://www.whitemountainforensic.com/wound-ballistics-motion-effects-projectiles-human-body/> [<https://perma.cc/WCF4-P6UR>] (last visited July 10, 2022).

149. *Worman*, 922 F.3d at 40.

150. See, e.g., Mooney, *supra* note 148.

151. See *Wound Ballistics*, *supra* note 148.

152. *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 248–52 (2d Cir. 2015).

challenges to assault weapons and large-capacity magazine bans in both New York and Connecticut.¹⁵³ The laws were similar to the expired federal assault weapons ban, and the Second Circuit came to a similar conclusion as the other circuits.¹⁵⁴ The court assumed that the weapons at issue were protected by the Second Amendment and that intermediate scrutiny applied.¹⁵⁵ The court based its decision on dubious justifications that the banned weapons are not as commonly used for self-defense and that other weapons remained available.¹⁵⁶ In applying intermediate scrutiny, the court upheld both bans.¹⁵⁷

The first justification—that the prohibited weapons are not being commonly used for self-defense—is inconsistent with the facts. Assuming, *arguendo*, that the court is correct that handguns vastly outnumber the amount of assault weapons used for the same purpose, the handguns used probably come standard with large-capacity magazines.¹⁵⁸ The common use of large-capacity magazines undercuts the court’s initial proposition that the laws do not burden the core of the Second Amendment. Like other rights, the core of the Second Amendment is judged using strict scrutiny.¹⁵⁹ As an example, First Amendment cases involving the core of the right, political speech, are judged using strict scrutiny.¹⁶⁰ It stands to reason, then, that at minimum the large-capacity magazine ban should have been judged using strict scrutiny.

The court’s second justification is far less supportable. The idea that certain weapons and magazines can be subjected to a

153. *Id.* at 248, 251.

154. *Id.* at 248, 252–53.

155. *Id.* at 257 (“In short, we proceed on the assumption that these laws ban weapons protected by the Second Amendment.”); *id.* at 260 (“[W]e conclude that intermediate, rather than strict, scrutiny is appropriate.”).

156. *Id.* at 258, 260.

157. *Id.* at 263–64.

158. *Duncan v. Becerra (Becerra II)*, 970 F.3d 1133, 1142 (9th Cir. 2020) (“LCMs are commonly used in many handguns . . .”), *rev’d on reh’g en banc, sub nom. Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *vacated*, 142 S. Ct. 2895 (2022) (mem.).

159. *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 195 (5th Cir. 2012) (“A regulation that threatens a right at the core of the Second Amendment . . . triggers strict scrutiny.”), *abrogated by N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

160. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (“Laws that burden political speech are ‘subject to strict scrutiny.’”) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)). First Amendment analogies can be used to support the Second Amendment. *United States v. Skoien*, 614 F.3d 638, 649 (7th Cir. 2010) (Sykes, J., dissenting) (“*Heller* [*I*] expressly approved the comparison of the Second Amendment to the First.”).

blanket ban because other inferior weapons are available is unreasonable. Continuing the First Amendment comparison, it would be difficult to imagine that a law banning certain political slogans would be upheld because other slogans were still available. The justifications are even more suspect as they seem to undermine any semblance of even a rational basis for the laws.

First, the court starts off by stating people can still buy some semi-automatic weapons.¹⁶¹ The primary issue with enforcing an assault weapons ban is the ability of creative manufacturers to simply reconfigure their weapons to avoid the ban.¹⁶² It strains rationality to accept that a law is acceptable because people can buy alternatives that do the exact same thing as it would then appear the law was pointless. Pointless restrictions on constitutional rights seem inherently suspect.

Second, the court states that the magazine ban is not a significant burden because a person is still allowed to buy as many magazines as they want.¹⁶³ While the court is correct with that finding, it misses the reality that weapons holding less than ten rounds can still be used to perpetrate mass violence.¹⁶⁴

The Second Circuit decided on intermediate scrutiny and deferred to the state legislatures that the laws were necessary for public safety.¹⁶⁵ The court continued the unfortunate trend of allowing social policy, even if well intentioned, to override the Constitution.

161. N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 260 (2d Cir. 2015).

162. Alana Wise, *Biden Wants New Ban on Assault-Style Weapons. What Lessons Were Learned from the '90s?*, NPR (Apr. 10, 2021, 8:14 AM), <https://www.npr.org/2021/04/10/985514254/biden-wants-new-ban-on-assault-style-weapons-what-lessons-were-learned-from-the-page> [https://perma.cc/5NSV-UUNA] (“I think one of the issues that came up with the original Assault Weapons Ban of '94 was that lawmakers underestimated maybe the creativity of a gun industry intent on circumventing the intention behind these laws.”).

163. *Cuomo*, 804 F.3d at 260.

164. The 2013 Washington Navy Yard shooting that left twelve people dead was committed with a Remington 870 shotgun. Michael S. Schmidt, *State Law Prevented Sale of Assault Rifle to Suspect Last Week, Officials Say*, N.Y. TIMES (Sept. 17, 2013), <https://www.nytimes.com/2013/09/18/us/state-law-stopped-gunman-from-buying-rifle-officials-say.html> [https://perma.cc/77C7-DD9C]. The Remington 870's magazine holds four rounds of ammunition. *Model 870 Wingmaster*, REMINGTON, <https://www.remarms.com/shotguns/pump-action/model-870/model-870-wingmaster> [https://perma.cc/7TA9-R2AC] (last visited July 30, 2022).

165. *Cuomo*, 804 F.3d at 263 (“[Plaintiff’s arguments were] not strong enough to overcome the ‘substantial deference’ we owe to ‘predictive judgments of the legislature’ on matters of public safety.”).

D. The Fourth Circuit and Kolbe v. Hogan

Kolbe v. Hogan breaks with the previous circuit courts because it decided that assault weapons and large-capacity magazines were simply not protected by the Second Amendment at all.¹⁶⁶ The court based its decision on its determination that the banned weapons were “weapons of war” and seemingly dismissed the common use test of *Heller I* as a “popularity test.”¹⁶⁷ The court decided the weapons at issue were “like” “M-16 rifles” and not protected by the Second Amendment.¹⁶⁸ For good measure, the court decided that even if the weapons were protected, intermediate scrutiny applied, and the laws passed muster.¹⁶⁹

The court’s apparent disregard of Supreme Court precedent by ignoring *Miller* and misrepresenting *Heller I* seems unwarranted. First, the idea that “weapons of war” are outside the scope of weapons protected by the Second Amendment was rejected by *Miller*.¹⁷⁰ If the Supreme Court can decline to find a weapon protected by the Second Amendment because it *is not* useful for military service and the Fourth Circuit can find a weapon not protected because it *is* useful for military service, a person could be left to wonder what category of weapon is protected. Second, the Supreme Court dismissed the common use test as an unworkable popularity contest because it is unclear how many weapons of the type must be owned before it becomes in common use.¹⁷¹ Taking the plain meaning of “common,” anything that is prevalent meets the definition. AR-15s and AK-47s are common based on the court’s own finding that 20% of rifle sales in 2012 were those types of weapons.¹⁷² The widespread sale of these weapons strongly indicates they are in common use.

The court’s use of its own “like an M-16 rifle” test is even more ambiguous and unwieldy than the in-common-use standard.¹⁷³ The court spends a significant amount of its discussion describing

166. *Kolbe v. Hogan*, 849 F.3d 114, 135 (4th Cir. 2017), *abrogated by* N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111 (2022).

167. *Id.* at 135, 141.

168. *Id.* at 136.

169. *Id.* at 138.

170. *Miller* held that a shotgun without a military purpose was not protected by the Second Amendment. *United States v. Miller*, 307 U.S. 174, 178 (1939).

171. *Kolbe*, 849 F.3d at 135–36.

172. *Id.* at 128.

173. While the Fourth Circuit opinion never explicitly creates a new test where weapons are compared to an M-16, it spends so much time justifying the law’s constitutionality by comparing the AR-15 to an M-16 that it appears that the comparison was the test. *See id.* at 124–26, 156.

how the AR-15 is like the military M-16 except for it being semi-automatic.¹⁷⁴ The court also goes to great lengths to describe the lethality of assault weapons and large-capacity magazines.¹⁷⁵ The court wraps up this apparent new test by explaining that machine guns have been effectively banned since 1986 and that in 1994 Congress passed a federal ban on assault weapons and large-capacity magazines.¹⁷⁶

Starting with the lowest hanging fruit, the reasoning that the 1994 federal ban somehow supports the constitutionality or reasonableness of the Maryland law is a red herring. While legislative intent can be a useful tool of statutory interpretation, an expired federal law does not illustrate the reasonableness of an existing state law. Mentioning the ban on fully automatic machine guns is also a red herring. The court readily admits that the AR-15 is semi-automatic as opposed to fully automatic but then seems to minimize as much as possible the relevancy of that distinction.¹⁷⁷ Other parts of the court's opinion indicate that this reasoning is potentially flawed. At first, the court says AR-15s are weapons of war and not protected by the Second Amendment but then points out the military M-16s are machine guns.¹⁷⁸ That is a much larger distinction than the court lets on, particularly because Congress felt restricting machine guns in 1934 was sound but banning semi-automatic versions was not.¹⁷⁹

The “like an M-16” test is likely unworkable because of the difficulty in determining what is like an M-16. The court's test appears to be a mix of a cosmetic and rate of fire test.¹⁸⁰ First, the court notes the external resemblance between the AR-15 and M-16 and cites marketing material advertising the similarity.¹⁸¹ A

174. *Id.* at 124.

175. *Id.* at 125.

176. *Id.* at 126.

177. *Id.* at 124–25 (“[T]he AR-15—is simply the semiautomatic version of the M16 rifle The difference between the fully automatic and semiautomatic versions of those firearms is slight.”). This understates the increased lethality of a fully automatic weapon. For the impact a fully automatic weapon can have, see Art Patnaude, *Machine Guns*, WALL ST. J., <https://graphics.wsj.com/100-legacies-from-world-war-1/machine-guns> [<https://perma.cc/YP24-6G8F>] (last visited July 16, 2022) (describing the impact fully automatic weapons had in World War 1).

178. *Kolbe*, 849 F.3d at 136.

179. The National Firearms Act of 1934 (NFA) restricts machine gun ownership by requiring registration and a \$200 tax. Frye, *supra* note 13, at 60–62. Civilians are prohibited from manufacturing, importing, or transferring machine guns that were not registered by May 19, 1986. 27 U.S.C. § 479.105.

180. *Kolbe*, 849 F.3d at 136.

181. *Id.* at 125, 128–29, 136.

features test like this was used in the 1994 federal assault weapons ban and is the easier test to apply.¹⁸² It ran into the same problem as state bans where manufacturers worked around it.¹⁸³

The second part of the court's "like an M16" comparison focuses on the rate of fire. That seems more like a capability-based test and would likely prove near impossible to implement. How capable is too capable? What rate of fire is acceptable? What would the court do about weapons that are more capable than their appearance suggests? For example, the Ruger Mini-14 rifle can have the appearance of a normal hunting rifle with a wood stock and no pistol grip.¹⁸⁴ The Mini-14 is chambered for the same round as the AR-15 and can be used with thirty round magazines giving it the same capability as the AR-15, yet its appearance often allows it to escape state bans.¹⁸⁵ While the common use test is unclear and difficult, the circuit court's apparent replacement is even more unworkable and flawed.

E. The Seventh Circuit and Friedman v. City of Highland Park

Friedman v. City of Highland Park was a challenge to the City of Highland Park's ban on assault weapons and large-capacity magazines.¹⁸⁶ The court upheld the City of Highland Park's ban on assault weapons and large-capacity magazines on the grounds that the weapons were not in common use in 1791 or useful for militia service and that the state could regulate weapons ownership because the state commands the militia.¹⁸⁷

The court's "common use in 1791" or "useful for militia service" test misses the mark. The idea that a constitutional right is tied to the state of technology at the time of enactment is not forced upon other rights. For example, the First Amendment applies on the internet despite it not being developed until over a

182. *Assault Weapons and Large Capacity Magazines*, EFSGV, <https://efsgv.org/learn/policies/assault-weapons-and-large-capacity-magazines/> [<https://perma.cc/29PW-VCX6>] (last visited Aug. 28, 2022).

183. Jordy Yager, *The Problem with 'Assault Weapons,'* HILL (Jan. 17, 2013, 1:22 AM) (on file with the *Houston Law Review*) ("Gun companies quickly realized they could stay within the law and continue to make rifles with high-capacity magazine clips if they steered away from the cosmetic features mentioned in the law.")

184. *See generally Mini-14® Ranch*, RUGER, <https://ruger.com/products/mini14RanchRifle/specSheets/5816.html> [<https://perma.cc/VPV2-3VLS>] (last visited July 10, 2022).

185. Mark McDaniel, *Assault Weapon Bans Are All About Appearance*, REASON (Jan. 11, 2019, 2:50 PM), <https://reason.com/podcast/2019/01/11/dianne-feinstein-assault-weapon-ban/> [<https://perma.cc/YU2Z-G9TP>].

186. *Friedman v. City of Highland Park*, 784 F.3d 406, 407 (7th Cir. 2015).

187. *Id.* at 410–11.

century after the Amendment was ratified.¹⁸⁸ The Fourth Amendment protects digital information held on a cellphone despite cell phones not being in existence in until the late twentieth century.¹⁸⁹ The Eighth Amendment allows for executions using drugs not synthesized until 1976.¹⁹⁰ The Supreme Court has since clarified that 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.”¹⁹¹

The second part of this line of the court’s reasoning looking for weapons useful for militia service also falls short because assault weapons and large-capacity magazines likely would be useful for militia service.¹⁹² This argument seems even more questionable given that this court’s opinion, and the previously mentioned court opinions, all stress how deadly and effective these weapons are.¹⁹³ The argument that assault weapons and large-capacity magazines are not useful for militia service cannot be reconciled with the facts of the case.

The creative aspect of this court decision is the idea that historical control of state militias grants states the power to restrict what type of weapons citizens can own. Moreover, it is a facially strong one. A state calling forth the militia creates a military force and military forces can control what types of

188. See *Reno v. ACLU*, 521 U.S. 844, 866–67, 885 (1997) (holding that a law restricting sharing obscene material over the internet violated the First Amendment).

189. *Riley v. California*, 573 U.S. 373, 403 (2014) (“Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.”).

190. See *Glossip v. Gross*, 576 U.S. 863, 881 (2015) (holding that execution using midazolam does not violate the Eighth Amendment). Midazolam was first synthesized in 1976. *Midazolam*, AM. CHEM. SOC’Y (June 15, 2015), <https://www.acs.org/content/acs/en/molecule-of-the-week/archive/m/midazolam.html> [<https://perma.cc/49FJ-2WAD>].

191. *Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016) (citing *Heller I*, 554 U.S. 570, 682 (2008)).

192. The Seventh Circuit has suggested military-grade weapons would be found in a militia armory. See *Friedman v. City of Highland Park*, 784 F.3d 406, 408 (7th Cir. 2015) (noting that “military-grade weapons” are “the sort that would be in a militia’s armory”) (citing *Heller I*, 554 U.S. 570 (2008)). Additionally, the distribution of at least 18,000 machine guns from the Ukrainian military to volunteer fighters during the Russian invasion of Ukraine shows that military arms can be useful in militia service. Joshua Zitser, *Video Reportedly Shows Ukrainian Men Helping Themselves to Guns on a Kyiv Street After All 18-60 Years Were Urged to Take Up Arms and Fight the Russian Invasion*, INSIDER (Feb. 25, 2022, 12:03 PM), <https://www.businessinsider.com/video-ukrainian-men-help-themselves-to-guns-in-kyiv-as-russia-attacks-2022-2> [<https://perma.cc/YV9Z-QX7Y>].

193. *Friedman*, 784 F.3d at 411.

weapons they use.¹⁹⁴ That would be a strong argument if the Second Amendment was a right of the state to organize and control a militia, but it is not. *Heller I* clearly states that the Second Amendment is an individual right to possess a firearm unconnected to militia service, and thus this argument is incompatible with *Heller I*.¹⁹⁵

F. The California Cases and the Opportunity to Clarify the Second Amendment

1. *Miller v. Bonta*. Judge Roger Benitez of the United States District Court for Southern District of California made national news with his 2021 ruling in *Miller v. Bonta* that California's assault weapons ban was unconstitutional.¹⁹⁶ While the media and California Governor Gavin Newsom focused on Judge Benitez's comparison of the AR-15 to a Swiss army knife,¹⁹⁷ the critical component of the ruling was the weight placed on the "fit" of the law under intermediate scrutiny.¹⁹⁸

The court found that the assault weapons ban failed both strict and intermediate scrutiny but evaluated the law by intermediate scrutiny.¹⁹⁹ The court heavily relied on the common use test of *Heller I* in its evaluation.²⁰⁰ The court found that modern rifles were extremely popular in California and nationally, so banning them was akin to banning an "entire class of very popular hardware" that could not survive any form of heightened

194. The closest existing organization to a state militia is each state's National Guard. The National Guard is part of the military. *GUARD FAQs*, ARMY NAT'L GUARD, <https://www.nationalguard.com/guard-faqs> [<https://perma.cc/X3GQ-R9EY>] (last visited July 11, 2022) ("The National Guard is a unique element of the U.S. military that serves both community and country.").

195. *Heller I*, 554 U.S. at 592.

196. *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1009, 1068 (S.D. Cal. 2021). For an example of the ruling in national news, see Eric Levenson & Josh Campbell, *Meet the Federal Judge Who Overturned California's Decades-Old Assault Weapons Ban*, CNN (June 9, 2021, 9:30 PM), <https://www.cnn.com/2021/06/09/us/roger-benitez-california-judge-guns/index.html> [<https://perma.cc/U45R-5WQ8>].

197. *'Disgusting Slap in the Face': California Governor Slams Judge as Assault Weapons Ban Overturned*, GUARDIAN (June 5, 2021, 3:53 PM), <https://www.theguardian.com/us-news/2021/jun/05/california-assault-rifles-ban-gavin-newsom-judge-roger-benitez-ar-15-swiss-army-knife> [<https://perma.cc/CU4H-FU37>].

198. *Bonta*, 542 F. Supp. 3d at 1027.

199. *Id.* at 1026–27.

200. *Id.* at 1021 ("[T]he *Heller I* test asks: is a modern rifle commonly owned by law-abiding citizens for a lawful purpose? For the AR-15 type rifle the answer is 'yes.'").

scrutiny.²⁰¹ When evaluating the law under intermediate scrutiny, the court found that the government’s interest in reducing crime was sufficient but that the “fit” of the law was insufficient because the law would not have the effect of reducing crime.²⁰²

The court’s *Heller I* analysis determined assault weapons were protected because they were in common use.²⁰³ In California there were 185,569 registered assault weapons and around 52,000 assault weapons that were unable to be registered because the registry closed before they were processed.²⁰⁴ While the number of assault weapons registered in California is only 5% of total weapons in the state, it’s important to remember the legal hurdles to owning an assault weapon in California because it suppresses their ownership.²⁰⁵ The national figures cited by the court give a much better view on the commonality of assault weapons. It found that 2018 data showed that 1,954,000 assault weapons were manufactured or imported that year alone.²⁰⁶ The court placed that number in perspective by comparing the 1,954,000 modern rifles produced to the 909,330 Ford F-150 trucks sold in 2018.²⁰⁷ The fact that assault weapons outsell the most popular vehicle in the United States by a factor of two strongly indicates assault weapons are in common use because no one could reasonably argue F-150s are uncommon. As *Heller I* protects weapons “in common use for law purposes,”²⁰⁸ the court was correct in finding that the law could not survive any form of heightened scrutiny.

Miller v. Bonta was appealed to the Ninth Circuit but has been subsequently remanded back to the district court for further proceedings consistent with *Bruen*.²⁰⁹

201. The opinion uses “modern rifle” as a substitute term for rifles like the AR-15 that are designated as assault weapons in California. *Id.* at 1020, 1023 (“When the term “modern rifle” is used in this opinion, it principally refers to a rifle built on the AR-15 platform with prohibited features.”).

202. *Id.* at 1028.

203. *See id.* at 1021.

204. *Id.*

205. *Id.* at 1021, 1022.

206. *Id.* at 1022.

207. *Id.*; *see also Most Popular Cars in America*, EDMUNDS, <https://www.edmunds.com/most-popular-cars/> [<https://perma.cc/T97D-VABR>] (last visited July 24, 2022) (“The Ford F-150 has been the best-selling truck (and vehicle) in the United States for more than 40 years.”).

208. *Heller I*, 554 U.S. 570, 571 (2008).

209. *Miller v. Bonta*, No. 21-55608, 2022 WL 3095986, at *1 (9th Cir. Aug. 1, 2022).

2. *Duncan v. Bonta*. *Duncan v. Bonta* was a challenge to California's large-capacity magazine ban.²¹⁰ The law was ruled unconstitutional and enjoined by district court Judge Roger Benitez, the same judge from *Miller v. Bonta*.²¹¹ A three-judge panel of the Ninth Circuit affirmed the district court's enjoinder of the law.²¹² An en banc panel of the Ninth Circuit reversed and allowed the large-capacity magazine ban to resume.²¹³

After hearing California's argument that large-capacity magazines were not protected by the Second Amendment because they were weapons of war and most useful in military service, the court decided to avoid the issue by "assum[ing], without deciding, that the challenged law implicates the Second Amendment."²¹⁴ The court then applied intermediate scrutiny because the burden imposed by the large-capacity magazine ban was small and upheld the law citing the danger posed by large-capacity magazines in mass shootings.²¹⁵

In reaching its conclusion that the burden is small, the court relied on its determination that large-capacity magazines are not useful for self-defense in the home or other lawful purposes.²¹⁶ The court's determination that large-capacity magazines are not useful for self-defense was based on the First Circuit's findings in *Worman* that there were few cases of self-defense using large-capacity magazines in the home and studies showing most incidents of self-defense involved two or three rounds fired.²¹⁷

The court's reliance on the *Worman* court's inability to find instances where more than ten rounds were fired in self-defense is misplaced. Information on how many rounds were fired in a

210. *Duncan v. Bonta*, 19 F.4th 1087, 1087, 1096 (9th Cir. 2021), *vacated*, 142 S. Ct. 2895 (2022) (mem.).

211. *Becerra I*, 366 F. Supp. 3d 1131, 1182 (S.D. Cal. 2019), *rev'd en banc, sub nom. Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *vacated*, 142 S. Ct. 2895 (2022) (mem.) ("California Penal Code § 32310 unconstitutionally impinges on the Second Amendment rights of law-abiding responsible ordinary citizens who would like to acquire and possess for lawful purposes firearm magazines able to hold more than 10 rounds.").

212. *Becerra II*, 970 F.3d 1133, 1133–34 (9th Cir. 2020), *rev'd en banc, sub nom. Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *vacated*, 142 S. Ct. 2895 (2022) (mem.).

213. *Bonta*, 19 F.4th at 1111 ("[W]e reverse the district court's grant of summary judgment to Plaintiffs on their Second Amendment claim.").

214. *Id.* at 1102–03.

215. *Id.* at 1104, 1106–10. ("Defendant argues that the ban imposes only a small burden on the Second Amendment right and that, accordingly, intermediate scrutiny is the appropriate lens through which to view California's law. We agree.").

216. *See id.* at 1104.

217. *Id.* at 1104–05; *see Worman v. Healey*, 922 F.3d 26, 37 (1st Cir. 2019) ("[N]either the plaintiffs nor their experts 'could . . . identify even a single example of a self-defense episode in which ten or more shots were fired.'").

self-defense shooting is limited, as Judge Benitez points out that “there is no national or state data source that captures information on shots fired in gun attacks.”²¹⁸ Until such data exists, it is inappropriate to use the lack of reported cases to justify a ban on large-capacity magazines.

The court’s in-depth explanation that large-capacity magazines are not useful for self-defense in the home because studies show most self-defense shootings involve less than three rounds fired is also misguided. While there is support for the claim that the average self-defense shooting involves three rounds, that does not negate the need for large-capacity magazines in self-defense.²¹⁹ Law enforcement agencies across the United States, from the FBI to municipal police departments, carry weapons with large-capacity magazines even though they have probably heard that most shootings involve three rounds.²²⁰ Law-abiding citizens commonly follow law enforcement’s example in selecting weapons with large-capacity magazines for self-defense.²²¹ The court’s determination that that large-capacity magazines “provide significant benefit to soldiers and criminals who wish to kill many people rapidly. But the magazines provide at most a minimal benefit for civilian, lawful purposes” is misguided.²²² Accordingly, the court’s rationale for its ruling is not accurate.²²³ The plaintiffs appealed to the Supreme Court for

218. *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1042 (S.D. Cal. 2021).

219. Brian Palmer, *How Do You Win a Gunfight?*, SLATE (Feb. 13, 2013, 1:39 PM), <http://slate.com/news-and-politics/2013/02/christopher-dorner-cornered-how-do-you-win-a-gunfight.html> [<https://perma.cc/6YLR-LNAR>] (“NYPD firearms expert Frank McGee says the typical police gunfight conforms to a ‘rule of three:’ three rounds, 3 yards, three seconds.”).

220. *See, e.g.*, Aaron Smith, *Glock Wins \$85 Million FBI Contract*, CNN (July 1, 2016, 6:42 AM), <https://money.cnn.com/2016/06/30/news/companies/glock-gun-contract-fbi/index.html> [<https://perma.cc/4PKZ-CM8D>] (“RFP called for a compact pistol, with a minimum magazine capacity of 14 rounds, and a full-size pistol, with a minimum magazine capacity of 16 rounds.”); *see also* Shawn Cohen, *NYPD Vets Upset That Rookies Get Better Guns*, N.Y. POST (Nov. 28, 2016, 5:24 AM), <https://nypost.com/2016/11/28/nypd-vets-upset-rookies-get-better-guns/> [<https://perma.cc/7VJQ-GW83>] (describing how the New York Police Department issues Glock handguns that use fifteen round magazines).

221. *See How the Glock Became America’s Weapon of Choice*, NPR (Jan. 24, 2012, 10:47 AM), <https://www.npr.org/transcripts/145640473> [<https://perma.cc/HS9H-2GNZ>] (“The point was to get the police departments to adopt the gun, and that would give the gun credibility in the much larger, much more lucrative civilian market . . .”).

222. *Bonta*, 19 F.4th at 1106.

223. As circuit Judge VanDyke noted, “in the nine Western states covered by our court, the right to ‘keep and bear arms’ means, *at most*, you might get to possess one janky handgun and 2.2 rounds of ammunition, and only in your home under lock and key. That’s it. That’s ridiculous.” *Id.* at 1172–73 (VanDyke, J., dissenting).

review.²²⁴ The Supreme Court remanded the case back to the Ninth Circuit for further consideration consistent with *Bruen*.²²⁵

IV. RESTORING THE SECOND AMENDMENT

Section IV.A proposes a new test for Second Amendment cases that applies both the “in common use” test of *Heller I* and the “history and tradition” test of *Bruen*. Section IV.B then applies this improved test to California’s ban on assault weapons and large-capacity magazines.

A. A Product Improved Second Amendment Test

An improved test is needed for evaluating laws that regulate the purchase and possession of popular weapons like the AR-15. The two-step test used by the circuit courts makes sense on its face.²²⁶ It first asks whether the restriction burdens conduct that is protected by the Second Amendment.²²⁷ It then asks what level of scrutiny should apply based on “how closely a particular law or policy approaches the core of the Second Amendment right and how heavily it burdens that right.”²²⁸ The problem with this test is that it leaves too much discretion to the circuit courts. Most circuit courts have decided that intermediate scrutiny applies to laws that do not burden self-defense in the home.²²⁹ There are two issues with this outcome. First, this approach minimizes the in common use standard of *Heller I*. Secondly, means-end scrutiny in Second Amendment cases has been rejected by the Court in *Bruen*.²³⁰

Improving the two-step test starts with clarifying how courts should apply *Heller I*.²³¹ The circuit courts have spent too much time worrying about the exact core of protection and trying to

224. See generally Petition for Writ of Certiorari, *Duncan v. Bonta*, No. 21-1194, 2022 WL 625099.

225. *Duncan v. Bonta*, 142 S. Ct. 2895 (2022) (mem.).

226. Elke C. Meeùs, *The Second Amendment in Need of a Shot in the Arm: Overhauling the Courts’ Standards of Scrutiny*, 45 W. ST. L. REV. 29, 48 (2017) (describing the two-step test many courts use).

227. *Id.*

228. *Worman v. Healey*, 922 F.3d 26, 36 (1st Cir. 2019).

229. *Silvester v. Becerra*, 138 S. Ct. 945, 947 (2018) (Thomas, J., dissenting) (“Courts of Appeals generally evaluate Second Amendment claims under intermediate scrutiny.”).

230. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2127 (2022).

231. Justice Thomas has stated that “the lower courts are resisting this Court’s decisions in *Heller [I]* and *McDonald* and are failing to protect the Second Amendment to the same extent that they protect other constitutional rights.” *Silvester*, 138 S. Ct. at 950 (Thomas, J., dissenting).

precisely calculate the popularity of the AR-15.²³² The best way to fix this problem is to simplify *Heller I*'s in common use standard into a commerce-based approach. Under this approach, unreliable studies of ambiguous data would be replaced with a single question: is the weapon at issue commonly available for civilian purchase in the majority of states.²³³ This test follows *Heller I* because the weapons in common use will be those that are widely available in commerce.²³⁴ Some might criticize this test as allowing a majority of states to overrule weapons restrictions of the other states. That is the likely effect of this test, but the views of the majority of the states have been used to support overruling state laws before in landmark Fourth and Sixth Amendment cases.²³⁵ The purpose of step one of this proposed test is to give the Second Amendment the wide scope of protection an enumerated right should have and be an initial gatekeeper against truly dangerous weapons like nuclear bombs while allowing commonly owned weapons like AR-15s to be constitutionally protected. The law will be invalid if the weapon passes step one, otherwise it must go on to step two.

The next improvement to the current two-step test is to judge laws that restrict weapons that are not in common use by the history and tradition standard. While “[h]istorical analysis can sometimes be difficult,” this is an important step of the test because some weapons should be protected by the Second Amendment even if they are not in common use.²³⁶ One example of a weapon in this category is the Uzi, of which only 75,000 have

232. See *infra* Part III.

233. *Duncan v. Bonta*, 19 F.4th 1087, 1171 (9th Cir. 2021) (VanDyke, J., dissenting) (“If most of the states in the Union allow a particular item to be used in the course of exercising a Second Amendment right, then the government’s justification for forbidding or restricting that item or usage should be subjected to strict scrutiny.”).

234. Guns like the AR-15 are in common use for a variety of lawful purposes like target shooting and self-defense because they are easily purchased. The National Shooting Sports Foundation estimates that one of five firearms sold in the United States is an AR-15 style rifle. Jon Schuppe, *America’s Rifle: Why So Many People Love the AR-15*, NBC NEWS (Dec. 17, 2017, 12:19 PM), <https://www.nbcnews.com/news/us-news/america-s-rifle-why-so-many-people-love-ar-15-n831171> [<https://perma.cc/HWA5-49MT>].

235. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 651 (1961) (“While in 1949, prior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule.”); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (“Twenty-two States, as friends of the Court, argue that *Betts* was ‘an anachronism when handed down’ and that it should now be overruled. We agree.”).

236. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2118, 2128 (2022).

been imported.²³⁷ The Uzi is a semi-automatic carbine useful for sport shooting, just like the AR-15.²³⁸ The Uzi is not in common use because relatively few are in the United States.²³⁹ However, just because the Uzi and other similar weapons are not in common use does not mean that they are not suitable for self-defense. Step two of this new test protects weapons like the Uzi because there is no history or tradition of banning them.²⁴⁰ The purpose of step two is to protect weapons that are not in common use but are substantially similar to weapons protected by step one.

The best way to restore the Second Amendment is to start by following *Heller I* and recognizing that weapons commercially available in the majority of states are those in common use for lawful purposes and evaluate laws restricting the types of weapons citizens can own under strict scrutiny. Assault weapons of all kinds are popular and in common use for a variety of lawful purposes. As of 2020, there were nearly twenty million assault weapons in circulation, and they account for nearly half of all rifles produced in the United States.²⁴¹ Large-capacity magazines are even more popular. Over “100,000,000 such magazines are currently lawfully owned by citizens of this country” and “account for *half* of all magazines owned in the United States today.”²⁴² *Heller I* held that the Second Amendment protected weapons “in common use,” and it is hard to argue the most popular firearms and accessories are not protected under that test.²⁴³ *Bruen* should be viewed as enhancing *Heller I* by protecting weapons that have been traditionally and historically available for civilian ownership. This two-step test will give the Second Amendment the respect it deserves while maintaining the restrictions on prohibitions on dangerous and unusual weapons that *Heller I* deemed valid.²⁴⁴ The Second Amendment is not a second-class right, and this test will ensure the equal protection of Second Amendment rights regardless of where a person lives.

237. Hurst, *supra* note 123.

238. *An Essential Uzi Guide*, AM. RIFLEMAN (Apr. 29, 2019), <https://www.americanriflemag.org/content/an-essential-uzi-guide/> [https://perma.cc/T466-JDTR].

239. *Id.*

240. Uzi carbines were banned in 1989. *Id.*

241. *NSSF Releases Most Recent Firearm Product Figures*, NSSF (Nov. 16, 2020), <https://www.nssf.org/articles/nssf-releases-most-recent-firearm-production-figures/> [https://perma.cc/V7CF-CG73].

242. *Duncan v. Bonta*, 19 F.4th 1087, 1155 (9th Cir. 2021) (Bumatay, J., dissenting).

243. *Heller I*, 554 U.S. 570, 627 (2008).

244. *Id.*

B. Does California's Ban on Assault Weapons and Large-Capacity Magazines Survive This Test?

California's ban on assault weapons and large-capacity magazines is a restriction on weapons commercially available in the majority of the states.²⁴⁵ For example, the Colt M4 Carbine is legal for purchase in all but California and eight other states.²⁴⁶ The Colt M4 comes with a thirty-round magazine that is legal in all but nine states.²⁴⁷ Under this proposed test, the weapons in controversy are protected by the Second Amendment because they are commonly available for purchase by individuals in a majority of states. Therefore, the law is invalid and analysis of the law can end.

However, suppose the weapon in question is the Heckler & Koch HK-91. The HK-91 would not pass step one of this test as it is not commercially available for civilian sales in a majority of states because the import of HK-91s has been illegal since 1989.²⁴⁸ Step two would protect the HK-91 because it has not been traditionally or historically banned. Some might argue that an import ban in place for over thirty-three years should qualify as a ban permitted by history and tradition, however *Bruen* overturned a ban on carrying concealed weapons that stood since the early 1900s.²⁴⁹ Accordingly, the argument that the thirty-three-year import ban satisfies the history and tradition test falls short, and laws banning rifles like the HK-91 would be invalid under step two of this test.

California's total prohibition of assault weapons and large-capacity magazines is too broad to survive review under the proposed test. California's desire to reduce crime and prevent tragic massacres like those in Las Vegas, Newtown, and Orlando is completely reasonable. However, that must not conflict with the Second Amendment. Of course, California is free to create new and more targeted laws that reduce crime to comport with the Second

245. Only seven states and the District of Columbia ban assault weapons and only nine states ban large-capacity magazines. See *Large Capacity Magazines*, *supra* note 4; *Assault Weapons*, *supra* note 5.

246. The Colt M4 Carbine is a popular AR-15 type rifle. *Colt M4 Carbine*, COLT, <https://www.colt.com/detail-page/colt-le6920-carbine-223556-161-301-pmag-mbus-4-pos-stk-blk> [<https://perma.cc/DD6H-7X56>] (last visited July 24, 2022).

247. *Id.*

248. Paula Yost, *Permanent Import Ban on Assault Rifles*, WASH. POST (July 8, 1989), <https://www.washingtonpost.com/archive/politics/1989/07/08/permanent-import-ban-on-assault-rifles/4cca6d11-9ce2-44fe-9009-bdf29a7772e4/> [<https://perma.cc/6WTA-RYMP>].

249. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2122 (2022).

Amendment. What those laws would be is up to California to determine and is beyond the scope of this Note.

V. CONCLUSION

The Second Amendment is an acknowledgment of the fundamental right of an American citizen to keep and bear arms. America's relationship with guns is unique, and it reflects the incredible role guns have played in American culture dating all the way back to the Revolutionary War. Guns are inherently dangerous and can be used as tools by evil people to inflict inconceivable amounts of death and destruction. It is a natural response to want to do something to stop it. However, Americans should not lose sight of the wisdom our Constitution provides us. The Constitution safeguards the essential liberties that make us who we are, including the right to keep and bear arms. Every right guaranteed by the Constitution is sacred, and none should be allowed to perish simply because it seems like a good idea. Justice Scalia put it best when he said “[t]he 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.”²⁵⁰ The right to keep and bear arms is necessary to the security of a free state: it is really worth insisting upon.

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250. *Heller I*, 554 U.S. 570, 634 (2008).