

2015

END THE POPULARITY CONTEST: A PROPOSAL FOR SECOND AMENDMENT "TYPE OF WEAPON" ANALYSIS

Cody J. Jacobs

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Jacobs, Cody J. (2015) "END THE POPULARITY CONTEST: A PROPOSAL FOR SECOND AMENDMENT "TYPE OF WEAPON" ANALYSIS," *Tennessee Law Review*. Vol. 83: Iss. 1, Article 7.

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END THE POPULARITY CONTEST: A PROPOSAL FOR SECOND AMENDMENT “TYPE OF WEAPON” ANALYSIS

CODY J. JACOBS*

The Supreme Court’s recognition in District of Columbia v. Heller of an individual Second Amendment right to bear arms for self-defense raised many questions about the scope of that right. One issue that will become increasingly important in the years ahead, but that has received relatively little attention from scholars and courts, is the question of which “arms” are protected by that right. Heller purports to establish a test that asks whether the weapon at issue is in “common use” at the time the case is decided. This Article critiques that test, arguing that it creates poor incentives, is difficult to apply, and, most importantly, is disconnected from the central component of the Second Amendment right—self-defense. This Article proposes an alternative test that asks whether the weapon at issue is a reasonable choice for armed self-defense.

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* Abraham L. Freedman Fellow, Temple Beasley School of Law. Thanks to Michael Seidman, Jonathan Wolfson, Tim Lytton, Kim Connolly, Danielle Pelfrey Duryea, Chris Moellering, Lisa Bauer, and the members of the SUNY Buffalo Law Junior Faculty Forum for their helpful comments and suggestions. I would also like to thank the staff at the Law Center to Prevent Gun Violence for everything they taught me about firearms policy (though the views in this Article do not necessarily reflect the views of the Law Center). I also appreciate the research assistance of Brian Sarama.

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INTRODUCTION

Since the Supreme Court held in *District of Columbia v. Heller*¹ that the Second Amendment protects an individual right to own a gun, separate and apart from service in a militia,² scholars and lower courts have labored to define the scope of that right and the proper method of analysis for determining when the right is violated. Much of the major litigation and scholarship about the Second Amendment since *Heller* has focused on whether, and to what degree, the right recognized in *Heller* in the context of home self-defense extends outside of the home.³ Courts and scholars have also

1. 554 U.S. 570 (2008).

2. See *id.* at 599. The full text of the Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

3. See, e.g., *Peruta v. Cnty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014), *vacated and reh'g en banc granted*, 781 F.3d 1106 (9th Cir. 2015); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *cert. denied*, No. 13-827, 2014 WL 126071 (U.S. May 5, 2014); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 422 (2013); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), *reh'g en banc denied*, 708 F.3d 901 (7th Cir. 2013); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013); Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695 (2012); Michael P. O'Shea, *Modeling the Second*

examined whether Second Amendment claims should be analyzed using the traditional “level-of-scrutiny” analysis used in other areas of constitutional law or if the Second Amendment calls for a different “historical” or “categorical” approach.⁴ This Article focuses on a different question: How should courts determine which weapons the Second Amendment guarantees individuals the right to use for self-defense? This question is likely to become increasingly important to courts as weaponry becomes more sophisticated and both assault weapons and bans on assault weapons become more popular.

This Article examines the “common use” test established in *Heller* and the attempted application of that test by lower courts. That test asks whether the weapon at issue is in common use at the time the case is decided.⁵ This test is not easy to apply or desirable in the modern era of weaponry, nor does precedent or the Second

Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of “Bearing Arms” for Self-Defense, 61 AM. U. L. REV. 585 (2012); Jordan E. Pratt, *A First Amendment-Inspired Approach to Heller’s “Schools” and “Government Buildings,”* 92 NEB. L. REV. 537 (2014); see also Jonathan Meltzer, Note, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1488 (2014) (“The most consequential cases in defining the contours of the Second Amendment, however, relate to the right to carry firearms outside the home.”).

4. See, e.g., *Peruta*, 742 F.3d at 1167–68 (noting that the courts of appeals “have grappled with varying sliding-scale and tiered-scrutiny approaches, agreeing as a general matter that ‘the level of scrutiny applied to gun control regulations depends on the regulation’s burden on the Second Amendment right to keep and bear arms,’” but also noting that “an alternative approach for the most severe cases . . . [where] . . . [a] law effect[s] a ‘destruction of the right’ rather than merely burdening it”); *Heller v. D.C.*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.”); Ivan E. Bodensteiner, *Scope of the Second Amendment Right—Post-Heller Standard of Review*, 41 U. TOL. L. REV. 43 (2009); Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437 (2011); Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What’s A Court to Do Post-McDonald?*, 21 CORNELL J.L. & PUB. POL’Y 489 (2012); Michael J. Habib, *The Second Amendment Standard of Review: The Quintessential Clean-Slate for Sliding-Scale Scrutiny*, ADMIN. & REG. L. NEWS, Summer 2012, at 13; Ryan L. Card, Note, *An Opinion Without Standards: The Supreme Court’s Refusal to Adopt A Standard of Constitutional Review in District of Columbia v. Heller Will Likely Cause Headaches for Future Judicial Review of Gun-Control Regulations*, 23 BYU J. PUB. L. 259 (2009); Andrew Peace, Comment, *A Snowball’s Chance in Heller: Why Decastro’s Substantial Burden Standard is Unlikely to Survive*, 54 B.C.L. REV. ELECTRONIC SUPPLEMENT 175 (2013), available at <http://lawdigitalcommons.bc.edu/bclr/vol154/iss6/14>.

5. See *Heller*, 554 U.S. at 624–25.

Amendment's text require it. Indeed, lower courts have already been shirking the common use test rather than following it to its logical—and disturbing—conclusions that lead to both over-protecting and under-protecting Second Amendment rights.⁶ This Article proposes an alternative test that calls for courts to objectively examine whether the weapon at issue is a reasonable weapon for self-defense. This inquiry looks at the weapon's usefulness in a self-defense situation, its potential dangerousness to innocent bystanders, and the likelihood that the weapon will be employed for illegal purposes. Although this test is not perfect, it would protect the core right of armed self-defense recognized in *Heller*⁷ while allowing regulation of the most dangerous weapons.

This Article begins in Part II with an overview of the growing popularity of assault weapons and large capacity magazines and government efforts to ban these weapons. Part III summarizes the *Heller* decision and the common use test it describes for determining which arms the Second Amendment protects. Part III also describes the analytical framework courts have settled on for analyzing Second Amendment claims since *Heller* was decided. Part IV describes how courts have struggled to apply the common use test and how these struggles illustrate fundamental problems with that

6. See *infra* Part V.

7. See *Heller*, 554 U.S. at 599 (recognizing self-defense as “the central component of the right” to keep and bear arms in the Second Amendment). Of course, the validity of the central holding of *Heller*—that the Second Amendment protects an individual right separate from service in a militia—has been and continues to be the subject of rigorous scholarly debate. See, e.g., Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 630 (2008) (“Scalia’s use of historical texts is entirely arbitrary and result oriented. Atypical texts that support Scalia . . . are pronounced to be influential, while generally influential texts . . . are dismissed as unrepresentative. Such an approach is intellectually dishonest and suggests that Justice Scalia’s brand of plain-meaning originalism is little more than a smoke screen for his own political agenda.”) (citation omitted); David B. Kopel, *The Natural Right of Self-Defense: Heller’s Lesson for the World*, 59 SYRACUSE L. REV. 235 (2008) (praising *Heller*’s recognition of the Second Amendment as codifying a pre-existing right and critiquing the dissenting opinions); see also *McDonald v. City of Chi.*, 561 U.S. 742, 914 (2010) (Breyer, J., dissenting) (collecting articles critiquing *Heller*); William G. Merkel, *The District of Columbia v. Heller and Antonin Scalia’s Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349, 349 (2009) (“The majority holding—that the Second Amendment was originally understood to protect the right to possess any commonly held weapon for purposes unrelated to militia service such as self-defense and hunting—requires misreading, misunderstanding, or ignoring the bulk of relevant evidence . . .”). Although this debate is surely an important one, this Article assumes the validity and ongoing vitality of *Heller*’s individual right holding.

test. Part V examines five of the most fundamental problems with the common use test, discusses alternatives to the common use test proposed in scholarship, and proposes an alternative test based on reasonable self-defense.

I. TYPES OF WEAPONS – A BREWING CONTROVERSY

Over the last few decades, the weaponry available to civilians has become more sophisticated and deadly. Recently—particularly since the 2012 shooting at Sandy Hook Elementary School—activists and legislators have been increasingly calling for—and in some cases enacting—new restrictions on large capacity ammunition magazines⁸ and assault weapons.⁹ These trends set the stage for

8. See *Large Capacity Ammunition Magazines Policy Summary*, LAW CTR. TO PREVENT GUN VIOLENCE (May 31, 2013), <http://smartgunlaws.org/large-capacity-ammunition-magazines-policy-summary/> (defining “large capacity” magazines as magazines with a capacity of more than ten rounds of ammunition). Ammunition magazines are containers that hold ammunition cartridges and feed them into a firearm. See OXFORD UNIVERSITY PRESS, *THE OXFORD AMERICAN DICTIONARY AND THESAURUS* 900 (2003). The “capacity” of a magazine refers to the number of cartridges a magazine can hold at one time. Large capacity ammunition magazines are generally considered by most laws to be those larger than ten rounds, but some laws set a higher number. See LAW CTR. TO PREVENT GUN VIOLENCE, *supra*.

9. See Brad Plumer, *Everything You Need to Know About the Assault Weapons Ban*, in *One Post*, WASH. POST (Dec. 17, 2012), <http://www.washingtonpost.com/news/wonkblog/wp/2012/12/17/everything-you-need-to-know-about-banning-assault-weapons-in-one-post/>. Some gun rights enthusiasts take issue with the phrases “assault weapons” and “large capacity ammunition magazines” calling them “pejorative.” See, e.g., Memorandum in Support of Plaintiffs’ Motion for Summary Judgment at 7, *Shew v. Malloy*, 994 F. Supp. 2d 234 (D. Conn. Jan. 30, 2014) (No. 3:13-cv-00739), 2013 WL 4511019 (“The Act bans standard magazines in common use that it calls ‘large capacity magazines’”); Petition for Writ of Certiorari at n.3, *Silveira v. Loker*, 540 U.S. 1046 (2003) (No. 03-51), 2003 WL 23194550 (“The Court should be aware that the pejorative expression ‘assault weapon’ is used by anti-firearm activists to frighten and mislead, not to inform.”). The issue about the definition of “assault weapons” stems from the way certain assault rifles modeled on military rifles have been marketed to civilians. This issue is discussed further below in Part II.A and in note 19, *infra*. For clarity, this Article will use the phrase “assault weapons” to refer to guns that were deemed assault weapons under the now-defunct federal assault weapons ban or are generally considered assault weapons by bans that currently exist in some states.

The “large capacity ammunition magazine” issue is more a dispute over semantics. Gun rights supporters dislike the phrase “large capacity” because it implies that these magazines are somehow out of the ordinary and therefore not protected by the Second Amendment under the “common use” test. As discussed below in Part V, this kind of dispute highlights the flawed nature of the inquiry that

legal clashes that will force courts to carefully examine the issue of what types of weapons are protected by the Second Amendment.

A. *The Proliferation of Assault Weapons*

Although fully automatic and semi-automatic¹⁰ firearms became popular in the American military as early as World War I,¹¹ the most common weapons on the civilian market in the twentieth century up until the 1980s bore little resemblance to those used on the battlefield. For example, although semi-automatic handguns were used by the military as early as 1911,¹² revolvers dominated the American handgun market as recently as 1989.¹³

The 1980s marked a shift in the gun industry toward the manufacture and marketing of civilian versions of military firearms. For example, the nine millimeter (“9mm”) semi-automatic pistol was widely marketed to the domestic population at the same time it was

the test requires. We would be better off disputing whether a given magazine size is actually reasonable for self-defense than whether it is subjectively “large.”

10. Automatic weapons continuously fire bullets while the trigger is depressed (until the available rounds are expended), while semi-automatic weapons fire only one bullet each time the trigger is depressed. See Jim Supica, *A Brief History of Firearms*, NAT. RIFLE ASS'N, <http://www.nramuseum.org/gun-info-research/a-brief-history-of-firearms.aspx> (last visited Dec. 23, 2015). Single-shot guns (guns that are neither automatic nor semi-automatic) require some action by the user in order to load a new bullet into the chamber each time the gun is fired. See Adam Weinstein, *A Non-Gun-Owner's Guide to Guns*, MOTHER JONES (Dec. 21, 2012, 7:01 AM) <http://www.motherjones.com/politics/2012/12/semi-automatic-gun-assault-weapon-definitions>. For example, a traditional single-action revolver requires the user to “cock” or pull back the hammer on the back of the gun, which rotates the cylinder so as to line up a new cartridge between the hammer and the barrel, and then to release the hammer by pulling a trigger. See Tom Harris, *How Revolvers Work*, HOW STUFF WORKS (Mar. 7, 2002), <http://science.howstuffworks.com/revolver.htm>.

11. See, e.g., STEPHEN BULL, *WORLD WAR I TRENCH WARFARE* (1) 1914–16, at 11–12 (2002); Scott Engen, *The History of the 1911 Pistol*, BROWNING (Jan. 24, 2011), <http://www.browning.com/library/infonews/detail.asp?ID=301>. Notably, the first well-functioning “machine gun” was invented much earlier, during the Civil War in 1862 by Richard Gatling. See JULIA KELLER, *MR. GATLING'S TERRIBLE MARVEL* 1, 5 (2008).

12. See, e.g., *M-1911 Pistol History*, M-1911 PISTOLS ORG., http://www.m1911.org/full_history.htm (last visited Dec. 23, 2015).

13. See VIOLENCE POLICY CTR., *THE MILITARIZATION OF THE U.S. CIVILIAN FIREARMS MARKET* 14 (2011), <http://www.vpc.org/studies/militarization.pdf> [hereinafter VIOLENCE POLICY CTR.]; see also M.D. Johnson, *The Trend Toward Autoloaders*, in *THE GUN DIGEST BOOK OF GUNS FOR PERSONAL SELF DEFENSE* 36 (Kevin Michalowski ed., 2004) (noting the trend in the 1980s of police departments and civilians switching from revolvers to semi-automatic handguns).

becoming the standard military side-arm.¹⁴ Eventually, the 9mm and similar semi-automatic pistols displaced the revolver as the most popular type of handgun on the civilian market.¹⁵

The gun industry employed a similar strategy in the market for long guns. Beginning in the 1980s, the industry began to promote semi-automatic versions of assault rifles previously only marketed to the military.¹⁶ For example, the M-16, an assault rifle used by the military, was marketed to civilians as the AR-15.¹⁷ The main difference between the military versions of these firearms and their civilian counterparts was the ability to fire in fully automatic mode.¹⁸ While the M-16 and similar military assault rifles usually have a small lever that allows the user to switch between semi-automatic and fully automatic mode, their civilian counterparts do not and are restricted to firing only in semi-automatic mode.¹⁹

The significance of this difference is hotly debated²⁰ but both sides agree that—other than the ability to fire in fully automatic mode—these civilian guns have all the same features of their

14. VIOLENCE POLICY CTR., *supra* note 13, at 14–16.

15. *See id.*

16. *See* TOM DIAZ, *THE LAST GUN* 159–60 (2013). The heavy promotion of these rifles and other military firearms was likely motivated, at least in part, by declining handgun sales. *See id.* at 160.

17. *See id.* at 159–60; VIOLENCE POLICY CTR., *supra* note 13, at 25, 29. Originally the AR-15 was sold under a patent held by Colt Industries. DIAZ, *supra* note 16, at 159–60. Once that patent expired, numerous other manufacturers began selling similar guns, including the M&P15, which was used by James Holmes in the 2012 Aurora, Colorado movie theatre shooting. *Id.* at 144–45, 160.

18. *See id.* at 157–58.

19. *Id.* at 157.

20. This is the primary dispute over the use of the phrase “assault weapons.” Pro-gun activists argue that “assault weapons” is a purely political term and that the phrase “assault rifles” should only be understood to refer to long guns capable of firing in fully automatic mode. *See, e.g.*, Bruce H. Kobayashi & Joseph E. Olson, In Re 101 California Street: A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of “Assault Weapons,” 8 STAN. L. & POL’Y REV. 41, 42–43 (1997) (“Prior to 1989, the term ‘assault weapon’ did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists to expand the category of ‘assault rifles’ so as to allow an attack on as many additional firearms as possible on the basis of undefined ‘evil’ appearance.”); David B. Kopel, *Rational Basis Analysis of “Assault Weapon” Prohibition*, 20 J. CONTEMP. L. 381, 387 (1994) (“No ‘assault rifle’ (by Defense Intelligence Agency definition) is an ‘assault weapon’ because all ‘assault rifles’ are automatic, while no ‘assault weapons’ are automatic. ‘Assault rifles’ are used by the military, whereas no ‘assault weapon’ is used by the military. ‘Assault rifles’ are all rifles, but ‘assault weapons’ include semiautomatic rifles, semiautomatic shotguns, revolver-action shotguns, semiautomatic handguns, and semiautomatic airguns.”).

military counterparts.²¹ Both sides also seem to agree that these guns have become more popular in recent years.²²

This rise in popularity—coupled with the use of assault weapons in many high profile mass shootings—has put these guns in the crosshairs of legislators, setting up a clash in the courts to settle whether (and/or to what extent) assault weapons are protected by the Second Amendment.

B. *The Renewed Popularity Of Assault Weapon Bans*

Assault weapon bans in the United States have generally worked in one of three ways: they ban a list of predetermined gun models, ban guns with a certain number of specified features, or ban guns based on some combination of both.²³ Laws using a “feature based” test typically look to whether the gun has features that are common in civilian models of military weapons, such as a telescopic or “folding” stock, a pistol grip protruding unusually far beneath the action of the weapon, or a barrel capable of accepting a flash suppressor.²⁴ Such bans prohibit many of the military-style rifles, discussed above, that became popular beginning in the 1980s.

21. See DIAZ, *supra* note 16, at 156 (noting that other than the ability to fire in fully automatic mode, civilian assault rifles “function identically” to their military counterparts); Liz Klimas, *So What Is an ‘Assault Rifle’ Really? We Look at the Definitions and How the Term Is ‘Demonized,’* THE BLAZE (Jan. 11, 2013, 10:22 AM), <http://www.theblaze.com/stories/2013/01/11/so-what-is-an-assault-rifle-really-we-look-at-the-definitions-and-how-the-term-is-demonized/> (“[T]he only difference [between military and civilian assault rifles] is that one is fully automatic and the other is semi-automatic.”).

22. See VIOLENCE POLICY CTR., *supra* note 13, at 29, 40; see also Brief for Appellants at 46, *Heller v. D.C.*, 670 F.3d 1244 (D.C. Cir. 2011) (No. 10-7036) (citing evidence from the district court record indicating that “[s]ome two million AR-15 type rifles are in civilian hands”); Justin Peters, *How Many Assault Weapons Are There in America? How Much Would It Cost the Government To Buy Them Back?*, SLATE (Dec. 20, 2012), http://www.slate.com/blogs/crime/2012/12/20/assault_rifle_stats_how_many_assault_rifles_are_there_in_america.html (estimating that there may be as many as 3.75 million AR-15s in the United States).

23. See, e.g., Brian Roth, Comment, *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, 413–14 (2013).

24. See, e.g., *id.*; see also Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1484 (2009) (noting that assault weapons bans “often focus on features . . . such as folding stocks, pistol grips, bayonet mounts, flash suppressors, or (for assault handguns but not assault rifles) magazines that attach outside the pistol grip or barrel shrouds that can be used as hand-holds.”).

The first modern assault weapon ban in the United States was passed in California in 1989 in response to a series of high-profile shootings there in which gunmen used assault weapons.²⁵ Other states followed suit, and by 1994, five states and several local governments had passed some form of assault weapon ban.²⁶ Then, in 1994, Congress enacted a federal ban on assault weapons and large capacity ammunition magazines.²⁷ The ban had a "sunset" provision under which it would expire in ten years if not renewed by Congress.²⁸ During the time the ban was in effect, two additional states passed some version of their own assault weapon ban.²⁹ The federal assault weapon ban expired in 2004, ten years after its effective date pursuant to its sunset provision.³⁰ During the years between the federal assault weapon ban's expiration in 2004 and 2012, no other states adopted new assault weapon prohibitions.

At the end of 2012, the country's focus turned back to assault weapons and large capacity ammunition magazines after the Sandy Hook Elementary School shooting in Newtown, Connecticut.³¹ The

25. See Daniel Abrams, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL'Y REV. 488, 489 (1992); Carl Ingram, *Assault Gun Ban Wins Final Vote: Deukmejian's Promised Approval Would Make It 1st Such U.S. Law*, L.A. TIMES, May 19, 1989, at 1, 27, available at http://articles.latimes.com/1989-05-19/news/mn-112_1_assault-weapons-ban-military-style-assault-types-of-semiautomatic-rifles ("While the [California assault weapons ban] legislation was announced in December, it was the Jan. 17 murders of five Southeast Asian refugee children in a Stockton schoolyard that provided the emotional ingredient required to advance the bill and gain the support of [California Governor George] Deukmejian, long an opponent of new controls on guns."). West Virginia had a law prior to California's that regulated assault weapons, but that law was "of limited utility since it did not even define the term 'assault weapon.'" Robert A. O'Hare, Jr. & Jorge Pedreira, *An Uncertain Right: The Second Amendment and the Assault Weapon Legislation Controversy*, 66 ST. JOHN'S L. REV. 179, 196 (1992).

26. LEGAL CMTY. AGAINST VIOLENCE, BANNING ASSAULT WEAPONS—A LEGAL PRIMER FOR STATE AND LOCAL ACTION 3 (2004), http://smartgunlaws.org/wp-content/uploads/2012/05/Banning_Assault_Weapons_A_Legal_Primer_8.05_entire.pdf [hereinafter LEGAL CMTY. AGAINST VIOLENCE]; see also Abrams, *supra* note 25, at 489 (noting that as of 1992 "[o]ver thirty major cities" had enacted assault weapons laws).

27. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 110101, 110103 Stat. 1796 (1994).

28. Violent Crime Control and Law Enforcement Act of 1994 § 110105(2).

29. See LEGAL CMTY. AGAINST VIOLENCE, *supra* note 26, at 3.

30. See, e.g., Jill Lawrence, *Federal Ban on Assault Weapons Expires*, USA TODAY (Sept. 14, 2004, 12:03 AM), http://usatoday30.usatoday.com/news/washington/2004-09-12-weapons-ban_x.htm.

31. See N.Y. TIMES, *State Gun Laws Enacted in the Year After Newtown*, Dec. 10, 2013, at A20, <http://www.nytimes.com/interactive/2013/12/10/us/state-gun-laws>

Sandy Hook gunman killed twenty elementary school students, seven adults, and himself primarily using a .223 Bushmaster rifle,³² which is a variation on the AR-15.³³ The gunman also used large capacity ammunition magazines.³⁴ The Newtown tragedy led to a nationwide push for stronger gun control laws, including bans on assault weapons and large capacity ammunition magazines.³⁵

Although higher profile efforts at the federal level have failed to revive the defunct national assault weapon ban,³⁶ several states passed laws either strengthening existing bans on assault weapons and large capacity ammunition magazines or enacting new ones.³⁷ One thing the debates at both the state and federal levels on these issues had in common (whether those debates ended in new laws or not) was that opponents and supporters of these proposals hotly debated their constitutionality. For example, one legislator in California called a proposed bill that would have expanded California's existing assault weapons ban an attempt to "erase the Second Amendment."³⁸ Proponents of the bill to renew the federal

enacted-in-the-year-since-newtown.html.

32. James Barron, *Pupils Were All Shot Multiple Times with a Semiautomatic, Officials Say*, N.Y. TIMES, Dec. 15, 2012, at 1, 27, http://www.nytimes.com/2012/12/16/nyregion/gunman-kills-20-children-at-school-in-connecticut-28-dead-in-all.html?_r=0. The gunman killed his own mother at home prior to going to the school and killing twenty children and six school employees. *Id.* at 27.

33. See Lee Ferran & Shushannah Walshe, *Newtown Massacre: What Is a Bushmaster .223?*, ABC NEWS (Dec. 17, 2012), <http://abcnews.go.com/Blotter/newtown-massacre-bushmaster-223/story?id=18000884>.

34. See Matt Ferner, *Adam Lanza, Sandy Hook Shooter, Used High-Capacity Magazines From Colorado's Magpul Industries*, HUFFINGTON POST (Nov. 26, 2013, 2:46 PM), http://www.huffingtonpost.com/2013/11/26/adam-landa-sandy-hook-magazines-magpul_n_4344175.html.

35. See, e.g., Josh Blackman & Shelby Baird, *The Shooting Cycle*, 46 CONN. L. REV. 1513 (2014) (noting the sharp increase in support for a federal assault weapons ban and other gun laws following the Newtown shooting).

36. Ed O'Keefe, *Gun Background Check Compromise, Assault Weapon Ban Fail in Senate*, WASH. POST, Apr. 17, 2013, <http://www.washingtonpost.com/blogs/post-politics/wp/2013/04/17/senate-to-vote-on-amendments-to-gun-bill-with-background-check-plan-in-doubt/>.

37. See N.Y. TIMES, *supra* note 31, at A20.

38. Awr Hawkins, *CA Republican: 'Assault Weapons' Ban 'Erases' Second Amendment*, BREITBART (Oct. 7, 2013), <http://www.breitbart.com/Big-Government/2013/10/07/Pending-CA-Assault-Weapons-Ban-Erases-The-Second-Amendment>. Indeed, the bill that the legislator was referring to, SB 374, was ultimately vetoed by the governor because the governor did not believe that the "bill's blanket ban on semi-automatic rifles would reduce criminal activity or enhance public safety enough to warrant this infringement on gun owners' rights." See Veto Message from Jerry Brown, Governor, to the Members of the Cal. State Senate (Oct. 11, 2013), *available*

assault weapons ban argued that it was consistent with the Second Amendment, with one senator noting that “[t]here are reasonable limits on each [constitutional] amendment” and another arguing that “[i]t is hard to imagine that it would [not] be a violation of the First Amendment for somebody to yell fire in a crowded theater but [that it would be] a violation of the Second Amendment to prevent somebody from bringing a hundred-round magazine into a crowded theater”³⁹ Even the bill’s stated purpose included an implicit argument for its constitutionality under *Heller*, stating that the bill was intended “[t]o regulate assault weapons, to ensure that the right to keep and bear arms is not unlimited, and for other purposes.”⁴⁰

The series of new laws that did pass at the state and local level set the stage for court battles over the scope of the Second Amendment’s protection for different types of guns and magazines between those governments and proponents of expanded gun rights.

II. POST-*HELLER* SECOND AMENDMENT DOCTRINE—*HELLER*, THE COMMON USE TEST, AND THE TWO-STEP TEST

The decision in *Heller* was groundbreaking in that it recognized, for the first time, that the Second Amendment protects an individual right to bear arms for self-defense unconnected to militia service. However, the opinion was somewhat vague on what the proper the method of analysis was for Second Amendment claims. Lower courts have filled in some of the gap, with most settling on a version of a two-part analysis: (1) asking whether the conduct at issue is protected by the Second Amendment and, if it is, (2) selecting and applying an appropriate level of scrutiny.⁴¹

at http://gov.ca.gov/docs/SB_374_2013_Veto_Message.pdf.

39. Nicole Flatow, *Senators Destroy Ted Cruz’s Argument Against the Assault Weapons Ban*, THINK PROGRESS (Mar. 14, 2014, 1:00 PM), <http://thinkprogress.org/justice/2013/03/14/1720351/senators-destroy-ted-cruzs-argument-against-the-assault-weapons-ban/>.

40. S. 150, 113th Cong. (1st Sess. 2013) (emphasis added); cf. *D.C. v. Heller*, 554 U.S. 570, 626 (2008) (“Like most rights, the right secured by the Second Amendment is not unlimited.”).

41. See *infra* Part V.

A. District of Columbia v. Heller

1. Embracing an Individual Right

In *Heller*, the plaintiff challenged a set of laws in the District of Columbia that effectively banned handguns in the home.⁴² The Supreme Court held, in a five to four decision, that these laws violated the Second Amendment. The *Heller* decision marked a watershed moment in courts' understanding of the Second Amendment. Prior to that decision, courts had generally agreed that the Second Amendment only protected a "collective right" to own firearms for the purpose of service in a well-regulated militia.⁴³

Heller emphatically rejected this "collective right" view, instead finding that the Second Amendment protected an individual right to use firearms for self-defense.⁴⁴ Although the Court acknowledged that the framers' purpose in including the Second Amendment in the Bill of Rights may have been tied to militia service, the Court found that the framers' method of accomplishing that purpose was to codify a pre-existing right to keep and bear arms.⁴⁵ The Court announced that the pre-existing right's "central component" was the right to use arms for self-defense.⁴⁶

The Court reached this conclusion first by parsing the text of the Second Amendment and then through a long historical analysis that examined the public understanding of the "right to bear arms" prior to, contemporaneous with, and in the decades following the Second Amendment's adoption.⁴⁷ The analysis relied heavily on contemporary commentators, news accounts, and case law interpreting analogous state constitutional provisions.⁴⁸

42. *Heller*, 554 U.S. at 574–76. The plaintiff also challenged a law requiring guns kept in the home to be completely disassembled and unloaded when not in use. *Id.*

43. See, e.g., Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 708 (2012) ("For most of the twentieth century, the meaning of the Second Amendment seemed well settled. Courts consistently read it as guaranteeing a right to have and use guns only for purposes of organized state militia activity."); see also Reva B. Siegel, *Heller & Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1412–13 (2009) (noting that *Heller* represented the first time in history the Supreme Court had struck down a law as violation of the Second Amendment).

44. *Heller*, 554 U.S. at 599.

45. See *id.*

46. *Id.*

47. *Id.* at 576–619.

48. *Id.* at 602–19.

Once the Court found that such a right existed, it had no trouble finding that the District of Columbia's handgun ban violated that right.⁴⁹ However, in contrast to the lengthy discussion of whether the right at issue was an individual one or a "collective" one (which was also the primary subject of Justice Stevens' dissent), the Court said relatively little about the method of analysis that was to be applied in future Second Amendment claims. It did not, for example, lay out a particular level of scrutiny to be applied in Second Amendment cases. Although the majority rejected the interest-balancing test resembling intermediate scrutiny proposed by Justice Breyer's dissent, it did not lay out its own test but instead simply noted that the District's scheme would fail "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."⁵⁰ The Court did acknowledge that the Second Amendment right it recognized was "not unlimited" and laid out a few categories of regulation that were "longstanding" and therefore "presumptively lawful" under the Second Amendment, such as laws prohibiting felons from owning firearms.⁵¹ However, even that list came with the caveat that it was "not exhaustive."⁵² The Court did not explain its methodology for creating the list.⁵³

2. The "Common Use" Test

The *Heller* Court also spilled little ink on the question of what types of "arms" the Second Amendment protects. In discussing the text of the Second Amendment, the Court endorsed the seemingly broad view that the term "arms" encompassed any "weapo[n] of offence, or armour of defence" whether or not such an arm was the type used in war.⁵⁴ The Court also sharply dismissed the idea that

49. *Id.* at 628–29.

50. *Id.* at 628. The Court also struck down the District of Columbia's requirement that guns be kept completely disassembled and unloaded when not in use, finding that the requirement made "it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and [was therefore] unconstitutional." *Id.* at 630.

51. *Id.* at 626–27. The Court also said that prohibitions on firearm ownership by the mentally ill, laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, and laws imposing conditions and qualifications on the commercial sale of arms were presumptively constitutional. *Id.*

52. *Id.* at 627 n.26.

53. *See id.* at 721 (Breyer, J., dissenting) ("I am similarly puzzled by the majority's list, in Part III of its opinion, of provisions that in its view would survive Second Amendment scrutiny. . . . Why these? Is it that similar restrictions existed in the late 18th century? The majority fails to cite any colonial analogues.").

54. *Id.* at 581.

the Second Amendment only protects the particular arms in existence at the time of the Amendment's adoption, finding 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."⁵⁵

After this brief discussion about the meaning of the term "arms," the types of arms covered by the Second Amendment did not come up in the Court's extensive historical analysis, and the issue was only raised again in a section of the Court's opinion discussing whether the individual rights interpretation of the Second Amendment conflicted with any of the Court's prior holdings.⁵⁶ In that section, the Court attempted to distinguish its individual right holding from its 1939 holding in *United States v. Miller*,⁵⁷ that a law prohibiting the transportation of an unregistered short-barreled shotgun in interstate commerce did not violate the Second Amendment.⁵⁸

In *Miller*, the Court found that "[i]n the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."⁵⁹ The *Heller* majority was mainly concerned with refuting Justice Stevens' argument in dissent that *Miller* supported a collective right interpretation of the Second Amendment, and only briefly touched on the "type of weapon" test *Miller* appears to suggest:

Read in isolation, *Miller's* phrase "part of ordinary military equipment" could mean that only those weapons useful in warfare are protected. That would be a startling reading of the opinion, since it would mean that . . . restrictions on machineguns . . . might be unconstitutional, machineguns being useful in warfare in 1939. We think that *Miller's* "ordinary military equipment" language must be read in tandem with what comes after: "[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." The traditional militia was formed from a pool of men bringing arms "in common use at the time" for lawful purposes like self-defense. "In the colonial

55. *Id.* at 582.

56. *Id.* at 624-25.

57. 307 U.S. 174 (1939).

58. *Id.* at 178.

59. *Id.*

and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.” Indeed, that is precisely the way in which the Second Amendment’s operative clause furthers the purpose announced in its preface. We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.⁶⁰

Thus, in distancing itself from the “startling reading” of *Miller* that *Miller*’s military usefulness test would seem to suggest, the Court formulated a “common use” test focusing on whether the weapons at issue are currently in common use for lawful purposes such as self-defense.⁶¹ Compared with the rest of the opinion, the Court’s selection of this test was based on relatively little historical analysis. The Court simply noted that people in the militia at the time of the founding commonly used the personal weapons they brought with them to service.⁶²

The Court briefly alluded to the common use test again in the context of applying the newly recognized individual Second Amendment right to the District of Columbia’s handgun ban, finding that “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home ‘*the most preferred firearm in the nation to “keep” and use for protection of one’s home and family,*’ would fail constitutional muster.”⁶³ The Court rejected the District of Columbia’s argument that because long guns were still legal, it could ban handguns:

It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength

60. *Heller*, 554 U.S. at 624–25 (citations omitted).

61. *Id.* at 624.

62. *Id.* at 624–25. Even that assertion is somewhat debatable. Justice Breyer pointed out in dissent that some militias at the time of the founding required specific types of guns, not just whatever weapons the citizens called to serve in the militia happened to have around. *Id.* at 716 (Breyer, J., dissenting) (noting that some militia statutes at the time found handguns “acceptable” only for certain special militiamen (generally, certain soldiers on horseback), while requiring muskets or rifles for the general infantry.”).

63. *Id.* at 628–29 (emphasis added) (citations omitted).

to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.⁶⁴

Again, the Court simply reiterated (adding the somewhat cryptic introduction of “it is enough to note”) that handguns are the most popular arm for self-defense purposes. Interestingly, in making this assertion about the popularity of handguns, the Court cited only one source: the D.C. Circuit’s opinion below.⁶⁵ That opinion, in turn, cites to a single academic paper to support that proposition.⁶⁶ That paper compiled the results of several surveys from 1988 to 1993 in order to estimate the number of defensive uses of firearms in the United States during that period.⁶⁷ However, as the authors of that paper admit, some of the surveys used to compile these estimates only asked about handguns while others asked about all guns. Thus the paper “did not separately establish how many of the [defensive gun use incidents] involved handguns and how many involved other types of guns.”⁶⁸

This is not to suggest that the Court’s conclusion that handguns are the most popular weapon for self-defense was wrong—it almost certainly was correct. Rather, the issue is that the Court’s cursory citation to the lower court’s mentioning this study does not provide any guidance about how the Court was applying the “common use” test to reach the conclusion it did. Did the Court find that handguns were the most commonly chosen weapon because handguns are the weapon most often *used* in self-defense situations or simply because Americans most commonly purchase or own handguns for that

64. *Id.* at 629.

65. *Id.* at 628–29 (citing *Parker v. D.C.*, 478 F.3d 370, 400 (D.C. Cir. 2007)).

66. *Parker*, 478 F.3d at 400 (“Indeed, the pistol is the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family.”) (citing Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 182–83 (1995)).

67. See Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 182–84 (1995).

68. *Id.* at 164. Moreover, the larger conclusions and methodology of that paper have been subject to significant criticism since it was published. See, e.g., Egon D. Cohen & Kristina M. Johnson, *The Restricted Firearms License: A Proposal to Preserve Second Amendment Rights and Reduce Gun Violence in the United States*, 31 YALE L. & POL’Y REV. INTER ALIA 10, 11–12 & n.12 (2013), http://ylpr.yale.edu/inter_alia/restricted-firearms-license-proposal-preserve-second-amendment-rights-and-reduce-gun.

purpose? Is survey data that is well over a decade old sufficient proof of today’s “common use?” These questions were left unanswered, and as discussed below, the Court’s lack of guidance has been reflected in lower courts’ unwillingness to deeply engage in common use analysis.⁶⁹

Justice Breyer’s dissent briefly critiqued the “common use” test, noting that it creates odd incentives for states:

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.⁷⁰

However, Justice Breyer did not specifically suggest an alternative type of weapon test, despite describing his own “interest-balancing” test that he would apply to Second Amendment claims generally.⁷¹

Thus, while taking a monumental step in recognizing an individual Second Amendment right, the Court left lower courts with little to guide them in analyzing future claims—other than claims regarding handgun bans identical to the one in *Heller*—and even less guidance on how to decide what weapons are protected by the Second Amendment. In *McDonald v. City of Chicago*,⁷² the Court’s only return to the Second Amendment since *Heller*, the Court found

69. See *infra* Part IV.

70. *Heller*, 554 U.S. at 721 (Breyer, J., dissenting).

71. Justice Breyer proposed that courts apply something in between rational basis and strict scrutiny to Second Amendment claims—likely a form of intermediate scrutiny. *Id.* at 689–90 (suggesting that a court should not “effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny). Rather [a court should ask] whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.”).

72. 561 U.S. 742 (2010).

that the Second Amendment protects a fundamental right incorporated against state and local governments but did not provide any further insight into the appropriate analysis for Second Amendment cases or into the meaning of the “common use” test for arms described in *Heller*.⁷³

B. The Two-Step Test

Because the Supreme Court has not established a methodology for analyzing Second Amendment claims, lower courts have been given a wide berth to elaborate on the scope of the Second Amendment right recognized in *Heller*. Since *Heller*, all of the federal courts of appeal that have done any in-depth analysis of the Second Amendment have settled on some form of a two-part test that: (1) asks whether the law at issue burdens conduct protected by the Second Amendment and, if there is such a burden, (2), asks courts to apply an “appropriate” level of scrutiny given the severity of the burden on Second Amendment rights.⁷⁴

Critics of the two-step test—most of whom favor broader Second Amendment rights—prefer a “scope only” approach that would simply ask whether the law burdens the Second Amendment as the amendment was understood at the time of its ratification. Proponents of this approach argue that if a law prohibits conduct protected by the Second Amendment, it should be struck down

73. See *McDonald*, 561 U.S. at 750, 767–68, 778.

74. See, e.g., *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) (noting that the two-step approach “has emerged as the prevailing approach” and adopting that approach), *cert. denied*, 134 S. Ct. 1364 (2014); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 375 (2012); *United States v. Booker*, 644 F.3d 12, 22–26 (1st Cir. 2011); *Heller v. D.C. (Heller II)*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 700–04 (7th Cir. 2011); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); see also *United States v. Decastro*, 682 F.3d 160, 166–69 (2d Cir. 2012) (adopting a “substantial burden” test where “heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)”), *cert. denied*, 133 S. Ct. 838 (2013). The Eighth and Eleventh Circuits have summarily rejected a few Second Amendment challenges to federal prohibitions on certain criminals possessing firearms and on the possession of particularly dangerous weapons, see, e.g., *United States v. Bena*, 664 F.3d 1180, 1182–85 (8th Cir. 2011); *United States v. Rozier*, 598 F.3d 768, 770–71 (11th Cir. 2010), but have not yet engaged in an in-depth discussion of the standard of review for Second Amendment cases.

without resort to the kind of "interest-balancing" the *Heller* majority expressly disclaimed.⁷⁵

In any case, courts that have applied the two-step approach as well as those arguing for the "scope only" approach both largely agree that the scope inquiry is determined by a historical analysis that looks at whether the challenged conduct was within the scope that the Second Amendment was understood to have at the time it was ratified and for at least some amount of time after ratification.⁷⁶ "It begins with the pre-ratification 'historical background of the Second Amendment,' since 'the Second Amendment . . . codified a preexisting right.' Next, it turns to whatever sources shed light on the 'public understanding [of the Second Amendment] in the period after its enactment or ratification,' such as nineteenth-century judicial interpretations and legal commentary."⁷⁷

75. See, e.g., *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."); Petition for Writ of Certiorari at 24, *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (No. 13-42), 2013 WL 3484362, at *24 (complaining that under the two-step approach "many courts simply dispense with the first step of discerning a right through interpretation, only assuming that a right (of abstract dimension) is implicated, thus carefully avoiding any holding that the right has any substantive content. By assuming, rather than finding and thus defining the right's existence, courts reduce the right to a cypher that cannot withstand the second step's application, always alleged to be intermediate scrutiny."), cert. denied, 134 S. Ct. 422 (2013); see also *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1168 (9th Cir. 2014) (arguing for using the scope only approach in the "most severe cases" that involve a "complete destruction" of Second Amendment rights), vacated and re'g en banc granted, 781 F.3d 1106 (9th Cir. 2015); cf. *Allen Rostron*, supra note 43, at 706–07 ("The lower courts, frustrated by the indeterminacy of historical inquiry and puzzled by the categorizations suggested by Justice Scalia, have steered in other directions. They have effectively embraced the sort of interest-balancing approach that Justice Scalia condemned, adopting an intermediate scrutiny test and applying it in a way that is highly deferential to legislative determinations and that leads to all but the most drastic restrictions on guns being upheld.").

76. See, e.g., *Peruta*, 742 F.3d at 1150–51; *Nat'l Rifle Ass'n of Am.*, 700 F.3d at 194.

77. *Peruta*, 742 F.3d at 1151 (citations omitted) (alterations in original) (quoting *D.C. v. Heller*, 554 U.S. 570, 592 (2008)). But see *Drake v. Filko*, 724 F.3d 426, 433–34 (3d Cir. 2013) (noting that prohibitions on the possession of firearms by felons were found to be "longstanding" by *Heller* despite the fact that such prohibitions did not exist until the early twentieth century, and therefore, concluding that other prohibitions dating to that era could be considered "longstanding" and presumptively lawful), cert. denied, 134 S. Ct. 2134 (2014).

Once a court applying the two-step approach determines whether the law at issue burdens or regulates conduct protected by the Second Amendment, the court will then determine the proper level of scrutiny to apply to the law. The closer a law comes to burdening the “core” right identified in *Heller*—the right to possess a firearm for self-defense in the home—the higher the level of scrutiny applied to the law.⁷⁸ Usually courts decline to apply rational basis scrutiny⁷⁹ to a law found to burden conduct protected by the Second Amendment (because that standard was specifically rejected by the majority in *Heller*) and instead will either apply strict or intermediate scrutiny,⁸⁰ depending on the severity of the burden on Second Amendment rights.⁸¹

This mode of analysis has led courts to apply intermediate scrutiny to most gun control laws that have been reviewed after *Heller*, because most of these laws either burden only conduct outside the home or only regulate the possession of firearms by particular types of individuals. For example, laws regulating the carrying of firearms outside of the home—probably the most

78. See, e.g., *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (citation omitted) (“[T]he level of scrutiny should depend on (1) ‘how close the law comes to the core of the Second Amendment right,’ and (2) ‘the severity of the law’s burden on the right.’”); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 93 & 93 n.17 (2d Cir. 2012) (“Although we have no occasion to decide what level of scrutiny should apply to laws that burden the ‘core’ Second Amendment protection identified in *Heller*, we believe that applying less than strict scrutiny when the regulation does not burden the ‘core’ protection of self-defense in the home makes eminent sense in this context and is in line with the approach taken by our sister circuits.”) (collecting cases), *cert denied*, 133 S. Ct. 1806 (2013); *Ezell v. City of Chi.*, 651 F.3d 684, 708 (7th Cir. 2010) (“[A] severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government’s means and its end. Second, laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.”).

79. Rational basis analysis places the burden on the challenger of a law to prove that the law is not rationally related to a legitimate governmental interest. See, e.g., 16B AM. JUR. 2D *Constitutional Law* § 860 (2009).

80. Intermediate scrutiny analysis places the burden on the government to show that the law is substantially related to an important governmental interest, while strict scrutiny places the burden on the government to show that the law is narrowly tailored to serve a compelling governmental interest. See, e.g., *id.* at §§ 861–62.

81. See, e.g., *Ezell*, 651 F.3d at 706 (“Although the Supreme Court did not do so in either *Heller* or *McDonald*, the Court *did* make it clear that the deferential rational-basis standard is out, and with it the presumption of constitutionality.”).

prominent issue in the courts since *Heller*—have received intermediate scrutiny in three courts of appeals.⁸² Similarly, every court of appeals that has reviewed the federal prohibition on domestic violence misdemeanants possessing firearms has upheld that law, applying some form of intermediate scrutiny.⁸³ By contrast, the few laws that have been subjected to a strict scrutiny analysis (or some variation thereof) or that have been struck down using the “scope only” approach have usually been complete bans on the possession, sale, or use of firearms.⁸⁴

IV. THE COMMON USE TEST APPLIED IN THE COURTS

Comparatively few courts have tackled the issue of what types of weapons are protected by the Second Amendment. The courts that have—usually in the context of lawsuits challenging bans on assault weapons and large capacity magazines—hewed to the usual two-step analysis in analyzing these laws. When applied to type-of-weapon cases, the analysis usually asks (1) whether the type of weapon at issue is protected by the Second Amendment and (2) (assuming the first step found some level of protection) what level of scrutiny a ban on the type of weapon at issue warrants.

In working through this analysis, courts have largely followed a familiar pattern. The first step of the two-step test is where courts have usually most directly wrestled with the “common use” test. In stark contrast to the often lengthy historical discussions that

82. See *Kachalsky*, 701 F.3d at 96–97; *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 422 (2013); *Drake*, 724 F.3d at 436. *But see Peruta*, 742 F.3d at 1173–79 (declining to apply intermediate scrutiny and invalidating a discretionary concealed licensing law using the scope only approach); *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012) (striking down Illinois’ complete ban on carrying firearms outside the home and noting that “our analysis is not based on degrees of scrutiny, but on Illinois’s failure to justify the most restrictive gun law of any of the 50 states.”).

83. See, e.g., *Chovan*, 735 F.3d at 1138; *United States v. Booker*, 644 F.3d 12, 25–26 (1st Cir. 2011); *United States v. Chester*, 628 F.3d 673, 682–83 (4th Cir. 2010); *United States v. Skoien*, 614 F.3d 638, 641–42 (7th Cir. 2010).

84. See, e.g., *Ezell*, 651 F.3d at 708–09 (requiring “a more rigorous showing than [intermediate scrutiny] . . . , if not quite ‘strict scrutiny’” when reviewing a total ban on firing ranges in the city of Chicago); *Ill. Ass’n of Firearms Retailers v. City of Chi.*, 961 F. Supp. 2d 928, 939–40 (N.D. Ill. 2014) (applying a standard of review higher than intermediate scrutiny for a challenge to a Chicago ordinance banning virtually all gun sales in the City); *Palmer v. D.C.*, 59 F. Supp. 3d 173, 182–83 (D.C. Cir. 2014) (finding that under any level of heightened scrutiny, the District of Columbia’s virtual total ban on carrying firearms outside the home would violate the Second Amendment).

typically come in the first step of Second Amendment analysis, the application of the “common use” test by most courts has generally involved only brief citation to statistical evidence offered by the parties about the supposed prevalence of the weapons at issue. In the second step, courts have taken a broader focus and looked at such issues as the dangerousness of the banned weapons, and other avenues available for self-defense. Although these issues would naturally come up in the *application* of a level of scrutiny (i.e., to show the government’s need for the ban), courts have actually used these considerations frequently in *selecting* the appropriate level of scrutiny (i.e., in determining how much the right is burdened). Through this method, courts essentially end up determining the scope of the right primarily in the second step rather than the first.

As demonstrated in the cases discussed below, courts’ unwillingness to deeply engage with the common use test and tendency to either (A) rationalize their results through the second step of the analysis or (B) ignore the common use test altogether reflects the profound unworkability of the common use test and its disconnection from the central right recognized in *Heller*. In only one case did the court meaningfully engage in a deep look at the common use test, and that analysis only serves to underscore the test’s problems when taken to its logical conclusions.

A. *Heller II* & NYSRPA—Using the Second Step to Fix the First Step

In the most prominent case so far involving assault weapons and large capacity ammunition magazines, *Heller v. District of Columbia (Heller II)*, the D.C. Circuit upheld the District of Columbia’s bans on these items in the face of a Second Amendment challenge.⁸⁵ In determining whether the bans impinged on Second Amendment rights, the court found it “clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in ‘common use.’”⁸⁶ To support this conclusion, the court cited three statistics: (1) 1.6 million AR-15s have been manufactured since 1986; (2) in 2007, AR-15s accounted for 5.5 percent of all firearms and 14.4 percent of all rifles produced in the U.S. for the domestic market; and (3) 18% of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and

85. *Heller v. D.C. (Heller II)*, 670 F.3d 1244, 1247–48 (D.C. Cir. 2011).

86. *Id.* at 1261.

approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000.⁸⁷

The citation of these facts raises several questions about what the common use test really means. Why is the manufacture of 1.6 million AR-15s since 1986 significant when there are over 300 million civilian firearms in circulation in the United States?⁸⁸ How can a firearm that represents less than half of one percent of all firearms be considered in “common use”? Of course, the 1.6 million figure is probably both over and under-inclusive for purposes of this analysis since some AR-15s would not qualify as “assault weapons” under Washington D.C.’s law⁸⁹ and because there are other types of assault weapons besides AR-15s.

As for the second manufacturing statistic, why is that relevant to determining common use? Manufacturing does not necessarily reflect whether a firearm will ultimately be sold. Moreover, why only focus on the year 2007 (four years prior to the case being decided) and why only on domestic manufacturing? Why is the percentage of rifles specifically relevant? Is there some independent right to possess commonly used rifles? Finally, even taking all of the figures at face value, why is 5.5% or even 14.4% significant enough to constitute common use? The magazine figures raise even more questions. Why rely on such dated figures? Why rely solely on import data when so many firearms are manufactured domestically?⁹⁰

The court did not answer any of these questions, but seemed to implicitly recognize some of the difficulty with its assertion by noting

87. *Id.*

88. See, e.g., Don B. Kates & Carlisle Moody, *Heller, McDonald, and Murder: Testing the More Guns = More Murder Thesis*, 39 FORDHAM URB. L.J. 1421, 1445 (2012); Blaire Briody & Maureen Mackey, *19 Unbelievable Facts About Guns in America*, BUSINESS INSIDER (Dec. 19, 2012, 9:53 AM), <http://www.businessinsider.com/unbelievable-facts-about-guns-in-america-2012-12>.

89. The District of Columbia’s assault weapons ban, like many others, prohibits semi-automatic rifles with one of a list of enumerated features. D.C. CODE § 7-2501.01(3A)(A)(i)(IV) (LexisNexis 2001 & Supp. 2015). Gun manufacturers have responded to these bans by marketing “compliant” versions of popular guns, including variants on the AR-15, that are different from the ordinary versions of these guns only in the sense that they lack any of the banned features. See, e.g., *M&P Rifles: State Complaint*, SMITH & WESSON, http://www.smith-wesson.com/webapp/wcs/stores/servlet/Category4_750001_750051_772659_-1_757784_757784_image (last visited Dec. 25, 2015).

90. See JURGEN BRAUER, SMALL ARMS SURVEY, THE US FIREARMS INDUSTRY PRODUCTION AND SUPPLY 45 (2013), available at <http://www.smallarmssurvey.org/fileadmin/docs/F-Working-papers/SAS-WP14-US-Firearms-Industry.pdf> (finding that the number of firearms produced domestically was greater than the number of firearms imported into the United States in every year from 1999 through 2010).

that “based upon the record as it stands [the court] cannot be certain whether these weapons are commonly used or are useful specifically for self-defense or hunting and therefore whether the prohibitions . . . meaningfully affect the right to keep and bear arms.”⁹¹ This statement is also interesting in that the court appears to conflate the distinction between a weapon simply being “commonly used” and being *useful* for self-defense or hunting. Obviously, these two things are very different because a weapon could be useful for self-defense and be uncommon, or vice versa. The court did not explore the issue further and declined to resolve the question, instead assuming that the prohibitions did impinge on Second Amendment rights and moving on to the next step of the analysis: selecting an appropriate level of scrutiny.⁹²

In determining the appropriate level of scrutiny, the court relied, in several ways, on the nature of the banned weapons and magazines. The court noted that, unlike the law in *Heller*, the law here did not prohibit the possession of “the quintessential self-defense weapon, to wit, the handgun” and that the ban did not prevent people from owning other “suitable and commonly used weapon[s] for protection in the home,” such as long guns that lack the prohibited features.⁹³ Thus, the court found that while it could not say whether the prohibitions impinged at all on a right protected by the Second Amendment, it was reasonably certain that the bans did not substantially burden that right.⁹⁴ In support of this argument, the court cited the same defensive gun use statistics relied upon in *Heller* to show that most instances of defensive gun use were accomplished with handguns.⁹⁵ Accordingly, the court found the appropriate standard of review was intermediate scrutiny and went on to uphold the law as reasonably related to the District of Columbia’s interest in public safety.

This application of the second step of the analysis is also puzzling. The first step is supposed to be an identification of the right at issue, with the second step simply asking how much the right that is identified and described in the first step is burdened. Because the court assumed in the first step that large capacity ammunition magazines and assault weapons were protected by the Second Amendment, the second step question—how much the right identified in the first step is burdened—should have had an easy answer: a lot, because those items are completely banned under the

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

92. *Id.*

93. *Id.* at 1261–62 (citing *D.C. v. Heller*, 554 U.S. 570, 629 (2008)).

94. *Id.* at 1261.

95. *Id.* (citing *Kleck & Gertz*, *supra* note 67, at 177, 185).

District of Columbia’s laws. Such an answer probably would have led to the application of strict scrutiny. Instead, the court’s supposed inquiry into how much the bans burdened Second Amendment rights more closely resembled what the first step is supposed to be—an inquiry into whether the Second Amendment protects the conduct at issue at all. In making that determination, the court was able to dispense with the “common use” test and focus instead on other questions about these weapons and magazines, such as how often they are actually used in self-defense and whether alternative “suitable and commonly used” weapons were still available for home self-protection under the District of Columbia’s laws.⁹⁶

After *Heller II*, in *New York State Rifle & Pistol Ass’n Inc. v. Cuomo* (NYSRPA),⁹⁷ the Second Circuit upheld new laws in New York and Connecticut banning assault weapons and large capacity magazines. The laws were enacted in the wake of the Sandy Hook Elementary School shooting.⁹⁸ Like the court in *Heller II*, the Second Circuit assumed that the guns and magazines at issue were protected by the Second Amendment and, applying intermediate scrutiny, upheld the bans.⁹⁹

96. As the dissent pointed out, it is unclear why the argument that other kinds of firearms are still legal is persuasive here when it was not persuasive in *Heller* itself (where the government unsuccessfully attempted to rely on the continued legality of long-guns). See *id.* at 1290 (Kavanaugh, J., dissenting). This further suggests that the court was really arguing that these guns and magazines—unlike the handguns in *Heller*—were outside the scope of the Second Amendment.

97. 804 F.3d 242 (2d Cir. 2015).

98. Both laws added to existing prohibitions in those states. New York already banned semi-automatic rifles with at least two “military-style” features, but its new law expanded the definition of assault weapon to include semi-automatic rifles with only one such feature. *New York State Rifle & Pistol Ass’n v. Cuomo*, 990 F. Supp. 2d 349, 355–56 (W.D.N.Y. 2013) *aff’d in part, rev’d in part*, 804 F.3d 242 (2d Cir. 2015). New York also previously banned large capacity ammunition magazines, but its new law eliminated a “grandfather” clause that allowed New Yorkers to keep magazines manufactured prior to 1994. *Id.* at 356–57. Connecticut also moved from a “two feature” to a “one feature” test for its assault weapons ban but its restriction on large capacity ammunition magazines was new. See *Shew v. Malloy*, 994 F. Supp. 2d 234, 240–41 & n.19 (D. Conn. 2014) *aff’d in part, rev’d in part sub nom.* *New York State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015).

99. See *NYSRPA*, 804 F.3d at 257, 260–64. The court struck down a separate provision that required magazines to only be loaded with no more than seven cartridges at one time, except when at a shooting range. *Id.* at 264. The court found that the state had failed to sufficiently justify the load limit since ten round magazines would remain in circulation under the laws, making the load limit unlikely to have much practical impact. See *id.* This is noteworthy because it appears to be the closest a court has come, since *Heller*, to striking down a “type of weapon”

In *NYSRPA*, the court broke the “scope of the right” portion of its analysis into two parts—whether the guns and magazines were in common use and whether they were “typically possessed by law-abiding citizens for lawful purposes.”¹⁰⁰ In analyzing common use, the court reviewed more evidence about common use than in *Heller II*, likely because of the development on both sides of better research into the issue in the years after *Heller II*. In addition to the data relied on by the *Heller II* court in *NYSRPA* had before it manufacturing data about the number of AR-15 type rifles manufactured for the domestic market,¹⁰¹ the percentage of firearm sales AR-15s accounted for in 2011, the fact that many popular firearms are designed for use with large capacity ammunition magazines, the fact that one study estimated that there were one million privately owned assault weapons in the United States in 1990, and the fact that as of 2000, nearly 50 million large capacity ammunition magazines had been approved for import into the United States.¹⁰² The court also considered evidence offered by the plaintiffs that a plurality of responders to an online survey of owners of AR-15 type guns indicated that they only owned one such weapon, which the plaintiffs argued indicated widespread ownership.¹⁰³ The defendants countered with an estimate finding assault weapons only account for roughly 2% of all guns owned in the United States.¹⁰⁴

Just like in *Heller II*, the citation to this evidence raised many of the same puzzling questions about the common use test and how the Second Circuit was applying it. The court did not make much of an

restriction on Second Amendment grounds; although, this restriction was really on behavior (loading extra rounds) not on the type of equipment a person could possess. The court also held Connecticut’s specific ban on the Remington Tactical Rifle Model 7615, a pump-action (not semi-automatic) rifle, unconstitutional because of the state’s failure to present arguments defending its constitutionality on appeal. *Id.* at 250 n.17, 257 n.73, 262 n.112, 265.

100. *Id.* at 254–55.

101. *Id.* at 255. Interestingly, the number the court relied upon came from a declaration offered by the plaintiffs saying that 3.97 million AR-15 type rifles had been manufactured since 1986. *Shew*, 994 F. Supp. 2d at 245 & nn.40–41; *NYSRPA*, 990 F. Supp. 2d at 364. While this appears to conflict with the statement in *Heller II* that only 1.6 million AR-15s had been manufactured since 1986, the discrepancy is probably explained by the *NYSRPA* declaration’s broader focus on all “AR-15 type rifles.” See *NYSRPA*, 990 F. Supp. 2d, at 364 (emphasis added) (“Though the mark ‘AR-15’ is Colt’s, many manufacturers make a similar firearm.”).

102. See *NYSRPA*, 804 F.3d at 255; *Shew*, 994 F. Supp. 2d at 245–46 & nn.40–41; *NYSRPA*, 990 F. Supp. 2d at 364–65.

103. *NYSRPA*, 804 F.3d at 255; Joint Appendix at 155–64, *New York State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015) (No. 14-0036).

104. *NYSRPA*, 804 F.3d at 255.

effort to address these questions directly. The *NYSRPA* court simply concluded—after reciting some of the statistics above—that the banned weapons were in common use because millions of them exist in the United States even according to “the most conservative estimates cited by the parties.”¹⁰⁵ The court did not explain why possession by a few million Americans was sufficient to qualify as “common use.” Nor did either court explain which of the statistics offered were relevant to the common use test and which were not (or which had the most weight).

The court was less sure of itself in looking at the second part of the scope inquiry—whether the weapons were “typically possessed” for lawful purposes—and followed the path of *Heller II* by assuming without deciding that the weapons were typically possessed for such purposes.¹⁰⁶ Thus, the court assumed that the bans did prohibit conduct within the scope of the Second Amendment.¹⁰⁷

After making that assumption, the court went on to find that intermediate scrutiny was the appropriate standard to apply to the bans. The court largely tracked the reasoning in *Heller II*, finding that the law did not warrant strict scrutiny because it did not “effectively disarm” individuals or prohibit an “entire class of arms” because other protected arms, including semi-automatic weapons without prohibited features, were still available.¹⁰⁸ Interestingly, the court suggested another reason for applying intermediate scrutiny was that the weapons prohibited by these laws were not as popular as the handguns at issue in *Heller*.¹⁰⁹ Applying intermediate scrutiny, the court upheld the bans based on the public safety justifications offered by Connecticut and New York.¹¹⁰

The application of intermediate scrutiny in *NYSRPA* is puzzling for the same reasons it was in *Heller II*. After the courts found (or assumed) that the laws at issue completely banned weapons that are protected by the Second Amendment, it should have been an easy decision to apply strict scrutiny. The choice to apply intermediate scrutiny instead seems motivated by some doubt on the part of the court that the weapons at issue should receive Second Amendment protection at all. If these courts really believed that assault weapons and large capacity ammunition magazines were protected, then these cases should not have been unlike *Heller* itself where one

105. See *NYSRPA*, 804 F.3d at 255–56.

106. *Id.* at 256–58.

107. *Id.*

108. *Id.* at 258–61 (citing *Heller v. D.C. (Heller II)*, 670 F.3d 1244, 1262 (D.C. Cir. 2011)).

109. See *NYSRPA*, 804 F.3d at 260 n.98.

110. *Id.* at 261–64.

commonly used type of arm (handguns) was completely banned while another type (long guns) remained legal.¹¹¹

The fairly deferential intermediate scrutiny that was applied to the laws in *NYSRPA* and *Heller II* that considered available self-defense alternatives can only be harmonized with the much harsher treatment the law received in *Heller* by some difference in the weapons at issue. In order to reconcile this disparate treatment, something about the assault weapons and large capacity ammunition magazines in the former cases would, in the eyes of courts, have to make them less worthy of protection than the handguns in the latter. The courts do not say what this is,¹¹² but I think it reflects these courts' serious misgivings about whether they were applying the common use test correctly in finding these weapons protected in the first place,¹¹³ given all the questions about the test that were left unanswered in *Heller*, the lack of reliable data on the market share of different types of firearms, and, perhaps, underlying disagreement with the common use test itself.

B. James & Kampfer — Ignoring the Common Use Test and Replacing it with Danger Prevention and Alternative Means Analysis

Other courts have been more obvious in their reluctance to apply the common use test. In *People v. James*,¹¹⁴ the California Court of Appeal rejected a Second Amendment challenge to the state's ban on assault weapons and .50 caliber rifles (rifles capable of utilizing particularly large and destructive cartridges).¹¹⁵ The court dispensed

111. See *supra* Part III.A.2.

112. Though *Heller II* does compare the frequency with which assault weapons are used defensively to the frequency of defensive handgun use. See *Heller II*, 670 F.3d at 1262.

113. This is reflected in the *NYSRPA* court's argument that bans on assault weapons and large capacity ammunition magazines are not deserving of strict scrutiny because those weapons are less popular than handguns. See *NYSRPA*, 804 F.3d at 260 n.98. At least one court has looked at much of the same evidence as *Heller II* and *NYSRPA* and expressed "serious[] doubts" about whether assault weapons are protected by the Second Amendment at all. See *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 788–89 (D. Md. 2014) ("[A]ssault weapons represent no more than 3% of the current civilian gun stock, and ownership of those weapons is highly concentrated in less than 1% of the U.S. population."). However, that court still applied a similar mode of analysis to *Heller II* and *NYSRPA* because it assumed that the banned weapons were protected by the Second Amendment and upheld the ban under intermediate scrutiny. *Id.* at 789–91, 793 n.33, 797.

114. 94 Cal. Rptr. 3d 576 (Cal. Ct. App. 2009).

115. A cartridge is a metallic package containing "a bullet, case, powder, and primer," in simpler terms, a bullet and propellant. See, e.g., VIN SPARANO,

with the case by finding that the bans simply did not prohibit firearms that were protected by the Second Amendment.¹¹⁶

While the court paid lip service to the “common use” test,¹¹⁷ its analysis essentially ignored it. Instead, the court described some of the dangerous features of these guns that the legislature was concerned about when it enacted the bans, including the high rate of fire of assault weapons and the capability of a .50 caliber rifle to destroy or damage buildings and vehicles.¹¹⁸ From those facts, the court concluded that “[t]hese are not the types of weapons typically possessed by law-abiding citizens for lawful purposes such as sport hunting or self-defense; rather, these are weapons of war. . .” and thus “fall within the category of dangerous and unusual weapons that the government can prohibit for individual use.”¹¹⁹

While the evidence before the California Legislature and the *James* court may have shown that these weapons were dangerous, it had no bearing on whether these weapons were *also* unusual (i.e., not in common use). Surely, a weapon could be both very dangerous and in common use. The *James* court elided that distinction by focusing on the question of dangerousness and ignoring the question of unusualness completely.

Similarly, in *Kampfer v. Cuomo*,¹²⁰ another challenge to New York’s post–Newtown assault weapons ban, the federal district court did not even mention the common use test.¹²¹ Instead, in the first step of its analysis, the court focused entirely on whether alternative arms remained available for self-defense, arguing that “any burden upon the possession of an ‘assault weapon’ is relevant only insofar as it generally impacts one’s ability to possess arms.”¹²² Because the court found that “ample firearms remain[ed] available to carry out the ‘central component’ of the Second Amendment right[,] self-defense,” the court held that New York’s assault weapons ban did

Cartridges, in *THE COMPLETE OUTDOORS ENCYCLOPEDIA*, 36, 36–37 (St. Martin’s Griffin rev. ed. 2000).

116. *James*, 94 Cal. Rptr. 3d at 586.

117. *Id.* at 585 (describing the Second Amendment right recognized in *Heller* as “the right to possess and carry weapons typically possessed by law-abiding citizens for lawful purposes such as self-defense”) (citing *D.C. v. Heller*, 554 U.S. 570, 628–30 (2008)).

118. *Id.* at 585–86.

119. *Id.* at 586.

120. 993 F. Supp. 2d 188 (N.D.N.Y. 2014).

121. Unlike the plaintiffs in *NYSRPA*, the plaintiff in *Kampfer* did not challenge New York’s ban on large capacity ammunition magazines. *See id.* at 193 n.6.

122. *Id.* at 195 n.10.

not impose a substantial burden on Second Amendment rights and essentially ended its analysis there.¹²³

While *James* and *Kampfer*'s explicit replacement of the common use test with different inquiries about dangerousness and alternative means is probably not consistent with *Heller*, their shirking of the common use test at least has the virtue of being more transparent than the sleight of hand pulled off by the courts in *Heller II* and *NYSRPA*. The courts in both of the former cases put the question of whether the weapons were covered by the Second Amendment squarely where it logically belongs, in the first part of the two-step analysis.¹²⁴ In doing so, these courts made explicit what was implicit in the *Heller II* type cases: Assault weapons should not qualify for Second Amendment protection.

Nevertheless, these cases are still unsatisfying in that they fail to provide any explanation for *why* they depart from the common use inquiry. Moreover, the alternative tests those courts utilize present pose problems of their own. In the case of a pure dangerousness test, it seems unlikely that the law in *Heller* itself would have been struck down under such a test because handguns are used very commonly by criminals and have proven to be quite dangerous.¹²⁵ Similarly, a test centered only on alternative means also suggests a different outcome in *Heller* since long guns remained available under the District's handgun ban.¹²⁶ More broadly, even a ban on all firearms might survive such a test since other arms, such as knives and tasers, might remain available.¹²⁷

123. See *id.* at 196 (quoting *D.C. v. Heller*, 554 U.S. 570, 599 (2008)).

124. See, e.g., *James*, 174 Cal. App. 4th at 676–77. *James* was decided prior to the two-step test becoming widely used and did not explicitly mention such a test, but its analysis clearly reflects the kind of “scope of the right” inquiry that is now the hallmark of the first step of that test.

125. See *Heller v. D.C. (Heller II)*, 670 F.3d 1244, 1286 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (noting that “semi-automatic handguns are more dangerous as a class than semi-automatic rifles because handguns can be concealed . . .” and that handguns “are the overwhelmingly favorite weapon of armed criminals.”).

126. See *Heller*, 554 U.S. at 575.

127. See David B. Kopel et al., *Knives and the Second Amendment*, 47 U. MICH. J.L. REFORM 167, 191–99 (2013); Ron F. Wright, Note, *Shocking the Second Amendment: Invalidating States’ Prohibitions on Taser with the District of Columbia v. Heller*, 20 ALB. L.J. SCI. & TECH. 159, 176 (2010).

C. *Fyock—Engaging With The Common Use Test*

One characteristic all the cases discussed above share is that they fail to meaningfully engage with questions about what the common use test really means. An exception to this trend is *Fyock v. City of Sunnyvale*,¹²⁸ which was a case from the Northern District of California dealing with a Second Amendment challenge to a California city’s ordinance prohibiting the possession of large capacity ammunition magazines.¹²⁹ Although the court ultimately denied the plaintiffs’ request for a preliminary injunction enjoining the law, the court did find that large capacity ammunition magazines were in common use and therefore protected by the Second Amendment.¹³⁰ Along the way, the court raised and answered some interesting questions about how it was applying the common use test.

Like the courts in *Heller II* and similar cases, the court cited statistical evidence offered by the plaintiffs that large capacity magazines are commonly owned, including a declaration alleging that large capacity ammunition magazines make up approximately 47% of all magazines owned nationwide and evidence showing that many of the semi-automatic rifles and handguns currently for sale to consumers are sold with large capacity ammunition magazines.¹³¹ However, the court also noted that “[b]oth parties admit[ted] that reliable data on the number of the banned magazines owned by individuals does not exist.”¹³² The court nevertheless found it “safe to say that whatever the actual number of such magazines in United States consumers’ hands is, it is in the tens-of-millions, even under the most conservative estimates.”¹³³

The defendants argued that the court should apply a local test and conclude that such magazines could not be in common use *in California* because their sale (though not their possession) had been banned in California—through a combination of state and federal laws—since 1994.¹³⁴ The court rejected that argument because the “Supreme Court [in *Heller*] did not define the common use test as a local test, but rather evaluated common use as a national test”¹³⁵ The court further asserted that any local test would not

128. 25 F. Supp. 3d 1267 (N.D. Cal. 2014).

129. *See id.* at 1272–73.

130. *See id.* at 1275–77.

131. *See id.* at 1275.

132. *Id.*

133. *Id.*

134. *See id.* at 1275–76.

135. *Id.* Although *Heller* referred to handguns as “the most preferred firearm *in*

make sense because it would lead to the scope of individuals' Second Amendment rights varying based on location, which would not be consistent with safeguarding individual rights equally throughout the United States.¹³⁶

The court also rejected an argument that even if large capacity ammunition magazines are commonly owned, they are not commonly used for self-defense.¹³⁷ The court found—in a departure from the apparent view of the court in *Heller II*—that under the common use test, “the standard is [solely] whether the [weapons at issue] are ‘typically possessed by law abiding citizens for lawful purposes,’ not whether the [weapons] are often used for self-defense.”¹³⁸ The court explained that most people never need to discharge a firearm in self-defense at all, but that this fact “should be celebrated” rather than used as a basis to limit the protections of the Second Amendment.¹³⁹ Thus, the court found that large capacity ammunition magazines were protected by the Second Amendment.¹⁴⁰

However, like the courts that employ the *Heller II* style methodology, the court concluded that intermediate scrutiny was the appropriate standard to apply to the ban largely because of the availability of alternative weapons.¹⁴¹ The court observed that “[m]agazines having a capacity to accept more than ten rounds are hardly crucial for citizens to exercise their right to bear arms.”¹⁴² Rather, “[i]ndividuals have countless other handgun and magazine options to exercise their Second Amendment rights.”¹⁴³ Accordingly, the court concluded that the ban only imposed a “light” burden on

the nation to ‘keep’ and use for protection of one’s home and family,” the Court did not explicitly describe the common use test as a national standard. See D.C. v. *Heller*, 554 U.S. 570, 628–29 (2008) (emphasis added).

136. See *Fyock*, 25 F. Supp. 3d at 1276. But see Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 124–32 (2013) (noting the prevalence of local variation in the enforcement of constitutional rights in other areas and suggesting that such variation may be particularly desirable in Second Amendment analysis).

137. See *Fyock*, 25 F. Supp. 3d at 1276.

138. See *id.* (quoting *Heller*, 554 U.S. at 625).

139. *Id.*

140. *Id.* at 1277. The court also rejected an argument that magazines are not arms at all. See *id.* at 1276. The court found ammunition magazines must be protected by the Second Amendment because they are “integral components to vast categories of guns.” *Id.*

141. See *id.* at 1278–79.

142. *Id.* at 1278.

143. *Id.*

Second Amendment rights and applied intermediate scrutiny to uphold the ban based on its connection to preserving public safety.¹⁴⁴

The court's analysis in *Fyock* takes the common use test to its logical conclusion: Any weapon that is sufficiently popular with the public (on a nationwide basis) is subject to Second Amendment protection, regardless of the weapon's usefulness or necessity for adequate self-defense.¹⁴⁵ While the court was more honest than other courts about the true meaning of the common use test, the court's choice to apply an alternative means analysis in the second step of its reasoning shows that it was just as eager to blunt the impact of the common use test as other courts.¹⁴⁶

As described in the following section, courts' reluctance to apply the common use test forthrightly is a reflection of the test's unworkable nature, tendency to create undesirable incentives, and inadequacy to protect the Second Amendment right recognized in *Heller*.

V. THE COMMON USE TEST'S FLAWS & THE REASONABLE SELF-DEFENSE APPROACH

As the discussion above demonstrates, courts have had a difficult time applying the common use test in a coherent and intellectually honest way. In this section, I will demonstrate why those difficulties are not caused by the Supreme Court's failure to adequately explain the test, but instead reflect fundamental problems with the test itself. Next, I will outline some of the alternatives to the common use test proposed in recent scholarship and explain why they are unpersuasive. Finally, I will propose my own test for analyzing type-of-weapon claims: Whether the weapon at issue is consistent with reasonable self-defense.

A. *The Problems with The Common Use Test*

While *Heller* left many questions unanswered about the common use test, the lower courts' subsequent applications of the test, particularly in the *Fyock* decision, provide a reasonably clear picture of what the common use test actually requires. Moreover, unlike the courts, legal scholars have more willingly engaged in detailed applications of the common use test to particular weapons.¹⁴⁷ These

144. *See id.* at 1278–79.

145. *See id.* at 1277.

146. *See id.* at 1278.

147. *See, e.g.*, Kopel, *supra* note 127, at 191–96 (arguing that knives are protected by the Second Amendment); Dan Terzian, *The Right to Bear (Robotic)*

articles elucidate further what *Fyock*, and, to a less explicit extent, *Heller II* and similar cases suggest: The common use test is a mere gauge of the current total ownership in the United States of the weapon at issue.

The common use test essentially asks courts to look at evidence about the number of the particular firearm or firearm accessory¹⁴⁸ at issue owned by private citizens¹⁴⁹ in the United States for lawful purposes such as self-defense¹⁵⁰ at the time the case is decided. As discussed above, in *Heller II*, *NYSRPA*, and *Fyock*, the courts relied on evidence that usually was offered as indirect proof of those numbers, such as manufacturing and sales statistics.¹⁵¹ From this data, courts make a determination about whether the guns or gun accessories are sufficiently popular to warrant protection, usually finding such protection when the number of weapons in private hands reaches into the “tens-of-millions” range.¹⁵²

Arms, 117 PENN. ST. L. REV. 755, 770–73 (2013) (admitting that robotic arms probably do not qualify for protection under the common use test today but arguing that they will “edge toward” qualifying for protection in the future, assuming they are not banned); Lindsay Colvin, Note, *History, Heller, and High-Capacity Magazines: What Is the Proper Standard of Review for Second Amendment Challenges?*, 41 FORDHAM URB. L.J. 1041, 1069 (2014) (arguing that large capacity ammunition magazines qualify for protection under the common use test); Peter Jensen-Haxel, Comment, *3D Printers, Obsolete Firearm Supply Controls, and the Right to Build Self-Defense Weapons Under Heller*, 42 GOLDEN GATE U. L. REV. 447, 485–93 (2012) (discussing the potential application of the common use test to weapons manufactured using 3D printing technology); Wright, *supra* note 127, at 181–89 (arguing that tasers qualify for protection under the common use test).

148. There has been some discussion about the level of generality to be applied in determining whether a particular weapon is in common use. See, e.g., Volokh, *supra* note 24, at 1479 (“How common a weapon is depends on how specifically it is defined. Handguns are in common use, but particular brands of handguns are less common, and some are uncommon, simply because they come from small companies or are of unusual caliber or design.”); Jensen-Haxel, *supra* note 147, at 486–88, 487 n.257.

149. See Colvin, *supra* note 147, at 1050–51 (“The Court [in *Heller*] rejected the notion that the common user includes military organizations . . .”).

150. Most courts have analyzed the lawful use factor separately. A notable exception is *NYSRPA* and that court ultimately had to just assume this factor was present because of a lack of reliable data on the uses of the weapons at issue. See *NYSRPA*, 804 F.3d at 256–57.

151. See discussion *supra* Part IV.

152. See, e.g., *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1275 (N.D. Cal. 2014). This is one area that the courts and subsequent scholarship have not filled in about the common use test—the exact quantum of popularity required for a weapon to enter common use. However, I maintain that no matter how this or any other gap in the test is filled in, the test will remain fatally flawed. See discussion *infra*

This test has at least five critical flaws. First, it gives the government the ability to essentially freeze the right where it now stands by preventing new firearms from becoming popular and therefore protected (the under-protection problem). Second, it gives the firearm industry the ability to unilaterally make new firearms protected simply by manufacturing and heavily marketing them (the overprotection problem). Third, while the idea of linking the scope of the right to the choice of the people is superficially appealing, the advantages of doing so are lessened in this context, especially since the test does not necessarily even reflect what it purports to reflect—the average person's firearm of choice (the public choice fallacy). Fourth, reliable data on which firearms are possessed most commonly by Americans does not exist and is not likely to exist in the future (the data problem). Fifth, the test is not commanded by the text or history of the Second Amendment; instead, it is simply the result of a poor attempt to harmonize *Heller's* holding with other precedent (the doctrinal problem).

1. The Under-Protection Problem

As many have pointed out, the common use test creates an incentive for governments that are interested in restricting access to firearms to ban new weapons completely before they can become popular.¹⁵³ If a new firearm that is extremely effective for self-defense is invented, and Congress immediately bans its use nationwide, it could never become commonly possessed for self-defense simply because Congress decided to ban it.¹⁵⁴ Even more troubling, consider the hypothetical proposed by Professors Craig Lerner and Nelson Lund:

subsections V.A.1–4.

153. See, e.g., Craig S. Lerner & Nelson Lund, *Heller and Nonlethal Weapons*, 60 HASTINGS L.J. 1387, 1393 (2009) ("Justice Scalia's test empowers Congress to create its own exceptions to the Second Amendment so long as the Supreme Court waits awhile before it checks to see whether particular weapons are in common civilian use."); Terzian, *supra* note 147, at 770 & n.114 (collecting sources); Colvin, *supra* note 147, at 1051; Wright, *supra* note 127, at 181 n.131; see also *D.C. v. Heller*, 554 U.S. 570, 721 (2008) (Breyer, J., dissenting) ("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.")

154. See *Heller*, 554 U.S. at 721.

Suppose, for example, that the federal handgun ban imposed in the District of Columbia in 1976 had been applied by Congress to the entire nation that same year. If a case challenging the ban had not reached the Supreme Court until 2008, it would presumably have been upheld under the [common use] test¹⁵⁵

Could it be that the outcome of a case that is often used as the gold standard of the originalist interpretive methodology¹⁵⁶ turned, not on the original understanding of the constitutional text in 1791, but on a policy decision made by Congress in the last few decades? That is exactly the direction in which the common use test points.

For obvious reasons, it is very troubling to give Congress the power to control the scope of the right guaranteed by the Second Amendment or any other enumerated constitutional right. The Bill of Rights in general, and the Second Amendment, in particular, are supposed to act as restraints on the power of Congress in order to protect individual liberty. Indeed, in an oft quoted passage from *Heller*, the majority declares that “[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”¹⁵⁷ But under the common use test, future Congresses have quite a bit of power to control the scope of the right.

Moreover, because courts have interpreted the common use test (probably correctly)¹⁵⁸ to be a question about *national* common use

155. Lerner & Lund, *supra* note 153, at 1393. Another article provides a more futuristic hypothetical illustrating the problem:

Suppose a new weapon is designed that emits a laser beam and is *absolutely* non-lethal. A legislature could immediately and completely ban the weapon before it reaches the masses and would theoretically be permissible to do so under *Heller*. While the firearms of *Heller* have been circulating in the public for centuries, our hypothetical laser weapon would never have a chance to become ‘common’ enough to [satisfy the common use test]

Wright, *supra* note 127, at 181 n.131.

156. See, e.g., Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13 (“Justice Scalia’s opinion is the finest example of what is now called ‘original public meaning’ jurisprudence ever adopted by the Supreme Court.”).

157. *Heller*, 554 U.S. at 634–35.

158. After all, as Lerner & Lund’s hypothetical demonstrates, a local test would probably have resulted in *Heller* itself coming out differently. See Lerner & Lund,

as opposed to state-wide or local common use,¹⁵⁹ the test places this power to define the scope of the arms protected by the Second Amendment solely in the hands of the federal government rather than state or local governments. If granting such power to the government were proper at all, it would make little sense to give it to the federal government but not to state governments, particularly given state (and local) governments' traditional leading roles in setting firearms policy.¹⁶⁰ This dichotomy also undermines the idea, which is repeated throughout *McDonald*, that the Second Amendment right—like others in the Bill of Rights—should apply to the states with the same strength as it applies to the federal government, rather than in a less strong, “watered-down” form.¹⁶¹ The common use test turns this concern on its head, applying a watered down version of the Second Amendment to the federal government and a stronger version to the states.

Finally, giving any government this power creates an incentive for ineffective regulation of firearms and makes compromise less likely in the gun debate. It would be rational under this test for policy makers favoring stronger gun control laws to push aggressively for outright bans of new firearms and to be less inclined to consider alternative forms of regulation. This is because if sales of a new firearm are allowed and it becomes popular enough to gain constitutional protection, then any regulations on that firearm could become jeopardized. Making the battle over each new weapon an “all or nothing” fight will lead policymakers away from careful individualized consideration of each weapon, which all sides would likely agree is not a smart way to making gun policy.

2. The Over-Protection Problem

A similar problem that has gotten much less attention is that the common use test leads to the protection of guns that really should not be protected (or at least could lead to them being protected for the wrong reasons). The test does this by putting a great deal of power into the hands of gun manufacturers and more pro-gun states. It also may hinder efforts to require consumer safety features on guns.

supra note 153, at 1393.

159. See discussion of *Fyock*, *supra* Section IV.C.

160. See Blocher, *supra* note 136, at 107–121 (describing “urban gun control” as a “nationwide phenomenon” in the founding era and the following century and noting that the first major federal gun control law was not enacted until the 1930s).

161. See *McDonald v. City of Chi.*, 561 U.S. 742, 765 (2010).

As the story of the exploding popularity of assault weapons discussed in Section II.A, *supra*, demonstrates, the gun industry has the ability to flood the market with new, deadlier weapons in a very short time frame. The common use test will give the industry even more incentive to do just that. By quickly bringing new weapons into popularity, the industry will not only be making significant current profits but will also be constitutionally guaranteeing future profits. This is particularly true since, as demonstrated in many of the cases above, courts often rely on mere *manufacturing* data in determining common use rather than *sales* data, which is more difficult to ascertain. Thus, manufacturers can contribute to a weapon's constitutional protection simply by making a lot of them—whether or not they immediately become popular with consumers.

The common use test also increases the power of legislators in more pro-gun states to control what becomes constitutionally protected. The use of a national common use test means that a weapon that becomes very popular in just a handful of populous states can become constitutionally protected in all of the states. Thus, while state governments may not have the federal government's power to prevent arms from becoming protected under the common use test, a handful of pro-gun states with high enough populations could have the ability to bring a gun type into common use simply by allowing that type of gun to be sold even if most other states do not. There is no justification for giving states that favor less restrictive gun laws such unilateral power.

State efforts to require safety improvements to firearms could also be stunted by the common use test. Although there are no federal design safety standards for firearms, several states have enacted laws setting such standards in order to promote safer designs—particularly of handguns—to prevent accidents.¹⁶² For example, California's law requires semi-automatic handguns that were approved for sale in California after a certain date to include a "chamber load indicator,"¹⁶³ which is a device that provides a clear

162. See CAL. PENAL CODE §§ 16380, 16900, 17140, 31900–32110 (West 2012 & Supp. 2015); D.C. CODE § 7-2505.04 (2001); HAW. REV. STAT. § 134-15(a) (1993); 720 ILL. COMP. STAT. ANN. 5/24-3(A)(h) (West Supp. 2015); MD. CODE ANN., PUB. SAFETY, §§ 5-405–406 (LexisNexis 2011); MASS. GEN. LAWS ANN. ch. 140, §§ 123, 131½, 131¾ (West 2002 & Supp. 2015); MINN. STAT. ANN. §§ 624.712, 624.716 (West 2009 & Supp. 2015); N.Y. PENAL LAW § 400.00(12-a) (McKinney Supp. 2015); CAL. CODE REGS. tit. 11, §§ 4047–4074 (2011); D.C. Mun. Regs. tit. 24, § 2323 (2013); 501 MASS. CODE REGS. §§ 7.01–.16 (2007); 940 MASS. CODE REGS. §§ 16.01–.09 (1999); N.Y. COMP. CODES R. & REGS. tit. 9, §§ 482.1–.7 (1980).

163. See CAL. PENAL CODE § 31910(b)(4) (West 2012).

indication on a gun when a round is in the firing chamber.¹⁶⁴ A more ambitious law in New Jersey will require all handguns that are sold after a certain date to be equipped with "smart gun" or "owner authorization" technology that allows the gun only to be fired by its authorized owner, once such technology is available.¹⁶⁵

The purpose of these laws is to drive changes in existing firearm models. In order to do that, these laws necessarily prohibit (or cause to be phased out over time) the sale of firearms that do not comply with these safety standards. In doing so, the laws may ban the sale of firearms that are currently in common use because many people in the nation will still possess firearms without the features promoted by the laws. This concern is not hypothetical; at least one lawsuit predicated on this exact argument is currently challenging California's handgun safety standards.¹⁶⁶

Whether implementing certain safety standards for firearms somehow diminishes citizens' ability to defend themselves is debatable, but that debate is not the one the common use test will require. Instead, the test simply asks whether the law bans firearms that are currently most commonly possessed, a test that laws setting new safety standards are, by definition, likely to fail.¹⁶⁷ After all, if guns with a particular safety feature were already the norm, there would be much less of a need for regulatory intervention.

164. See SPORTING ARMS AND AMMUNITION MFRS.' INST., *Owner Recognition Technology*, in BACKGROUND PAPER #9, 1, 3–4, http://www.saami.org/specifications_and_information/publications/download/SAAMI_ITEM_229-Owner_Recognition_Technology.pdf (last visited Dec. 26, 2015).

165. See N.J. STAT. ANN. §§ 2C:39-1dd, 2C:58-2a(5)(e), -2.3, -2.4; (West 2005 & Sup. 2015).

166. See Plaintiffs' Memorandum Of Points And Authorities In Support Of Plaintiffs' Motion For Summary Judgment at 14, 19–20, *Pena v. Lindley*, No. 2:09-cv-01185, 2015 WL 854684 (E.D. Cal. Feb. 6, 2015) (arguing that California's handgun safety standards result in a ban on the sale of "handguns of the kind in common use protected by the Second Amendment.").

167. Of course, that is not to say that challenges to these laws are necessarily guaranteed to succeed. Depending on the level of generality one uses to define firearms in common use, it may be that such laws do not ban firearms in common use after all (i.e., it does not matter whether handguns with feature X are common; it only matters that handguns generally are common, and since handguns are allowed under the laws, even if they must have feature X, the law does not ban a weapon in common use). Moreover, even if a court does find that the banned firearms are in common use, such laws could still survive at the second step of the analysis by satisfying the appropriate level of scrutiny.

3. The Public Choice Fallacy

One of the alleged virtues of the common use test is that it supposedly reflects consumer choice and thus allows Americans, as a whole, to exercise the Second Amendment right in the way they decide is best.¹⁶⁸ Superficially, this is an advantage the common use test shares with the test the Court established in *Kyllo v. United States*¹⁶⁹ for determining whether the government's use of a particular technology constituted a search by looking at whether the technology the government used was in general public use.¹⁷⁰ However, the advantage is lessened by the difference between the two rights. The Fourth Amendment's underlying concern is privacy, while the Second Amendment's underlying concern is physical safety. Unlike physical safety, privacy is a concept that is directly tied to the popular mores of the day.¹⁷¹ Thus, while a test based on the popularity of a particular technology might make sense in the Fourth Amendment context, it is less appropriate in the Second Amendment context.

However, even taking the goal of reflecting public sentiment at face value, the common use test fails to accomplish this goal. For the reasons stated above, governments and firearm manufacturers actually have at least as much, if not more control than average Americans over which weapons end up in common use. But even setting those concerns aside, the common use test, at least as it has been applied by the courts so far, fails to actually reflect the self-defense choices of most Americans.

The problem is, as demonstrated in the cases above, in determining common use, courts tend to rely on the raw number of weapons that are in private hands without putting those numbers

168. See Jensen-Haxel, *supra* note 147, at 471 (“[I]ndividual autonomy, as with many fundamental rights, may be an important consideration in defining the scope of protection.”); Michael P. O’Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 386 (2009) (“That hundreds of thousands, indeed millions of individuals choose a particular means of participating in constitutionally protected conduct is powerful *prima facie* evidence that the chosen means is itself deserving of protection. In other constitutional contexts, wide deference is given to individuals’ chosen means for exercising a constitutional right—even if most judges and other elites might find the people’s choice as unseemly and ill-adapted as, say, the decision to engage in political protest by wearing a jacket that reads ‘Fuck the Draft.’”).

169. 533 U.S. 27 (2001) (Scalia, J.).

170. See *id.* at 40.

171. See *United States v. Jones*, 132 S. Ct. 945, 962 (2012) (Alito, J., concurring) (“New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile.”).

into any context. But context is quite important. 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.¹⁷² Even assuming that manufacturing statistics necessarily reflect ownership¹⁷³ 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 some people, probably a great number, own more than one AR-15 style rifle.¹⁷⁴ Thus, these statistics do not reflect any widespread popularity of the AR-15 style rifle, but rather reflect these weapons' popularity with a relatively small number of people building personal arsenals.¹⁷⁵

This is a problem that is likely to arise with respect to many categories of firearms because gun ownership is becoming more concentrated in the United States.¹⁷⁶ One 2004 study found that 20% of the nation's gun owners own 65% of the nation's guns.¹⁷⁷ It is likely that this concentration has only increased since then as more recent surveys have found a drop in the percentage of Americans who say they own any guns¹⁷⁸ despite record numbers of background checks being processed by the federal government.¹⁷⁹

This concentrated ownership gives courts a skewed picture of which guns are in common use. By simply looking at raw numbers, courts will extend the Second Amendment's protection to new

172. See discussion of *NYSRPA* and *Heller II*, *supra* Section IV.A.

173. A potentially dubious assumption for the reasons discussed in the next subsection.

174. See *Kolbe v. O'Malley*, F. Supp. 3d 768, 786 & n.23 (D. Md. 2014) (citing declaration testimony indicating that the average owner of an AR or AK platform rifle owns 3.1 such weapons).

175. See *id.*

176. See, e.g., *id.*

177. See Allison Brennan, *Analysis: Fewer U.S. Gun Owners Own More Guns*, CNN (July 31, 2012, 8:05 PM), <http://www.cnn.com/2012/07/31/politics/gun-ownership-declining/>.

178. This also highlights a potential under-protection problem. If the decline in gun ownership rates continues, even if the remaining gun owners own many guns, there could come a point at which *no guns* are in common use. At that point, under the common use test, the government would theoretically be able to ban all guns.

179. See Sabrina Tavernise & Robert Gebeloff, *Share of Homes with Guns Shows 4-Decade Decline*, N.Y. TIMES (Mar. 9, 2013), <http://www.nytimes.com/2013/03/10/us/rate-of-gun-ownership-is-down-survey-shows.html> (noting that according to a 2012 survey, only 34% of Americans reported having a gun in their home, a historic low, but also noting that the number of background checks has "surged" since the late 1990s).

weapons based on the preferences of a shrinking number of gun enthusiasts. This greatly diminishes the common use test's supposed value as a reflection of Americans'—or even gun owners'—collective self-defense preferences.

4. The Data Problem

A practical problem with the common use test is that the data on firearm ownership necessary to evaluate whether the test is satisfied in any given case simply does not exist. The United States has no national registry recording firearm ownership, nor do most states have such registries.¹⁸⁰ For that reason, courts have been forced to rely on secondary indicators of firearm ownership, most commonly production and import data, sales data, and survey data.¹⁸¹ Each of these sources is inadequate and potentially problematic.

Production and import data presents the obvious problem that it does not necessarily reflect which guns were actually sold. Of course, a smart company is unlikely to continue manufacturing or importing a type of gun that is not selling well, but an adjustment in manufacturing or imports would likely be a lagging indicator of any decline or rise in the popularity of a weapon among consumers. A related problem is that manufacturing and import data will reflect what companies think consumers want to buy now or perhaps in the next few months or years, not what they already own. This will lead courts to overestimate the popularity of more “contemporary” guns while underestimating the popularity of guns that may indeed be widely owned but were bought a long time ago and are not widely in demand today.

More fundamentally, manufacturing data is unlikely to provide enough specific information to be of use to courts because “firearms manufacturers generally don't break down their production statistics

180. See *Registration of Firearms Policy Summary*, LAW CTR. TO PREVENT GUN VIOLENCE (Oct. 1, 2013), <http://smartgunlaws.org/registration-of-firearms-policy-summary/> (noting that only Hawaii and the District of Columbia require the registration of all firearms). The federal government does require the registration of machine guns. *Id.* A few states maintain records of some firearm transfers that could be used as a basis to estimate ownership, but since those records are primarily kept for the purpose of tracking the transfers rather than ownership, they would likely be of limited utility. See *Kolbe*, 42 F. Supp. 3d at 784 n.21 (“Since 1994, Maryland has gathered information regarding the transfer of regulated firearms. It is important to note, however, that all transfers were recorded, even if the transfer was of a firearm previously transferred. . . . In this way, the information collected by Maryland may overstate the number of regulated firearms.”) (citations omitted).

181. See, e.g., *Heller v. D.C. (Heller II)*, 670 F.3d 1244, 1287 (D.C. Cir. 2011).

by model.”¹⁸² Perhaps for competitive reasons, gun manufacturers simply do not publicly release data at the fine level of detail that would be necessary to draw conclusions in cases challenging laws that target very specific firearm characteristics. For this reason, manufacturing data (and probably import data) will seldom be of much use in applying the common use test.

Sales data also is not likely to be a good barometer of common use. Like manufacturing data, it suffers from the problem of only reflecting consumers’ current choices, rather than the types of guns consumers may have purchased many years ago. Sales data is also elusive because information submitted to the federal government to obtain background checks does not include any information on the specific type of firearm the purchaser attempted to buy.¹⁸³ Moreover, even if such records were kept in connection with background checks, a significant portion of firearm transfers are conducted without background checks at all through so-called “private” transfers (transfers that do not involve a federally licensed firearms dealer).¹⁸⁴ When it comes to the sale of ammunition and other accessories, no background checks are conducted at all in most states.

For these reasons, the only sales data available is the data that is voluntarily released by firearms retailers. Such data is likely to be lacking both in its level of detail about the specific weapon types

182. See Peters, *supra* note 22.

183. See 28 C.F.R. § 25.9(b)(1) (2009) (listing the types of information logged for each criminal background check conducted). Even the data that is collected in order to conduct these checks must be erased within twenty-four hours if the purchase is approved. See 28 C.F.R. § 25.9(b)(1)(iii) (2009). However, the federal government does keep data on the raw number of background checks conducted by state and by date. See FBI, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) Operations 2013 (2013), <https://www.fbi.gov/about-us/cjis/nics/reports/2013-operations-report>.

184. See Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, NAT’L INST. OF JUST.: RES. IN BRIEF 6–7 (1997), available at <https://www.ncjrs.gov/pdffiles/165476.pdf>. The exact percentage of transfers conducted without background checks has been the subject of some dispute in recent years in the debate over whether to expand the background check requirement to private transfers. See Glenn Kessler, *Obama’s continued use of the claim that 40 percent of gun sales lack background checks*, WASH. POST: FACT CHECKER (Apr. 2, 2013), http://www.washingtonpost.com/blogs/fact-checker/post/obamas-continued-use-of-the-claim-that-40-percent-of-gun-sales-lack-background-checks/2013/04/01/002e06ce-9b0f-11e2-a941-a19bce7af755_blog.html. However, the basic point for my purposes, whether the number is as high as 40% or as low as 10%, is that such checks do not cover some sizeable portion of firearm transfers in the United States.

purchased and in completeness because of the large number of firearms dealers in the United States.¹⁸⁵ Thus, sales data is also unlikely to be helpful in applying the common use test.

Perhaps the best form of data available to approximate firearm ownership is survey data. However, even survey data is unlikely to be sufficient for purposes of the common use test because most polling questions about gun ownership are much broader than would be helpful. Polls usually track questions like whether anyone in the household owns “a gun” generally, without asking about the type.¹⁸⁶ This type of information may be helpful in determining the size of the total pool of gun owners to the extent that is relevant, but it is unlikely to help courts get very far when it comes to determining whether weapons with very specific features are in common use.

Although one could argue that the existence of the common use test will lead to the creation of more robust data in the future, that is unlikely to occur because data on firearms sales and ownership is deliberately cloaked in secrecy by the firearms industry and pro-gun groups. Unlike many other industries, trade groups representing the firearm industry do not release sales data as a regular practice.¹⁸⁷ Moreover, pro-gun groups have actively—and successfully—lobbied against any efforts by the federal government to gather data on firearm sales through its background check system or other means.¹⁸⁸ Similarly, the gun lobby has successfully suppressed

185. See U.S. DEPT OF JUSTICE BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES, REPORT OF ACTIVE FIREARMS LICENSES—LICENSE TYPE BY STATE STATISTICS 2 (July 10, 2014) (showing just over 140,000 federally licensed firearms sellers), available at <https://www.atf.gov/file/17071/download>.

186. See, e.g., *Washington Post-ABC News poll April 11–14, 2013*, WASH. POST, <http://apps.washingtonpost.com/g/page/politics/washington-post-abc-news-poll-april-11-14-2013/105/> (asking whether “you or anyone in your house own a gun or not?”) (last visited Dec. 26, 2015).

187. See Josh Horwitz, *When It Comes to Data on Firearm Sales, Gun Lobby Still Shooting Blanks*, HUFFINGTON POST (Feb. 6, 2012, 7:20 AM), http://www.huffingtonpost.com/josh-horwitz/when-it-comes-to-data-on_b_1256769.html (noting that while “[v]irtually every other industry in America offers the media *actual data* on sales[,]” the firearm industry does not).

188. See 28 C.F.R. § 25.9(b)(3) (2014) (forbidding the FBI or any other government agency from using background check data “to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions”); Robert Draper, *Inside the Power of the N.R.A.*, N.Y. TIMES (Dec. 12, 2013), <http://www.nytimes.com/2013/12/15/magazine/inside-the-power-of-the-nra.html> (“[A] chief talking point of the gun lobby was that universal background checks might enable a government agency to compile a national registry”); Amanda Terkel, *Federal Gun Registry Is The New Death Panels*, HUFFINGTON POST, (Apr. 17, 2013, 1:21 PM), <http://www.huffingtonpost.com/2013/04/17/federal-gun->

federal funding for research on firearms, which will make it less likely that more rigorous, detailed studies will be done on gun ownership patterns.¹⁸⁹ Thus, it is unlikely that, even with the common use test in place, a new source of data will emerge to help courts evaluate whether particular weapons pass that test.¹⁹⁰

5. The Doctrinal Problem

The above problems could be dismissed as mere disagreements with the policy results of the test if the test were somehow required

registry_n_3101204.html (“In the days leading up to Wednesday’s Senate vote on gun legislation amendments, the talking point that has taken off most amongst conservatives as a reason to oppose the background check compromise is that it would lead to a national database of gun owners.”); see also James W. Porter II, *Registered Firearms Today; Confiscated Firearms Tomorrow*, NAT’L RIFLE ASS’N INST. FOR LEGISLATIVE ACTION (Apr. 1, 2014), <http://www.nraila.org/news-issues/articles/2014/4/registered-firearms-today-confiscated-firearms-tomorrow.aspx> (arguing that any system of registration will lead to “confiscation” of firearms).

189. See Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, §§ 218, 12 Stat. 786, 1085 (2011), 125 Stat 786, 1085 (“None of the funds made available [to the Department of Health & Human Services] may be used, in whole or in part, to advocate or promote gun control.”); Michael de Leeuw, *Let Us Talk Past Each Other for a While: A Brief Response to Professor Johnson*, 45 CONN. L. REV. 1637, 1647 (2013) (noting that after the quoted appropriations language was first adopted in 1996, “[r]ightly (or wrongly) the CDC took this admonition seriously and essentially stopped all research into firearms-related health issues.”); Michael Luo, *N.R.A. Stymies Firearms Research, Scientists Say*, N.Y. TIMES (Jan. 25, 2011), <http://www.nytimes.com/2011/01/26/us/26guns.html> (“The amount of money available today for studying the impact of firearms is a fraction of what it was in the mid-1990s, and the number of scientists toiling in the field has dwindled to just a handful as a result, researchers say.”). Moreover, pro-gun groups’ suspicion of attempts to gather data on firearm ownership may lead to lower response rates on any surveys that are attempted to measure firearm ownership in more detail.

190. The only other potential source of firearms data is “gun tracing” conducted by the FBI for local law enforcement in connection with criminal investigations. Gun tracing tracks a particular weapon to its point of sale and does require recording the exact type of firearm involved. See U.S. DEP’T OF JUSTICE BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES, FIREARMS TRACE DATA: ALABAMA 2 (2012), <https://www.atf.gov/sites/default/files/assets/statistics/tracedata-2012/2012-trace-data-alabama.pdf>. However, that data has important limitations, including the fact that the FBI only conducts traces on guns where it is requested by local law enforcement agencies, therefore making the sample contained in the trace data not random. See *id.* More fundamentally, trace data reflects the type of guns used in (or suspected of being used in) crimes, whereas the common use test is concerned with guns that are owned for lawful purposes. See *N.Y. State Rifle & Pistol Ass’n v. Cuomo* (NYSRPA), 990 F. Supp. 2d 349, 364–65 (W.D.N.Y. 2013).

by the constitutional text. After all, a constitutional mandate's failure to work in practice should not give courts license to ignore it. Even if the test were merely required by long-standing precedent, that would at least provide some reason for trepidation in suddenly going in a different direction. However, the common use test is not mandated by the Constitution or precedent at all and is in fact inconsistent with the other (more important) parts of *Heller*.

The Second Amendment's text obviously contains no explicit limitation on the type of "arms" it protects.¹⁹¹ As the court found in *Heller*, it "extends, prima facie, to all instruments that constitute bearable arms . . ." ¹⁹² The Court, of course, would limit this broad scope with the common use test. But the source of that test is not purported to be the constitutional text, but rather the Court's earlier decision in *Miller*.¹⁹³

However, the Court's supposed reliance on *Miller* does not hold up to scrutiny. *Miller* does not apply the common use test at all. Instead, *Miller* found the short-barreled shotgun at issue unprotected by the Second Amendment because it was not "any part of the ordinary military equipment . . . [and] could [not] contribute to the common defense."¹⁹⁴ This is a test tied to that Court's conception of the Second Amendment as having the "obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces . . ." ¹⁹⁵ Only after making that clear, does the Court mention "that ordinarily when called for service [men serving in the militia] were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."¹⁹⁶ This one sentence hardly represents the creation of a common use test, particularly when the Court applied a completely different test in actually determining the outcome of the case.

Moreover, in other aspects of its analysis, the *Heller* Court went to great lengths to criticize and undermine any precedential value *Miller* may have had. The Court noted that "[i]t is particularly

191. U.S. CONST. amend. II.

192. 554 U.S. 570, 582 (2008).

193. See *id.* at 623–27; see also Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 419 (2009) ("Although [extending the protection of the Second Amendment only to arms in common use] is probably in line with contemporary popular understanding of the Second Amendment, it is difficult to justify based on a categorical reading of the Amendment's text or original understanding.").

194. *United States v. Miller*, 307 U.S. 174, 178 (1939) (alteration in original).

195. *Id.* ("[The Second Amendment] must be interpreted and applied with that end in view.").

196. *Id.* at 179.

wrongheaded to read *Miller* for more than what it said, because the case did not even purport to be a thorough examination of the Second Amendment.”¹⁹⁷ The Court explained that *Miller* was decided under strange circumstances because the defendants made no appearance in the case, so the Court only heard from the government.¹⁹⁸ This fact alone was “reason enough,” for the Court in *Heller*, “not to make [*Miller*] the beginning and the end of this Court’s consideration of the Second Amendment[.]”¹⁹⁹ The Court also criticized *Miller* as a source of the meaning of the Second Amendment because it contained “[n]ot a word (*not a word*) about the history of the Second Amendment.”²⁰⁰

In light of the Court’s finding that *Miller* was completely unworthy of reliance in determining the central question in *Heller*, it makes no sense to twist *Miller*’s language in knots to divine the meaning of the term “arms” in the Second Amendment. Whether the Court wanted to explicitly admit it or not, *Miller* was relying on a collective understanding of the Second Amendment that the *Heller* Court was abandoning. Therefore, there was no need or reason for the Court to have relied on *Miller* in determining any part of the scope of the new *individual* right it was recognizing.²⁰¹

The common use test is also in some tension with the asserted central purpose of the right to keep and bear arms identified by *Heller*. The Court repeatedly described the right (or at least its core

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

198. *Id.*

199. *Id.*

200. *Id.* at 624.

201. See *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1155–56 (9th Cir. 2014), *vacated and reh’g en banc granted*, 781 F.3d 1106 (9th Cir. 2015) (citations omitted) (“[S]ome cases are more equal than others. That’s because, with *Heller* on the books, the Second Amendment’s original meaning is now settled in at least two relevant respects. First, *Heller* clarifies that the keeping and bearing of arms is, *and has always been*, an individual right. Second, the right is, *and has always been*, oriented to the end of self-defense. Any contrary interpretation of the right, whether propounded in 1791 or just last week, is error. What that means for our review is that historical interpretations of the right’s scope are of varying probative worth, falling generally into one of three categories ranked here in descending order: (1) authorities that understand bearing arms for self-defense to be an individual right, (2) authorities that understand bearing arms for a purpose *other than* self-defense to be an individual right, and (3) authorities that understand bearing arms not to be an individual right at all.”); see also Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 259 (1983) (“[T]he ‘ordinary military equipment’ criterion is infected by *Miller*’s conceptually flawed concentration on the amendment’s militia purpose, to the exclusion of its other objectives.”).

component) as the “the inherent right of self-defense”²⁰² However, the common use test has nothing whatsoever to do with self-defense. Its origin is in the way people served in militias at the time of the founding, while its application in the modern context focuses on market share. While both of these things might be tangentially related to self-defense,²⁰³ neither is directly tied to modern self-defense in any meaningful way. A gun can become popular for reasons that have nothing to do with its usefulness for self-defense, such as cost, heavy marketing, or usefulness for some other purpose (i.e., sports shooting). Conversely, a gun (or other weapon) that is unpopular may nevertheless be highly useful for self-defense. The test for determining what arms are protected should not be so divorced from the right’s central self-defensive purpose.

B. Proposed Alternatives to The Common Use Test

I am not the first to criticize the common-use test, and a few alternative approaches have been suggested. However, each of these alternatives²⁰⁴ suffers from its own deficiencies that make it an unsatisfying choice to replace the common-use test. One test would ask whether a particular firearm is a “descendant” of a firearm that was in common use at the time of the founding.²⁰⁵ A second proposal would tie protection of firearms to law enforcement’s firearm

202. *Heller*, 554 U.S. at 628; see, e.g., *id.* at 599, 606, 616 (“The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. . . . [Although] self-defense had little to do with the right’s codification; it was the *central component* of the right itself. . . . Tucker elaborated on the Second Amendment: ‘This may be considered as the true palladium of liberty The right to self defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible.’ . . . It was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense.”) (internal quotation marks omitted).

203. The weapons used in the militia at the time of the founding were probably similar to weapons used for self-defense, and today’s consumer preferences in firearms probably in some ways reflect self-defense preferences.

204. This does not purport to be an exhaustive list of all ideas that have been suggested, but the ideas described in this section represent some of the major themes that have been proposed.

205. See *Kates*, *supra* note 201, at 259.

choices.²⁰⁶ A third would ask whether a given weapon is materially more dangerous than the handguns at issue in *Heller*.²⁰⁷

1. The Lineal Descendant Test

The lineal descendant test was proposed by some scholars prior to *Heller* and at least implicitly embraced by the D.C. Circuit in the opinion that was reviewed in *Heller*.²⁰⁸ Although there are several variants of it, this approach, either in addition to or instead of the common-use test, asks whether the weapon at issue is one that is "lineally descended from the kinds of weaponry known to the Founders."²⁰⁹ While this approach has the virtue of some link to history, it would create more problems than it would solve.

The lineal descendent test is unlikely to be a good solution because it is unworkable and just as disconnected from the central purpose of the Second Amendment right as the common use test.²¹⁰ The practical difficulty lies in determining which guns are in fact "descendants" of founding era weapons. In some sense, every modern firearm is descended from some earlier weapon because of the inherently iterative nature of all technological development. The test must necessarily be narrower than that. But what aspect of a firearm makes it a descendant? The D.C. Circuit seemed to think today's semi-automatic handguns are lineal descendants of colonial era muskets.²¹¹ But would a 3D printed handgun that is otherwise identical to other modern handguns similarly be considered a descendant? Do large capacity ammunition magazines count as lineal descendants because firearms at the time of the founding also had some amount of bullets? If so, would that mean that *any* capacity magazine (i.e., a 100 round magazine) would necessarily be a lineal descendant? These questions are extremely difficult to answer and would likely devolve into an arbitrary line drawing exercise.²¹²

206. See Lerner & Lund, *supra* note 153, at 1411–12.

207. See Volokh, *supra* note 24, at 1481–83.

208. See *Parker v. D.C.*, 478 F.3d 370, 398 (2007); Jerry Bonanno, Comment, *Facing the Lion in the Bush: Exploring the Implications of Adopting an Individual Rights Interpretation of the Second Amendment to the United States Constitution*, 29 HAMLINE L. REV. 463, 484 (2006); Kates, *supra* note 201, at 259.

209. See Kates, *supra* note 201, at 259.

210. To the extent this test is simply added to the common use test (i.e., by requiring that a weapon be lineally descended in addition to being in common use) it retains many of the problems the common use test has on its own, discussed *supra*.

211. See *Parker*, 478 F.3d at 398.

212. See John Zulkey, Note, *The Obsolete Second Amendment: How Advances in*

More problematically, this test suffers from the same problem that the common use test does in that it disconnects the scope of the word “arms” from the self-defensive purpose of the right. Whether a particular weapon is a lineal descendant of a weapon in use at the time of the founding (however courts would ultimately end up applying that test), has little relationship to whether that weapon would be helpful for modern self-defense. Consider, for example, the taser. Tasers generally work by shooting “two small, needle-like tethered probes 135-160 feet-per-second into the skin or clothing of a target using compressed nitrogen. The probes instantly emit a pulsating, electrical charge on contact that lasts an uninterrupted five to seven seconds[]” in order to (non-lethally) subdue the target.²¹³ It would be hard to argue that tasers are descended from any kind of weapon that would be familiar to the founders, and yet, they can be highly useful to modern people for self-defense—perhaps even more so than a handgun.²¹⁴ The lineal descendant test simply replaces the common use test’s misplaced focus on popularity with a misplaced inquiry into firearms history that remains disconnected from the Second Amendment right’s central purpose.

2. The Law Enforcement Test

Another intriguing test suggested in the scholarship is to tie which weapons are protected by the Second Amendment to those that are commonly used by law enforcement.²¹⁵ Different proposals have incorporated this concept differently into various tests;²¹⁶ but

Arms Technology Have Made the Prefatory Clause Incompatible with Public Policy, U. ILL. J.L. TECH. & POL’Y 213, 232, 232 n.138 (2010) (“Given that technology does not have clear-cut predecessors and family lines the way humans and animals do, there is no objective test to determine which weapons are or are not the lineal descendants of revolutionary-era weapons.”); *see also* Volokh, *supra* note 24, at 1477 (“The trouble with [a lineal descendants test] is that all civilian firearms are in some ways both modifications of military firearms and technological advancements on past civilian firearms.”).

213. Wright, *supra* note 127, at 163–64.

214. *See id.* at 181–89 (arguing that tasers are particularly useful for self-defense because of the lessened likelihood compared with firearms that they will be used to injure the user or injure someone else unlawfully); *see also* Lerner & Lund, *supra* note 153, at 1398 (“Judged by ease of use and minimization of harm, pepper spray and Tasers are generally superior to traditional lethal weapons, such as handguns and shotguns.”).

215. *See* Lerner & Lund, *supra* note 153, at 1411–12; O’Shea, *supra* note 168, at 391–92.

216. Professor O’Shea’s proposal calls for looking to both the popularity of a weapon among the general public (i.e., the common use test) and to the popularity of

the basic idea is that if a weapon is commonly issued to police to carry out law enforcement functions, then that is strong evidence that it qualifies for protection under the Second Amendment. Proponents of this test argue, probably correctly, that it would solve the under-protection problem because governments are unlikely to bar their police from adopting new useful self-defense weapons even if governments might be inclined to ban civilian possession of those weapons.²¹⁷ However, the test would create numerous other problems.

The main issue is that police and civilians are not at all similarly situated with respect to self-defense. Unlike civilians, police are highly trained in how to operate their firearms under particularly stressful circumstances.²¹⁸ Also unlike civilians, police, by the nature of their job, may put themselves into dangerous combat-like situations and may also make themselves targets for heavily armed criminals. For these reasons, it may be more appropriate for police officers to carry deadlier weapons than would likely be necessary for civilian self-defense needs.

Moreover, rendering police unable to possess better weapons than those available to the general population would encourage an arms race between police and criminals. If every time the police get a new sophisticated weapon, that weapon must be made available to the public, then criminals will also gain access to that weapon,

a weapon among police departments. O'Shea, *supra* note 168, at 391–92. Professors Lerner & Lund would have the courts “adopt a presumption that civilians may employ self-defense technologies in widespread use by the police,” which would be “rebuttable by sufficiently strong evidence that a particular device is suitable for police work but not for civilian use.” Lerner & Lund, *supra* note 153, at 1411–12.

217. See O'Shea, *supra* note 168, at 391.

218. See *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 798–99 (D. Md. 2014) (citations omitted) (“In Maryland, law enforcement officers who wish to carry firearms must successfully complete the applicable firearms classroom instruction, training, and qualification. They must then submit to firearms training every year thereafter. If the officers do not submit to the required annual training, their firearms are seized until the training is completed. In addition to receiving extensive training on the use of firearms generally, law enforcement officers must receive further specialized training to use assault weapons. They are taught how and when assault weapons may be used, as well as techniques to minimize the risk of harm to innocent civilians. Even after they have received this training, they must undergo periodic requalification to continue carrying assault weapons in the line of duty. Retired law enforcement officers have also received training on the use of LCMs; in particular, they have been taught how to assess each shot for effectiveness and how to evaluate the circumstances before continuing to fire additional rounds. Finally, they have received judgment training on the use of deadly force and how to safely handle and store firearms, including in their homes.”).

leaving the police to look for a still more advanced weapon to regain the upper hand. This cycle unfortunately already goes on to some extent as it is, and there is no reason to create a test for Second Amendment analysis that would further encourage it.²¹⁹

3. The Handgun Dangerousness Test

One approach that has been suggested—and the one that is most similar to my own proposal—asks whether the weapon at issue is materially more dangerous than a handgun or other weapon already in common use.²²⁰ The idea is because weapons in common use, such as handguns, were already approved by *Heller*, then any weapons that are of equivalent or lesser dangerousness than those guns should be allowed.²²¹ Conversely, any weapons that are more dangerous than those already approved in *Heller* should be unprotected because the exemplar weapons *Heller* listed as unprotected (machine guns and sawed-off shot guns) are more dangerous than handguns in common use.²²²

This test makes sense to a certain degree; it would have the positive effect of bringing some of the attention back to the weapons themselves and their dangerousness instead of ancillary concerns like market share and each weapon's history. However, its main problem is that it does not completely walk away from the concept of common use, which still leaves intact many of the problems discussed above.

Additionally, the test's singular focus on dangerousness probably would create some issues. For example, a weapon may be developed (or may already exist) that is more dangerous than a handgun but more useful for self-defense. Under this test, because the weapon is considered more dangerous than a handgun, it presumably could be banned without examining its self-defensive utility. Or, on the other side of the coin, this approach would not allow much room for safety

219. It might be argued by some that putting the police and civilians on equal footing is exactly what the Second Amendment was intended to do (i.e., to create a bulwark against tyranny). See, e.g., David Pittman, Note, *Heller: A Bulwark Against Tyranny*, 8 APPALACHIAN J.L. 201, 202 (2009). However, this purpose of the Second Amendment right was not endorsed by *Heller*, with the Court acknowledging that “it may be true that no amount of small arms could be useful against modern-day bombers and tanks.” See *D.C. v. Heller*, 554 U.S. 570, 627 (2008).

220. See Michael S. Obermeier, Comment, *Scoping Out the Limits of “Arms” Under the Second Amendment*, 60 U. KAN. L. REV. 681, 718–20 (2012); Volokh, *supra*, note 24, at 1481–83.

221. See Volokh, *supra* note 24, at 1481–82.

222. See *id.*

regulations on handguns because it begins with the assumption that the handguns that were in use at the time *Heller* was decided, or anything else equivalently dangerous, are untouchable. This would be true even if the safety regulations at issue did nothing to interfere with the utility of handguns.

Dangerousness is a particularly nebulous concept in the area of weapons. Every weapon is—by design—dangerous. And often, the more dangerous a weapon is, the more effective it is for self-defense.²²³ A better rule would go deeper than asking about dangerousness alone and instead ask *why* a particular weapon is dangerous.²²⁴

C. The Reasonable Self-Defense Approach

To determine whether a weapon is protected by the Second Amendment, courts should be guided by a test that is directly tied to that right's purpose of self-defense. Accordingly, I propose the following test: Is the weapon at issue a reasonable choice for lawful, armed self-defense? A court could consider the totality of the circumstances in determining reasonableness, including:

A weapon's usefulness for self-defense. How well does the weapon stop attackers? Can a person under duress easily use the weapon?

The weapon's dangerousness to the user or innocent bystanders. Does the weapon have a record of malfunctioning? Can it be easily accessed and used by children? Does the type of ammunition involved have more destructive power than necessary for self-defensive purposes?

The weapon's propensity to be used in mass shootings. Does the weapon allow the shooter to fire many rounds very quickly with minimal recoil?

A weapon's propensity or potential to be used for other unlawful purposes. Weapons like entirely plastic guns designed to avoid metal

223. See *N.Y. State Rifle & Pistol Ass'n v. Cuomo (NYSRPA)*, 990 F. Supp. 2d 349, 368 (W.D.N.Y. 2013) ("There thus can be no serious dispute that the very features that increase a weapons' utility for self-defense also increase its dangerousness to the public at large.").

224. Michael Obermeier, in his insightful comment on this issue, recognized as much by pairing his proposed dangerousness comparison to handguns with asking whether "the innate characteristics of the weapon . . . generally favor legitimate purposes, such as self-defense or hunting, over criminal ones." See Obermeier, *supra* note 220, at 684.

detectors or guns with the serial numbers removed²²⁵ could be examples of weapons with such a potential.

All of these factors would be judged in the context of the universe of weapons that remain available in light of the law at issue (i.e., the available alternatives). These are not necessarily a complete list of the factors courts could rely on in determining reasonableness,²²⁶ but the basic point would always be to protect those weapons that allow users to defend themselves²²⁷ well with minimal risk to themselves and the community at large.

The main advantage of this approach over the common use test and other suggested tests is that it is directly tied to the purpose of the right. Under this test, in any type of weapon case, the focus both of the arguments between the parties, and the court's ultimate decision would be squarely on what the weapon involved actually does. In a case challenging an assault weapons ban, the court would consider whether a weapon with the characteristics prohibited by the statute is a reasonable choice for self-defense, rather than searching in vain for market share statistics. In a case challenging consumer safety requirements for handguns, a court would consider whether guns without the required safety features are reasonable self-defense choices, rather than grappling with what level of generality defines a "handgun." Simply put, the reasonable self-

225. *Cf. United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010) ("Firearms without serial numbers are of particular value to those engaged in illicit activity because the absence of serial numbers helps shield recovered firearms and their possessors from identification.").

226. Litigants could also have the opportunity to convince courts to consider the geographical scope of a particular ban in determining reasonableness. For example, a city defending a city-wide ban on a particular type of arm could argue that the weapon is not a reasonable choice for self-defense in a densely populated city, or a plaintiff challenging a ban on a particular weapon type in a more rural area could argue that a higher degree of firepower is necessary where police response times may be higher. In either case though, geography would likely be of little weight compared to the intrinsic characteristics of the weapon and how those characteristics bear on the weapon's capacity for self-defense because confrontations requiring self-defense probably are not extremely dissimilar even in different places.

227. Or perhaps, engage in other lawful firearm related activities such as hunting. Although the Court described the central component of the right as the right to self-defense, it left open the possibility that other uses of firearms could be protected. *See D.C. v. Heller*, 554 U.S. 570, 599 (2008) ("The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting."). My proposal would apply equally in the event such a right to use arms for hunting is recognized, with the question slightly modified to whether the weapon at issue is a reasonable choice for lawful hunting purposes.

defense test allows litigants to have an argument about what actually matters: the relationship between the weapons and self-defense.

Another advantage is that this test would be much easier for courts to apply than the common use test. Unlike the common use test’s reliance on statistics of questionable value and availability, applying the self-defense test would require only looking at information that is readily available, either in the form of empirical data or expert testimony. In fact, courts have already been relying on this sort of information in purporting to conduct the second step of the analysis (selecting or applying the appropriate level of scrutiny) in type of weapons cases. As described above in Part IV, in *Heller II*, *NYSRPA*, and *Fyock*, the courts upheld bans on assault weapons and large capacity ammunition magazines based on factors including those weapons’ propensity for use in mass shootings,²²⁸ their usefulness for self-defense,²²⁹ and the likelihood of the weapons injuring bystanders.²³⁰ Similarly, in *James*, where the court simply ignored the common use test, the court based its dangerousness analysis on similar kinds of evidence.²³¹ The reasonable self-defense

228. See, e.g., *NYSRPA*, 990 F. Supp. 2d at 369 (“Studies and data support New York’s view that assault weapons are often used to devastating effect in mass shootings.”); *Heller v. D.C. (Heller II)*, 670 F.3d 1244, 1263 (D.C. Cir. 2011) (“[A]ssault weapons account for a larger share of guns used in mass murders and murders of police, crimes for which weapons with greater firepower would seem particularly useful[.]”) (internal quotation marks omitted).

229. See, e.g., *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1280 (N.D. Cal. 2014) (finding a ban on large capacity ammunition magazines satisfies intermediate scrutiny in part because “studies of the NRA Institute for Legislative Action database demonstrate[e] that individuals acting in self-defense fire 2.1–2.2 shots on average.”).

230. See, e.g., *Heller II*, 670 F.3d at 1263–64 (“[H]igh capacity magazines are dangerous in self-defense situations because the tendency is for defenders to keep firing until all bullets have been expended, which poses grave risks to others in the household, passersby, and bystanders.”) (internal quotation marks omitted).

231. See *People v. James*, 94 Cal. Rptr. 3d 576, 585–86 (Cal. Ct. App. 2009) (“The .50 caliber BMG rifle has the capacity to destroy or seriously damage vital public and private buildings, civilian, police and military vehicles, power generation and transmission facilities, petrochemical production and storage facilities, and transportation infrastructure. These are not the types of weapons that are typically possessed by law-abiding citizens for lawful purposes such as sport hunting or self-defense; rather these are weapons of war.”) (internal quotation marks omitted). In *Kamper v. Cuomo*, although the court did not explicitly rely on any specific piece of evidence about the weapons at issue, it did rely on the fact that the weapons left available by the ban in that case gave citizens the ability to defend themselves. See 993 F. Supp. 2d 188, 194 (N.D.N.Y. 2014).

test would allow courts to be honest about what their methodology and use this evidence to assess whether the weapons should be protected at all.

Courts are also very institutionally familiar with the concept of objective reasonableness as a standard. Courts already routinely ask whether officers had reasonable suspicion to stop and frisk a suspect,²³² whether a person exercised reasonable care,²³³ or whether a reasonable person would believe a contract has been formed.²³⁴ In the context of self-defense in criminal law, courts already apply a proportionality analysis that asks whether the defendant used an amount of force that was “not excessive in relation to the threatened force” against him or her.²³⁵ Applying a similar reasonableness standard to firearms that asks whether the chosen firearm is excessive in relation to a more generalized conception of the threats people face would not be a large leap for courts to make. This is in stark contrast to the mostly unfamiliar concept of common use.

Some may critique this proposal as allowing courts too much discretion in determining which weapons are protected.²³⁶ However, the common use test already allows at least as much discretion by allowing courts to define the level of generality at which a weapon’s commonality will be measured and by allowing courts to pick and choose between different points of largely suspect data in deciding how to measure common use. Moreover, the description of certain supposedly long-standing exceptions to Second Amendment protection recognized in *Heller* already represented some amount of subjective balancing, even if the Court did not admit it.²³⁷ Essentially, almost any test will have a certain amount of subjectivity to it, so the test courts choose might as well be one that is actually connected to the right *Heller* recognized and one that will

232. See *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

233. See DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 127 (2d ed. 2011).

234. See 17A AM. JUR. 2D *Contracts* § 31 (2004).

235. E.g., Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 377 (1996).

236. See Gregory T. Holding, *Stop Hammering Fourth Amendment Rights: Reshaping the Community Caretaking Exception with the Physical Intrusion Standard*, 97 MARQ. L. REV. 123, 133 n.64 (2013) (“Legal scholars and jurists alike agree that reasonableness is a malleable standard[.]” (collecting sources); see also *D.C. v. Heller*, 554 U.S. 570, 634 (2008) (criticizing Justice Breyer’s dissent for proposing “a judge-empowering ‘interest-balancing inquiry’”).

237. See, e.g., Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1572–73 (2009).

force courts to point to available objective evidence to support their conclusions.

In fact, at least one court has successfully evaluated similar considerations to those proposed by the reasonable self-defense test in a Second Amendment type of weapon case by relying largely on objective facts. In *Colorado Outfitters Ass'n v. Hickenlooper*,²³⁸ the court heard a challenge to Colorado's ban on magazines capable of holding more than fifteen rounds of ammunition.²³⁹ Unlike the other cases discussed above, which were either decided at the preliminary injunction or summary judgment stage, the court held a bench trial where it heard testimony from numerous expert witnesses about the self-defense utility of the banned magazines.²⁴⁰ The court also considered other evidence bearing on whether the banned magazines were an appropriate choice for self-defense, including the likelihood of criminal use and whether using the magazines in self-defense situations harms innocent bystanders.²⁴¹

The *Hickenlooper* court fit this evidence into the analytical framework as part of the second step of the analysis after concluding that the weapons were in common use for purposes of the first step.²⁴² Nevertheless, the court's approach is an example of how courts could apply a reasonable self-defense test by carefully examining evidence presented by the parties about the self-defensive potential of the weapons at issue—perhaps in some cases, as in *Hickenlooper*, with a full bench trial. Although weighing competing expert testimony and other evidence can be a somewhat subjective exercise, a court—like the one in *Hickenlooper*—will at least be able to articulate the objective facts that gave rise to its decision.

Another objection to this test might be that allowing courts to consider the existence of available alternative weapons is inconsistent with *Heller*. *Heller* did reject the District of Columbia's argument that the availability of long guns should allow the ban on handguns to survive.²⁴³ However, the Court's reasons for rejecting this argument are instructive. Although the Court again reiterated how common handguns were, it also recited several reasons why

238. 24 F. Supp. 3d 1050, 1050–51 (D. Colo. 2014).

239. *Id.* at 1054–56. The court also considered a Second Amendment challenge to a law requiring background checks for private transfers of firearms and a vagueness challenge to the grandfather clause for non-compliant magazines possessed prior to the ban's enactment. *Id.* at 1056–58.

240. *Id.* at 1069–72.

241. *Id.*

242. *Id.* at 1069. The court ultimately concluded that the ban satisfied intermediate scrutiny. *Id.* at 1073–74.

243. *D.C. v. Heller*, 554 U.S. 570, 629 (2008).

handguns were preferable to long guns for self-defense, including ease of use and accessibility in an emergency.²⁴⁴ In other words, the available alternative—long guns—was unsatisfactory because the banned weapon—the handgun—was a better choice for self-defense for the reasons the Court articulated.

This is exactly the type of inquiry that the reasonable self-defense test contemplates. It would not be enough for a court simply to find that *any* alternative weapon existed. Rather, courts would have to ask whether the banned weapon is a reasonable choice for self-defense, given the available alternatives. Such a test would necessarily require examining the capabilities and limitations of those alternatives alongside the capabilities and limitations of the banned weapons, just as the Court did in *Heller*.

Finally, it may be objected that this test has no relationship to the prefatory clause of the Second Amendment regarding the preservation of the militia. The common use test is at least purportedly connected to the militia because people in the founding era used the arms they had at home when they reported for militia duty. However, the idea of connecting the content of the right to the purpose stated in the prefatory clause was soundly rejected by *Heller*.²⁴⁵ There is no reason for this one component of the right to continue to be chained to the prefatory clause when the rest of the right is completely unmoored from it. Instead, the content of the “arms” portion of the right should be interpreted just like the rest of the Second Amendment—with an eye toward self-defense, the Second Amendment’s central purpose.

CONCLUSION

In the coming years, the issue of what types of guns and accessories are protected by the Second Amendment is going to become more and more salient. Whether it comes up in the form of clashes over assault weapon bans, the imposition of mandatory safety features on firearms, or the introduction of newer forms of firearms and non-lethal weapons, the courts will need a framework to sort out these claims.

244. *Id.* (“There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police.”).

245. *See id.* at 595–99.

The common use test fails to provide a framework that is either practical or connected to the purpose of the Second Amendment right. Engaging in a difficult and likely arbitrary effort to assess the popularity of contested weapons will not protect citizens' ability to engage in the armed self-defense *Heller* envisioned, nor will it ensure that the most dangerous and unnecessary weapons are kept off of the streets.

The implementation of a test based on whether a weapon is a reasonable choice for lawful, armed self-defense will by no means make these cases easy for courts to resolve. The question of whether particular weapons would be more useful for self-defense or more likely to hurt the innocent has been at the center of a vigorous and contentious national debate for decades. But, at least by asking the right question, litigants will be able to have an honest battle over these issues in the courts, rather than being forced to engage in a proxy argument about popularity.

