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Constitutional Law - Don't Shoot the Messenger: The First Circuit Upholds Massachusetts Assault Weapons Ban - Worman v. Healey, 922 F.3d 26 (1st Cir. 2019)

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CONSTITUTIONAL LAW—DON'T SHOOT THE MESSENGER: THE FIRST CIRCUIT UPHOLDS MASSACHUSETTS ASSAULT WEAPONS BAN—*WORMAN V. HEALEY*, 922 F.3D 26 (1ST CIR. 2019).

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.[1]

For most of its history, the Supreme Court of the United States provided little guidance for interpreting the text of the Second Amendment despite vigorous legal and public debate.[2] Finally—two centuries after its ratification—the Court in *District of Columbia v. Heller* adopted the theory that the Second Amendment protects an individual right to bear arms rather than a collective right of the states to maintain militias.[3] Despite the

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[1] U.S. CONST. amend. II.

[2] *See* United States v. Miller, 307 U.S. 174, 178 (1939) (concluding Second Amendment protection extends only to use or possession of firearms with "some reasonable relationship to the preservation or efficiency of a well regulated militia."); *see also* Presser v. Illinois, 116 U.S. 252, 264–65 (1886) (reaffirming rights of citizens to bear arms as members of militia for public security); United States v. Cruikshank, 92 U.S. 542, 553 (1876) (holding Second Amendment is restriction on federal government, not states); Brian Roth, *Reconsidering a Federal Assault Weapons Ban in the Wake of the Aurora, Oak Creek, and Portland Shootings: Is It Constitutional in the Post-Heller Era?*, 37 NOVA L. REV. 405, 410 (2013) (outlining modes of interpreting Second Amendment). The modern debate over interpretation of the Second Amendment involves two different approaches, spawned by the *Miller* decision. Roth, *supra* note 2, at 410.

> Individual's right theorists believe that the Second Amendment right should not be interpreted differently from other constitutional provisions, which confer individual rights. Collective people's right supporters contend that the founders' concern regarding the Second Amendment primarily revolved around the allocation of military power, and as a result, the right conferred is a collective people's right.

Id. (internal quotation marks omitted); SARAH HERMAN PECK, CONG. RESEARCH SERV., R44618, POST-HELLER SECOND AMENDMENT JURISPRUDENCE 2–9 (2019) (outlining history of Second Amendment jurisprudence).

[3] *See* District of Columbia v. Heller, 554 U.S. 570, 612 (2008) (finding individual right to keep and bear arms based on Amendment's text and history). In a 5-4 decision, the majority, led by Justice Scalia and using an originalist approach, analyzed the plain meaning behind each of the twenty-seven words that comprise the Second Amendment. *Id.* at 576–95. First, the majority broke the Amendment into two separate clauses: the prefatory clause ("[a] well regulated Militia, being necessary to the security of a free State") and the operative clause ("the right of the people to keep and bear Arms, shall not be infringed."). *Id.* at 577. The Court then used the Amendment's historical context to support its textual analysis because "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right" to

significance of this interpretation, many disputes and questions about the Second Amendment remain unresolved by the Court.[4] Particularly, lower federal courts have been left unequipped to determine what kinds of regulations are consistent with *Heller*'s declaration of the individual right to keep and bear arms.[5] In *Worman v. Healey*,[6] the First Circuit addressed whether a Massachusetts law prohibiting a certain class of firearms impermissibly burdened the fundamental Second Amendment right of its

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bear arms. *Id.* at 592. Justice Scalia relied on eighteenth-century definitions of the terms and phrases to conclude that the operative clause announces the Amendment's purpose: to "guarantee the individual right to possess and carry weapons in case of confrontation." *Id.* The phrase "well-regulated militia" in the prefatory clause referred not to a military force, but "all males physically capable of acting in concert for the common defense." *Id.* at 595. Therefore, the language of the prefatory clause served to prevent the elimination of the militia. *Id.* at 596–99. The Court found that the clauses fit together perfectly, as "history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms." *Id.* at 598. This seminal case interpreted the entirety of the Second Amendment to confer an individual right to keep and bear arms. *Id.* at 612–13.

[4] *See* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller,* 67 DUKE L.J. 1433, 1435–36 (2018) (addressing unresolved disputes surrounding interpretation of Second Amendment). Over the past decade, the conversation surrounding the Second Amendment changed significantly amongst courts, lawyers, and scholars because:

> In the first generation of the gun debate, legal doctrine was the desired output; now it must be an input as well. If the first question was *whether* to treat the Second Amendment right as unconnected to militia service, the second question is *how* to do so. Put simply, the debate has shifted not only in substance, but in methodology–generally, from interpretation to construction; meaning to implementation; first principles to doctrine.

Id. at 1436 (emphasis added).

[5] *See* Ruben & Blocher, *supra* note 4, at 1434–35 (explaining new challenges for Second Amendment jurisprudence). *Heller* resolved the crucial question regarding whether the right to keep and bear arms was an individual one, however:

> [I]n the decade since *Heller*, Second Amendment law, scholarship, and advocacy have moved on to new battlefields. Disputes about the underlying purposes and themes of the Second Amendment remain important and, in significant ways, unresolved. But most of the important, timely, and difficult questions involve determining what kinds of regulations are consistent with the individual right to keep and bear arms. An entire field of constitutional doctrine is being built from the ground up–a rare challenge and opportunity for judges, lawyers, and scholars.

Id.

[6] 922 F.3d 26 (1st Cir. 2019).

citizens.[7] The court ultimately held that although the law may indeed impact this right, it does so "(at most) minimally."[8]

In 1998, the Massachusetts legislature passed a statute called An Act Relative to Gun Control in the Commonwealth ("the Act") banning the sale, offer for sale, transfer, or possession of assault weapons and large capacity magazines ("LCMs").[9] The Act was modeled after the Public Safety and Recreational Firearms Use Protection Act (the "federal ban") passed by Congress in 1994 in an effort to decrease the proliferation of assault weapons similar to those used in the military.[10] Massachusetts adopted virtually the

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[7] *See* MASS. GEN. LAWS ch. 140, §131M (West 2019) (proscribing sale, transfer, and possession of certain semi-automatic weapons and large capacity magazines); *see also Worman*, 922 F.3d at 33–36 (considering scope of Second Amendment right as applicable to Massachusetts law). The court, which included Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court sitting by designation, sought to address the question by analyzing the Court's interpretation of the Second Amendment. *Worman*, 922 F.3d at 34–38.

[8] *See Worman*, 922 F.3d at 41 (declaring implication of Act on Second Amendment). The court stated further: "We hold, however, that the Act's burden on that core right is minimal and, thus, the Act need only withstand intermediate scrutiny–which it does." *Id.* at 30–31. The court assumed that the proscribed weapons have protection under the Second Amendment and that the Act implicates the right to self-defense. *Id.* at 30–31, 36. In light of this holding, the court added "[c]onsequently, we are obliged to cede some degree of deference to the decision of the Massachusetts legislature about how best to regulate the possession and use of the proscribed weapons." *Id.*

[9] *See* MASS. GEN. LAWS ch. 140, § 131M (imposing restrictions on assault weapons and LCMs not lawfully possessed before September 13, 1994).

> Whoever not being licensed under the provisions of section 122 violates the provisions of this section shall be punished, for a first offense, by a fine of not less than $1,000 nor more than $10,000 or by imprisonment for not less than one year nor more than ten years, or by both such fine and imprisonment, and for a second offense, by a fine of not less than $5,000 nor more than $15,000 or by imprisonment for not less than five years nor more than 15 years, or by both such fine and imprisonment. The provisions of this section shall not apply to: (i) the possession by a law enforcement officer; or (ii) the possession by an individual who is retired from service with a law enforcement agency and is not otherwise prohibited from receiving such a weapon or feeding device from such agency upon retirement.

Id.

[10] *See* Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, §§ 110101-06, 108 Stat. 1796, 1996-2010 (1994) (codified as amended in scattered sections of 18 U.S.C.) (repealed 2004) (exempting assault weapons and LCMs lawfully possessed before its enactment in September 1994). Congress included the federal ban in an omnibus anti-crime bill titled the Violent Crime Control and Law Enforcement Act of 1994. *See id.* The federal ban stated that the term "semiautomatic assault weapon" encompassed nineteen specific models, and any semiautomatic rifle, pistol, or shotgun that either has the ability to accept a detachable magazine or has at least two combat-style features. *Id.* § 110102(b). The term "large capacity ammunition feeding device" referred to "a magazine, belt, drum, feed strip, or similar device that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition." *Id.* § 110103(b); *see also Worman*, 922 F.3d at 31 (highlighting Congressional rationale for ban). To

same language by proscribing nineteen specific models or variations of semiautomatic weapons—labelled "Enumerated Weapons"—which include the popular AR-15 and "copies or duplicates of the weapons, of any caliber."[11] While the federal ban expired in 2004, the Massachusetts legislature elected instead to make the Act permanent that same year.[12] Furthermore, in 2016, Massachusetts Attorney General Maura Healey ("Healey") issued a public enforcement notice ("the Enforcement Notice") designed to "provide a framework to gun sellers and others for understanding the definition of 'Assault weapon' contained in [the Act]."[13]

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explain the purpose behind the ban, Congress stated "that semiautomatic assault weapons have a capability for lethality–more wounds, more serious, in more victims–far beyond that of other firearms in general, including other semiautomatic guns." *Worman*, 922 F.3d at 31; James B. Jacobs, *Why Ban "Assault Weapons"?*, 37 CARDOZO L. REV. 681, 697–99 (2015) (presenting particular social and political context for ban). The ban had a ten-year lifespan due to a sunset provision—meaning the act was to expire unless Congress decided to renew it—and any such attempts were ultimately unsuccessful. Jacobs, *supra* note 10, at 697. There are several proffered reasons for why the ban was successfully enacted in 1994 but not extended ten years later:

> For one thing, in the months prior to the [federal ban]'s expiration, there were no horrific mass shootings that might have rallied public opinion in favor of renewal. Additionally, violent crime nationally had declined dramatically, but no serious studies attributed the decline to the [federal ban]. In 2004, there was also a Republican president–George W. Bush. Many Democrats had become gun shy, some believing that the 1993 Brady Law and the 1994 [federal ban] had cost the Democrats control of Congress in 1994 and had cost Al Gore the presidency in 2000. Although President Bush said he would sign a renewal if Congress passed it, he certainly knew that Congress would not pass it.

Id. at 698–99. After the federal ban expired, consumer demand for the newly unrestricted weapons increased, supporting the conclusion that "[i]ronically, perhaps the most significant effect of both the 1994 [federal] ban and the 2004 expiration was a massive increase in the number of assault weapons in civilian hands." *Id.* at 699; *Large Capacity Magazines*, Background, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, https://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/large-capacity-magazines/ (last visited Apr. 8, 2020) [perma.cc/N3DX-3HGM] (explaining impact of LCMs on gun violence). According to reported studies, during the ten-year period that the federal ban was in effect, "mass shooting fatalities were 70% less likely to occur compared to the periods before and after the ban" and "the number of high-fatality mass shootings fell by 37%, and the number of people dying in such shootings fell by 43%." *Large Capacity Magazines*, *supra* note 10. However, once the ban lapsed in 2004, "there was a 183% increase in high-fatality mass shootings and a 239% increase in deaths from such shootings." *Id.*

[11] *See* MASS. GEN. LAWS ch. 140, § 121 (2018) (adopting federal ban's definition of "assault weapon").

[12] *See* Worman v. Healey, 922 F.3d 26, 31 (1st Cir. 2019) (highlighting Massachusetts legislature's decision to renew Act, despite expiration of model federal ban). "In signing the [Act] into law, then-Governor Romney declared that semiautomatic assault weapons and LCMs are not made for recreation or self-defense. They are instruments of destruction with the sole purpose of hunting down and killing people." *Id.* (internal quotation marks omitted).

[13] *See Enforcement Notice: Prohibited Assault Weapons*, OFFICE OF THE MASS. ATTORNEY GEN. 1, 3 (July 20, 2016), http://www.mass.gov/ago/public-safety/assault-weapons-enforcement-notice.pdf [perma.cc/N3DX-3HGM] (providing further guidance on weapons banned by Act).

On January 23, 2017, a group comprised of Massachusetts firearm owners, prospective firearm owners, firearm dealers, and a firearm advocacy association (collectively "Plaintiffs") filed suit against Healey, Governor Charles Baker, and other state officials (collectively "Defendants") alleging that the Act—as interpreted by the Enforcement Notice in 2016—violated the Second Amendment and the Due Process Clause of the Fourteenth Amendment.[14] Plaintiffs argued that the Act "prohibits an entire class of firearms . . . commonly kept by law-abiding, responsible citizens for lawful purposes' from the home, where Second Amendment protections are 'at their zenith.'"[15] Plaintiffs were either law-abiding, responsible citizens, or

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According to the notice, when a weapon "meets one or both of the [two] tests and is 1) a semiautomatic rifle or handgun that was manufactured or subsequently configured with an ability to accept a detachable magazine, or 2) a semiautomatic shotgun . . . . [I]t is a Copy or Duplicate (and therefore a prohibited assault weapon) even if it is marketed as 'state compliant' or 'Massachusetts compliant.'" *Id* at 3–4. Under the first of these tests, known as the Similarity Test, "a weapon is a Copy or Duplicate if its internal functional components are substantially similar in construction and configuration to those of an Enumerated Weapon." *Id.* at 3. Under the second test, the Interchangeability Test, "[a] weapon is a Copy or Duplicate if it has a receiver that is the same as or interchangeable with the receiver of an Enumerated Weapon[,]" which may involve operating components such as the trigger assembly or magazine port. *Id.* at 4; *see also* Marc A. Polito, Note, *Assault on the Second Amendment: The Attorney General's Attempt to Unilaterally Ban Assault Rifles in Massachusetts,* 51 SUFFOLK U. L. REV. 133, 145–49 (2018) (presenting conflicts surrounding ban and Attorney General's rationale for same). Prior to the Enforcement Notice's issuance, the Act "was enforced in the same manner as the previous [federal ban], because many believed this was what the legislature intended." Polito, *supra* note 13, at 146. However, "[b]y creating these two tests, the Attorney General greatly expanded the weapons covered by [the Act] without consulting the legislature or the public." *Id.*; Danny McDonald, *Appeals Court Rejects Challenge to Massachusetts Assault Weapons Ban*, BOS. GLOBE (Apr. 26, 2019, 10:47 PM), https://www.bostonglobe.com/metro/2019/04/26/appeals-court-rejects-challenge-massachusetts-assault-weapons-ban/tpZaG7DfTmrHcaitDOwZzN/story.html [perma.cc/WG8C-42KM] (explaining historical context and rationale for Attorney General's ban). The Enforcement Notice was issued in the wake of the 2016 Pulse Nightclub shooting in Orlando, Florida. McDonald, *supra* note 13. After Healey's office reviewed the Act and gun sales in the state, it determined "gun manufacturers had been ignoring language in the law and promoting guns that were being marketed as copycat iterations of weapons like the AR-15 and the AK-47." *Id.*

[14] *See* Worman v. Healey, 293 F. Supp. 3d 251, 256–57 (D. Mass. 2018) (summarizing history of case), *aff'd*, 922 F.3d 26 (1st Cir. 2019); Brief of Appellants at 4, Worman v. Healey, 922 F.3d (1st Cir. 2019) (No. 18-1545), 2018 WL 4182335 (providing context for Plaintiffs' challenges to ban). Individual Plaintiffs, Dr. David Seth Worman, Jason William Sawyer, and Anthony Linden, all owned firearms and magazines banned by the Act. Brief of Appellants, *supra* note 14, at 4–5. Paul Nelson Chamberlain did not own a banned firearm but would have purchased one if not for the Act. *Id.* at 5. The organization Gun Owners Action League Inc., "a non-profit corporation dedicated to promoting safe and responsible firearms ownership, marksmanship competition, and hunter safety throughout Massachusetts," and two federally-licensed firearms dealers (On Target Training, Inc. and Overwatch Outpost) represent themselves and all current and potential customers precluded from purchasing popular assault weapons and LCMs that are banned in the state. *Id.* at 5–6.

[15] *See Worman,* 293 F. Supp. 3d at 259 (quoting Pl. Compl. ¶ 74, 76) (describing plaintiffs' claims). The individual Plaintiffs who owned firearms put forth other reasons for keeping them, in

representatives thereof, seeking to use the proscribed assault weapons and LCMs for self-defense in their homes or other lawful purposes (such as for hunting and sport).[16] The United States District Court for the District of Massachusetts disagreed with Plaintiffs' interpretation of the Act, finding that the banned weapons are "not within the scope of the personal right to 'bear Arms' under the Second Amendment."[17] The district court granted partial summary judgment for Defendants with respect to their Second Amendment challenges, after which the Plaintiffs appealed to the First Circuit for review.[18]

The Supreme Court definitively interpreted the Second Amendment as conferring an individual right to keep and bear arms when it struck down a D.C. prohibition on the ownership of handguns in *Heller*, emphasizing that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[19]

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addition to self-defense in the home. *Id.*; *see also* Brief of Appellants, *supra* note 14, at 5 (addressing arguments in favor of Second Amendment right presented by plaintiffs). Dr. Worman owned them for target practice and as collector's items. Brief of Appellants, *supra* note 14, at 5. Mr. Sawyer, a former Marine Corps Corporal, is both a nationally ranked competitive shooter and certified firearms instructor for the National Rifle Association and the Massachusetts State Police. *Id.* Lastly, Mr. Linden suffers from polyarthritis and owned AR-15 style rifles because they are easier to use at the practice range and while hunting. *Id.*

[16] *See Worman*, 922 F.3d at 33 (stating "it is undisputed that the individual plaintiffs are not prohibited persons" under Act).

[17] *See Worman*, 293 F. Supp. 3d at 264 (dismissing Plaintiffs' Second Amendment challenge). The court concluded that "[t]he undisputed facts in this record convincingly demonstrate that the AR-15 and LCMs banned by the Act are 'weapons that are most useful in military service.' As matter of law, these weapons and LCMs thus fall outside the scope of the Second Amendment and may be banned." *Id.* The court further elaborated that:

> Both their general acceptance and their regulation, if any, are policy matters not for courts, but left to the people directly through their elected representatives. In the absence of federal legislation, Massachusetts is free to ban these weapons and large capacity magazines. Other states are equally free to leave them unregulated and available to their law-abiding citizens. These policy matters are simply not of constitutional moment. Americans are not afraid of bumptious, raucous, and robust debate about these matters. We call it democracy.

Id. at 272.

[18] *See Worman*, 922 F.3d at 32 (discussing procedural posture of case).

[19] *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (pointing to core of Second Amendment right). Dick Heller, a special D.C. police officer, filed suit challenging the District's general prohibition on the registration and possession of handguns in the home. *Id.* at 574–76. Further, the law required that "any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable." *Id.* at 628. In determining the kind of weapons that may be protected under the Second Amendment, the Court analyzed its previous case *United States v. Miller*. *Id.* at 624. The majority read *Miller* not as limiting the right to keep and bear arms strictly for militia purposes, but rather limiting the type of weapon to which the right applies to those used

Two years later, in another seminal case, *McDonald v. City of Chicago*, the Court held that the Second Amendment right established in *Heller* is "fully applicable to the States" through the Due Process Clause of the Fourteenth Amendment.[20] Although the *Heller* opinion did not explicitly decide

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by the militia, i.e. "arms 'in common use at the time' for lawful purposes like self-defense." *Id.* at 624–25. Using this historical analysis, the Court concluded that "the inherent right of self-defense has been central to the Second Amendment." *Id.* at 628. As applied to the D.C. law, the Court explained:

> The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," would fail constitutional muster . . . . We must also address the District's requirement (as applied to respondent's handgun) that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional.

Id. at 628–30. From this analysis of *Miller* emerged the common use test, which federal courts use in the wake of *Heller* to determine which weapons–such as assault weapons and LCMs–are protected under the Second Amendment. *Id.*; *see also* Cody J. Jacobs, *End the Popularity Contest: A Proposal for Second Amendment "Type of Weapon" Analysis*, 83 TENN. L. REV. 231, 264 (2015) (explaining application of common use test). This test "essentially asks courts to look at evidence about the number of the particular firearm or firearm accessory at issue owned by private citizens in the United States for lawful purposes such as self-defense at the time the case is decided." Jacobs, *supra* note 19, at 264.

[20] *See* McDonald v. Chicago, 561 U.S. 742, 791 (2010) (incorporating Second Amendment right to self-defense to states through Fourteenth Amendment). Given that Washington D.C. is a federal enclave, the *Heller* decision did not apply to the states. *Id.* at 753. However, when the constitutionality of handgun bans in the City of Chicago and a neighboring suburb were challenged in 2010, the Court elected to incorporate the Second Amendment. *Id.* at 750. To determine whether a particular Bill of Rights provision may be incorporated through the Due Process Clause of the Fourteenth Amendment, the court first must inquire whether it "is fundamental to our scheme of ordered liberty and system of justice." *Id.* at 764. Relying on the *Heller* holding that "individual self-defense is *'the central component'* of the Second Amendment right," which is deeply rooted in the country's history and tradition, the *McDonald* court found that such a right applies equally to the states as it does the federal government. *Id.* at 767; *see also* Michael S. Obermeier, Comment, *Scoping Out the Limits of "Arms" Under the Second Amendment*, 60 U. KAN. L. REV. 681, 696–97 (2012) (discussing impact of *McDonald*). One consequence of the *McDonald* decision is the inevitable issue of federal preemption:

> Before *McDonald*, the Second Amendment only applied to the federal government. Individual state provisions solely governed the states, and federal laws could not preempt those of the states. Thus, the power to regulate arms was, at least partially, reserved to the states as a police power. Now that both state and federal laws are accountable to the same source of law–the Second Amendment–it is possible for federal preemption of state laws when laws conflict . . . Although numerous states

whether Second Amendment protection extends to assault weapons and LCMs, it did caution that "[l]ike most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[21] Recognizing the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,'" the Court suggested that "weapons . . . most useful in military service—M-16 rifles and the like—may be banned."[22] However, the Court has yet to announce a standard of review under which legislative challenges are to be evaluated, as previously established for other constitutional rights it has deemed fundamental.[23] In the meantime, the lower federal courts

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> regulate weapon ownership and use, most of these laws, if not all, are now vulnerable to attack in the aftermath of *McDonald*.

Obermeier, *supra* note 20, at 696.

[21] *See Heller*, 554 U.S. at 626 (recognizing appropriate limitations to Second Amendment).

[22] *See id.* at 626–627 (recognizing historical limitations to Second Amendment).

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. In addition to these specific limitations, the Court made clear that restrictions on certain weapons are not constitutionally suspect because "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes," and therefore are outside the scope of the right to bear arms. *Id.* at 625.

[23] *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460, 468–69 (2009) (holding strict scrutiny is triggered by content-based restrictions on speech in public forums); Craig v. Boren, 429 U.S. 190, 197 (1976) (determining gender classifications are subject to intermediate scrutiny); Loving v. Va., 388 U.S. 1, 12 (1967) (determining strict scrutiny is appropriate standard when freedom to marry is restricted by racial classification); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (finding strict scrutiny is "essential" classification when "invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."); United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) ("Regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts . . . it rests upon some rational basis within the knowledge and experience of the legislators."); Ayrn Carpenter, Case Comment, *Moving Targets: Roving Standards of Review in Second Amendment Cases*, 11 J. MARSHALL L.J. 60, 60 (2018) (defining common standards of review in constitutional context). Acknowledging that "Courts usually announce a framework, or a level of scrutiny, when analyzing laws that impinge upon a constitutional right," Carpenter defined the traditional tiers of means-end scrutiny:

> At bottom, rational basis places the burden on the challenger of the law to show that the law is not rationally related to a legitimate government purpose. Intermediate scrutiny shifts the burden to the government to show that the law is substantially related to an important government purpose. The most stringent standard of review is strict scrutiny. Like intermediate scrutiny, the burden remains on the government; however, strict scrutiny requires the government to show that the challenged law is necessary and narrowly tailored to achieve a compelling government interest.

attempted to fill this void by creating and applying standards they deem appropriate when addressing these challenges, such as those for assault weapons and LCM bans.[24]

Prior to 2019, six federal circuit courts of appeals addressed the question of whether assault weapon and LCM bans in their respective jurisdictions were constitutional.[25] Nearly all federal courts reviewing Second Amendment challenges have adopted a two-step post-*Heller* framework to do so.[26] Under this common approach, the court first must ask

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Carpenter, *supra* note 23, at 60.

[24] *See* Philip Casey Grove, Note, *Common Use Under Fire: Kolbe v. Hogan and the Urgent Need for Clarity in the Mass-Shooting Era*, 59 ARIZ. L. REV. 773, 782–86 (2017) (summarizing lower courts' "attempts to craft workable frameworks around *Heller*'s discussion of common use and lawful purposes."). The ambiguities of the Supreme Court's Second Amendment interpretation cause apprehension in the lower courts and provides little guidance for addressing Second Amendment litigation. *Id.* at 781–82; *see also* John J. Phelan IV, Comment, *The Assault Weapons Ban-Politics, the Second Amendment, and the Country's Continued Willingness to Sacrifice Innocent Lives for "Freedom"*, 77 ALB. L. REV. 579, 593 (2014) (discussing various state and local assault weapon bans). Six other states (California, Connecticut, Hawaii, Maryland, New Jersey, New York), the District of Columbia, and at least seventeen other localities currently ban assault weapons in some form. Phelan, *supra* note 24, at 593; Roth, *supra* note 2, at 419–20 (questioning *Heller*'s applicability to state and local assault weapon bans). "Prior to the Supreme Court's decision in *Heller* . . . there was little doubt that assault weapons bans were constitutional and not in violation of the Second Amendment." Roth, *supra* note 2, at 420. "The question emerges then, whether *Heller* . . . changed the constitutional landscape of assault weapons bans." *Id.* at 415.

[25] *See* Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. New Jersey, 910 F.3d 106, 122 (3d Cir. 2018) (upholding LCM ban under intermediate scrutiny); Kolbe v. Hogan, 849 F.3d 114, 135–37 (4th Cir. 2017) (finding assault weapons and LCMs not protected by Second Amendment); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 257 (2d Cir. 2015) (upholding ban under intermediate scrutiny); Friedman v. City of Highland Park, 784 F.3d 406, 410 (7th Cir. 2015) (upholding ban under court's own framework); Fyock v. City of Sunnyvale, 779 F.3d 991, 1001 (9th Cir. 2015) (upholding ban under intermediate scrutiny); Heller v. District of Columbia, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (upholding ban under intermediate scrutiny).

[26] *See* United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010) (analyzing law under two-step approach suggested by *Heller*). This framework originated in the Third Circuit, when the court upheld the defendant's conviction under 18 U.S.C. § 922(k) for possession of a firearm with an obliterated serial number. *Id.* at 87. Under the first step, the court found that § 922(k) did not bar the defendant from possessing any otherwise lawful firearm for the purpose of self-defense. *Id.* at 94. Although it is uncertain whether unmarked firearms are excluded from the scope of the Second Amendment, the court did not decide whether the defendant's right to bear arms was infringed because under the second step, the statute passed constitutional muster even if it burdened this protected conduct. *Id.* at 95. This two-step approach has since been endorsed by several circuit courts, including the First Circuit. *See, e.g.*, Gould v. Morgan, 907 F.3d 659, 669 (1st Cir. 2018) (adopting two-step framework for Second Amendment challenges in assessing constitutionality of Massachusetts firearm licensing statute); Young v. Haw., 896 F.3d 1044, 1051 (9th Cir. 2018) (applying framework to statute restricting right to carry firearm in public for self-defense); Drake v. Filko, 724 F.3d 426, 429 (3d Cir. 2013) (applying framework to New Jersey law regulating issuance of permits to carry handguns in public); Ezell v. City of Chi., 651 F.3d 684, 704–10 (7th Cir. 2011) (mandating framework to city ordinance that required firing-range training as prerequisite to lawful gun ownership); United States v. Chester 628 F.3d 673, 680 (4th Cir. 2010)

"whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee," which turns on the common use test established in *Heller*.[27] If this conduct is not burdened, then the inquiry is complete; however if it is burdened, the court proceeds to the second step and evaluates the law under "some form of means-end scrutiny," which must pass muster to be constitutional.[28] The four circuit courts that employed this approach prior to 2019—D.C., Second, Third, and Ninth—did not decide the threshold question of whether to use the common use test when applying intermediate scrutiny to uphold the constitutionality of assault weapon and LCM bans; instead, they avoided it.[29]

(employing framework to statute under which domestic violence misdemeanant was convicted for possessing firearms).

[27] *See* District of Columbia v. Heller, 554 U.S. 570, 624–28 (2008) (quoting United States v. Miller, 307 U.S. 174, 179 (1939)) ("[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."); *see also* Caetano v. Mass., 136 S. Ct. 1027, 1028 (2016) (Alito, J., concurring) (employing common use test). The Supreme Court recently shed more light on the common use test in a case involving a Massachusetts woman's conviction under a law banning the possession of stun guns, after she used one in an act of self-defense against an abusive ex-boyfriend. *Caetano*, 136 S. Ct. at 1028. The court per curiam vacated the trial's court decision by reiterating *Heller*'s clear statement 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," although without further engagement in an analysis of the law's constitutionality. *Id.* at 1027 (quoting *Heller*, 554 U.S. 570 at 582). Therefore, when employing the common use test, the fact that a proscribed weapon was not in existence–and consequently not in common use–does not end the analysis. *Id.*; Grove, *supra* note 24, at 780 (analyzing common use test). One of the main problems with the common use test, after being announced in *Heller*, is:

> The Court did not articulate the proper method lower courts should use to determine whether a specific type of firearm was in common use or possessed for lawful purposes. For example, while Justice Scalia's conclusion that handguns are the "quintessential firearm for self-defense within the home" meant that the class of firearms facially satisfied the common use test, the Court offered no guidance to help a lower court determine if a more nuanced restriction—such as the prohibition of a particular model or type of handgun—affects the analysis of whether the weapon is in common use.

Grove, *supra* note 24, at 780; *see also Enforcement Notice: Prohibited Assault Weapons*, *supra* note 13 and accompanying text (discussing context and origin of common use test).

[28] *See Marzzarella*, 614 F.3d at 89 (defining second step of framework); Carpenter, *supra* note 23 (defining traditional tiers of means-ends scrutiny as referred to in second step); Allen Rostron, *The Continuing Battle over the Second Amendment*, 78 ALB. L. REV. 819, 824 (2014-2015) (discussing development of lower courts' two-step approach). Although the Supreme Court has yet to specify the level of scrutiny that applies to Second Amendment issues, "*Heller* [declared] that the right must be protected by something more demanding than mere rational basis scrutiny. Courts therefore tend to regard the matter as boiling down to a choice between intermediate scrutiny and strict scrutiny, and most opt for the former." Rostron, *supra* note 28, at 824.

[29] *See Heller*, 670 F.3d at 1261 ("Nevertheless, based upon the record as it stands, we cannot be certain whether these weapons are commonly used or are useful specifically for self-defense or

In *Friedman*, the Seventh Circuit notably diverged from the majority of circuits who employed the two-step approach by upholding the constitutionality of a city's assault weapon ban under its own entirely novel framework.[30] Deeming the common use test "circular" and abstaining from deciding which level of scrutiny applies, the Seventh Circuit instead found it "better to ask [(1)] whether a regulation bans weapons that were common at the time of ratification or those that have 'some reasonable relationship to the preservation or efficiency of a well regulated militia'[;] and [(2)] whether law-abiding citizens retain adequate means of self-defense."[31] In 2017, the

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hunting . . . ."); *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 116–17 ("We will nonetheless assume without deciding that LCMs are typically possessed by law-abiding citizens for lawful purposes and that they are entitled to Second Amendment protection."); *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 257 ("In the absence of clearer guidance from the Supreme Court or stronger evidence in the record, we follow the approach taken by the District Courts and by the D.C. Circuit in [*Heller*, 670 F.3d 1244] and assume for the sake of argument that these 'commonly used' weapons and magazines are also 'typically possessed by law-abiding citizens for lawful purposes.'"); *Fyock*, 779 F.3d at 997 ("[W]e need not determine at this juncture whether firing-capacity regulations are among the longstanding prohibitions that fall outside of the Second Amendment's scope."); Grove, *supra* note 24, at 784 (identifying similarities amongst circuit courts that apply two-step framework approach).

> Here, the circuits faced *Heller*'s first jurisprudential roadblock: what evidence was required under *Heller* to prove that a firearm or magazine is in common use for lawful purposes? While the circuits seemed to agree on using an objective, statistical inquiry to evaluate common use, more important were their later conclusions that they need not actually *decide the question at all.*

Grove, *supra* note 24, at 784.

[30] *See Friedman*, 784 F.3d at 412 (establishing unique methodology). The court held that the City of Highland Park's assault weapon and LCM ban did not violate the plaintiffs', private gun owners', and the Illinois State Rifle Association's Second Amendment right to bear arms for self-defense purposes. *Id.* at 407. In doing so, the court used its own discretion in creating a new framework and explained: "*McDonald* circumscribes the scope of permissible experimentation by state and local governments, but it does not foreclose *all* possibility of experimentation. Within the limits established by the Justices in *Heller* and *McDonald*, federalism and diversity still have a claim." *Id.* at 412.

[31] *See id.* at 410 (internal citations omitted) (applying new framework). The court criticized the more traditional two-step framework as limiting:

> [R]elying on how common a weapon is at the time of litigation would be circular to boot. Machine guns aren't commonly owned for lawful purposes today because they are illegal; semi-automatic weapons with large-capacity magazines are owned more commonly because, until recently (in some jurisdictions), they have been legal. Yet it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly owned. A law's existence can't be the source of its own constitutional validity.

Id. at 409. Under this approach, the court found that the weapons prohibited by Highland Park's ordinance were uncommon in 1791 and that "[u]nlike the District of Columbia's ban on handguns, Highland Park's ordinance leaves residents with many self-defense options," thus the ban satisfied

Fourth Circuit further deviated from the standard set by its sister circuits; sitting en banc, the court ruled in *Kolbe v. Hogan* that assault weapons and LCMs are not at all protected by the Second Amendment because such arms "are like M-16 rifles—weapons that are most useful in military service—which the *Heller* Court had already singled out as being beyond the Second Amendment's reach."[32] Overall, the hesitation of the D.C., Ninth, and

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the new test. *Id.* at 410–11; *see also* Friedman v. City of Highland Park, 136 S. Ct. 447, 448 (2015) (Thomas, J., dissenting) (denying further appellate review). Subsequently the Supreme Court denied certiorari and Justice Thomas and Justice Scalia dissented, citing non-compliance with Second Amendment precedents:

> Instead of adhering to our reasoning in *Heller*, the Seventh Circuit limited *Heller* to its facts, and read *Heller* to forbid only total bans on handguns used for self-defense in the home . . . . [b]ased on its crabbed reading of *Heller*, the Seventh Circuit felt free to adopt a test for assessing firearm bans that eviscerates many of the protections recognized in *Heller* and *McDonald*.

Friedman, 136 S. Ct. at 448; Wilson v. Cook Cty., 937 F.3d 1028, 1037 (7th Cir. 2019) (dismissing residents' Second Amendment challenge of county assault weapon and LCM ban). In 2019, the Seventh Circuit reaffirmed its novel framework in regard to a challenged Cook County, Illinois ordinance: "Less than five years ago, we upheld a materially indistinguishable ordinance against a Second Amendment challenge . . . . [b]ecause the plaintiffs have not come forward with a compelling reason to revisit our previous decision, we affirm the judgment of the district court." *Wilson*, 937 F.3d at 1029.

[32] *See* Kolbe v. Hogan, 849 F.3d 114, 121 (4th Cir. 2017) (quoting District of Columbia v. Heller, 554 U.S. 570, 627 (2008)) (rejecting common use test analysis), *cert. denied*, 138 S. Ct. 469 (2017). In a swift response to the December 2012 shooting at Sandy Hook Elementary School in Newton, Connecticut, the Maryland legislature passed a sweeping ban of assault weapons and LCMs named the Firearm Safety Act of 2013 (the "FSA"). *Id.* at 120; *see also* Kolbe v. O'Malley, 42 F. Supp. 3d 768, 789 (D. Md. 2014) (upholding FSA with common use analysis). In evaluating the FSA's constitutionality, the United States District Court for the District of Maryland applied the two-step framework, but like many federal courts before it, struggled to resolve the common use inquiry. *Kolbe*, 42 F. Supp. 3d at 778. Instead, the court chose to "assume, although not decide, that the [FSA] places some burden on the Second Amendment right." *Id.* at 789. The district court proceeded to the second step and found intermediate scrutiny to be the appropriate standard in upholding the FSA as constitutional. *Id.* at 790. While the Fourth Circuit agreed that the district court correctly upheld the FSA as constitutional under this standard of review, the circuit "diverge[d] from the district court on one notable point: [w]e conclude–contrary to the now-vacated decision of our prior panel–that the banned assault weapons and large-capacity magazines are not protected by the Second Amendment." *Kolbe*, 849 F.3d at 121. In "February of 2016, a divided three-judge [circuit court panel] vacated . . . and remanded to the district court, directing the application of the more restrictive standard of 'strict scrutiny' to the FSA" becoming the first circuit to do so. *Id.* However, that decision was quickly vacated upon the court's grant of rehearing en banc. *Id.*; Grove, *supra* note 24, at 793–94 (discussing Fourth Circuit's choice to replace common use test). In reviewing the decisions and rationales of the district court, the appellate panel, and other circuit courts, the Fourth Circuit en banc ultimately:

> [A]cknowledged that it easily could follow the other courts' lead in avoiding the troublesome nature of resolving this inquiry by assuming, without deciding, that the FSA implicated the Second Amendment. But maintaining the status quo, the majority opined, would weaken the circuit's decision, especially in light of the dissent's unequivocal

Second Circuits to apply the common use inquiry of the two-step framework, and the Seventh and Fourth Circuits' deviation from the traditional application of the framework altogether, has resulted in non-conformity and confusion among the lower federal courts, which the Supreme Court has yet to clarify.[33]

In *Worman*, the First Circuit was presented with the significant opportunity to evaluate whether weapons banned by the Act are subject to Second Amendment protections.[34] The court acknowledged that, in a recent decision, it had expressly adopted the two-step approach popular among other federal circuit courts for analyzing Second Amendment challenges after *Heller*, and thus would follow precedent by using this framework in the present case.[35] Under the first step, the court asked whether the conduct

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> conclusion that the Second Amendment should protect the banned firearms and LCMs. The radical nature of this choice cannot be understated. By deciding, as a threshold matter, to confront headlong the question of whether assault weapon and LCM bans implicate the Second Amendment, the majority forced itself to enter a jurisprudential no-man's land.

Grove, *supra* note 24, at 794. Additionally, the Fourth Circuit held in the alternative that if the weapons were "somehow entitled to Second Amendment protection," the ban should be reviewed under intermediate scrutiny under which it would still be lawful. *Kolbe*, 42 F. Supp. 3d at 121.

[33] *See* Andrew Kimball, Note, *Strictly Speaking: Courts Should Not Adopt Strict Scrutiny for Firearm Regulations*, 83 BROOK. L. REV. 441, 453 (2017) (discussing lack of uniformity among circuit courts in approach to Second Amendment challenges).

> By failing to define a standard of review and creating a loose set of exceptions to the rights protected by the Second Amendment, the *Heller* decision requires the Supreme Court to further direct the course of Second Amendment jurisprudence. This is especially true in light of the Fourth Circuit's decision in *Kolbe* . . . .

Id.

[34] *See* Worman v. Healey, 922 F.3d 26, 33 (1st Cir. 2019) (discussing whether banned weapons receive Second Amendment protections). The court "glean[ed] from the teachings of *Heller* that four data points determine the level of protection, if any, that the Second Amendment provides." *Id.* The first point concerns "the person who is asserting the right," the second concerns "the purpose for which the right is being asserted," the third concerns "the place where this right is being asserted," and the fourth concerns "the type of weapon" involved. *Id.* All four points, according to the court, are "touched upon by *Heller*'s most meaningful message": the right to self-defense in the home by law-abiding and responsible citizens. *Id.* As applied to the case at bar, the court found *Heller*'s "message check[ed] off the first three data points . . . [as] the Plaintiffs [were] not prohibited persons," but rather law-abiding citizens seeking to use the weapons for self-defense in their homes. *Id.* This left the court to focus only on the fourth point. *Id.*

[35] *See id.* ("In conducting this inquiry, we do not write on an entirely pristine page."); *see also* Gould v. Morgan, 907 F.3d 659, 669–70 (1st Cir. 2018) (finding framework both workable and consistent with *Heller*). Although it had employed a similar framework in prior cases, the First Circuit explicitly adopted it in *Gould*, noting that it "results in a workable framework, consistent with *Heller*, for evaluating whether a challenged law infringes Second Amendment rights." *Gould*, 907 F.3d at 669. The court then used the framework to conclude that the challenged Massachusetts

restricted by the Act—the possession of assault weapons and LCMs for the use of self-defense—fell within the scope of the Second Amendment.[36] Claiming that "*Heller* is the beacon by which we must steer," the court applied the common use test; however, like several of its sister circuits, it abandoned ship before reaching an actual result.[37] Due to the Supreme Court's silence regarding the line between common and uncommon use, the parties "strove to fill that void," as the plaintiffs presented evidence that "as of 2013, nearly 5,000,000 people owned at least one semiautomatic assault weapon . . . [and] between 1990 and 2015, Americans owned approximately 115,000,000 LCMs," while the defendants presented evidence that "only three percent of guns in the United States are assault weapons [with only] one percent of Americans own[ing] such a weapon."[38] Finding such evidence inadequate as to the issue of prohibited weapons for self-defense, the court instead cautiously chose to "simply assume, albeit without deciding, that the Act burdens conduct that falls somewhere within the compass of the Second Amendment," and move on to the next step of their inquiry.[39]

Since the court assumed in step one that the Act burdened the plaintiffs' Second Amendment right, the second step was to determine how "heavily" it burdened this right in order to choose an appropriate level of scrutiny to apply.[40] In *Heller*, the Supreme Court repeatedly emphasized the unique popularity of handguns banned under the D.C. statute, reasoning that a ban of such a "quintessential" weapon would heavily burden the Amendment's core right to self-defense in the home.[41] Yet from the outset, the *Worman* court distinguished the Act from the handgun ban in *Heller*

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firearm licensing statute—which restricts open carry—was constitutional and reasoned that the Second Amendment right is limited only to self-defense in the home. *Id.* at 671.

[36] *See Worman*, 922 F.3d. at 33 (quoting United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010)) (analyzing scope of Second Amendment right). The court explained that this first step "is backward-looking and seeks to determine whether the regulated conduct was understood to be within the scope of the right at the time of ratification." *Id.* (internal quotation marks omitted).

[37] *See id.* at 34–36 (choosing to assume rather than decide answer to common use test); *see also* cases cited *supra* note 29 and accompanying text (listing circuit court cases that previously assumed rather than decided answer to common use test).

[38] *See Worman*, 922 F.3d. at 35 (reiterating that *Heller* provides little guidance).

[39] *See id.* at 36 (quoting Privitera v. Curran, 855 F.3d 19, 22 (1st Cir. 2017)) ("In the end, 'courts should not rush to decide unsettled issues when the exigencies of a particular case do not require such definitive measures.'").

[40] *See id.* at 37 (quoting *Gould*, 907 F.3d at 672) (outlining second step in framework). However, the court notes that—unlike the plaintiffs in *Gould*—the present plaintiffs contend that the Act affects their use of self-defense in the home. *Id.*

[41] *See* District of Columbia v. Heller, 554 U.S. 570, 629 (2008) (explaining burden on Second Amendment right).

since the Act does not ban all semiautomatic weapons and LCMs.[42] Next, in distinguishing *Worman* from *Heller*, the court looked to the record; Plaintiffs neither demonstrated that semiautomatic weapons share the features that make handguns well-suited to self-defense in the home nor did they indicate that these weapons have commonly been used for such a purpose: "[i]n fact, when asked directly, not one of the plaintiffs or their six experts could identify even a single example of the use of an assault weapon for home self-defense, nor . . . a single example of a self-defense episode in which ten or more shots were fired."[43] As such, the court deemed intermediate scrutiny, which requires a fit between the asserted governmental interests and the means chosen to advance them, as the appropriate level for evaluating the Act.[44] Massachusetts asserted compelling governmental interests in public safety and crime prevention, as well as ample evidence regarding the unique dangers posed by the misuse of these weapons, which lent support to the legislature's overall goal of curtailing outbreaks of mass violence between its citizens.[45] As a result, the court held that while the Act touches on the

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[42] *See Worman*, 922 F.3d. at 36–37 ("Instead, [the Act] proscribes only a set of specifically enumerated semiautomatic assault weapons, magazines of a particular capacity, and semiautomatic assault weapons that have certain combat-style features."); *see also* Jacobs, *supra* note 19, at 241–48 (discussing *Heller*'s self-defense analysis and emphasis on handgun popularity).

[43] *See Worman*, 922 F.3d. at 37 (criticizing plaintiffs' lack of evidence on issue); *see also* Donald L. Flexner, *Why the Civilian Purchase, Use, and Sale of Assault Weapons and Semiautomatic Rifles and Pistols, Along with Large Capacity Magazines, Should Be Banned*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 593, 612–13 (2017) (arguing that Second Amendment should not protect most dangerous weapons). Concerning the grave dangers of assault weapons and LCMs affecting society, there is ample evidence that is:

> [C]lear from public reports, ATF findings, and other studies. Also clear is that these weapons have been used offensively against civilians, not in "'defense of self, family, and property [which] is most acute' in the home." On the other hand, there is no public reporting that assault and semiautomatic weapons have been used defensively by private citizens, whether in the home or otherwise.

Flexner, *supra* note 42, at 613.

[44] *See Worman*, 922 F.3d. at 38 (describing intermediate scrutiny standard). "To achieve this substantial relationship, there must be a 'reasonable fit' between the restrictions imposed by the law and the government's valid objectives, 'such that the law does not burden more conduct than is reasonably necessary.'" *Id.* (quoting Drake v. Filko, 724 F.3d 426, 436 (3rd Cir. 2013)).

[45] *See id.* at 39 (noting Massachusetts's governmental objective of protecting public). The court pointed to the Act's manifest purpose, which was to "'help keep the streets and neighborhoods of Massachusetts safe' by 'making it harder for criminals to get their hands on these dangerous guns.'" *Id.* Further, it reaffirmed that "few interests are more central to a state government than protecting the safety and well-being of its citizens." *Id.* (citing *Gould*, 907 F.3d at 673). Specifically, the defendants put forth evidence that most perpetrators of mass shootings legally obtain the semiautomatic weapons used. *Id.* at 40. The court found the defendants' evidence substantial, but "not incontrovertible." *Id.* The plaintiffs did not dispute the evidence regarding

core Second Amendment right to self-defense, it does not "impermissibly intrude" because it withstands the intermediate scrutiny standard.[46]

In this ambiguous, post-*Heller* world, the circuit courts' options to assess the constitutionality of an assault weapon and LCM ban are as follows: (1) apply the traditional two-step framework and assume, without deciding, that the at-issue weapons satisfy the common use test and proceed to the next step; (2) abandon the common use question while keeping the overall analytical framework intact; or (3) abandon the common use test and the two-step framework entirely.[47] The *Worman* court's reliance on the first option is predictable, as it follows the steps of the majority of circuit courts that have decided cases before it in this area of Second Amendment jurisprudence.[48] However, despite some courts not abandoning the test, their unwillingness to engage deeply with it by rationalizing their results in the second step of the framework illustrates its "profound unworkability."[49] So, while the *Worman* court reached an appropriate result in ultimately upholding the Act by maintaining that the Second Amendment right is not unlimited as per *Heller*, the court's failure to abandon the common use test

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the lethality and the frequency of their use in mass shootings and—assuming that the Act does curb the criminal use of the proscribed weapons—they argued:

> [T]he Act fails intermediate scrutiny because it "make[s] no exception for law-abiding, responsible citizens to keep these arms for lawful purposes like self-defense in the home." According to the plaintiffs, the forbidden assault weapons and LCMs are "ideal" for domestic self-defense for many of the same reasons that such weapons are ideal for mass shootings–they are easier to hold and shoot, require less user accuracy, and allow a shooter to fire many times without reloading. Thus, the plaintiffs assert, any regulation prohibiting law-abiding, responsible citizens from possessing such weapons sweeps too broadly.

Id. This argument was rejected, as it is the legislature's role–and not the court's–to weigh evidence, draw reasonable inferences, and make necessary policy judgments. *Id.*

[46] *See id.* at 40–41 (stating holding of case); *see also* United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010) (defining second step of framework).

[47] *Compare* Kolbe v. Hogan, 849 F.3d 114, 135–37 (4th Cir. 2017) (exemplifying second option), *with* Friedman v. City of Highland Park, 784 F.3d 406, 410 (7th Cir. 2015) (exemplifying third option), *and* Heller v. District of Columbia, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (exemplifying first option). *See* Grove, *supra* note 24, at 782 (discussing mixed success in courts' applications of *Heller*). "Regarding Second Amendment challenges to assault-weapon and LCM bans, courts have had mixed success in their attempts to craft workable frameworks around *Heller*'s discussion of common use and lawful purposes." *Id.* at 782.

[48] *See* cases cited *supra* note 29 and accompanying text (recognizing previous circuit courts to have assumed rather than decided answer to common use test).

[49] *See* Jacobs, *supra* note 19, at 252 (criticizing common use test and "its disconnection from the central right recognized in *Heller*.").

is troubling because of the legitimate concerns surrounding it.[50] Thus, *Worman* is the latest in a long line of cases highlighting the urgent need for clarification from the Supreme Court on Second Amendment analysis.[51]

While the Supreme Court has found that the Second Amendment guarantees an individual right to weapons most commonly used for lawful purposes, it has not explicitly adopted the common use test as part of a standard of review for courts to employ—not in *Heller* or any subsequent cases.[52] Federal courts applying the test have "little to no guidance regarding both the type of evidence they can and cannot consider, and how much weight they can ascribe to that evidence," nor is there a statistical threshold in place for an assault weapon or LCM to be deemed "common" to pass muster.[53] As a result, these courts tend to solely rely on the raw number of weapons in private hands without considering the proper context, for example:

> In analyzing assault weapons bans, some courts have highlighted the fact that several million AR-15 type rifles have been manufactured over the last few decades. Even assuming that manufacturing statistics necessarily reflect ownership and that several million is enough to constitute common use, this statistic still fails to demonstrate that AR-15 type rifles are really commonly chosen for self-defense. That is because this statistic fails to account for the fact that

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[50] *See* District of Columbia v. Heller, 554 U.S. 570, 623, 626–27 (2008) (declaring that "Second Amendment right, whatever its nature, extends only to certain types of weapons."). The Court also made clear that it would uphold laws that impose "conditions and qualifications on the commercial sale of arms." *Id.*

[51] *See* cases cited *supra* note 25 (showing discrepancies amongst circuit courts in standards applied to assault weapon and LCM bans).

[52] *See Heller*, 554 U.S. at 635 (explaining why it declined to "clarify the entire field" of Second Amendment jurisprudence); *see also* Kimball, *supra* note 33, at 445 (discussing uncertainty as to protections under Second Amendment).

> Since *Heller* expressed limitations and exceptions without clearly defining them, it is uncertain what the Second Amendment protects, nor is it clear whether these exceptions fall under a uniform standard of review or are subject to more individualized treatment.

Kimball, *supra* note 33, at 445.

[53] *See* Grove, *supra* note 24, at 792 (outlining evidentiary concerns with common use test). Another question that remains open with the common use test is whether the test applies nationally, regionally, or locally. *Id.*

> some people, probably a great number, own more than one AR-15 style rifle.[54]

Another critical flaw is that the test takes into account how widely the at-issue weapon is circulated by the time a ban has been both enacted and challenged, thus incentivizing the gun industry to "flood the market with new, deadlier weapons in a very short time frame" to increase the popularity, and in turn, constitutional protection of that weapon.[55] Simply put, the common use test as it stands today is too vague and impractical for courts to utilize effectively.[56]

Until the Supreme Court holds otherwise, the question of which analytical framework to apply remains one for the lower courts to decide.[57]

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[54] *See* Jacobs, *supra* note 19, at 270–72 (describing what author refers to as "public choice fallacy.").

[55] *See id.* at 265–70 (describing what author refers to as "over-protection problem."); *see also* Kolbe v. Hogan, 849 F.3d 114, 141 (4th Cir. 2017) (criticizing dissent's reasoning). The en banc majority in *Kolbe* raised these very concerns:

> Under the dissent's popularity test, whether an arm is constitutionally protected depends not on the extent of its dangerousness, but on how widely it is circulated . . . . Consider, for example, short-barreled shotguns and machineguns. But for the statutes that have long circumscribed their possession, they too could be sufficiently popular to find safe haven in the Second Amendment. Consider further a state-of-the-art and extraordinarily lethal new weapon. That new weapon would need only be flooded on the market prior to any governmental prohibition in order to ensure it constitutional protection.

Kolbe, 849 F.3d at 141. Alternatively, this test can run afoul of *Heller* as it creates just as much of an incentive for governments to ban new weapons immediately before they can become popular and commonly possessed for self-defense. *Id.* at 141. This was a concern Justice Breyer, brought up in his *Heller* dissent, while criticizing the common use test:

> According to the majority's reasoning, if Congress and the States lift restrictions on the possession and use of machineguns, and people buy machineguns to protect their homes, the Court will have to reverse course and find that the Second Amendment does, in fact, protect the individual self-defense-related right to possess a machinegun. On the majority's reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so. In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit. There is no basis for believing that the Framers intended such circular reasoning.

Heller, 554 U.S. at 721 (Breyer, J., dissenting) (expounding on balancing test). Justice Breyer proposed an "interest-balancing" test that would apply to Second Amendment claims as an alternative, but this was explicitly rejected by the majority. *Id.* at 634 (majority opinion).

[56] *See Kolbe*, 849 F.3d at 135–36 (questioning what common use means).

[57] *See* Carpenter, *supra* note 23, at 71 (acknowledging disparate standards of review applied by lower federal courts without Supreme Court guidance).

Therefore, in *Worman*, a better test for the First Circuit to have used in place of the common use test (while leaving the remainder of the two-step framework intact) is one that focuses on how "dangerous and unusual" the weapon is, particularly—in relation to the hand-gun which was approved in *Heller*—so that weapons of equal or lesser dangerousness would be permitted, and any more dangerous weapons, such as the M-16 rifle and other weapons "most useful in military service," would not.[58] Under this test, the *Worman* court would ultimately reach the same result of upholding the Act without having to proceed to the second step and rationalize its decision there, as the Act would not impose a burden by prohibiting weapons that do not fall within the scope of the Second Amendment by virtue of being dangerous and unusual.[59] This new test would require a "frank, clinical appraisal of a weapon's destructive capacity," which, although unpleasant, is necessary; otherwise, courts would continue to focus on the weapon's popularity, which is as illogical as it is irresponsible.[60] By choosing to follow the status quo, the *Worman* court passed on an opportunity to formulate a new test and redefine Second Amendment challenges in its circuit, especially in an era where mass shootings—involving weapons specifically proscribed

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[58] *See Kolbe*, 849 F.3d at 135–37 (undertaking military-usefulness analysis in deciding that assault weapons and LCMs not protected by Second Amendment); *see also supra* notes 19, 21, and 22 (discussing significance of handgun for self-defense and limitations on Second Amendment right in *Heller*); Jacobs, *supra* note, 19 at 282–83 (discussing suggested approach referred to as "handgun dangerousness test"); Obermeier, *supra* note 20, at 718–720 (proposing more detailed, two-part inquiry "instead of simple reliance on the 'common use test.'").

[59] *See* Worman v. Healey, 922 F.3d 26, 39 (1st Cir. 2019) ("The record contains ample evidence of the unique dangers posed by the proscribed weapons."); Flexner, *supra* note 42, at 602–03 (discussing historical limits on gun ownership and use). The Supreme Court's recognition of historical prohibitions on "dangerous and unusual" weapons:

> [A]pplies precisely to the kinds of weapons that are now widely available for the public's purchase–those that have caused the deaths of too many innocent lives, and which would be banned by the passage of a new assault weapons ban. It is reasonable to conclude that such weapons become both "unusual" and even more "dangerous" when their magazine capacity permits rapid firing with more than ten rounds of ammunition, such as those with thirty rounds or more that "most prohibited [assault weapons] [have come] equipped with." This is particularly true when, as reported, such rifles with [LCMs are] "used in roughly 14% to 26% of gun crimes."

Flexner, *supra* note 42, at 603.

[60] *See* Obermeier, *supra* note 20, at 719 (emphasizing need for such consideration in test involving assessment of dangerousness). Under an original two-part inquiry suggested by Obermeier, a test to determine whether arms are protected under the Second Amendment requires: "(1) that the weapon pose no significantly greater threat to human life than a handgun and (2) that the innate characteristics of the weapon generally favor legitimate purposes over criminal ones." *Id.* at 684. Such a test would "require a crude weighing of raw human lives against the utility that a particular weapon bears for lawful purposes," which is "absolutely essential to the creation of a sensible and comprehensive framework for Second Amendment analysis." *Id.*

by the Massachusetts legislature—have become increasingly frequent.[61] While the *Worman* decision has been appealed to the Supreme Court, it remains unclear if or when the Court will step in to provide a more concrete framework for Second Amendment challenges since they have declined other recent opportunities to do so.[62]

In *Worman,* the First Circuit upheld the Massachusetts assault weapon and LCM ban. In doing so, the court applied a framework that has been crafted and applied by many other circuit courts to uphold their respective state and local bans. While this court ultimately reached an appropriate conclusion, its struggle to effectively incorporate the meager guidance the Supreme Court provided in the *Heller* decision highlights the

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[61] *See* Grove, *supra* note 24, at 775 n.8 (quoting JEROME P. BJELOPERA ET AL., CONG. RESEARCH SERV., R43004, PUBLIC MASS SHOOTINGS IN THE UNITED STATES: SELECTED IMPLICATIONS FOR FEDERAL PUBLIC HEALTH AND SAFETY POLICY 1, 4 (2013)) (defining mass shooting).

> The U.S. Congressional Research Service acknowledges that there is not a single accepted definition for a public mass shooting, but settled on "incidents occurring in relatively public places, involving four or more death–not including the shooter(s)–and gunmen who select victims somewhat indiscriminately." Notably, this definition excluded events where the gunmen were motivated by terrorism.

Id.; Flexner, *supra* note 42, at 611 (addressing current public health and safety impact of assault weapons). The use of assault weapon and LCMs resulted in:

> [F]orty-nine killed and fifty-eight injured in a June 12, 2016 attack in Orlando's Pulse Nightclub; twelve killed and fifty-eight injured in a July 20, 2012 attack in an Aurora, Colorado movie theater; twenty-six killed and two wounded in a December 12, 2012 attack at a Newtown, Connecticut school for young children; and fifty-nine killed along with hundreds wounded at the Las Vegas Mandalay Bay Resort and Casino.

Flexner, *supra* note 42, at 611; *see also Large Capacity Magazines*, *supra* note 10 (acknowledging role of firearms in crimes other than mass shootings). More recently, nine people were killed and twenty-six were wounded in Dayton, Ohio after the assailant used "an assault weapon and a drum magazine that held 100 rounds . . . to fire at least 41 rounds of ammunition in less than 30 seconds." *Large Capacity Magazines*, *supra* note 10. According to Giffords Law Center, "[d]ata suggests that the use of firearms with [LCMs] in crime has substantially increased since the expiration of the federal assault weapons and [LCM] ban in 2004. Firearms equipped with high-capacity magazines are estimated to account for 22% to 36% of guns" used in other crimes across the country, and "nearly 40% of crime guns used in serious violent crimes, including murders of law enforcement officers." *Id.*

[62] *See* Worman v. Healey, No. 19-404, 2020 U.S. Lexis 3159 (U.S. June 15, 2020) (denying petition for writ of certiorari). At the time of publication, the Supreme Court had announced its decision to decline review. *Id.*; *see also* Kolbe v. Hogan, 138 S. Ct. 469, 469 (2017) (denying petition for writ of certiorari); Friedman v. City of Highland Park, 136 S. Ct. 447, 447 (2015) (denying petition for writ of certiorari).

need to establish a uniform standard by which Second Amendment challenges can be evaluated.

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