WHEN REGULATION BECOMES A MATTER OF LIFE OR DEATH: FILLING THE GAPS OF *HELLER* AND *MCDONALD*

CLAIRE PERNA*

I. INTRODUCTION

On October 1, 2013, Maryland enacted the Firearm Safety Act ("FSA"). The FSA made it illegal to "possess, sell, offer to sell, transfer, or receive" assault weapons[1] and large capacity magazines ("LCMs"), which the FSA defined as detachable magazines that could hold ten or more rounds.[2] The FSA's ban on assault weapons and LCMs gave rise to *Kolbe v. Hogan* in which plaintiffs Stephen Kolbe, Andrew Turner, and two businesses that sold firearms for hunting and sport shooting argued that the FSA obstructed their Second Amendment rights to self-defense.[3] On appeal from the District Court, the Fourth Circuit ruled in the plaintiffs' favor and struck down Maryland's ban.[4] In a similar case, Arie Friedman from Highland Park, Illinois contested a city ordinance banning assault weapons.[5] The ordinance defined "assault weapons" as semi-automatic weapons that

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* L.L.M. in taxation Candidate, 2019, Northwestern Pritzker School of Law; J.D., 2018, Michigan State University College of Law; B.A., 2015, Marquette University.

[1] *See* Kolbe v. Hogan, 813 F.3d 160, 168 (4th Cir. 2016) (citing MD. CODE ANN., CRIM. LAW §4-303(a)).

[2] *Id.* at 169-70. Additionally, the FSA placed a ban on semi-automatic weapon transportation into Maryland but imposed no such transportation restriction on LCMs. *Id.* at 170.

[3] *Id.* Plaintiffs claimed that their individual circumstances made semi-automatic weapons the best means of self-defense. Kolbe had a violent threat occur in his store and lived close to a public highway and Turner was injured in the Navy, which made operating other types of firearms difficult for him. Also among the plaintiffs were two sporting goods stores that sold semi-automatic weapons for hunting. *Id.*

[4] *Id.* at 184. The Fourth Circuit remanded the case to apply strict scrutiny; it did not hold the ban unconstitutional. However, the implications of the Court's application of a higher level of scrutiny might in practice render the FSA ban unconstitutional because the new burden will be very challenging to me, if the State can meet it at all. This holding, while not explicitly holding the ban as unconstitutional, created a split amongst the circuits.

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

accept LCMs and functioned like Maryland's weapons regulation.[6] However, in *Friedman v. City of Highland Park*, the Seventh Circuit upheld the city's ordinance on appeal.[7] Thus, in reviewing similar facts and similar weapon regulations, two circuit courts reached opposing conclusions.[8] Significantly, the only difference between the two cases was the standard of review used to evaluate the regulations.[9]

While other circuit courts usually apply some test or analysis equivalent to intermediate scrutiny,[10] the Fourth Circuit applied a higher level of scrutiny by utilizing the gaps in *Heller* and *McDonald*, the leading Supreme Court cases on the issue.[11] Accordingly, in *Kolbe*, the Fourth Circuit created a circuit split when it struck down a ban on semi-automatic weapons by applying a higher standard of review than other circuit courts.[12] By applying strict scrutiny, the Fourth Circuit increased the burden imposed on government actors because the strict scrutiny standard requires the government actors to prove that their laws "further[] a compelling interest and [are] narrowly tailored to achieve that interest."[13] Strict scrutiny is a higher standard of review than intermediate scrutiny, which requires a regulation to not only further an important governmental objective, but also be substantially related to that objective without being overly broad.[14]

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[6] *Id.* ("The ordinance defines an assault weapon as any semi-automatic gun that can accept a large-capacity magazine and has one of five other features: a pistol grip without a stock . . . a folding, telescoping, or thumbhole stock; a grip for the non-trigger hand; a barrel shroud; or a muzzle brake or compensator."). Additionally, AR-15s and AK-47s are prohibited by name under the ordinance. *Id.*

[7] *Id.* at 412.

[8] *Compare id.* at 406, 412 (affirming the lower court's summary judgment in favor of Highland Park), *with Kolbe*, 813 F.3d at 168 (vacating the lower court's denial of the plaintiff's Second Amendment claim).

[9] *See generally Friedman*, 784 F.3d at 406.

[10] *See* TINA MEHR & ADAM WINKLER, AM. CONST. SOC'Y FOR L. & POL'Y, THE STANDARDLESS SECOND AMENDMENT 9 (2010), (noting the "wide variety of approaches" used by the circuit courts).

[11] *See, e.g., id.* at 2 (noting that the Court was "unwilling[] to articulate a generally applicable standard of review or set of guidelines" for lower courts to use in evaluating weapon bans and that lower courts "do not know how to decide whether or not those laws are constitutionally permissible" when confronted with gun control laws); *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, 1456 (2009) ("The Court did not discuss what analysis would be proper for less 'severe' restrictions.").

[12] *See* Gabriel Malor, *Strict Scrutiny for Firearms Restrictions*, NAT'L REV. (Feb. 5, 2016),
http://www.nationalreview.com/article/430836/gun-control-assault-weapons.

[13] Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007).

[14] 16B AM. JUR. 2D *Constitutional Law* § 861.

The Supreme Court must establish a standard of review for Second Amendment weapon ban analysis because doing so has reach beyond administrative or constitutional law—it has the potential to impact public safety. Over the past eleven years, the United States has witnessed five of its deadliest shootings.[15] The deadliest shooting in United States history took place on October 1, 2017 in Las Vegas, where the gunman used multiple rifles—some outfitted with bump-fire stocks that enabled him to rapidly fire bullets into a crowd of concert-goers from the thirty-second floor of his hotel room—to kill fifty-eight people.[16] The second deadliest shooting took place in June 2016 at Blaze nightclub in Orlando, Florida, where the gunman used a semi-automatic rifle and a semi-automatic pistol to kill forty-nine people.[17] The third deadliest shooting took place on the Virginia Tech campus in April 2007 where the gunman took the lives of thirty-two people with a semi-automatic pistol.[18] The fourth deadliest shooting took place at Sandy Hook Elementary School in December 2012, where the gunman killed six adults and twenty children, between the ages of six and seven, using a semi-automatic rifle.[19] Finally, the fifth deadliest shooting took place at a church in Sutherland Springs, Texas in November 2017 where the gunman killed twenty-five people and an unborn child using a semi-automatic rifle.[20] These events not only demonstrate the salience of the issue at hand, but also demonstrate that the seemingly narrow question of what level of scrutiny to apply to Second Amendment challenges has a huge impact on public safety.[21]

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[15] *See Deadliest Mass Shootings in Modern U.S. History Fast Facts*, CNN LIBR. (Feb. 19, 2018, 11:54 AM), http://www.cnn.com/2013/09/16/us/20-deadliest-mass-shootings-in-u-s-history-fast-facts/.

[16] *See* Malachy Browne et al., *Multiple Weapons Found in Las Vegas Gunman's Hotel Room*, N.Y. TIMES (Oct. 2, 2017), https://www.nytimes.com/2017/10/02/us/las-vegas-shooting.html; Holly Yan, Madison Park & Darran Simon, *Las Vegas Shooting: Bodycam Footage Shows First Response*, CNN (Oct. 7, 2017, 2:36 AM), https://www.cnn.com/2017/10/03/us/las-vegas-shooting-investigation/index.html.

[17] *See* Ralph Ellis et al., *Orlando Shooting: 49 Killed, Shooter Pledged ISIS Allegiance*, CNN (June 13, 2016, 11:05 AM), http://www.cnn.com/2016/06/12/us/orlando-nightclub-shooting/.

[18] *See id.*

[19] *See* Steve Vogel, Sari Horwitz & David A. Fahrenthold, *Sandy Hook Elementary Shooting Leaves 28 Dead, Law Enforcement Sources Say*, WASH. POST (Dec. 14, 2012), https://www.washingtonpost.com/politics/sandy-hook-elementary-school-shooting-leaves-students-staff-dead/2012/12/14/24334570-461e-11e2-8e70-e1993528222d_story.html.

[20] Aaron Smith, *What We Know About the Rifle Used in the Texas Church Massacre*, CNN MONEY (Nov. 6, 2017, 2:46 PM), http://money.cnn.com/2017/11/06/news/companies/ruger-ar-556-ar-15/index.html.

[21] *See generally infra* Section V.B (discussing the policy implications of Second Amendment weapon ban analyses).

Recent Supreme Court decisions have given lower courts a great deal of latitude in selecting the standard of review used to evaluate weapon bans.[22] In order to promote consistency among lower courts, the Supreme Court should adopt a hybrid test that requires courts to engage in an interest balancing test that asks whether the core right of the Second Amendment is substantially burdened by the gun regulation at issue and if so, which interest should prevail.[23] This hybrid test combines a heightened standard of review that respects an individual's right to bear arms—a substantial burden test—with an interest balancing test that considers the totality of the circumstances surrounding the weapon ban at issue in order to better accommodate all of the issues involved in Second Amendment challenges.[24] The myriad tests and analyses that lower courts have developed demonstrate the difficulty of fitting Second Amendment considerations neatly into a traditional scrutiny test.[25] A hybrid analysis is better suited for Second Amendment challenges because of the unique, and often complex, policy interests that the Second Amendment implicates.[26]

Part I of this Note introduces the two leading Supreme Court decisions regarding Second Amendment interpretation, *Heller* and *McDonald*.[27] Part II of this Note discusses the policy issues surrounding firearms and the United States' relationship with firearm violence.[28] Part III of this Note demonstrates how circuit courts have interpreted the Supreme Court's decisions by presenting an overview of the various tests the courts have developed to evaluate weapon bans.[29] Part IV of this Note compares the analyses of two recent circuit court decisions, *Kolbe* and *Friedman*, by walking through each case and highlighting how two nearly identical cases can yield opposite holdings under the Supreme Court's current guidance.[30] Finally, Part V proposes a hybrid substantial burden-interest balancing

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[22] *See generally infra* Part III (examining various tests the circuit courts have come up with in response to the same Supreme Court precedent).

[23] *Compare* Part I *with* Part III (examining the current Supreme Court case law on the issue of weapon ban analyses under the Second Amendment and the various tests used among circuit courts).

[24] *See infra* Part V (discussing proposed hybrid test in detail). *See generally* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010) (discussing the practice of combining constitutional tests).

[25] *See infra* Part III (discussing the various tests the circuit courts have used to evaluate weapon bans under the Second Amendment).

[26] *See infra* Part II (discussing the policy issues implicated by the Second Amendment).

[27] *See infra* Part I.

[28] *See infra* Part II.

[29] *See infra* Part III.

[30] *See infra* Part IV.

test.[31] Specifically, Part V argues that a hybrid test is better suited than traditional scrutiny tests because it respects the core Second Amendment right but also allows for consideration of the complex policy issues that usually surround weapon regulations.[32]

II. SUPREME COURT TREATMENT OF THE SECOND AMENDMENT AND WEAPON BANS

The two leading Supreme Court cases regarding weapon ban analyses under the Second Amendment are *Heller* and *McDonald*.[33] *Heller* is important because it represents the first case in which the Supreme Court recognized that the Second Amendment applies to an individual's right to bear arms—not just to the maintenance of a militia.[34] *McDonald* is important because it established that the Second Amendment is enforceable against the states through the Fourteenth Amendment.[35] In *Heller*, the Court articulated factors for lower courts to consider in future weapon ban analyses.[36] Specifically, the Court outlined a list of regulations that are *per se* unreasonable, emphasized consideration of the history of the Second Amendment, and rejected both the interest balancing test and the rational basis test.[37] Although lower courts and commentators have interpreted the

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[31] *See infra* Part V.

[32] *See infra* Section V.C (describing the hybrid test and its components).

[33] *See infra* text accompanying note 34 (describing *Heller*'s importance); *infra* note 64, at 742 (describing *McDonald*'s effect of incorporating the Second Amendment).

[34] *See* District of Columbia v. Heller, 554 U.S. 570, 599 (2008) ("It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia."); *see also* Cody J. Jacobs, *End the Popularity Contest: A Proposal for Second Amendment "Type of Weapon" Analysis*, 83 TENN. L. REV. 231, 241 (2015) ("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."); Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1564 (2009) ("[T]he Second Amendment had long been read not to have any relevance to gun control. For the previous seventy years . . . courts read the amendment to protect only a militia-related right.").

[35] McDonald v. City of Chicago, 561 U.S. 742, 784-85 (2010) ("Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then . . . that guarantee is fully binding on the states."). The Court rejected the respondent's argument that the Second Amendment is not binding on the States because it would be out of line with traditional notions of federalism and would "stifle experimentation." *Id.* at 783. The issue in *McDonald* involved a Chicago ban on unregistered handgun possession. An additional city regulation also prohibited registration of handguns, thereby effectively banning handgun possession. *Id.* at 750.

[36] *See Heller*, 554 U.S. at 626-27, 634 (emphasizing the "longstanding" prohibitions of certain weapons and rejecting the interest balancing).

[37] *See id.*

Court's decision in *Heller* differently, its two-step approach has been an important foundation for weapon ban analyses.[38]

A. *Heller: The Landmark Case and Notable Dicta*

Despite the fact that the immediate issue before the Court was relatively narrow, the Supreme Court in *Heller* not only established a test for lower courts to apply, but also informally established a number of other factors for lower courts to consider in weapon regulation cases.[39] The issue in *Heller* was whether the District of Columbia's ban on possessing usable handguns in the home violated the Second Amendment.[40] After an extensive review of Second Amendment history[41]—from the Framers' intent and the Amendment's ratification to the modern popularity of handguns—the Court held that the District of Columbia's ban on home handgun possession was unconstitutional.[42]

In reaching its conclusion, Justice Scalia's majority opinion relied on principles of originalism and tradition.[43] Specifically, Justice Scalia relied on the operative clause of the Second Amendment, which states, "the right

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[38] *See infra* Part III (detailing the different tests circuit courts have used when presented with assault weapon bans).

[39] *See* Nelson Lund, *The Second Amendment,* Heller, *and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1356 (2009) (commenting on the Court's use of dicta for issues not before the Court).

[40] *Heller*, 554 U.S. at 573. The regulation made it a crime to carry an unregistered handgun, but also prohibited registration of handguns; the effect of the regulation was a general ban on possessing handguns. *Id.* at 574. Dick Heller, the respondent, was a special police officer in D.C. who was authorized to carry a handgun while on duty. He sought to register a handgun for use in his home, but was prohibited in doing so pursuant to the regulation. Heller's claim was dismissed in the District Court and then subsequently reversed by the Court of Appeals for the D.C. Circuit. *Id.* at 573, 576.

[41] *See* Winkler, *supra* note 34, at 1557-58 (describing *Heller*'s opinion as "lengthy" including "roughly forty-fives pages of discussion of the original meaning of the Second Amendment.").

[42] *Heller*, 554 U.S. at 635 ("In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.").

[43] *See id.* at 626-29 (mentioning the tradition of the militia, where citizens were called to bear weapons of all kind that they lawfully possessed, and how the conception of a militia continues to influence the kinds of weapons citizens can lawfully bear today). *Cf.* Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008), https://newrepublic.com/article/62124/defense-looseness (arguing that the majority actually engages in the opposite of originalism in acknowledging evolving perspectives about guns in society).

of the people to keep and bear Arms shall not be infringed."[44] According to Justice Scalia, this clause, when read literally, implies a right for individuals to keep weapons.[45] After establishing that individuals have the right to bear arms, Justice Scalia applied what is referred to as the "common use test."[46] Under this test, the Court looks to the popularity of the weapon in question at the time of the Second Amendment's ratification—that is, whether or not the weapon was in common use.[47] In *Heller*, the Court answered this inquiry in the affirmative and observed that historically Americans prefer handguns as their weapon of choice for self-defense.[48] Thus, the Court concluded that a complete prohibition on handguns would be unconstitutional.[49] Commentators have applauded the common use test for its basis in textualism and reliance on originalism, which can be seen in the Court's consideration of the types of weapons that a militia might have carried during the Second Amendment's ratification.[50]

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

[45] *See* Lund, *supra* note 39, at 1348 (noting that the operative clause "presumptively implies" a private right and that "[t]hose who focus on the operative clause argue that the protected right is that of individual citizens to keep and bear their privately owned weapons.").

[46] *See Heller*, 554 U.S. at 627 ("We also recognized another important limitation on the right to keep and carry arms . . . that the sorts of weapons protected were those 'in common use at the time.' We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'") (citation omitted).

[47] *See* Winkler, *supra* note 34, at 1560 (noting that Justice Scalia "looks to the fickle dynamics of contemporary consumer choices" in determining which weapons are protected); *see also* Jacobs, *supra* note 34, at 264 ("The common use test essentially asks courts to look at evidence about the number of the particular firearm or firearm accessory at issue owned by private citizens . . . for lawful purposes . . . at the time the case is decided.").

[48] *Heller*, 554 U.S. at 629 (noting that "[i]t is enough to note . . . that the American people have considered the handgun to be the quintessential self-defense weapon" and "[w]hatever 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.").

[49] *Id.*

[50] *See id.* at 624-25 ("The traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense."); *see also* Jacobs, *supra* note 34, at 245 ("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."); Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 246 (2008) (describing *Heller* as "the most explicitly and self-consciously originalist opinion in the history of the Supreme Court."). Professor Sunstein also raises the question of how the "idea [of common use] bear[s] on modern questions, especially in light of the fact that the weapons at issue are necessarily modern ones." *Id.* at 257; *see also* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659 (2009) (noting that the "force" of originalist arguments was "dramatically in evidence" in *Heller*, and describing Justice Scalia's recounting of the Second Amendment's history as "the most thoroughgoing originalist opinion in the Court's

Importantly, Justice Scalia expressly rejected both the interest balancing and rational basis tests in dictum.[51] Interest balancing tests weigh the burden imposed by a weapons ban against the benefits that the ban seeks to achieve.[52] Justice Scalia rejected an interest-balancing test due to his belief in a strict adherence to longstanding traditions.[53] Specifically, the Court rejected an interest balancing test because it would have departed from the traditional standards of review employed by the Court.[54] The Court also rejected the use of the rational basis test.[55] The rational basis test, the lowest standard of review, only requires a regulation to rationally further a state's purpose.[56] The Court rejected the rational basis test on the grounds that any weapons ban would be able to pass such a lenient standard and would render any further analysis redundant.[57]

The *Heller* decision was the result of an originalist interpretation of the Second Amendment that delineates a presumption of constitutionality on

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history"). *But see* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009) (opining that *Heller* "represents a failure" in the way that it failed "to adhere to a conservative judicial methodology in reaching its decision" and that it "encourages Americans to do what conservative jurists warned for years they should not do: bypass the ballot and seek to press their political agenda in the courts.").

[51] *See Heller*, 554 U.S. at 628, n.27.

[52] *See* MEHR & WINKLER, *supra* note 10, at 2 ("[Interest balancing] would ask whether the burden on the individual is disproportionate to the law's benefits."). In his dissent in *Heller*, Justice Breyer advocated for an interest-balancing test. *Heller*, 554 U.S. at 681-82; *see also infra* Section III.A.

[53] *See Heller*, 554 U.S. at 626-27 ("[N]othing... should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places . . . or laws imposing conditions and qualifications on the commercial sale of arms."); *see also* Winkler, *supra* note 34, at 1564 (noting that the Court did not "give any substantive explanation for why the types of laws mentioned in the laundry list" were maintained as constitutional aside from labeling them as "longstanding"). According to Professor Winkler "it is entirely unclear why the mere fact that these laws have been on the books for a long time suffices to save them from legal defeat." *Id.*

[54] *Heller*, 554 U.S. at 634 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest balancing' approach.").

[55] *See id.* at 628, n.27 ("'[R]ational basis' is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right . . . If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant . . . and would have no effect.") (citations omitted); *see also* MEHR & WINKLER, *supra* note 10, at 1-2 ("[T]he Court rejected the rational basis review because that standard . . . already applies to all legislation and would render the Second Amendment irrelevant.").

[56] 16B AM. JUR. 2D *Constitutional Law* § 858.

[57] *Heller*, 554 U.S. at 628, n.27.

certain weapon restrictions.[58] Therefore, the *Heller* decision prohibited use of the interest balancing and rational basis tests and acknowledged that certain weapons are *per se* restricted because of longstanding traditions.[59] However, the Court declined to articulate a universal standard of review to apply to weapon bans.[60] Instead, the Court laid a foundation of dicta that, in one commentator's opinion, reached far beyond the scope of the immediate issue.[61] Nonetheless, *Heller* is still hailed as a triumph of originalism and its influence was prominent in *McDonald*, the Second Amendment incorporation case.[62]

B. *McDonald: The Incorporation of the Second Amendment*

In *McDonald*, the Supreme Court applied the Second Amendment to the states by incorporating it into the Due Process Clause of the Fourteenth Amendment.[63] In doing so, the Court made clear that the rights in the

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[58] *Id.* at 626-27 (stating that the presumptively lawful prohibitions the Court delineates are restrictions for felons, the mentally ill, possession in sensitive places, such as schools and government buildings, and qualifications on the commercial sale of weapons).

[59] *See id.* at 626-27, 634 (rejecting interest balancing and noting that since certain weapons have always been considered dangerous as a "longstanding tradition," those weapons should remain prohibited); *see also* MEHR & WINKLER, *supra* note 10, at 1-2 (noting that *Heller* delineated some outer limits for weapon prohibitions, like those presumptively unlawful, and that the Court rejected two standards of review, one being interest balancing).

[60] *Heller*, 554 U.S. at 634 ("The very enumeration of the right takes out of the hands of Government . . . the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."); *see also* MEHR & WINKLER, *supra* note 10, at 2 (noting that the Court was "unwilling[] to articulate a generally applicable standard of review or set of guidelines" for lower courts to use in evaluating weapon bans).

[61] *See* Lund, *supra* note 39, at 1356 (noting the Court's "astounding" use of dicta for "a wide range of gun control regulations that were not before the Court"); *see also* Nelson Lund, *Promise and Perils in the Nascent Jurisprudence of the Second Amendment*, 14 GEO. J.L. & PUB. POL'Y 207, 213 (2016) (observing that "Scalia endorses several forms of gun control that were not at issue in this case, without providing any relevant evidence about the original meaning of the Constitution and without even giving a reasoned explanation for his conclusions.").

[62] *See, e.g.*, Debra C. Weiss, *Second Amendment Ruling Is Justice Scalia's Originalism "Legacy"*, A.B.A.J. (June 27, 2008, 11:25 AM), http://www.abajournal.com/news/article/second_amendment_ruling_is_justice_scalias_originalism_legacy (declaring *Heller* as Justice Scalia's legacy and the influence he has had in terms of moving the law towards adherence to originalism); *see also* Lund, *supra* note 39, at 1557 (dubbing *Heller* as an "important test of originalism").

[63] McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) ("[A] provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. We therefore hold that the Due Process

Second Amendment would apply equally, and with full force, to the states as it would federally.[64] In *McDonald*, the Court affirmed both *Heller*'s review of the Second Amendment's historical background and *Heller*'s rejection of interest balancing.[65] *McDonald* also reaffirmed the presumptively lawful regulations delineated in *Heller*.[66] In upholding these presumptively lawful categories, Justice Alito assured that not every firearm regulation is in danger of being invalidated.[67] Nonetheless, the Court did not state *how* lower courts should go about analyzing weapon bans.[68] Therefore, *Heller* and *McDonald* left the lower courts without a concrete standard or test with which to evaluate weapon bans under the Second Amendment.[69]

Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.") (citations omitted).

[64] *Id.* Full incorporation is contrasted with partial incorporation, or no incorporation at all. The First, Second, and Fourth Amendments are fully incorporated. *See generally* Aguilar v. Texas, 378 U.S. 108 (1964) (incorporating the warrant requirement); Mapp v. Ohio, 367 U.S. 643, 656-57 (1961) (incorporating the freedom from unreasonable search and seizure); Everson v. Board of Educ., 330 U.S. 1, 7 (1947) (incorporating the guarantee against establishment of religion); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 266 (1940) (incorporating the free exercise of religion); DeJonge v. Oregon, 299 U.S. 353, 364 (1937) (incorporating the right to assembly and petition); Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating the freedom of speech). The Third Amendment has not been incorporated. *See generally* Engblom v. Carey, 677 F.2d 957, 961 (1982). The Fifth, Sixth, Seventh, and Eighth Amendments have been partially incorporated. *See generally* McDonald v. City of Chicago, 130 S.Ct. 3020, n.13 (2010) (rejecting the incorporation of the right to excessive fines); Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211, 219 (1916) (rejecting the incorporation of the right to jury in civil cases); Hurtado v. California, 110 U.S. 516, 538 (1884) (rejecting the incorporation of the right to indictment by a grand jury); Caudill v. Scott, 857 F.2d 344, 346 (6th Cir. 1988) (rejecting the incorporation of the right to jury select from residents of the location of the crime).

[65] *See McDonald*, 561 U.S. at 769-79, 785, 787 (noting that "[i]n *Heller* . . . we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing."); *Heller*, 554 U.S. at 634. The Court also upheld *Heller*'s interpretation of how the concept of a militia influences present-day weapon regulations, as well as *Heller*'s historical analysis of the Second Amendment. *Heller*, 554 U.S. at 603-05, 618-19.

[66] *McDonald*, 561 U.S. at 786 (listing the categories that the Court in *Heller* describe as presumptively unlawful and stating "[w]e repeat those assurances [of traditionally prohibited weapons] here.").

[67] *Id.* at 786 ("[I]ncorporation does not imperil every law regulating firearms.").

[68] *See* Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 724 (2012) ("[T]he Court shed no new light on exactly how judges should go about sorting valid gun laws from invalid ones. The Court, for example, did not talk about levels of scrutiny or other forms of assessment that might be used.").

[69] *See* Alexander C. Cooper, *Fully Loaded: An Alternative View of the Gun Control*

Heller and *McDonald* are the leading Supreme Court cases on weapon bans under the Second Amendment.[70] The cases are considered landmark cases because of their analyses of the Second Amendment.[71] Specifically, *Heller* reclassified the right to bear arms as a right that lies with individuals, not just the militia, and *McDonald* incorporated that right so as to apply to the states.[72] Furthermore, these cases represent the Court's most recent attempt to provide guidance to the lower courts by defining the scope of the Second Amendment and weighing weapon bans against the policy considerations for which the bans were created—an attempt that arguably falls short of actually assisting lower courts.

III. THE PUBLIC POLICY ANGLE: CONSIDERING FIREARM VIOLENCE IN THE UNITED STATES

A discussion of weapon regulation and the Second Amendment is inevitably linked to discussions about policy issues surrounding the United States' ongoing—and often tumultuous—relationship with firearms.[73] In general, the United States experiences firearm violence at a higher rate than other, comparable countries.[74] For example, the United States' rates in

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Debate, 8 ALB. GOV'T L. REV. 337, 366-67 (2015) ("Although considered landmark decisions of the Court on the issue of gun control, the decisions in *Heller* and *McDonald* provide no definite guidance on how far state and federal governments can regulate the right to keep and bear arms without infringing on an individual's rights."); *see also* MEHR & WINKLER, *supra* note 10, at 1 ("In *Heller* and *McDonald* . . . the Supreme Court declined to establish a clear standard or test for the Second Amendment."); Lindsay Colvin, *History,* Heller, *and High-Capacity Magazines: What Is the Proper Standard of Review for Second Amendment Challenges?*, 41 FORDHAM URB. L.J. 1041, 1054 (2014) ("Justice Alito [in *McDonald*] failed to articulate a precise standard of review for modern firearm legislation.").

[70] *See* Jacobs, *supra* note 34; Rostron, *supra* note 68, at 724 (describing *McDonald*'s effect of incorporating the Second Amendment).

[71] *See generally* Rostron, *supra* note 68, at 705; Sunstein, *supra* note 50, at 246. These are just two examples of scholars who recognize and treat *Heller* and *McDonald* as landmark cases.

[72] *See McDonald*, 561 U.S. at 786; Jacobs, *supra* note 34.

[73] *See Heller*, 554 U.S. 570, 636 (2008) ("We are aware of the problem of handgun violence in this country."); *see also id.* at 694 (Breyer, J., dissenting) (discussing the context within which D.C.'s handgun ban was enacted, like noting that guns were responsible for 69 deaths in the country each day) (internal quotations omitted).

[74] *See generally* Erin Grinshteyn & David Hemenway, *Violent Death Rates: The US Compared with Other High-Income OECD Countries, 2010*, 129 AM. J. MED. 266, 268 (2016) (comparing mortality data among high-income countries involving firearm-related deaths, breaking the statistics down by type of death, gender, race, and age). Among the other countries studied were Australia, Canada, France, Germany, Japan, Korea, New Zealand, and Spain. *Id.* at 271. The types of violence ranged from firearm homicide, firearm suicide, unintentional firearm death, and undetermined firearm death. *Id.* at 269-70.

terms of population for firearm-related deaths, such as homicide, suicide, and unintentional deaths, are higher than other countries' rates for firearm-related deaths.[75] The statistics for firearm-related deaths among children is even more alarming; data suggests that nineteen children per day die, or are medically treated in an emergency room, because of incidents involving firearms.[76] While these statistics do not differentiate between the types of firearm used, the numbers illustrate the precarious environment in which weapon regulations are promulgated and, later, litigated.[77]

Semi-automatic weapons, in particular, usually play a role in mass shootings.[78] While the definition of "mass shooting" can vary—the Congressional Research Service defines it as a shooting where the gunman indiscriminately kills four or more people in a public space—even under a conservative definition the number of mass shootings in 2017 is alarming.[79] According to one estimate, there have been eight mass shootings between January 2017 and June 2017, which is equivalent to about 1.3 mass shootings per month.[80] These numbers only increase as the definition of

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[75] *Id.* The U.S. had a firearm homicide rate that was seven times higher than Canada, which had the second-highest rate. *Id.* at 269. The U.S. took first place in all categories of firearm-related deaths studied. *Id.* The U.S. firearm suicide rate was two times higher than its runner-up (Finland). *Id.* at 269-70.

[76] *See* Katherine Fowler et al., *Childhood Firearm Injuries in the United States*, 140 PEDIATRICS 1, 6 (2017) (examining firearm-related deaths and injuries among U.S. children from 2012-2013, examining patterns such as intent, demographics, location, race, and age).

[77] A further limitation is that the available data is limited and from years 2003-2013. *Id.* at 8-9. However, the study does mention the societal influence surrounding the raw data, such as poverty, education levels, and family life—this further illustrates the complexities that surround firearm legislation. *Id.* at 8.

[78] *See* Christopher Ingraham, *Assault Rifles Are Becoming Mass Shooters' Weapon of Choice*, WASH. POST (June 12, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/06/12/the-gun-used-in-the-orlando-shooting-is-becoming-mass-shooters-weapon-of-choice/?utm_term=.72be4d357595 (citing research that has been complied regarding the popular use of assault weapons in recent shootings).

[79] *Compare* JEROME P. BJELOPERA ET AL., CONG. RESEARCH SERV., PUBLIC MASS SHOOTINGS IN THE UNITED STATES: SELECTED IMPLICATIONS FOR FEDERAL PUBLIC HEALTH AND SAFETY POLICY 4 (2013) (defining "public mass shooting" as "incidents occurring in relatively public places, involving four or more deaths—not including the shooter(s)—and gunmen who select victims somewhat indiscriminately." The violence here is not a "means to an end," like violence involved in a bank robbery), *with General Methodology*, GUN VIOLENCE ARCHIVE (Jul. 6, 2017), http://www.gunviolencearchive.org/methodology (broadly defining "mass shooting" as an incident where four or more individuals are shot or killed in a single event in the same general location and time).

[80] Nancy Coleman & Sergio Hernandez, *Even Under the Narrowest Definition, There's Been at least 1 Mass Shooting every Month This Year*, CNN (June 15, 2017),

"mass shooting" is broadened to include shootings where four or more people are killed or wounded. Under this broadened definition of "mass shooting," between January 2017 and June 2017, up to 154 mass shootings, or 6.7 shootings per week, occurred.[81] Broadening the temporal and geographic scope to include mass shootings internationally between 1966 and 2012, the United States experienced 31% of all mass shootings.[82]

According to one commentator, a contributing factor to these statistics is comparative leniency of firearm laws in the United States.[83] Currently, it is difficult to determine whether high rates of firearm violence are caused by lax government regulation or, conversely, by attempts to regulate firearms, which aggravate violence.[84] Nonetheless, the statistics illustrate Justice Breyer's recurring remarks regarding the unique policy implications that are involved in creating and evaluating weapon bans.[85] Given the potential for

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http://www.cnn.com/2017/06/15/health/mass-shootings-in-2017-trnd/index.html.

[81] *Id.* (noting the broad definition of "mass shootings" where four or more people are wounded or killed).

[82] *Id.* (citing Adam Lankford, *Public Mass Shooters and Firearms: A Cross-National Study of 171 Countries*, 31 VIOLENCE & VICTIMS 187 (2016)).

[83] Mark B. Melter, *The Kids Are Alright; It's the Grown-Ups Who Scare Me: A Comparative Look at Mass Shootings in the United States and Australia*, 16 GONZ. J. INT'L L. 33, 34 (2012) ("Over the past fifty years, the global community has increasingly viewed mass shootings as a problem unique to the United States.").

[84] Volokh, *supra* note 11, at 1465 ("The difficulty is that we often won't know if the proposed law is really necessary to reduce various dangers. . . . There are no controlled experiments that can practically and ethically be run."). According to Professor Volokh, the idea that gun restrictions could cause more violence is based on the argument that "gun restrictions largely won't disarm those who misuse guns" and that "any possible slight decline in injuries caused by people who do comply with gun laws . . . will be more than offset by the increase in crime and injury stemming from lost opportunities for effective self-defense." *Id.*

[85] *See* McDonald v. City of Chicago, 561 U.S. 742, 916 (2010) (Breyer, J., dissenting). Justice Breyer advocated for the Court to consider contemporary factors when making weapon ban determinations, rather than solely considering the history of the Second Amendment:

[T]he Court should not only look to history alone but to other factors as well—above all, in cases where the history is so unclear that the experts themselves strongly disagree. It should, for example, consider the basic values that underlie a constitutional provision and their contemporary significance. And it should examine as well the relevant consequences and practical justifications that might, or might not, warrant removing an important question from the democratic decisionmaking process.

Id.; *see also* District of Columbia v. Heller, 554 U.S. 570, 682 (2008) (Breyer, J., dissenting). Justice Breyer evaluated the District of Columbia's handgun regulation by way of interest balancing, which highlights the importance of weighing governmental interest with the burden imposed by the ban:

A legislature could reasonably conclude that the law will advance the goals of great public

weapon regulation to incite violence, the tragic mass shootings, and the ferocity with which citizens cling to their opinions on the issue, the government has many perspectives to balance while constructing regulations that do not infringe on Second Amendment rights.[86] An evaluative tool that accounts for these complexities is arguably beyond the scope of the traditional standards of review courts employ, which is why each court has seemingly established its own technique.[87]

IV. THE PROLIFERATION OF TESTS AMONG THE CIRCUIT COURTS

Since the Supreme Court did not establish what standard should apply to weapon ban challenges, the lower courts have adopted a variety of standards.[88] While many lower courts apply different standards, they have all generally avoided applying strict scrutiny.[89] Most lower courts apply some variation of intermediate or heightened scrutiny in an effort to fit a Second Amendment analysis into a traditional scrutiny framework.[90]

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importance, namely, saving lives, preventing injury, and reducing crime. The [District's regulation] is tailored to the urban crime problem in that it is local in scope . . . the law concerns handguns, which are specially linked to urban gun deaths and injuries, and which are the overwhelming favorite weapon of armed criminals; at the same time, the law imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the Second Amendment was adopted. In these circumstances, the District's law falls within the zone that the Second Amendment leaves open to regulation by legislatures.

Id.

[86] *See* Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What's A Court to Do Post-*McDonald*?*, 21 CORNELL J.L. & PUB. POL'Y 489, 521 (2011) (describing a "tripartite" of interests that accompany Second Amendment challenges, which are "the individual's interest to keep and bear arms; the state's interest in protecting human life that may be endangered by guns; and the state's interest in safeguarding the health and welfare of individuals").

[87] *See id.*; *see also* Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 957 (1994) (discussing how analyzing constitutional rights requires "more flexibility than the categorical definition of rights protected by strict scrutiny review provides").

[88] *See* Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U.L. REV. 1187, 1190-91 (2015) ("In Heller, the Court pointedly refused to adopt any standard of scrutiny by which a challenged gun-control law could be tested to determine if it was sufficiently justified"); *see also supra* text accompanying note 69.

[89] *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 694 (2007) (discussing standard of reviews for other Amendments in the Bill of Rights, specifically noting that "we might conclude that textual grounding in the Bill of Rights creates a presumption against strict scrutiny."). Professor Winkler goes on to say that "courts do not and have never applied strict scrutiny consistently" and has "never been accepted in practice by the Supreme Court." *Id.*

[90] *See Heller*, 554 U.S. 570, 626-27 (2008); *see also infra* Sections III.B-E (examining

A. *Justice Breyer's Advocacy for Interest Balancing*

Justice Breyer advocated twice for the Court to apply interest balancing to Second Amendment weapon ban analyses, which would weigh the burden imposed on the individual by the ban against the public safety benefits the law seeks to achieve.[91] In *Heller*, Justice Breyer's interpretation of how the handgun ban interacted with the Second Amendment deviated from the majority on two points.[92] First, Justice Breyer argued that the Second Amendment was intended to protect the interests of a militia, not those of an individual for self-defense.[93] Second, he argued that Second Amendment protection is not absolute.[94] By this, Justice Breyer meant that the Second Amendment prioritizes government regulation where the government has an important interest.[95] In order for the majority's view to be correct, the majority would have to prove that the regulation is unreasonable under the terms of the Second Amendment by showing that it fails to regulate the important interests for which it was enacted.[96] Justice Breyer considered the government's interest as an important consideration because of the public policy concerns attached to the Second Amendment, such as injury, death, crime, and violence.[97] At its core, Justice Breyer's argument in defense of interest balancing is that firearm regulation is too burdened with policy implications for a court to

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the four different tests applied by the circuit courts).

[91] *See id.* at 681, 687 (Breyer, J., dissenting) ("The law at issue here, which in part seeks to prevent gun-related accidents, at least bears a 'rational relationship' to that 'legitimate' life-saving objective."). Justice Breyer's dissent focuses heavily on other states' weapon regulations and the motives behind those regulations, emphasizing the interests the regulations seek to serve. *See id.* at 683-87.

[92] *See id.* at 681.

[93] *Id.* ("[S]elf-defense alone, detached from any militia-related objective, is not the Amendment's concern."); *see also* Lawrence Rosenthal & Joyce L. Malcolm, McDonald v. Chicago*: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U.L. REV. 437, 445 (2011) (advocating for a closer reading of the phrase "well-regulated militia," and stating that "[t]he Court breezed past the adjective 'well-regulated' . . ."). Rosenthal further reasoned that if by "militia" the Framers meant "anyone capable of bearing arms," then it suggests a "comprehensive regulation of all who possess and carry firearms," which is in line with what Justice Breyer takes issue with in the majority view. *Id.*

[94] *Heller*, 554 U.S. at 681 ("The second independent reason is that the protection the Amendment provides is not absolute.").

[95] *See id.*

[96] *See id.* ("The Amendment permits government to regulate the interests that it serves. Thus, irrespective of what those interests are—whether they do or do not include an independent interest in self-defense—the majority's view cannot be correct unless it can show that the District's regulation is unreasonable or inappropriate in Second Amendment terms. This the majority cannot do.").

[97] *See* McDonald v. City of Chicago, 561 U.S. 742, 916 (2010) (Breyer, J., dissenting).

"presume either constitutionality (as in rational basis review) or unconstitutionality (as in strict scrutiny)."[98] In addition to explicitly stating his preference for interest balancing, Justice Breyer went on to explain that when there are extensive fact-sensitive inquiries and policy considerations, the Court will usually weigh the burden a regulation poses against the protected interest and give more deference to a legislature's judgment.[99] Justice Breyer stressed the importance of the Court balancing experience and logic when making its decisions.[100] Specifically, he noted that since the Supreme Court has had little experience in weighing such fact-sensitive interests, the Supreme Court should give greater weight to approaches taken by the lower courts, as they have greater experience adjudicating cases with such interests.[101]

Justice Breyer's second campaign for an interest balancing test appeared in *McDonald*'s dissent.[102] In *McDonald*, Justice Breyer urged the Court to consider the values underlying constitutional provisions and their importance in modern society.[103] Furthermore, Justice Breyer rejected the "judicial homilies" that the Court used in its incorporation methodology.[104]

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[98] *See Heller*, 554 U.S. at 689. According to Justice Breyer, interest balancing underlies the application of any scrutiny test. He stated:

[A]ny attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interest protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.

Id. Interestingly, Justice Breyer's conclusion contradicts Justice Scalia's comment that interest balancing has never been a method of evaluating constitutionality. Specifically, Justice Breyer states that courts engage in interest-balancing all the time because it is implicated in their scrutiny test, and therefore is just as appropriate as any other method employed by the Court.

[99] *See id.* at 689-90.

[100] *See id.* at 690-91 ("Experience as much as logic has led the Court to decide that in one area of constitutional law or another the interests are likely to prove stronger on one side of a typical constitutional case than on the other. Here we have little prior experience. Courts that *do* have experience in these matters have uniformly taken an approach that treats empirically based legislative judgment with a degree of deference.").

[101] *Id.*

[102] *See McDonald*, 561 U.S. at 912 (Breyer, J., dissenting).

[103] *See generally id.* (urging the Court to consider contemporary factors when evaluating weapon bans).

[104] *See id.* at 924. Justice Breyer rejects the incorporation methodology used by the majority, and urges for a less categorical method for evaluating Second Amendment challenges:

In answering such questions judges cannot simply refer to judicial homilies, such as Blackstone's 18th-century perception that a man's home is his castle. . . . [T]he Court could lessen the difficulty of the mission it has created for itself by adopting a jurisprudential

He explained that because the Second Amendment implicates unique policy interests, the problems judges often face involve empirical questions that are difficult to determine.[105] Consequently, he argued, interest balancing was the appropriate test in evaluating firearm regulations.[106]

Contrary to Justice Breyer's dissent, which advocated for interest balancing,[107] Justice Scalia's majority opinion in *Heller* lauded the use of originalism and the consideration of historical contexts as more reliable than judicial interest balancing.[108] Specifically, the majority opinion warned that interest balancing would lead to inconsistent results because it allocates too much discretion to judges.[109] While Justice Scalia's interpretation of the Second Amendment ultimately prevailed and provided the legal basis for the majority opinion, lower courts have nevertheless relied on Justice Breyer's dissent when evaluating weapon regulations.[110] In fact, interest balancing is widely used among the various circuit courts,

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approach similar to the many state courts that administer a state constitutional right to bear arms. Rather, the Court has haphazardly created a few simple rules.

Id. at 924-25.

[105] *See id.* at 923. Justice Breyer lists a variety of empirical questions that he does not think judges will be able to answer:

Does the right to possess weapons for self-defense extend outside the home? To the car? To work? What sort of guns are necessary for self-defense? Handguns? Rifles? Semiautomatic weapons? When is a gun semi-automatic? What are different kinds of weapons likely needed? Does time of day matter? Does the presence of a child in the house matter? Does the presence of a convicted felon in the house matter? Do police need special rules permitting patdowns designated to find guns? When do registration requirements become severe to the point that they amount to an unconstitutional ban?

Id. at 923-24.

[106] *See id.* at 916, 921-23.

[107] *See id.*

[108] *Id.* at 720 ("Scalia makes clear that the analysis should be primarily historical in nature. For Scalia, the original meaning of the right and traditional understandings that surrounded it . . . cannot be trumped by the whims of contemporary cost-benefit policy analysis.").

[109] District of Columbia v. Heller, 554 U.S. 570, 634 (2008). In addressing Justice Breyer's interest balancing in his majority opinion, Justice Scalia stated, "[Justice Breyer] proposes . . . none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering 'interest balancing inquiry.'" *Id.* Justice Scalia goes on to say that "[a] constitutional guarantee subject to future judge's assessments of its usefulness is no constitutional guarantee at all." *Id.*

[110] *See* Rostron, *supra* note 68, at 720-21 ("Scalia, not Breyer, was able to garner five votes in *Heller*, and thus a significant initial dispute about the Second Amendment was resolved."); *id.* at 756 ("[T]he lower court decisions and the analytical approach that has begun to crystallize in them reflect Justice Breyer's sentiments about Second Amendment claims far more than those of Justice Scalia or other members of the Court who formed the majorities in *Heller* and *McDonald*.").

usually in combination with intermediate scrutiny or the common use test delineated in *Heller*.[111]

B. *Intermediate Scrutiny and Marzzarella's Two-Step Analysis*

Given the uncertainty surrounding standards of review after *Heller* and *McDonald*, the Third Circuit extracted two prongs from *Heller* to evaluate the constitutionality of weapon regulations under the Second Amendment in *United States v. Marzzarella*.[112] First, the Third Circuit asked whether the challenged law regulates activity falling within the scope of the Second Amendment.[113] If the answer to this question was "no," then the inquiry ended there; if not, the inquiry continued to the next prong.[114] The second inquiry involved an evaluation of the challenged law under some form of scrutiny analysis; if the regulation passes the scrutiny test applied, then it was constitutional.[115]

As applied, the analysis was comparable to intermediate scrutiny.[116] The Third Circuit's analysis took into account both traditionalist notions of Second Amendment protection and interest balancing by using a version of the common use test from *Heller* while also evaluating the government's interests in enacting the regulation.[117] Under this standard, the Third

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[111] *See Heller*, 554 U.S. at 627 (describing and implementing the common use test); *see also infra* Sections II.B-E (discussing the various circuit court analyses in depth).

[112] *See* United States v. Marzzarella, 614 F.3d 85, 89 (3rd Cir. 2010) ("As we read [*Heller*], it suggests a two-pronged approach to Second Amendment challenges."). At issue in this case was whether defendant Marzzarella had a right under the Second Amendment to keep a handgun with an obliterated serial number. *Id.* at 88. The Court rejected Marzzarella's assertion. *Id.* at 87. Notably, the Third Circuit mentioned the lack of guidance from *Heller* when it stated, "*Heller* did not prescribe the standard applicable," and "much of the scope of the right [to bear arms] remains unsettled." *Id.* at 92, 95.

[113] *Id.* at 89 ("First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee.").

[114] *See id.* (explaining that if the law does not impose a burden on conduct falling within the Second Amendment, "our inquiry is complete" and ends with the first prong).

[115] *See id.* ("[W]e evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.").

[116] *See id.* at 97 (determining that the regulation "should merit intermediate, rather than strict, scrutiny"); *see also* Colvin, *supra* note 69, at 1058 (noting that the two-step test in *Marzzarella* "combines both a historical *and* an interest-balancing inquiry"); Sobel, *supra* note 86, at 514 (noting that courts that use *Marzzarella*'s two-prong test "are ultimately making an intermediate scrutiny evaluation")

[117] *Marzzarella*, 614 F.3d at 95. The Court stated that Marzzarella's right to self-defense is not impaired because "the presence of a serial number does not impair the use or functioning in anyway." *Id.* at 94. The Court went on to say that "[b]ecause a firearm with a serial number is equally effective as a firearm without one, there would appear to be no compelling reason why a law-abiding citizen would prefer an unmarked firearm." *Id.* at 95

Circuit upheld the weapon regulation at issue.[118] The Fourth,[119] Fifth,[120] Sixth,[121] and Tenth Circuits[122] have followed the Third Circuit's approach in *Marzzarella*. Although the majority of circuit courts have adopted the *Marzzarella* approach, the other circuit courts that have not specifically adopted *Marzzarella* have nonetheless similarly endeavored to make a traditional standard of review compatible with the interests behind weapon regulations for an appropriate Second Amendment analysis.[123]

C. *Two Tests from the Seventh Circuit: Chief Judge Easterbrook Versus Judge Sykes*

Even though the Seventh Circuit decided *Skoien* and *Ezell* within one year of each other, the two cases produced two different Second Amendment evaluation methods.[124] In beginning his analysis in *Skoien*, Chief Judge Easterbrook observed that the lower courts read too much into the dicta of *Heller*.[125] He went on to note that *Heller* is not a statute, so courts should not stringently adhere to it like a statute.[126] Additionally,

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The Court speculated that the preference of an unmarked firearm would be "unusual and dangerous" because firearms without serial numbers would more likely be used in a crime. *Id.*

[118] *Id.* at 98 (stating that the regulation "serves a law enforcement interest in enabling the tracing of weapons via their serial numbers," and that "preserving the ability of law enforcement to conduct serial number tracing . . . constitutes a substantial or important interest").

[119] *See generally* Wollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013). This case is significant because, while following the *Marzzarella* test, the same court three years later reached opposing conclusions: one supporting the strict scrutiny interpretation, and another (from the dissent) stating how this case specifically rejects strict scrutiny. *See* Kolbe v. Hogan, 813 F.3d 160, 182, 197 (4th Cir. 2016).

[120] *See generally* Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185 (5th Cir. 2012).

[121] *See generally* United States v. Greeno, 679 F.3d 510 (6th Cir. 2012).

[122] *See generally* United States v. Reese, 627 F.3d 792 (10th Cir. 2010).

[123] *See infra* Sections III.C-E (discussing the other approaches that the Seventh, Ninth, and D.C. Circuit Courts have taken, rather than the Third Circuit's *Marzzarella* approach).

[124] *See generally* Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011); United States v. Skoien, 614 F.3d 638 (7th Cir. 2010); *see also* Rostron, *supra* note 68, at 743-46 (describing *Skoien* and *Ezell* and the tests employed in each case).

[125] *See Skoien*, 614 F.3d at 640 (stating that *Heller* should not be treated "as containing broader holdings than the Court set out to establish," which was the right of self-defense.). The Court goes on to note that other entitlements that may exist under the Second Amendment were "left open." *Id.* At issue in *Skoien* was a statute making it unlawful to possess a firearm after having been convicted of a misdemeanor of domestic violence. *Id.* at 639.

[126] *Id.* at 640 (stating that *Heller* is "not a comprehensive code" and that "[j]udicial

Chief Judge Easterbrook declined to consider longstanding tradition as a factor in determining the regulation's validity because he thought it was "weird" that a regulation would be lawful simply because of its own lasting existence.[127] Through that lens, the Seventh Circuit upheld the regulation at issue and determined that intermediate scrutiny should be used to evaluate the regulation.[128] However, Judge Sykes remained unconvinced, stating in his dissent that the *en banc* majority's interpretation of *Heller* was oversimplified and incomplete and that the *en banc* majority did not explicitly state a standard of evaluation.[129]

One year after the Seventh Circuit considered *Skoien*, the Seventh Circuit featured Judge Sykes's interpretation of weapon ban analyses in the *Ezell v. City of Chicago* majority opinion.[130] In *Ezell v. City of Chicago*, the Seventh Circuit interpreted *Heller* and *McDonald* in a unique way to derive its own test for evaluating firearm bans.[131] According to Judge Sykes, the first question to address in evaluating firearm bans is whether the law at issue regulates conduct that the framers and ratifiers intended to protect under the Second Amendment.[132] If the Court answers the first question

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opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration").

[127] *Id.* at 641 ("It would be weird to say that [the regulation] is unconstitutional in 2010 but will become constitutional by 2043, when it will be . . . 'longstanding.'").

[128] *See id.* The Seventh Circuit stated:

> The United States concedes that some form of strong showing ('intermediate scrutiny,') . . . is essential, and that [the regulation] is valid only if substantially related to an important government objective. . . . The concession is prudent, and we need not get more deeply into the 'levels of scrutiny' quagmire, for no one doubts the goals of [the regulation], preventing armed mayhem, is an important governmental objective. Both logic and data establish a substantial relation between [the regulation] and this objective.

Id. at 641-42.

[129] *See id.* at 647.

[130] *See generally* Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011). The regulation at issue in this case required one hour of range training before an individual could own a gun, while also banning all firing ranges. *Id.* at 689-90. This was considered a broad and sweeping regulation, and failed under the test that Judge Sykes constructed. *Id.* at 711.

[131] *See* Nelson Lund, *Second Amendment Standards of Review in a* Heller *World*, 39 FORDHAM URB. L.J. 1617, 1633 (2012) (noting that the *Ezell* court "offer[ed] a more detailed and somewhat different interpretation of *Heller* and *McDonald*" than other circuits).

[132] *See Ezell*, 651 F.3d. at 702. Judge Sykes stated:

> [I]f the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment . . . then the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review.

Id. at 702-03.

positively, then the Court considers to the second prong of the inquiry, asking whether the government has a strong enough justification for regulating the Second Amendment right.[133]

Interestingly, Judge Syke's analysis borrowed reasoning and logic usually applied to First Amendment claims.[134] Under this approach, the rigor of the review is determined by evaluating how close the ban comes to infringing on a core Second Amendment right.[135] Under the facts in *Ezell*, the regulation at issue more closely implicated the core Second Amendment right to bear arms than the regulation at issue in *Skoien*, which triggered what one commentator called an "aggressive attitude . . . that *almost* [rose] to . . . strict scrutiny."[136] Therefore, the Seventh Circuit supplied two other permissible tests under *Heller*—one turning again to intermediate scrutiny and the other stemming from the First Amendment.[137]

D. *Heller II and its Derailed Two-Step Analysis*

After the Supreme Court struck down the District of Columbia's ban in *Heller*, the D.C. Circuit Court evaluated the amended regulation in *Heller II*.[138] *Heller II*'s analysis is notable because of the assumptions made by

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[133] *See id.* at 703 ("If the government cannot establish [the first prong]—if the historical evidence is inconclusive or suggests that the regulated activity is *not* categorically unprotected—then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights.").

[134] *See, e.g.*, Lund, *supra* note 131, at 1635 ("Judge Sykes insisted on the kind of rigor that courts routinely demand in First Amendment cases."). Professor Lund states that "she distilled an approach" to the Second Amendment. *Id.* at 1634.

[135] *See Ezell*, 651 F.3d at 703. Judge Sykes states that this approach requires "the court to evaluate the regulatory means the government has chosen and the public-benefits end it seeks to achieve. Borrowing from the Court's First Amendment doctrine, the rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." *Id.*

[136] Rostron, *supra* note 68, at 754 (emphasis added). Judge Sykes stated:

> In *Skoien* we required a "form of strong showing"—a/k/a "intermediate scrutiny"—in a Second Amendment challenge . . . Here, in contrast, the plaintiffs *are* "law-abiding, responsible citizens" whose Second Amendment rights are entitled to full solicitude under *Heller*, and their claim comes much closer to implicating the core of the Second Amendment right.

Id. at 708 (quoting United States v. Skoien, 614 F.3d 638, 708 (7th Cir. 2010)).

[137] *See generally Ezell*, 651 F.3d at 701 (noting that *Heller* "was not explicit about how Second Amendment challenges should be adjudicated"). Using this case as an example of how the lack of specificity in *Heller* is used in a variety of ways, Judge Sykes went on to pick out two inquiries from *Heller* as she understood them to become the basis of her unique test. *Id.* at 701-03.

[138] *See generally* Heller v. District of Columbia (*Heller II*), 670 F.3d 1244 (D.C. Cir. 2011). The District of Columbia's regulation required the registration of firearms and

the D.C. Circuit Court in its use of the two-step test introduced in *Heller*.[139] Instead of evaluating whether the weapon at issue is in common use and then considering the extent to which the regulation burdens the right, the D.C. Circuit assumed that the Second Amendment protects assault weapons, including semi-automatic weapons and large-capacity magazines.[140] The D.C. Circuit based its assumption on its own notion that these weapons are currently in common use.[141]

Having made the assumption that semi-automatic weapons are protected, the D.C. Circuit did not flesh out the common use analysis, and instead moved on to select the level of scrutiny by examining the nature of the weapons at issue.[142] The D.C. Circuit considered handguns, like in *Heller*, closer to the core right of the Second Amendment than semi-automatic weapons[143] and therefore used intermediate scrutiny to examine and uphold the semi-automatic weapon ban.[144] The Second Circuit followed this approach.[145] Even given the unique approach that the D.C. and Second

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prohibited the registration of both assault weapons and the possession of large-capacity magazines. *Id.* at 1247-48. Plaintiffs argued that the District of Columbia's legislature did not have authority to make such a law, and that if the legislature did, then the law violated the Second Amendment. *Id.* The Court ultimately upheld the District of Columbia's law. *Id.*

[139] *See* Jacobs, *supra* note 34, at 254.

[140] *See Heller II*, 670 F.3d at 1261. When compared to the first sentence of the preceding paragraph in the decision, the Court's assumption in the first prong of the test is even more apparent. *Id.* That sentence states, "We think it clear enough in the record that semi-automatic rifles and large-capacity-magazines are indeed in 'common use.'" *Id.*

[141] *See id.*; Jacobs, *supra* note 34, at 254 (noting how the Court brushed passed the "common use" prong by assuming certain prohibitions did infringe on Second Amendment rights and moved straight to selecting a scrutiny level).

[142] After the Court made the common use determination, it went on to state:

> Nevertheless, based upon the record as it stands, we cannot be certain whether these weapons are commonly used or are useful specifically for self-defense or hunting and therefore whether the prohibitions of certain semi-automatic rifles and magazines holding more than ten rounds meaningfully affect the right to keep and bear arms. We need not resolve that question, however, because even assuming they do impinge upon the right protected by the Second Amendment, we think intermediate scrutiny is the appropriate standard of review and the prohibitions survive that standard.

Id.

[143] *See id.* at 1261-62 ("Unlike the law held unconstitutional in [*Heller*], the laws at issue here do not prohibit the possession of 'the quintessential self-defense weapon,' to wit, the handgun.") (quoting District of Columbia v. Heller, 554 U.S. 570, 629 (2008)).

[144] *See id.* at 1264 (noting that intermediate scrutiny requires a showing of a substantial relationship or a reasonable 'fit' between the prohibition on assault weapons and large-capacity magazines and the interests of controlling crime, and that the District "has carried its burden of showing a substantial relationship" and therefore satisfies intermediate scrutiny).

[145] *See generally* N.Y. State Rifle & Pistol Ass'n. Inc., v. Cuomo, 804 F.3d 242, 257

Circuit adopted in assuming a weapon's commonality, both courts ultimately arrived at the same conclusion as the other circuit courts—that intermediate scrutiny is the appropriate standard of review.[146]

E. *Nordyke and its Substantial Burden Test*

In *Nordyke v. King*, the Ninth Circuit derived a substantial burden test from *Heller* to evaluate weapon bans.[147] The Ninth Circuit considered strict scrutiny as inconsistent with *Heller* and declined its use, reasoning that strict scrutiny would employ the very interest balancing that the majority condemned.[148] Consequently, the Ninth Circuit applied a substantial burden test that asked whether the law at issue left sufficient alternatives that preserved individuals' Second Amendment right.[149] Under the Ninth Circuit's analysis, judges' decisions are more consistent because the analysis reduces the empirical judgment calls that the strict scrutiny test requires.[150] Furthermore, according to one commentator, the substantial

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(2d Cir. 2015) ("In the absence of clearer guidance from the Supreme Court . . . we follow the approach taken by the District Courts and by the D.C. Circuit in *Heller II* and assume for the sake of argument that these 'commonly used' weapons and magazines are also 'typically possessed by law-abiding citizens for lawful purposes.'").

[146] *See supra* text accompanying note 140. *Cf. supra* Sections III.B-C (illustrating that although there exists great variation in the circuit courts' analyses, they all have resulted in the application of either intermediate scrutiny or something very close to it).

[147] *See* Nordyke v. King, 644 F.3d 776, 784 (9th Cir. 2011) ("Just as important as what *Heller* said about a government-interest approach is what *Heller* did not say. Nowhere did it suggest that some regulations might be permissible based on the extent to which the regulation furthered the government's interest in preventing crime.").

[148] *Id.* at 784. The Ninth Circuit emphasized the inconsistency of strict scrutiny application with *Heller*'s conclusions, stating:

> [A]pplying strict scrutiny to every gun-control regulation would be inconsistent with *Heller*'s reasoning. Under the strict scrutiny approach, a court would have to determine whether each challenged gun-control regulation is narrowly tailored to a compelling governmental interest (presumably, the interest in reducing gun crimes). But *Heller* specifically renounced an approach that would base the constitutionality of gun-control regulations on judicial estimations of the extent to which each regulation is likely to reduce such crime.

Id.; *see also* Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1379 (2009) (arguing that "it is doctrinally impossible to conclude that strict scrutiny governs Second Amendment claims, while also upholding the four Heller exceptions").

[149] *Nordyke*, 644 F.3d at 787 ("[W]e should ask whether the restriction leaves law-abiding citizens with reasonable alternative means for obtaining firearms sufficient for self-defense purposes."); *see also* Sobel, *supra* note 86, at 516 (explaining the substantial burden test employed by the Ninth Circuit).

[150] *See Nordyke*, 644 F.3d at 784 ("We are satisfied that a substantial burden framework will prove to be far more judicially manageable than an approach that would

burden test protects the core rights of the Second Amendment, which *Heller* sought to protect, while acknowledging that some regulation is still necessary.[151] Although the Ninth Circuit did not establish which heightened level of scrutiny applied to firearm regulations, its version of a substantial burden test serves as another example of a weapon regulation analysis derived from *Heller* and *McDonald*.[152]

Following *Heller* and *McDonald*, circuit courts lacked specific guidance on how to analyze weapon regulations under the Second Amendment.[153] Consequently, circuit courts utilized dicta scattered throughout *Heller* to piece together standards of review that accommodate the *Heller* decision and state governments' public safety efforts.[154] Accordingly, circuit courts have been hesitant to apply strict scrutiny.[155] Instead, the courts have crafted tests that allow for a certain degree of interest balancing and employ characteristics of intermediate scrutiny, a traditional scrutiny test permissible under *Heller*.[156] Circuit courts employed myriad tests until *Kolbe*.[157] In *Kolbe,* the Third Circuit used the gaps in *Heller* to apply strict scrutiny and struck down a weapon regulation that otherwise would have been be upheld.[158]

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reflexively apply strict scrutiny to all gun-control laws. As *McDonald* recognized, 'assess[ing] the costs and benefits of firearms restrictions' requires 'difficult empirical judgments in an area in which [judges] lack expertise.'") (quoting McDonald v. City of Chicago, 561 U.S. 742, 791 (2010)).

[151] Sobel, *supra* note 86, at 517. Sobel considers this a better analysis, especially considering what the leading cases have not said: "*Heller* and *McDonald* have already identified the core protection and the presumptively lawful exceptions. *Id.* at 518-19. Therefore, the real question today concerns the Second Amendment boundaries." *Id.*

[152] *Id.* at 516 (explaining what *Nordyke* did establish. Sobel argues that *Nordyke* is valuable because it sets a "framework to first determine whether a substantial burden exists and, if so, then to apply heightened scrutiny," but it does not state "what heightened standard should be applied").

[153] *See supra* text accompanying note 69.

[154] *See* MEHR & WINKLER, *supra* note 10, at 9; Sobel, *supra* note 86, at 492-93 (demonstrating the efforts lower courts are taking post *Heller* and *McDonald.*). Professor Sobel states that there were "[m]ore than 190 judicial decisions" citing to *McDonald* within the fourteen months after its decision, and that "lower courts are presently applying different standards of review for Second Amendment cases." *Id.*

[155] *See generally id.* (noting the seemingly great deference that lower courts have given lawmakers when it comes to deciding whether to uphold or strike down weapon regulations).

[156] *See generally* Rostron, *supra* note 68 (arguing that courts have turned to the traditional levels of scrutiny to analyze Constitutional rights).

[157] *See generally* MEHR & WINKLER, *supra* note 10, at 9 (noting the "wide variety of approaches" used by the lower courts "to determine the constitutionality of gun control").

[158] *See, e.g.*, Winkler, *supra* note 34, at 1566 (noting specifically that "not one gun control law has been declared unconstitutional on the basis of the Second Amendment since Heller").

V. A SIDE-BY-SIDE EXAMINATION OF *FRIEDMAN* AND *KOLBE*

In an attempt to determine what standard of scrutiny to apply to Second Amendment claims, the circuit courts have been resourceful in constructing various analyses from dicta in *Heller* and *McDonald*.[159] However, a comparison of two recent cases, *Friedman* and *Kolbe*, illustrates the uncertainty—and the resulting lack of consistency—that still exists among circuit courts in Second Amendment cases.[160] Although many courts have arrived at similar holdings—upholding firearm regulations—regardless of the standard of review applied, the outcome in *Kolbe* demonstrates how the uncertainty surrounding the standard of review allows courts to apply different standards and strike down bans that would otherwise have been upheld.[161]

A. *The Common Facts: An Assault Weapon Owner Versus an Assault Weapon Ban*

The facts in *Friedman* and *Kolbe* are almost identical.[162] In *Friedman*, the ban at issue was a Highland Park city ordinance that prohibited the possession of assault weapons, including semi-automatic weapons and large-capacity magazines (LCMs).[163] Arie Friedman, the named plaintiff and owner of a semi-automatic rifle and LCMs, sought to enjoin enforcement of the city ordinance.[164]

In *Kolbe*, the ban at issue was Maryland's Firearm Safety Act, which also prohibited the ownership of assault weapons and LCMs.[165] Stephen Kolbe, the plaintiff and a small business owner, owned a semi-automatic handgun equipped with a LCM.[166] Unlike the Seventh Circuit, the Fourth Circuit explained that Kolbe had a previous experience that required him to use a

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[159] *See supra* Part III.

[160] *See infra* Section IV.B; *see also* Lund, *supra* note 131, at 1621 (describing Justice Scalia's reasoning as "lackadaisical" and "in support of several legal conclusions" that only "created a mist of uncertainty and ambiguity" among the lower courts).

[161] *Compare supra* Part III (detailing the various circuit court tests and the relatively congruent results of upholding firearm regulations), *with infra* Section IV.C (walking through the similar analyses that other circuit courts apply, but ultimately resulting in an opposite conclusion).

[162] *See generally* Kolbe v. Hogan, 813 F.3d 160 (4th Cir. 2016); Friedman v. City of Highland Park, 784 F.3d 406 (7th Cir. 2015). At the crux of both cases, the central issue is an assault weapon owner opposing an assault weapon regulation.

[163] *Friedman*, 784 F.3d at 407.

[164] *See id.* Other plaintiffs that sought to lawfully own these weapons included members of the Illinois State Rifle Association. *Id.*

[165] *See* Kolbe v. Hogan, 813 F.3d 160, 168 (4th Cir. 2016).

[166] *Id.* at 170.

firearm for self-defense in his store.[167] Kolbe's co-plaintiff, Andrew Turner, who owned three semi-automatic rifles with LCMs, also allegedly needed semi-automatic weapons because he suffered an injury while serving in the Navy that made it difficult for him to operate non-semi-automatic firearms.[168] While the facts of *Friedman* and *Kolbe* are similar, the differences—such as the rhetoric that the courts use to describe the factual scenarios and how the courts interpret those facts under Supreme Court precedent—are apparent when the circuit courts' analyses are parsed.[169]

B. *Mirrored Analyses: Different Readings of the Same Precedent at Each Step of the Way*

The analyses in which the Seventh and Fourth Circuits engaged traced the general framework used by the other circuits.[170] Both courts started by addressing the historical tradition behind the Second Amendment and referencing *Heller*'s list of presumptively lawful longstanding regulations.[171] Further, like other circuit courts, the Seventh and Fourth Circuits analyzed the firearm regulation under the common use test.[172] However, in its analysis of the firearm regulation under the common use test, the Seventh Circuit began to deviate from the Fourth Circuit's analysis.[173] The deviation gave way to a complete bifurcation—each mirrored step of analysis produced opposite outcomes, which lead the Seventh Circuit to uphold its regulation under intermediate scrutiny and the Fourth Circuit to strike down its regulation under strict scrutiny.[174]

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[167] *See id.*

[168] *Id.* The Fourth Circuit goes out of its way to describe events in the plaintiffs' lives that caused them to want to own assault weapons—this is something noticeably absent from the Seventh Circuit. *Compare id.*, *with* Friedman v. City of Highland Park, 784 F.3d 406, 407 (introducing the plaintiff as "Arie Friedman, who lives in Highland Park, [who] own[s] a banned rifle and several large-capacity magazines before the ordinance took effect, and [] wants to own these items again").

[169] *See infra* Section IV.B.

[170] *See generally Kolbe*, 813 F.3d at 171 (alluding to the approach adopted by "sister circuits"). To reiterate, the common framework alluded to is that used by Chief Judge Easterbrook in *Skoien* and the Third Circuit in *Marzzarella*—first looking at the burden the regulation imposes on the conduct protected by the Second Amendment, then applying the appropriate scrutiny test. *See generally supra* Section III.B; *supra* Section III.C.

[171] *See infra* Subsection IV.B.1 (describing the Fourth and Seventh Circuit's discussion of the historical tradition behind Second Amendment longstanding regulations).

[172] *See Friedman*, 784 F.3d at 409; *Kolbe*, 813 F.3d at 173.

[173] *See infra* Subsection IV.B.2 (observing how both the Seventh and Fourth Circuits accept the weapons as being in common use, but begin to show disagreement).

[174] *See infra* Section IV.C (describing the differing outcomes of *Kolbe* and *Friedman*).

1. Discussing Historical Tradition, the Common Use Test, and the Dangerous and Unusual Corollary

a. Friedman v. City of Highland Park

In an attempt to parallel *Heller*'s analysis, the Seventh and Fourth Circuits both considered their respective weapon ban in light of historical tradition and common use.[175] The plaintiffs in *Friedman* first argued that banning semi-automatic weapons and LCMs was not a longstanding tradition, as was the case for the enumerated exceptions in *Heller*.[176] In an opinion written by Chief Judge Easterbrook, the Seventh Circuit rejected the plaintiffs' argument on the ground that the bans enacted earlier should not be given more weight solely because of the passage of time.[177] Furthermore, the Seventh Circuit noted that *Heller* accounted for the possibility that the typical firearms utilized by a militia could change through innovation and regulation with the passage of time, thereby further rejecting the plaintiffs' historical tradition argument.[178]

The *Friedman* plaintiffs' argument that semi-automatic weapons are lawfully used by citizens and are in common use led the Seventh Circuit to apply the common use test.[179] The plaintiffs' argument flowed from a discussion about the lack of a longstanding semi-automatic weapons regulation tradition; the plaintiffs contended that because semi-automatic weapons had not been regulated, they were in common use and therefore a

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[175] *See generally Friedman*, 784 F.3d at 408 (describing *Heller* and the initial starting points for each court's analysis); *Kolbe*, 813 F.3d at 172.

[176] *Friedman*, 784 F.3d at 408. Plaintiff's argument stems from *Heller*, where the Court "cautioned against interpreting the decision to cast doubt on 'longstanding prohibitions,' including the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* at 407-08 (quoting District of Columbia v. Heller, 544 U.S. 570, 626 (2008)).

[177] *Id.* at 408. ("Nothing in *Heller* suggests that a constitutional challenge to bans on private possession of machine guns brought during the 1930s, soon after their enactment, should have succeeded – that the passes of time creates an easement across the Second Amendment."). *Cf.* United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (declining to go further into the historical analysis from *Heller*, because Chief Judge Easterbrook saw it as "precautionary language"). Here, the plaintiffs integrate *Heller*'s historical inquiry into their argument, which is why Chief Judge Easterbrook seems to entertain the notion more than in *Skoien*. *See Friedman*, 784 F.3d at 408.

[178] *See Friedman*, 784 F.3d at 409. The Seventh Circuit considered the plaintiff's argument overreaching because it would also cover machine guns—the Court states that machine guns were commonly owned until they were regulated starting in 1934 (at the Federal level). *Id.* at 409. This prompted the Court to state that *Heller* "contemplated that the weapons properly in private hands for militia use might change through legal regulation as well as innovation by firearms manufacturers." *Id.*

[179] *See id.* at 408.

ban on them was inappropriate.[180] Although this argument stemmed from *Heller*'s common use test, the Seventh Circuit took note of the plaintiffs' circular reasoning.[181] In response to the plaintiffs' assertion that semi-automatic weapons are in common use because they are legal, the Seventh Circuit noted that the converse is equally true—that weapons not in common use are those that are illegal, like machine guns.[182] The court ultimately recognized that semi-automatic weapons are commonly owned but rejected that semi-automatic weapons are commonly used.[183]

In support of the regulation that Friedman opposed, the city of Highland Park argued that semi-automatic weapons could be regulated because they are dangerous and unusual, which was a factor considered along with the common use test in *Heller*.[184] The dangerous and unusual inquiry is a corollary of the common use test because a weapon is not unusual if it is commonly owned.[185] The Seventh Circuit inquired how deadly one type of weapon is when compared to another type of weapon, but failed to address the question of ubiquity.[186] Nonetheless, Chief Judge Easterbrook took a

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[180] *See id.* at 408-09.

[181] *See id.* at 409 (noting that "a law's existence can't be the source of its own constitutional validity").

[182] *Id.* ("[S]emi-automatic weapons with large-capacity magazines are owned more commonly because, until recently . . . they have been legal. Yet it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly owned."); *see also* Winkler, *supra* note 34, at 1560-61. Professor Winkler agrees with the statement, as he traces the same circular reasoning in *Heller* and finds the same issue the Court here takes issue with: "[T]he Court suggests that machine guns might be banned because they are 'dangerous and unusual weapons' that they are not in 'common use.' But why are machine guns so rare? Because federal law has effectively prevented civilians from purchasing them for the past seventy-five years." *Id.*; *see also* Jacobs, *supra* note 34, at 265 (describing five flaws in the common use test, including the under-protection problem, which is based on the idea that the common use test freezes a right "by preventing new firearms from becoming popular and therefore protected," and the overprotection problem, which is based on the idea that the firearms industry can "make new firearms protected simply by manufacturing and heavily marketing them").

[183] *Friedman*, 784 F.3d at 409 ("[R]elying on how common a weapon is at the time of litigation would be circular to boot.").

[184] *See id.* (noting that the city argued that the ban is valid because semi-automatic weapons and large-capacity magazines are "dangerous and unusual" as contemplated by *Heller*); *see also* District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (explaining that the common use test is "supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'").

[185] *See Friedman*, 784 F.3d at 409.

[186] *See id.* ("[B]ut what line separates 'common' from 'uncommon' ownership is something the Court did not say."). The Court notes that, when compared with handguns, "the large fraction of murders committed by handguns may reflect the fact that they are much more numerous than assault weapons." *Id.*

similar stance to his position in *Skoien*, considering the dangerous and unusual inquiry too fact-sensitive and another reason why courts should not adhere to *Heller* like a statute.[187]

b. Kolbe v. Hogan

In *Kolbe*, the Fourth Circuit also began with a historical inquiry.[188] Like the *Friedman* court, the *Kolbe* court concluded that the lack of a longstanding tradition banning semi-automatic weapons did not mean that the firearms are immune from a ban.[189] However, the *Kolbe* court focused its historical inquiry more in the context of common use, as opposed to past weapon use and regulations like the *Friedman* court.[190] The Fourth Circuit considered the state's argument—that semi-automatic weapons are not commonly used for self-defense—to be an erroneous and narrow interpretation of *Heller*.[191] While the Fourth Circuit readily acknowledged the prevalence of semi-automatic weapons,[192] it ultimately asked whether a citizen typically possessed the weapon at issue for lawful purposes *as a*

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[187] *Compare id.*, *with* United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (noting that among the problems that result from the judiciary interpreting these issues is "the possibility that different judges might reach dramatically different conclusions about relative risks and their constitutional significance."). The dangerous and unusual factor is one of these points, because, as the Seventh Circuit noted, while the semi-automatic weapons shoot smaller bullets—which leads to less danger per bullet—they are meant for "spray fire rather than to be aimed carefully." *Id.* This factor characterizes the weapons as "simultaneously more dangerous to bystanders . . . yet more useful to elderly householders," which could lead courts to hold either way. *Id.*

[188] Kolbe v. Hogan, 813 F.3d 160, 172 (4th Cir. 2016). The Fourth Circuit stated:

> First, we ask "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." The answer to this question requires a "historical inquiry" into "whether the conduct at issue was understood to be within the scope of the right at the time of ratification."

Id. (quoting United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010)).

[189] *See id.* at 176 ("We find nothing in the record demonstrating that law-abiding citizens have been historically prohibited from possessing semi-automatic rifles and LCMs.").

[190] *Compare id.* at 177 (following up the observation of a lack of longstanding tradition banning semi-automatic weapons with stating, "In fact, semi-automatic firearms have been in use by the civilian population for more than a century"), *with Friedman*, 784 F.3d at 408-09.

[191] *See id.* at 176 ("The State's position flows from a hyper-technical, out-of-context parsing of the Supreme Court's statement in *Heller* 'that the sorts of weapons protected were those in common use at the time.' The State misreads *Heller*, as Second Amendment rights do not depend on how often the semi-automatic rifles or regulated magazines are *actually* used.") (quoting District of Columbia v. Heller, 554 U.S. 570, 627 (2008)).

[192] *See id.* at 174 ("[W]e have little difficulty in concluding that the banned semi-automatic rifles are *in common use* by law abiding citizens.").

matter of history and tradition.[193] Bolstered with facts about the pervasiveness of semi-automatic weapons and their high production rates, the Fourth Circuit determined that citizens do typically possess semi-automatic weapons for lawful purposes as a matter of history and tradition.[194] In further support of its conclusion, the Fourth Circuit engaged in the dangerous and unusual inquiry.[195]

Instead of dismissing the inquiry as too fact-sensitive, as the Seventh Circuit did, the Fourth Circuit reasoned that semi-automatic weapons were in common use and therefore could not be considered dangerous *and* unusual as contemplated by *Heller*.[196] Indeed, the Fourth Circuit's rhetoric corresponded with its characterization of assault weapons as common and thus not particularly dangerous or unusual.[197] For example, the Fourth Circuit plainly described LCMs as "used to strike at another and inflict damage," while the Seventh Circuit gravely described them as "designed to spray fire rather than to be aimed carefully."[198] Instead of reading *Heller* like an explanation, as Chief Judge Easterbrook did in *Friedman* and *Skoien*, the Fourth Circuit seemed to adhere to *Heller* as if it were statute.[199]

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[193] *See id.* at 176 ("The question of how a firearm is actually used prompted the Court to voice what it considered to be the "proper standard," which is "whether the prohibited weapons . . . are 'typically possessed by law-abiding citizens for lawful purposes' as a matter of history and tradition.") (quoting *Heller*, 554 U.S. at 625).

[194] *Id.* at 174 ("We make the assessment based on the present-day use of these firearms nationwide."). Some of the statistics the Court relies on include: from 1990-2012 more than 8 million AR- and AK semi-automatic rifles were made in or imported into the U.S; in 2012, semi-automatic sporting rifles made up twenty percent of retail firearms sales; and finally, the Court notes a comparison between semi-automatic weapon production and sales of the most commonly sold vehicle. *Id.*

[195] *Id.* at 178 ("*Heller* refers to 'dangerous' *and* 'unusual' conjunctively, suggesting that even a dangerous weapon may enjoy constitutional protection if it is widely employed for lawful purposes. Founding era understandings of what it means for something to be 'unusual' reflect that the firearm must be rare to be considered 'unusual.'").

[196] *See id.*

[197] *See id.* at 175.

[198] *Compare id.* ("Obviously, magazines and the rounds they contain are used to strike at another and inflict damage"), *with* Friedman v. City of Highland Park, 748 F.3d 406, 409 (4th Cir. 2015) ("This suggests that [assault weapons] are less dangerous per bullet—but they can fire more bullets. And they are designed to spray fire rather than to be aimed carefully."). This is a striking example of how the courts can use the same analysis—the dangerous and unusual inquiry—and come out with two completely different interpretations, which is reflected in the outcome of the cases.

[199] *See, e.g.*, *Kolbe*, 813 F.3d at 177. The *Kolbe* Court considered the State's argument—that assault weapons are dangerous and unusual—"novel" because it "reads too much into *Heller.*" *Id.* The *Kolbe* Court would rather read *Heller* as "focused on whether the weapons were typically or commonly possessed, not whether they reached or exceeded some undefined level of dangerousness." *Id.* The *Friedman* Court might agree on that latter point,

Therefore, while the reasoning of both circuits was valid and constitutionally consistent with *Heller*, when compared side-by-side it is evident that *Heller*'s gaps and ambiguities accommodated varying interpretation and manipulation.[200]

2. The Second Step: Selecting a Standard of Scrutiny

a. Friedman v. City of Highland Park

The function of the analyses thus far has been to determine whether semi-automatic weapons and LCMs may be constitutionally regulated under the scope of the Second Amendment.[201] Once it has been established that a firearm regulation invokes the Second Amendment, a court must select the appropriate standard of review or level of scrutiny.[202] In *Friedman*, the Seventh Circuit began its scrutiny inquiry by asking whether the weapons at issue were common during the time of ratification so as to have a reasonable relationship with the regulation of a militia.[203] Next, the Seventh Circuit asked whether the ban left citizens with alternative means for self-defense.[204] In answering both questions, the Seventh Circuit acknowledged that semi-automatic weapons were not commonly used at the time of ratification and that the nature of the weapons seems to be characteristic of the weaponry used by the military and police today—the regulation of which states should be given deference.[205] Furthermore, the

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that dangerousness is a matter of degree, however the *Friedman* Court was more willing to consider policy interests in considering the dangerousness and the reasons for the ban. *See id.*

[200] *Compare Friedman*, 748 F.3d at 408, *with Kolbe* 813 F.3d at 174 (exemplifying one point at which both courts take the same test from *Heller* and use it to ultimately come to two different interpretations that affect the respective holdings).

[201] *See, e.g.*, *Kolbe*, 813 F.3d at 173 (stating that the threshold question is "whether the ban[s] imposed . . . burden[s] conduct that falls within the scope of the Second Amendment"); *see also Friedman*, 748 F.3d at 414 (Manion, J., dissenting) (stating that when the activity being regulated is specifically tied to classes of weapons, the additional threshold matter is "whether the class of weapons regulated are commonly used by law-abiding citizens").

[202] *See, e.g.*, *Kolbe*, 813 F.3d at 179 (stating that "[h]aving determined that the Second Amendment covers the prohibited semi-automatic rifles, we next consider" which level of scrutiny is applicable).

[203] *Friedman*, 784 F.3d at 410 ("[W]e think it better to ask whether a regulation bans weapons that were common at the time of ratification or those that have 'some reasonable relationship to the preservation or efficiency or a well regulated militia.'").

[204] *See id.* ("[W]hether law-abiding citizens retain adequate means of self-defense.").

[205] *See id.* (noting that "[s]ome of the weapons prohibited by the ordinance are commonly used for military and police functions; they therefore bear a relation to the preservation and effectiveness of state militias. But states, which are in charge of militias, should be allowed to decide when civilians can possess military-grade firearms").

Seventh Circuit thought that the weapon ordinance did not infringe upon an individual's right to self-defense because homeowners could protect their homes through other means under the ordinance.[206] The Seventh Circuit took this opportunity to highlight that the characteristics of assault weapons, which make them the preferred weapons for self-defense by civilians, are the very same characteristics that make them widely used by perpetrators of mass shootings.[207] The fact that the Seventh Circuit went to such lengths to weigh the interests of individuals and the general public suggests, as noted by Judge Manion in his dissent, that the Seventh Circuit applied an intermediate scrutiny test.[208]

b. Kolbe v. Hogan

Likewise in *Kolbe*, the Fourth Circuit considered whether the regulation infringed upon the right to self-defense.[209] However, unlike the Seventh Circuit, the Fourth Circuit stated that the regulation banning semi-automatic weapons burdened the fundamental right to self-defense because it eliminated a class of weapons that citizens could use to defend their

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[206] *See id.* at 411. The Seventh Circuit outlines how citizens have other means, which are just as effective as semi-automatic weapons, to fulfill their right to self-defense:

> [The plaintiffs'] contention is undermined by their argument . . . because . . . criminals will just substitute permitted firearms functionally identical to the banned guns. If criminals can find substitutes for banned assault weapons, then so can law-abiding homeowners. Unlike the District of Columbia's ban on handguns, Highland Park's ordinance leaves residences with many self-defense options.

Id.

[207] *See id.* (characterizing assault weapons as "weapons of choice in mass shootings"). Even though the Court found that a core Second Amendment right is not infringed upon, the Court nonetheless made an effort to mention the policy argument underlying the ban:

> True enough, assault weapons can be beneficial for self-defense because they are lighter than many rifles and less dangerous per shot than large-caliber pistols or revolvers . . . But assault weapons with large-capacity magazines can fire more shots, faster, and thus can be more dangerous in the aggregate. Why else are they the weapons of choice in mass shootings? A ban on assault weapons and large-capacity magazines might not prevent shootings in Highland Park . . . but it may reduce the carnage if a mass shooting occurs.

Id.

[208] *See id.* at 410-12. While the majority is silent on explicitly stating the level of scrutiny applied, Judge Manion states in his dissent that "[i]nsofar as Highland Park's ordinance implicates the right to carry or use these weapons outside of one's property, it is subject to intermediate scrutiny." *Id.* at 419 (Manion, J., dissenting).

[209] *Kolbe*, 813 F.3d at 179 ("To select the proper level of scrutiny, we consider 'the nature of the conduct being regulated and the degree to which the challenged law burdens the right.'") (quoting United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010)).

home.[210] Contrary to the Seventh Circuit, the Fourth Circuit considered the availability of other weapons for self-defense irrelevant.[211] In comparing the regulation at issue in *Kolbe* to the handgun ban in *Heller*, the Fourth Circuit stated that although the semi-automatic weapons at issue in *Kolbe* were not necessarily classic self-defense weapons like the handguns in *Heller*, the regulation in *Kolbe* could not constitutionally ban of an entire class of weapons.[212] Further, the Fourth Circuit acknowledged that some citizens, like the plaintiffs in *Friedman*, may have reasons for preferring a semi-automatic weapon for self-defense over other weapons.[213] However, unlike the Seventh Circuit, the Fourth Circuit used particular citizens' preferences for semi-automatic weapons as a reason for upholding the ban and *not* as a reason to overturn the ban.[214] At this point, the differing interpretations of *Heller* culminated into opposite holdings from the Seventh and Fourth Circuits.[215]

C. *Conflicting Scrutiny: Intermediate in the Seventh Circuit and Strict in the Fourth Circuit*

Although the Seventh and Fourth Circuits used the same analytical framework, the interpretive choices made by each court caused the courts to apply two different standards of review.[216] Under intermediate scrutiny, the Seventh Circuit upheld the regulation banning semi-automatic weapons and LCMs.[217] The Seventh Circuit acknowledged that, pursuant to *Heller*

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[210] *See id.* at 179-80 (stating that the ban burdens "the availability and use of a class of arms for self-defense in the home" and that a "core" right of the Second Amendment is to be able to defend the home, and concluding "that the challenged provisions of the [Firearm Safety Act] substantially burden" that right).

[211] *See id.* ("[T]he fact that handguns, bolt-action and other manually-loaded long guns, and, as noted earlier, a few semi-automatic files are still available for self-defense does not mitigate this burden.").

[212] *See id.* at 181 ("A semi-automatic rifle may not be 'the quintessential self-defense weapon,' as *Heller* described the handgun.") (quoting District of Columbia v. Heller, 554 U.S. 570, 629 (2008)).

[213] *See id.* at 180.

[214] *Compare id.*, *with* Friedman v. City of Highland Park, 784 F.3d 406, 411 (7th Cir. 2015) (considering the positives of semi-automatic weapons for self-defense, but ultimately considered those positives as factors for a court to weigh and not in themselves determinative). Interestingly, the Fourth Circuit employed language from *Friedman*'s dissent when it stated, "The right to self-defense is largely meaningless if it does not include the right to choose the most effective means of defending oneself." *Id.* (quoting *Friedman*, 784 F.3d at 413).

[215] *See generally Kolbe*, 813 F.3d at 181 (demonstrating how the analyses begin to differ at this point, leading to opposing holdings in *Friedman* and *Kolbe*).

[216] *See id.* at 184; *Friedman*, 748 F.3d at 412.

[217] *Friedman*, 748 F.3d at 406-10. In arriving at its second prong of analysis, the

and *McDonald*, it had leeway in selecting its standard of review.[218] Conversely, the Fourth Circuit in *Kolbe* remanded the case to the lower court with instructions to apply the strict scrutiny test.[219] The Fourth Circuit stated that it would not follow other circuits in applying intermediate scrutiny just because all of the other circuit courts do so—the Court made clear that its decision to apply strict scrutiny was deliberate.[220] Furthermore, the Fourth Circuit bolstered its decision by acknowledging dissenting opinions from *Heller II* and *Friedman* that stated how strict scrutiny is most appropriate when the regulation applies in relation to a

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Seventh Circuit stated:

> [I]nstead of trying to decide what 'level' of scrutiny applies, and how it works, inquiries that do not resolve any concrete dispute, we think it better to ask whether a regulation bans weapons that were common at the time of ratification or those that have 'some reasonable relationship to the preservation or efficiency of a well-regulated militia' . . . and whether law-abiding citizens retain adequate means of self-defense.

Id. The Seventh Circuit later elaborated on this point when it stated, "The best way to evaluate the relation among assault weapons, crime, and self-defense is through the political process and scholarly debate, not by parsing ambiguous passages in the Supreme Court's opinions." *Id.* at 412. As further evidence of interest balancing performed by the Court is its policy discussion, the Seventh Circuit stated:

> A ban on assault weapons won't eliminate gun violence in Highland Park, but it may reduce the overall dangerousness of crime that does occur. . . . If it has no other effect, Highland Park's ordinance may increase the public's sense of safety. . . . If a ban on semiautomatic guns and large-capacity magazines reduces the perceived risk from a mass shooting, and makes the public feel safer as a result, that's a substantial benefit.

Id.; *see also supra* text accompanying note 208 (stating that the majority used intermediate scrutiny).

[218] *Friedman*, 748 F.3d at 412. In its decision to uphold the regulation, the Seventh Circuit relied on its ability to act within the limits delineated in *Heller* and *McDonald*, stating:

> *McDonald* circumscribes the scope of permissible experimentation by state and local governments, but it does not foreclose *all* possibility of experimentation. Within the limits established by the Justices in *Heller* and *McDonald*, federalism and diversity still have a claim. . . . Given our understanding of existing limits, the judgment is affirmed.

Id.

[219] *See* Kolbe v. Hogan, 813 F.3d 160, 184 (4th Cir. 2016) ("[W]e vacate the district court's order as to Plaintiffs' Second Amendment challenge and remand for the court to apply strict scrutiny in the first instance.").

[220] *See id.* ("The meaning of the Constitution does not depend on a popular vote of the circuits and it is neither improper nor imprudent for us to disagree with the other circuits addressing the issue. We are not a rubber stamp. We require strict scrutiny here not because it aligns with our personal policy preferences but because we believe it is compelled by the law set out in *Heller* and *Chester*.").

citizen's right to firearms inside the home.[221] Ultimately, in remanding *Kolbe* to the lower court with instruction to apply strict scrutiny, the Fourth Circuit effectively struck down Maryland's ban on semi-automatic weapons and LCMs.[222]

Comparing *Friedman* and *Kolbe* side-by-side is striking because doing so illustrates how circuit courts diverge in the evaluation and resolution of cases involving substantially similar weapon regulations. The comparison demonstrates how the circuit courts inconsistently safeguard citizens' Second Amendment protection rights. Additionally, these cases demonstrate how—under the same facts and analyzed under the same steps—the pivotal factor in determining the outcome of the case is the standard of review selected by the court.[223] Therefore, the Supreme Court needs to establish a standard of review for the Second Amendment to remedy the circuit courts' inconsistent and unreliable administration of citizens' Second Amendment protections.[224]

Although lower courts have differed on their analyses of weapon bans, excluding the Fourth Circuit, lower courts are usually consistent in upholding weapon bans.[225] In order to promote uniform treatment of weapon regulations and ensure that an individual's Second Amendment right will be enforced consistently, a single standard of review should be adopted by the Supreme Court—a standard that can accommodate the policy complexities of the Second Amendment while still respecting an individual's right to bear arms, which may not necessarily be a "traditional" scrutiny test.[226]

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[221] *See id.* at 182 ("[T]his longstanding out-of-the-home/in-the-home distinction bears directly on the level of scrutiny applicable"... with strict scrutiny applying to laws restricting the right to self-defense in the home... Strict scrutiny, then, is the appropriate level of scrutiny to apply to the ban of semiautomatic rifles and magazines holding more than 10 rounds.").

[222] *See id.* at n.219, n.220 (acknowledging that the regulation will be reevaluated under strict scrutiny and that it is likely that the ban will be struck down given how the Fourth Circuit treated the issue).

[223] *See Kolbe*, 813 F.3d at 179.

[224] *See id.* at 182 (recognizing this difference when it acknowledged *Friedman* and stating that the Seventh Circuit "recently upheld a ban on 'assault weapons' and LCM's by dispensing with levels of scrutiny entirely."). Even though the Seventh Circuit actually engaged in something very close to interest balancing, as mentioned in Judge Manion's dissent, the Fourth Circuit recognized the opposite result with this differing factor. *Id.*; Friedman v. City of Highland Park, 784 F.3d 406, 407 (7th Cir. 2015).

[225] *See supra* text accompanying note 69; *see also* Winkler, *supra* note 34, at 1566 (noting specifically that "not one gun control law has been declared unconstitutional on the basis of the Second Amendment since Heller"). *See generally supra* Part III (describing the various tests employed by the circuit courts).

[226] *See infra* Part IV (proposing a hybrid substantial burden-interest balancing test).

VI. PROPOSED SOLUTION: THE SUPREME COURT SHOULD ADOPT A SUBSTANTIAL BURDEN-INTEREST BALANCING TEST

As noted, the significance of *Kolbe* and *Friedman* is clear when the decisions are examined in tandem. [227] In *Kolbe* and *Friedman,* two circuit courts were presented with essentially the same facts within one year of each other.[228] The circuit courts then applied the same precedent and came to opposite conclusions.[229] These conflicting results illustrate the need for the Supreme Court to reevaluate the standard applied in Second Amendment analyses in order to better promote consistency among lower courts, and consequently promote consistency for citizens' enjoyment of their Second Amendment protections.[230] Lower courts have remained relatively consistent in their approaches, applying some variation of intermediate scrutiny and upholding assault weapon bans.[231] However, if other courts apply *Heller* like the Fourth Circuit did in *Kolbe*, necessary assault weapon bans may be struck down where they would have otherwise been upheld.[232] While the realistic safety benefits that surround the restricted use of semi-automatic weapons are speculative, the benefits should at least merit formal consideration under an interest balancing inquiry after a substantial burden inquiry.[233]

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[227] *See supra* Part IV (describing the facts and analysis in *Friedman* and *Kolbe*).

[228] *See supra* Part IV (describing the facts and analysis in *Friedman* and *Kolbe*).

[229] *See supra* Part IV (detailing how each step of the same analysis employed in the near-identical cases of *Kolbe* and *Friedman* is interpreted differently and results in opposite holdings, despite the same fact pattern).

[230] *See* Volokh, *supra* note 11, at 1456 ("The Court did not discuss what analysis would be proper for less 'severe' restrictions."); *see also* MEHR & WINKLER, *supra* note 10, at 2 (explaining that lower courts "do not know how to decide whether or not those laws are constitutionally permissible" when confronted with gun control laws).

[231] *See supra* Part III; *see also* MEHR & WINKLER, *supra* note 10, at 9 ("So far . . . the difference is only procedural given that lower courts continue to uphold gun control regardless of the standard applied."); Winkler, *supra* note 34, at 1566 ("Remarkably, not one gun control law has been declared unconstitutional on the basis of the Second Amendment since Heller.").

[232] *See* MEHR & WINKLER, *supra* note 10, at 7 ("So far, however, the difference is only procedural given that lower courts continue to uphold gun control regardless of the standard applied.").

[233] *See* Friedman v. City of Highland Park, 784 F.3d 406, 410 (7th Cir. 2015) (stating that even if the chances of a mass shooting are slim, "[i]f a ban on semiautomatic guns and large-capacity magazines reduces the perceived risk from a mass shooting, and makes the public feel safer as a result, that's a substantial benefit.").

A. *The Importance of Kolbe: Breaking the Mold and Initiating a Circuit Split*

Despite being hailed as the leading Supreme Court cases on the Second Amendment, *Heller* and *McDonald* left gaps in their holdings that have "unleashed" what Justice Stevens originally described as "a tsunami of legal uncertainty."[234] Such uncertainty permitted the Fourth Circuit, in *Kolbe*, to utilize the gaps in *Heller* and *McDonald* and apply a higher level of scrutiny than was necessary.[235] The Fourth Circuit's decision to apply strict scrutiny was arguably unnecessary because the Seventh Circuit was faced with the same facts in *Friedman* but upheld the weapon ban at issue as constitutional under a lower standard of review.[236] Nevertheless, due to the uncertainty that followed *Heller* and *McDonald*, in assessing the weapons regulation at issue in *Kolbe* the Fourth Circuit freely applied an entirely different level of scrutiny than applied by the Seventh Circuit and thus arrived at an entirely different conclusion despite identical facts.[237]

Indeed, Justice Breyer's list of questions in his dissent in *McDonald* illustrates such uncertainty.[238] Particularly relevant among his list is a question regarding implications for semi-automatic weapons.[239] In *Heller*, Justice Scalia recognized that the majority's decision left open certain facets of Second Amendment jurisprudence, but he seemed to understate the importance of determining the applicable scrutiny or standard of review.[240] However, according to one commentator, the question of what standard to apply does not represent a substantive problem, but rather a procedural one,

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[234] McDonald v. City of Chicago, 561 U.S. 742, 887 (2010) (Stevens, J., dissenting) ("Having unleashed in *Heller* a tsunami of legal uncertainty, and thus litigation, and now on the cusp of imposing a national rule on the States in this area for the first time in United States history, the Court could at least moderate the confusion, upheaval, and burden on the States by adopting a rule that is clearly and tightly bounded in scope."); *see also* Winkler, *supra* note 34, at 1552 (describing *Heller* as "hailed as one of the most significant constitutional law decisions of the twenty-first century").

[235] *See* Kolbe v. Hogan, 813 F.3d 160, 184 (4th Cir. 2016).

[236] *See supra* Part IV.

[237] *See supra* text accompanying note 224. *See generally supra* Part IV.

[238] *See McDonald*, 561 U.S. at 923-24 (Breyer, J., dissenting) (pointing out the limitations in *Heller* and *McDonald* that lower courts will inevitably face in the wake of these decisions).

[239] *See id.*

[240] *See* District of Columbia v. Heller, 554 U.S. 570, 634 (2008) ("Justice Breyer chides us for leaving so many applications of the right to keep and bear arms in doubt, and for not providing extensive historical justification for those regulations of the right that we describe as permissible. But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field.").

because courts usually uphold gun laws regardless of the standard.[241] This is an important observation because *Kolbe* invalidated a regulation by using a different standard of review and hence suggests that the difference is no longer procedural but has become substantive.[242] Now, when presented with a weapon regulation, a court could follow *Kolbe*'s example and require the regulation to pass a strict scrutiny analysis, even though *Heller* did not explicitly require a strict scrutiny analysis.[243] Therefore, a weapon regulation that would otherwise be constitutional could be struck down because a court decided to interpret *Heller* like the Fourth Circuit did in *Kolbe*.[244] The result of this unanswered question of standard of review could potentially mean a greater accessibility to semi-automatic weapons, which can have a notable impact on society.[245]

B. *Public Policy Considerations: The Second Amendment's Policy Complexities*

The sensitive policy issues unique to the Second Amendment—an individual's right to bear arms and the government's interest in public and individual safety—require a test that can evaluate complexities at a higher level than the traditional scrutiny tests. Therefore, a substantial burden-interest balancing hybrid test would be an effective method of analysis for evaluating weapon bans because this hybrid test would account for government interests, public policy considerations, and citizens' Second

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[241] *See* MEHR & WINKLER, *supra* note 10, at 9 ("So far . . . the difference is only procedural given that lower courts continue to uphold gun control regardless of the standard applied."); *see also* Winkler, *supra* note 34, at 1566 ("Remarkably, not one gun control law has been declared unconstitutional on the basis of the Second Amendment since Heller.").

[242] *Cf.* Winkler, *supra* note 34, at 1566. The fact that *Kolbe* has been one of the only—if not *the* only—semi-automatic weapon regulation to be stuck down suggests, based on Professor Winkler's remarks, that the difference between which level of scrutiny is applied has just become substantial, not merely procedural. *Id.*

[243] *See* Rosenthal, *supra* note 88, at 1191 (noting that the Supreme Court "pointedly refused" to specify a standard of analysis for weapon bans). While *Heller* did not condemn strict scrutiny application, the fact that *Kolbe* took that liberty to exercise a higher level of scrutiny could potentially be an abuse of discretion. *Id.*

[244] *See* Winkler, *supra* note 89, at 683 (noting that when confronted with weapon ban analyses, every state "applies a deferential reasonable regulation standard," and that "[n]o state applies strict scrutiny or any other type of heightened review to gun laws"); *see also id.* at 695 (discussing standard of reviews for other Amendments in the Bill of Rights, specifically noting that "we might conclude that textual grounding in the Bill of Rights creates a presumption against strict scrutiny."). Professor Winkler goes on to say that "courts do not and have never applied strict scrutiny consistently" and has "never been accepted in practice by the Supreme Court." *Id.*

[245] *See infra* Section V.B (discussing the policy considerations behind weapon ban analyses).

Amendment right to bear arms.[246] Unlike the traditional scrutiny tests, this test is multifaceted to account for the differing perspectives that surround weapon ban analyses under the Second Amendment.[247]

Public policy considerations were an important factor for Justice Breyer, who stressed the importance of weighing policy interests in both of his dissents in *Heller* and *McDonald*.[248] For example, in *Heller* Justice Breyer emphasized the importance of urban crime prevention and noted goals of public importance, such as saving lives and reducing crime.[249] Justice Breyer's policy concerns also permeated his *McDonald* dissent in which he urged consideration of the values that underlie the Second Amendment and its significance in contemporary society.[250] The nature of the Second Amendment raises a variety of questions that, according to Justice Breyer, cannot be answered by jurisprudence as understood exclusively by originalist principles.[251] One commentator described Justice Breyer's dissents as advocating for pragmatism, and for judges to be aware of the consequences of their policy choices regarding guns while remaining respectful of legislative assessment.[252]

However, the actual impact of any kind of weapon regulation is inherently speculative in nature.[253] According to Professor Volokh, the effects are difficult to measure because such evaluations call for predictions on two points: (1) the decrease in injury and crime resulting from gun controls and (2) the increase in injury and crime resulting from regulating self-defense.[254] Still, it is important to bear in mind the type of weapons at

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[246] *See* McDonald v. City of Chicago, 561 U.S. 742, 923-24 (2010) (Breyer, J., dissenting) (enumerating the policy implications inherent in Second Amendment regulations); District of Columbia v. Heller, 554 U.S. 570, 682 (2008) (Breyer, J., dissenting).

[247] *See infra* Section IV.C.

[248] *See generally Heller*, 554 U.S. at 682 (Breyer, J., dissenting) (discussing the policy behind the weapon regulations and how those considerations are necessary to consider).

[249] *See id.* ("[T]he law will advance goals of great public importance, namely, saving lives, preventing injury, and reducing crime. The law is tailored to the urban crime problem . . . and is entirely urban.").

[250] *See McDonald*, 561 U.S. at 916.

[251] *See id.* at 923 ("Given the competing interests, courts will have to try to answer empirical questions of a particularly difficult kind.").

[252] *See* Rostron, *supra* note 68, at 725 (speculating that Justice Breyer urged judges to be aware of the "real consequences of different policy choices about guns but deferential to reasonable legislative assessment").

[253] *See* Sobel, *supra* note 86, at 521 (discussing how gun regulations and crime or safety rates are speculative because these factors cannot be ethically experimented or tested).

[254] *See* Volokh, *supra* note 11, at 1465 ("People notoriously disagree about whether gun control laws will indeed reduce total injury and crime, especially since such evaluations require one to predict both (1) the possible decrease in injury and crime stemming from the

issue—assault weapons and LCMs.[255] While some banned assault weapons, like semi-automatics, are similar to other permitted assault weapons, like handguns, the banned assault weapons are adequately different to render them more susceptible to regulation than their slightly less lethal counterparts.[256] In fact, Professor Volokh mentioned that assault weapon bans are likely constitutional because individuals retain adequate means of self-defense through the use of other weapons that are not banned.[257] Stated another way, the regulation does not impose a *substantial* burden to the right to self-defense.[258]

Given the variations among the circuit courts' analyses, the only aspect that seems to be consistent is the result—upholding weapon bans.[259] The wide variation of tests and analyses is illustrative of the struggle courts face when an infringement on a constitutional right is posited against complex, sensitive policy interest and public safety concerns.[260] The courts' tendency to acknowledge policy interests suggests that those interests need to be considered in any test used to evaluate regulations under the Second Amendment.[261] Since this task may be beyond the reach of traditional scrutiny tests, a test that is able to respect an individual's Second Amendment right but also balance policy interests may be a practical solution.[262]

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controls and (2) the possible increase in injury and crime stemming from the interference with lawful self-defense.").

[255] *See id.* at 1488 (reviewing regulations and how the regulations differ by weapon).

[256] *See id.* at 1485 ("[T]he availability of close substitutes for assault weapons—the very reason why assault weapon bans are unlikely to work—also makes it hard to see how assault weapons bans would materially interfere with self-defense.").

[257] *See id.* at 1489 ("Assault weapon bans would generally be constitutional, if the right is seen as unconstitutionally infringed only when a law substantially burdens self-defense . . . because equally useful guns remain available.").

[258] *See supra* Section III.A (Justice Breyer's interest balancing test); *supra* Section III.C (Chief Judge Easterbrook's influential test in *Skoien*); *supra* Section III.E (*Nordyke*'s substantial burden test).

[259] *See* Winkler, *supra* note 34, at 1566 ("Remarkably, not one gun control law has been declared unconstitutional on the basis of the Second Amendment since Heller."); *see also* MEHR & WINKLER, *supra* note 10, at 4 ("[T]o date no court applying strict scrutiny under Second Amendment has invalidated a gun control law."). The later statement by Mehr and Professor Winkler implies that under a lower form of scrutiny would not strike down the bans either—because a law passed under strict scrutiny necessarily implies a higher level of evaluation. *See id.* at 1566.

[260] *See supra* text accompanying note 11.

[261] *See supra* text accompanying note 85.

[262] *See* Brownstein, *supra* note 87, at 955-56 ("[T]here may be no other approach that provides sufficient protection to the rights guaranteed by the Constitution without unreasonably preventing the other branches of government from performing their constitutionally assigned functions.").

C. *Solution: A Substantial Burden-Interest Balancing Hybrid Test*

Second Amendment cases are inherently complex because of various political, constitutional, and public safety interests that are often at odds.[263] Perhaps, then, the standard of review needed for challenged weapon bans under the Second Amendment is not one of the traditional tests. The test used should be multifaceted in order to account for as many interests as possible.[264] A hybrid test that begins with a substantial burden analysis and is followed by an interest balancing test, similar to one used in Fourth and Fifth Amendment analyses, respects an individual's constitutional right while also considering the totality of the circumstances surrounding a weapon ban.[265] The hybrid test also gives weight to state governments' interests in public safety.[266]

A substantial burden-interest balancing hybrid test would neither offend *Heller* nor *McDonald*.[267] When read together, *Heller* and *McDonald* are explicit in how *not* to analyze weapon bans under the Second Amendment.[268] Specifically, *Heller* and *McDonald* rejected using either an

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[263] *See* Sobel, *supra* note 86, at 521 (describing a "tripartite" of interests that accompany Second Amendment challenges which are "the individual's interest to keep and bear arms; the state's interest in protecting human life that may be endangered by guns; and the state's interest in safeguarding the health and welfare of individuals").

[264] *See, e.g.*, Transcript of Oral Argument at 44, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290). Justice Roberts seemed to acknowledge the difficulties in applying a traditional level of scrutiny, especially a rigid one, to the Second Amendment and the unique interests inherent in the right to bear arms:

> [T]hese various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. Isn't it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time, . . . and determine how these—how this restriction and the scope of this rights looks in relation to those?

Id. Justice Roberts goes on to note that the standards used in First Amendment analysis "just kind of developed over the years as sort of baggage that the First Amendment picked up." *Id.* It seems like Justice Roberts is suggesting the Second Amendment needs to be treated the same way; arguably, it seems like he is considering the direction the lower courts have taken—that is, intermediate scrutiny. *Id.*

[265] *See, e.g.*, *supra* text accompanying note 87 (discussing how constitutional analyses require more flexibility than a scrutiny test can offer).

[266] *See id.*

[267] *See* Rostron, *supra* note 68, at 737 ("[The Court] briefly mentioned that the District of Columbia's gun laws could not withstand any form of intermediate or strict scrutiny. The Court thus avoided making any commitments about the use of familiar formulas of heightened scrutiny but also did not entirely disavow them.").

[268] *See* MEHR & WINKLER, *supra* note 10, at 1 ("Even though the question of the

interest balancing test or a rational basis test in analyzing weapon bans under the Second Amendment[269] because these tests were either too subjective—in the case of interest balancing—or too easily met—in the case of rational basis.[270] Ironically, though, the Supreme Court utilized interest balancing when it described the list of presumptively lawful weapon restrictions.[271] Moreover, interest balancing is a recurring theme that seems to underlie any analysis, be it a scrutiny test or otherwise, because courts recognize the existence of other factors that influence whether and how a constitutional right is protected.[272] A substantial burden-interest balancing hybrid test would accommodate a higher standard to which courts want weapon bans to be subject.[273] The hybrid test would also facilitate an analysis of the circumstances and interests surrounding the ban, since courts will likely engage in that consideration anyway. After all, *Heller* rejected interest balancing as the *sole* standard of review, but did not condemn its use in conjunction with another standard.[274]

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appropriate standard was extensively briefed in both *Heller* and *McDonald*, all the Court would say was that two particular methods were inappropriate.").

[269] *See id.*; *see also* Colvin, *supra* note 69, at 1054 ("[A]fter *McDonald*, both interest-balancing and reasonableness inquiries (like the rational basis test), are inappropriate when evaluating the . . . right to keep and bear arms.").

[270] *See Heller*, 554 U.S. 570, 634 (2008) ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest balancing' approach."); *see also id.* at 628, n.27 ("'Rational basis' is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right . . . If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant . . . and have no effect."); MEHR & WINKLER, *supra* note 10, at 1-2 ("The Court rejected the rational basis review because that standard . . . already applies to all legislation and would render the Second Amendment irrelevant.").

[271] *See infra* Subsection V.C.2.

[272] *See* Sobel, *supra* note 86, at 498-99 ("A court usually looks at other factors such as the public verses private nature of the right at issue in order to determine a standard of review . . . These factors show that even when a regulation appears to fit into a particular analytic rubric, courts will still look to other considerations to determine how or if the right it protected."); *see also* Rosenthal & Malcolm, *supra* note 93, at 446-47 (arguing that "[d]espite Heller, interest-balancing may be inescapable in Second Amendment jurisprudence," and that interest balancing removes the empirical analysis that strict scrutiny requires).

[273] *See* Sobel, *supra* note 86, at 517 (explaining that a test "must give some deference to state and local governments while not eliminating the Second Amendment's core right" and that "[a]n undue burden test would allow this to occur" because "[t]he undue burden test protects the core right [of the Second Amendment], while acknowledging that some regulation is necessary").

[274] *See id.* Professor Sobel advocates for the use of an undue burden test, like the one

The hybrid test consists of two prongs. The test is influenced by the analysis used in abortion cases, Fourth and Fifth Amendment challenges, and the analyses that seemed to work best for the circuit courts in their weapon ban evaluations.[275] The first prong is the substantial burden test;[276] it asks whether the regulation substantially burdens an individual's right to keep and bear arms in order to determine whether the core right of the Second Amendment is being infringed upon.[277] To help answer this inquiry, one may consider whether there is an adequate alternative to the restricted item or activity.[278] If the regulation does not substantially burden the right, or an individual retains other adequate means of self-defense, then it will be upheld.[279] If the regulation is found to substantially burden the right, then the second prong will look to the governmental interests served by the regulation and, specifically, consider the totality of the circumstances surrounding the ban, including policy and safety concerns.[280] In this second prong, the governmental interests should be given some weight, so as to require the individual challenging the regulation to show that their right to keep and bear arms substantially outweighs the government's

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applied in abortion cases. While this Note advocates for a step beyond an undue burden test, the foundation of Professor Sobel's argument represents a good starting point. *Id.* at 517. Professor Sobel states that an undue burden test "is not contrary to Heller because the decision addressed only the narrow issue before the Court and did not discuss the outer limits of the Second Amendment's core right." *Id.*

[275] *See generally supra* Section III.E (discussing the substantial burden test employed in *Nordyke*); *supra* Section III.A (discussing interest balancing advocated by Justice Breyer); *see also* Sobel, *supra* note 86, at 517 (discussing the undue burden test used in abortion cases as it applies to the Second Amendment).

[276] *See* Nordyke v. King, 644 F.3d 776, 786 (9th Cir. 2011) (holding that "only regulations which substantially burden the right to keep and bear arms trigger heightened scrutiny under the Second Amendment," but declining to specify which level of heightened scrutiny to use).

[277] *See supra* text accompanying note 272.

[278] *See Nordyke*, 644 F.3d at 787 ("[W]e should ask whether the restriction leaves law-abiding citizens with reasonable alternative means for obtaining firearms sufficient for self-defense purposes.").

[279] *See generally* Volokh, *supra* note 11, at 1485-89 (discussing how a weapon ban that still leaves alternative means for self-defense is likely to be upheld).

[280] *See* Sobel, *supra* note 86, at 496 (discussing how Due Process challenges look "at whether the government's infringement of an individual right is sufficiently justified" and "may require courts to balance the respect for an individual's liberty and 'the demands of organized society.'"). Professor Sobel notes that in cases of Fourth and Fifth Amendment standards of review, strict scrutiny is not applied even though a fundamental right is at issue. *Id.* at 497. For the Fourth and Fifth Amendments, specifically, the courts look to a totality of the circumstances, or the surrounding circumstances, to evaluate challenges instead of using any scrutiny test. *Id.*

interest.[281]

1. The First Prong: A Substantial Burden Test

In *Nordyke*, the Ninth Circuit applied a substantial burden test to a Second Amendment challenge for the first time.[282] While a substantial burden test is not one of the "traditional" scrutiny tests, it still fits comfortably within the framework established by the Supreme Court.[283] A substantial burden test is unique in that it accounts for the malleable treatment of fundamental rights.[284] As one commentator observed, the substantial burden test may be the only test that protects fundamental Constitutional rights while also allowing the government to function as it should.[285] Given the inherent complexities in Second Amendment challenges, the substantial burden test seems to be a more appropriate test than the traditional scrutiny tests.[286] Perhaps the unyielding rigidity of the scrutiny analyses is why courts have struggled to reconcile them with Second Amendment challenges.[287]

While the Ninth Circuit was influential in applying the substantial burden test to its Second Amendment challenge, it stopped its analysis too soon—the Ninth Circuit acknowledged that a heightened level of scrutiny should

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[281] *See* Sobel, *supra* note 86, at 497-98; *see also* United States v. Salerno, 481 U.S. 739, 749 (1987) (recognizing that the government's interest at issue in the case—preventing crime—is both legitimate and, relevantly, compelling).

[282] *See Nordyke*, 644 F.3d at 785 (noting how a substantial burden test has been used in abortion cases and some free speech challenges).

[283] *See* Sobel, *supra* note 86, at 518-19.

[284] *See* Brownstein, *supra* note 87, at 955 ("What is constant, in determining what constitutes the infringement of a right, is the lack of constancy—the recognition that for each right certain purposes and effects are unacceptable, while other purposes and effects are either routinely upheld or subjected to some form of open-ended balancing test.").

[285] *See supra* text accompanying note 262.

[286] *See* Brownstein, *supra* note 87, at 956 ("The conventional understanding that all conflicts between rights-related activity and state action must be resolved under strict scrutiny review simply immunizes too large an area of human activity from democratic deliberation and regulation."). The fact that the substantial burden test is used for abortion cases seems to further suggest that it is especially well-suited for complex challenges to fundamental rights. *See* Sobel, *supra* note 86, at 521 ("The Second Amendment has more in common with the unenumerated right to abortion than with other rights enumerated in the Bill of Rights because those other rights do not typically involve acts that have the potential for serious immediate harm to the individual exercising the right or to others.").

[287] *See* United States v. Oppedisano, No. 09-CR-0305, 2010 WL 4961663, at *2 (E.D.N.Y. Nov. 30, 2010) (stating that "strict scrutiny is incompatible with *Heller*'s dicta concerning presumptively constitutional gun prohibitions"); *see also* Brownstein, *supra* note 87; Sobel, *supra* note 86, at 511 (noting that courts have been "straining to distinguish the challenged regulation from the one at issue in *Heller*" and reiterating the variety of tests that have been applied to Second Amendment challenges).

apply once a regulation is found to substantially burden a fundamental right, but failed to state the appropriate level of scrutiny.[288] While a second step is needed beyond *Nordyke*, a test that starts with a substantial burden analysis accommodates the complex interests of Second Amendment while still fitting within the parameters defined by *Heller* and *McDonald*.[289] Next, an interest balancing test—as opposed to a scrutiny test—should be used to compare the right being infringed upon with the government's justification.[290]

2. The Second Prong: Interest Balancing

After a weapon ban is found to substantially burden the core right of the Second Amendment, interest balancing should be used to determine whether the burden is justified by the interests that the ban seeks to serve.[291] Using an interest balancing inquiry that accounts for the totality of the circumstances when evaluating the regulation that infringes on a right is similar to some Due Process analyses performed when a core right of the Fourth, Fifth, or Fourteenth Amendments has been infringed.[292] In the Second Amendment context, for example, the interest balancing test could include an inquiry that "requires a court to examine all relevant facts and circumstances" surrounding the contested weapon ban at issue.[293] This

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[288] *See* Nordyke v. King, 644 F.3d 776, 786, n.9 (9th Cir. 2011) ("We need not decide today precisely what type of heightened scrutiny applies to laws that substantially burden Second Amendment rights.").

[289] *See* Sobel, *supra* note 86, at 496.

[290] *See infra* Subsection V.C.2. While Professor Sobel advocates solely for an undue burden test, this Note attempts to go one step further by suggesting that the burden test is only the first inquiry and that interest balancing should be the next inquiry. *See infra* Subsection V.C.2.

[291] 16B Am. JUR. 2D *Constitutional Law* § 861.

[292] *See* Sobel, *supra* note 86, at 496 ("Due Process . . . looks at whether the government's infringement of an individual right is sufficiently justified. Substantive Due Process claims may require courts to balance the respect for an individual's liberty and 'the demands of organized society.'") (internal quotations omitted); *see also* Yarborough v. Alvarado, 541 U.S. 652, 652 (2004) (applying a totality of the circumstances analysis to a Fifth Amendment infringement); Illinois v. Gates, 462 U.S. 213, 230-31 (1983) (applying a totality of the circumstances analysis to a Fourth Amendment infringement); Brownstein, *supra* note 87, at 871 ("[C]ourts and commentators have directed their attention to . . . determining whether a right exists and, if it does, whether a state infringement is justified.").

[293] Jodi Levine Avergun, Note, *The Impact of* Illinois v. Gates*: The States Consider the Totality of the Circumstances Test*, 52 BROOK. L. REV. 1127, 1129 (1987) (stating that in the context of the Fourth Amendment, the totality of the circumstances test "requires a court to examine all the relevant facts and circumstances surrounding an informant's tip and to make a practical and common sense decision whether, given all those circumstances, probable cause exists").

examination could account for geographical, social, and safety considerations present at the time the weapon ban was enacted or contested.[294] Viewing a regulation's infringement on one's Second Amendment right as one of many factors considered allows an analysis that may adapt to complex or fluid fact patterns.[295] Since analyzing government infringements on constitutionally protected rights by considering the totality of the circumstances has leant itself well to the fact-sensitive nature of Due Process cases, a similar approach would be helpful in a Second Amendment analysis through a "borrowing" process formally called hedging.[296]

According to one commentator, hedging can make an analysis more evolved because hedging expands the scope of what is being considered while absolving the analysis of any undesirable features.[297] In the context of the Second Amendment, incorporating a totality of the circumstances approach into an interest balancing analysis—*after* applying a substantial burden test—would (1) eliminate the unsettled analyses and inconsistent decisions at the forefront of Second Amendment disputes, (2) respect individuals' Second Amendment right to bear arms while still considering public policy and safety concerns, and (3) hedge against arbitrary empirical judgments—a problem which was among Justice Scalia's concerns in *Heller*.[298] The governmental interests that undoubtedly accompany weapon bans would be evaluated only after it has been established that a core right

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[294] *Gates*, 462 U.S. at 239 (stating that a totality of the circumstances test would "better achieve the accommodation of public and private interests that the Fourth Amendment requires").

[295] *See, e.g.*, *id.* at 230-31 ("This totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied."). Justice Breyer further pointed out that in the context of probable cause, the determination will often turn "on the assessment of probabilities in particular factual contexts." *Id.*

[296] *See* Tebbe & Tsai, *supra* note 24, at 475.

[297] *See id.* (discussing how hedging "is frequently undertaken to reduce the risks and disadvantages of making a singular doctrinal commitment" and "provides one route for escaping some of the undesirable features of path-dependent adjudication"). The authors also mention the forward-looking nature of law, and how conforming to past decisions can make it difficult to "sustain in the face of social pressure, if it meets unexpected circumstances, or if it winds up at a logical dead end." *Id.* at 475-76.

[298] *See* District of Columbia v. Heller, 554 U.S. 570, 634 (2008) (considering interest balancing as "the power to decide on a case-by-case basis whether the right is *really worth* insisting upon" and stating that "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all"); Sobel, *supra* note 86, at 500 ("Justice Stevens agreed in his dissent [in *McDonald*] that state and local governments should be able to 'try novel social and economic policies' as long as they are not 'arbitrary, capricious, or unreasonable.'") (quoting McDonald v. City of Chicago, 561 U.S. 742, 902 (2010) (Stevens, J., dissenting)).

has been infringed upon.[299] Interest balancing would only take place at this higher standard after the ban has already been subjected to a higher level of evaluation.[300]

3. Confronting Criticism: Why Including an Interest Balancing Test Is Permissible under Heller

While a narrow reading of *Heller*'s criticism of interest balancing suggests its use in conjunction with another test is permissible, the decision's outright rejection of interest balancing is the biggest opposition this hybrid test faces.[301] However, interest balancing is compatible with the *Heller* decision.[302] In *Heller*, the majority effectively engaged in interest balancing when it enumerated the list of presumptively lawful weapon bans.[303] For example, felons lose the right to possess firearms because of the greater threat they pose to society.[304] By adding this "weapons ban" of sort to the aforementioned list, the Supreme Court implicitly balanced, or at least stipulated to balancing, the right of felons to bear arms against the risk they would pose to society based on their prior conviction.[305]

While *Heller* has been considered a triumph of originalism,[306] interest balancing is usually seen as a pragmatic tool that is antithetical to originalism.[307] As Judge Posner suggested, in order to reach the majority's holding in *Heller* the Court had to interpret the Constitution as a living, evolving document rather than as originally crafted.[308] Judge Posner

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[299] *See id.* at 634.

[300] *Id.* Justice Scalia stated that no other constitutional right "has been subjected to a *freestanding* 'interest balancing' approach." *Id.* (emphasis added) (suggesting that only interest balancing *alone* is condemned—not when it is in conjunction with another test).

[301] *See supra* text accompanying note 109.

[302] *See* Winkler, *supra* note 34, at 1572 ("While the Court rejects interest balancing in name, something very much like it underlies the many limitations on the right recognized by the Court.").

[303] *Heller*, 554 U.S. at 626-27 (suggesting that certain "longstanding" laws will always be upheld).

[304] *See* Winkler, *supra* note 34, at 1572.

[305] *See id.* This interest balancing also underlies the other presumptively lawful bans. *Id.* Professor Winkler points out that dangerous people should not be allowed to possess firearms without regulation, hence the regulation of commercial gun sales. Guns should also not be able to end up in volatile, sensitive places where citizens may not be able to protect themselves, like schools, therefore regulations can be imposed for sensitive places. *Id.*

[306] *Id.* at 1557.

[307] *See, e.g.*, Rostron, *supra* note 68, at 720 ("Scalia and Breyer thus offered two fundamentally different, competing visions of how courts should look at Second Amendment claims. Breyer endorsed a highly pragmatic approach focused on assessing gun control laws from a contemporary public policy perspective, but with a potent dose of judicial restraint.").

[308] *See* Winkler, *supra* note 34, at 1574 (arguing that a contradiction in *Heller* is that

suggested that Justice Scalia's reasoning in *Heller*, while undertaken in the guise of originalism, is actually the opposite of true originalism.[309] In his interpretation of *Heller*, Judge Posner focused on the prefatory clause of the Second Amendment,[310] which states: "A well-regulated militia, being necessary to the security of a free State."[311] A focus on this clause suggests that the right to bear arms is closely related to an individual's participation in a militia.[312] However, the *Heller* majority focused on the operative clause of the Second Amendment, which states: "[T]he right of the people to keep and bear Arms, shall not be infringed."[313] The originalist argument stemming from the operative clause is that "the right to keep and bear arms" has no military connotation on its own and, taken on its face, grants an individual the right to bear arms.[314] The Supreme Court was able to rely on the operative clause in its originalist interpretation because, at the time of the *Heller* decision, no precedent on how to interpret the Second

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non-originalism was used in order to reach the decision, stating, "[l]ike all of our worthwhile rights, the right to keep and bear arms has changed over time"). Professor Winkler argues that in order to hold that the Second Amendment expands beyond the regulation of a militia, the majority would have to acknowledge that the right to self-defense has developed beyond the original intent of the framers. *Id.* Therefore, while the decision recounts much of what originalists look to for guidance—framers intent, actual text, the history behind the Amendment—a non-originalism perspective must have been employed as well. *Id.*; *see also* Lund, *supra* note 39, at 1345 ("Justice Scalia's majority opinion makes a great show of being committed to the Constitution's original meaning, but fails to carry through on that commitment.").

[309] *See* Posner, *supra* note 43 ("The majority opinion . . . concluded that the original, and therefore the authoritative, meaning of the Second Amendment is that Americans are entitled to possess pistols (and perhaps other weapons) for the defense of their homes.").

[310] *See id.* (explaining how "the Court decoupled the amendment's two clauses" to create a privilege to own guns separate from the militia).

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

[312] *See* Lund, *supra* note 39, at 1348 ("Those who focus on the Amendment's preamble argue that the protected right is the right of state governments to maintain military organizations, or at most a right of individuals to keep and bear arms while serving in such organizations."); Posner, *supra* note 43 ("The text of the amendment . . . creates no right to the private possession of guns for hunting or other sport, or for the defense of property.").

[313] U.S. CONST. amend. II; *see also* Lund, *supra* note 39, at 1348 ("Those who focus on the operative clause argue that the protected right is that of individual citizens to keep and bear their privately owned weapons.").

[314] *See, e.g.*, Rosenthal, *supra* note 88, at 1193 (noting that "the original meaning of the command in the Second Amendment's operative clause that the right to keep and bear arms 'shall not be infringed' suggests that no individual can be denied the right to possess or carry firearms in common civilian use in case of confrontation"); *see also* Lund, *supra* note 39, at 1348 (noting that the operative clause "presumptively implies" a private right, like in the First and Fourteenth Amendments, and that the terms used in the operative clause "were frequently used in nonmilitary contexts," which allows the phrase to extend beyond the military).

Amendment existed.[315] While Judge Posner made a compelling point—that the Court treated the Constitution as an evolving document in order to reach its "originalist" holding—the Court's reliance on the originalist interpretation of the operative clause is consistent with the decision's rationale and holding.[316] However, the Court went one step beyond a strictly originalist interpretation and incorporated what Judge Posner called a "flexible originalism" approach. Flexible originalism acknowledges that the Constitution is a living document, which necessarily takes into account the same interest balancing that the Court later chastised.[317]

Consistent with what Judge Posner recognized as "flexible originalism," the majority's holding—that the Second Amendment now applies to a citizen's right to self-defense, and not just the militia's right to self-defense—necessarily took into account citizens' changing perception of guns in America.[318] According to Judge Posner, the majority's opinion is ironic because a true originalist method would have yielded the opposite holding.[319] Similarly, another commentator observed that no part of *Heller*'s holding could be derived from a textual, originalist reading of the

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[315] *See* Lund, *supra* note 39, at 1347 ("One reason for regarding *Heller* as a particularly important test of originalism is that there were virtually no relevant Supreme Court precedents, and certainly none that could be considered dispositive."); *see also* Rosenthal, *supra* note 88, at 1198 ("[N]othing in the original meaning of the Second Amendment's operative clause as articulated in *Heller* offers a methodology for determining what types of burdens on the right to keep and bear arms are impermissible.").

[316] *See* Lund, *supra* note 39, at 1356. Professor Lund suggests that if Justice Scalia's opinion had only analyzed the D.C. handgun ban at issue, then the opinion would have been consistent and more or less true to originalism. *See id.* However, the majority opinion included "an astounding series of dubious obiter dicta pronouncing on the constitutionality of a wide range of gun control regulations that were not before the Court." *Id.* Simply put, perhaps if Justice Scalia had not covered so many bases in his analysis, there would be less for the lower courts to grapple with and sift through. *Id.*

[317] *See* Posner, *supra* note 43 ("Judges are advocates for whichever side of the case they have decided to vote for."); *see also* Wilkinson, *supra* note 50, at 254. While Judge Posner refers to the majority decision as "faux originalism," Judge Wilkinson goes on to accuse the majority of judicial subjectivity, which Judge Posner also mentions by attributing the recounting of Second Amendment history as "evidence of the ability of well-staffed courts to produce snow jobs." Posner, *supra* note 43.

[318] *See* Posner, *supra* note 43 ("The Framers of the Bill of Rights could not have been thinking of the crime problem in the large crime-ridden metropolises of twenty-first-century America, and it is highly unlikely that they intended to freeze American government two centuries hence at their eighteenth-century level of understanding."); Winkler, *supra* note 34, at 1574.

[319] *See* Posner, *supra* note 43 ("The irony is that the 'originalist' method would have yielded the opposite result."); *see also* Winkler, *supra* note 34, at 1557 (noting that the majority opinion "actually embodies a living, evolving understanding of the right to keep and bear arms").

Second Amendment.[320] Guns are now used by both militia and laymen and are in the homes of many as a source of personal protection.[321] The fact that the Court in *Heller* recognized this, though layered beneath a recounting of Second Amendment history, suggests that the very interest balancing the Supreme Court condemns was instrumental in its decision and is necessary in evaluating regulations under the Second Amendment.[322] Indeed, this irony is what lower courts seem to confront head on—that a decision seemingly so rooted in history and originalism leads to litigation that is resolved through the same interest balancing that the Court vehemently opposed.[323]

Kolbe is important not only because it created a circuit split, but because it directly opposes *Friedman*.[324] The Supreme Court gave discretion to lower courts by failing to state which level of scrutiny should be applicable to weapon ban analyses.[325] While some instances may be appropriate for strict scrutiny application, *Kolbe* was not one of them—this is highlighted by the fact that *Friedman* resolved a factually identical situation with a lower standard of review.[326] *Kolbe* is significant because it unnecessarily

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[320] *See* Rosenthal, *supra* note 88, at 1196 (stating that none of *Heller*'s holding "can be deduced from the Court's explication of the original meaning of the Second Amendment's text, which says not a word about self-defense or the importance of hearth and home").

[321] *See* Jacobs, *supra* note 34, at 235, 239 (providing an overview of the types of weapons, historical and current, that have been subject to weapon bans and their evolving use).

[322] *See* Lund, *supra* note 61, at 215 (arguing that "pretending to find guidance in the text and history that is not there, however reasonable that guidance may seem to some, is apt to discredit originalism"); *see also* Rosenthal, *supra* note 88, at 1195 (arguing that *Heller*'s holding "seems to rest on nonoriginalist considerations").

[323] *See* Rosenthal, *supra* note 88, at 1203. Professor Rosenthal observes:

> It is remarkable that an opinion that focused so consciously on the original meaning of the Second Amendment's operative clause, and which abjured any form of interest balancing, has resulted in litigation that pays so little attention to the original meaning of the operative clause, and which seems to utilize interest balancing with abandon.

Id. Professor Rosenthal also argues that the nonoriginalism plaguing *Heller* "helps to explain why lower courts have increasingly utilized the type of balancing tests and standards of scrutiny seemingly eschewed" by the decision, and that "original meaning has rarely played a decisive role" in the lower court decisions. *Id.* at 1192, 1197.

[324] *See generally supra* Part IV (comparing the *Kolbe* and *Friedman* analyses side by side).

[325] *See supra* text accompanying note 69; *supra* text accompanying note 88 (observing the lack of standard articulated by the Supreme Court). The Supreme Court recognized that it was not stating an explicit standard, it just condemned two—therefore, the Court granted lower courts some discretion in selecting a scrutiny level. *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) ("[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field.").

[326] *See generally* Friedman v. City of Highland Park, 784 F.3d 406, 419 (7th Cir. 2015)

applied a higher level of scrutiny, which opens doors for other courts to follow suit.[327] The absence of an applicable standard of review could lead to more incongruity in analyses and outcomes among the lower courts, and potentially lower the amount of weapons regulations.[328] *Kolbe* highlights the gap that was created by the Supreme Court decisions, the inconsistent responses by the lower courts, and the potential consequences that will ensue if the Supreme Court does not adopt a practical, consistent test.[329] Justice Breyer articulated a handful of consequences that he anticipated in his dissenting opinion in *Heller*, namely legal challenges, perpetual litigation, and the threat of "leav[ing] cities without effective protection against gun violence and accidents."[330] In order to respond to the circuit split, resolve ambiguity among lower courts in Second Amendment assault weapon analysis, and prevent the consequences that Justice Breyer predicted in *Heller*, the Supreme Court should adopt a substantial burden-interest balancing hybrid test.[331]

VII. CONCLUSION

Because the Supreme Court did not explicitly mandate a standard of review, the circuit courts utilized scattered dicta to piece together a semblance of an answer to the question of how courts should evaluate weapon bans under the Second Amendment.[332] From interest balancing and reasonable fit analyses to intermediate and heightened scrutiny, courts have employed a variety of tests to evaluate weapon bans.[333] The fact that five of the deadliest shootings in United States history have occurred in the

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(Manion, J., dissenting) (stating that the majority used intermediate scrutiny in making their decision).

[327] *See generally supra* Subsection IV.B.2 (comparing the different interpretations the *Kolbe* and *Friedman* Courts used in selecting the scrutiny standard to apply).

[328] *See generally supra* Section V.B (discussing policy implications).

[329] *See, e.g.*, Brett S. Turlington, Note, Kolbe v. Hogan*: Hewing to* Heller *and Taking Aim at a Standard of Strict Scrutiny for Comprehensive Firearms Legislation*, 76 MD. L. REV. 487, 501, 510 (2017) (stating that the Supreme Court "did not provide, and has not provided since, any further guidance in regard to the proper standard," and that "courts have applied a range of standards of scrutiny to laws challenged under the Second Amendment."). This commentator also notes *Kolbe*'s important argument and that it might "persuade the Supreme Court to address the circuit split" that the case had created. *Id.*

[330] *Heller*, 554 U.S. at 718 (Breyer, J., dissenting).

[331] *See generally supra* Section V.C (proposing and explaining a hybrid substantial burden-interest balancing test).

[332] *See* Lund, *supra* note 131, at 1623 ("Faced with harder cases, and with the fogginess of the Heller opinion, these courts understandably have reached for a framework resembling the familiar 'baggage' picked up by the First Amendment.").

[333] *See supra* Part III.

last eleven years highlights the importance of the governmental interests and policy motivations behind these weapon bans.[334] Inconsistent evaluations of firearm regulations are no longer acceptable, even if the source of the inconsistency is the Supreme Court. The Court should adopt a substantial burden-interest balancing hybrid test to appropriately account for an individual's right to bear arms and the public policy concerns of state governments. Adopting such a test is essential because doing so is more than just a hypothetical resolution to a circuit split—it has the potential to save lives.[335]

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[334] *See Deadliest Mass Shootings in Modern U.S. History Fast Facts*, CNN LIBR. (Feb. 19, 2018, 11:54 AM), http://www.cnn.com/2013/09/16/us/20-deadliest-mass-shootings-in-u-s-history-fast-facts/.

[335] *See supra* Part II; *supra* Section V.B.