FOURTH CIRCUIT SHOOTOUT: "ASSAULT WEAPONS" AND THE SECOND AMENDMENT

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INTRODUCTION

Severe restrictions on so-called assault weapons and large-capacity magazines have long been an important agenda item for organized proponents of gun control. For just as long, gun rights activists have accused their opponents of a kind of bait and switch. The main targets of these restrictions have been rifles that look like M16s, AK-47s, and other military rifles, but operate differently. Since 1934, civilians have been required to undergo a costly and burdensome federal licensing process in order to possess fully automatic weapons, commonly referred to as machineguns.[1] Such weapons, which include military rifles, are now rare and expensive because the federal government froze the civilian supply in 1986.[2] The rifles at which more recent laws are aimed, such as the AR-15 and AR-10, have a superficial resemblance to military weapons but use a *semi-automatic* operating system like those found in many ordinary hunting guns, as well as in a very large proportion of modern handguns. These semi-automatics are now called "modern sporting rifles" by their defenders, who hope to discourage the public from being fooled into mistaking them for machineguns.

The debate about this issue assumed national prominence in 1994, when Congress enacted a statute that restricted the sale of semi-automatic rifles with a military appearance and all magazines that can hold more than ten rounds of ammunition.[3] Although the statute contained a grandfather clause exempting weapons already in civilian hands, it provoked a firestorm of criticism, and the Democratic Party promptly lost control of both Houses of Congress for the first time in four decades. When the law expired by operation of a sunset provision ten years later, President Bush advocated its renewal.[4] The Republican Congress ignored him, and the Democrats failed to revive the

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1 *See* National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934).

2 *See* 18 U.S.C. § 922(o) (2012).

3 The statute defined an assault rifle as a semi-automatic rifle with a detachable magazine and any two of five other features: a folding or telescoping stock; a pistol grip; a bayonet mount; a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and a grenade launcher. The statute covered some rifles by name, exempted some others by name, and it had additional provisions dealing with certain pistols and shotguns. Pub. L. No. 103-322, § 110102(b) 108 Stat. 1996, 1997–98 (1994).

4 Eric Lichtblau, *Irking N.R.A., Bush Supports the Ban on Assault Weapons*, N.Y. TIMES, May 8, 2003, http://www.nytimes.com/2003/05/08/us/irking-nra-bush-supports-the-ban-on-assault-weapons.html?pagewanted=all.

measure after they regained control of Congress and the presidency in 2009. Evidently regarding such legislation as politically toxic, neither party has enacted a major gun control law at the national level for almost a quarter of a century.

Several states, however, have enacted laws that are modeled on the 1994 federal statute.[5] Maryland's version was recently upheld by the Fourth Circuit, sitting en banc, in *Kolbe v. Hogan*.[6] This case offers a useful lens through which to view the landmark decision in *District of Columbia v. Heller*,[7] a case in which the Supreme Court issued an opinion that was almost bound to create at least as much heat as light in the lower courts. Part I of this Article discusses *Heller*. Part II discusses the dispute in *Kolbe* about the correct interpretation of *Heller*. Throughout, the Article focuses on the effects of *Heller* in the lower courts, without probing the original meaning of the Second Amendment or the extent of *Heller*'s fidelity to that meaning.

I. SUPREME COURT PRECEDENT

In *Heller*, the Court invalidated a federal law that forbade almost all civilians in the nation's capital to keep a handgun in their homes for self-defense.[8] Much of Justice Antonin Scalia's 5-4 majority opinion is devoted to a detailed textual and historical analysis of the Second Amendment.[9] This originalist inquiry produced two threshold conclusions. First, the Second Amendment protects an individual's right to keep and bear arms, not a right of state governments to maintain an organized militia.[10] Second, the principal purpose of this right is to enable Americans to exercise their natural or inherent right of self-defense.[11]

The *Heller* opinion treats the *scope* of the Second Amendment right quite differently.[12] Notwithstanding some originalist window dressing, Scalia's statements about specific applications of the Second Amendment

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5 *See, e.g.*, MD. CODE ANN., PUB. SAFETY § 5-101(r)(2) (West 2017).

6 849 F.3d 114, 149 (4th Cir. 2017). The principal substantive provisions of the law resemble those in the 1994 federal statute. *Id*. at 121–23.

7 554 U.S. 570 (2008).

8 *Id*. at 636.

9 *Id*. at 576–636.

10 *Id*. at 580–81.

11 Justice John Paul Stevens wrote a dissent for four Justices, purportedly based on originalist interpretive methodology, which concluded that the Second Amendment protects an individual right that is properly described as "the right of the people of each of the several States to maintain a well-regulated militia." *Id*. at 637 (Stevens, J., dissenting). This position was unequivocally repudiated by the majority, and it has had virtually no direct influence in the lower courts. *See, e.g.*, Moore v. Madigan, 702 F.3d 933, 937 (7th Cir. 2012) (Posner, J.) (asserting that the Supreme Court's historical analysis is "debatable," but treating its implications as binding precedent).

12 For a detailed discussion, see Nelson Lund, *The Second Amendment,* Heller, *and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1344–68 (2009).

have little support in the relevant historical sources. That feature of the opinion may be of concern primarily to the few judges and academic commentators who take originalist interpretive theory seriously. A much broader audience, however, has reason to be interested in the effects of *Heller*'s vague, ambiguous, and sometimes conflicting statements that will bear on the adjudication of future cases.

Heller definitively resolved only one narrow issue: broad handgun bans are unconstitutional.[13] *McDonald v. City of Chicago*[14] confirmed what most observers expected, namely that this rule will also be applied to laws adopted by state and local governments.[15] Beyond that, however, the Court's guidance consists largely of a series of ipse dixits that are open to different interpretations.[16]

First, *Heller* offers a non-exhaustive list of "longstanding" regulations that are "presumptively lawful."[17] These include firearms disabilities imposed on felons and the mentally ill, bans on taking firearms into "sensitive places such as schools and government buildings," and the imposition of "conditions and qualifications on the commercial sale of arms."[18] Aside from the vagueness and ambiguity in some of its formulations, the Court's opinion is equivocal about whether these dicta are meant to be treated as binding rules by the lower courts.[19] The opinion also refers with apparent approval to nineteenth century cases upholding prohibitions on bearing concealed weapons in public,[20] but it does not expressly endorse them. *Heller* also interprets the Court's leading Second Amendment decision in *United States v. Miller*[21] to mean roughly the opposite of what it says.[22]

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13 554 U.S. at 628–29.

14 561 U.S. 742 (2010).

15 *Id*. at 791.

16 This Article leaves aside important questions about whether or to what extent the lower courts should consider themselves bound by anything except the holdings of Supreme Court decisions.

17 554 U.S. at 626–27, 627 n.26.

18 *Id*. at 626.

19 Ordinarily, one might assume that anything described as a presumption would be rebuttable. *Heller*, however, does not say how the presumptions might be rebutted. At the end of the opinion, moreover, the Court seems to treat these presumptions as settled conclusions: "[T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." *Id*. at 635.

20 *Id*. at 626.

21 307 U.S. 174 (1939).

22 *Miller* said:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. . . .
> . . . With obvious purpose to assure the continuation and render possible the effectiveness of such [militia] forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

In addition to many specific questions left unanswered by these dicta, *Heller* pointedly declined to say what analytical framework should govern future challenges to gun regulations. Should courts use the familiar "tiers of scrutiny" deployed in related areas of constitutional law? Or an historical approach suggested by some of *Heller*'s comments about certain "longstanding" regulations and nineteenth-century judicial precedents? Or an original-meaning interpretation modeled on *Heller*'s own treatment of the threshold issue involving the nature and purpose of the Second Amendment right? Or an ad hoc policy-based approach suggested by *Heller*'s unexplained approval of a miscellany of regulations that the Court was anxious to endorse without providing any reasoned justification?

II. *KOLBE V. HOGAN*

Most federal circuit courts have responded to this uncertainty by adopting a simple two-step approach. First, the court asks whether the challenged statute impinges on the Second Amendment right. If not, the statute is upheld. Otherwise, the court proceeds to the second step, where it usually upholds the statute after applying intermediate scrutiny. There are a few outlier decisions that take a different approach,[23] and there are some cases where a challenged statute has been invalidated.[24] The pattern just described, however, has been followed pretty consistently.[25]

In form, *Kolbe* follows the standard two-step analysis. In other respects, however, the case is unusual. A number of jurisdictions had enacted bans on

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Id. at 178. *Heller* interprets this to mean that short-barreled shotguns are not protected by the Second Amendment because they are not typically possessed by *civilians*, whereas handguns are protected by the Second Amendment, without regard to their military utility, because they *are* popular with civilians. 554 U.S. at 624–25. For further detail, *see* Nelson Lund, Heller *and Second Amendment Precedent*, 13 LEWIS & CLARK L. REV. 335, 338–39 (2009).

23 Several have come from the Seventh Circuit. Judge Diane Sykes, for example, has developed a complex and sophisticated framework that uses the Supreme Court's First Amendment jurisprudence as a model. *See* Ezell v. City of Chicago, 651 F.3d 684, 700–04 (7th Cir. 2011). Judge Frank Easterbrook, by way of contrast, has read *Heller* to leave the lower courts at liberty to decide cases based largely on the principle that ours is "a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national uniformity." Friedman v. City of Highland Park, 784 F.3d 406, 412 (7th Cir. 2015). Judge Richard Posner has offered a characteristically discursive blend of legal reasoning and empirical analysis. *See* Moore, 702 F.3d at 949–52.

24 *See, e.g.*, *Moore*, 703 F.3d at 942 (invalidating a total ban on bearing arms in public); Tyler v. Hillsdale Cty. Sheriff's Dept., 837 F.3d 678, 699 (6th Cir. 2016) (en banc) (sustaining as-applied challenge to statute imposing lifetime firearms disability on anyone involuntarily committed to a mental institution); Binderup v. Att'y Gen. U.S., 836 F.3d 336, 356–57 (3d Cir. 2016) (en banc) (sustaining as-applied challenge to statute imposing lifetime firearms disability on anyone convicted of certain state-law misdemeanors).

25 For a more detailed discussion, see Nelson Lund, *Promise and Perils in the Nascent Jurisprudence of the Second Amendment*, 14 GEO. J.L. & PUB. POL'Y 207, 215–21 (2016).

so-called assault weapons and large-capacity magazines.[26] The main features common to such bans had always been upheld,[27] and the trial court approved Maryland's statute after applying intermediate scrutiny.[28] A panel of the Fourth Circuit reversed and ordered the use of strict scrutiny.[29] There was no federal precedent for the use of strict scrutiny in a Second Amendment case,[30] and Judge Robert King issued a strongly worded dissent.[31]

The case was then taken en banc, where ten members of the court voted to uphold the Maryland statute. Perhaps influenced by the panel's bold use of strict scrutiny at step two of the standard analysis, Judge King's majority opinion boldly held at step one that the weapons at issue were not even covered by the Second Amendment.[32] This conclusion was itself unprecedented,[33] and Judge William Traxler wrote a dissent joined by three other judges.[34]

King and Traxler both claimed to be following *Heller*'s guidance. An analysis of the main points in their dispute illustrates how little the Supreme Court has really told us.

A. *Does the Second Amendment Even Apply?*

The *Kolbe* majority held that weapons of the kind challenged in this case are not protected by the Second Amendment. The court began by accepting

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26 *See, e.g.*, CAL. PENAL CODE § 32310 (West 2017) (banning large-capacity magazines); COLO. REV. STAT. § 18-12-302 (2017) (banning large-capacity magazines); CONN. GEN. STAT. § 53-202(c) (2017) (banning assault weapons).

27 *See, e.g.*, Heller v. District of Columbia, 670 F.3d 1244, 1264 (D.C. Cir. 2011) (*Heller II*); *Friedman*, 784 F.3d at 412; N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 269 (2d Cir. 2015). *See also* Fyock v. Sunnyvale, 779 F.3d 991, 999 (9th Cir. 2015) (upholding restrictions on large-capacity magazines).

28 Kolbe v. O'Malley, 42 F. Supp. 3d 768, 789–90 (D. Md. 2014).

29 Kolbe v. Hogan, 813 F.3d 160, 168 (4th Cir. 2016).

30 In *Ezell*, 651 F.3d at 708, the court characterized the standard applicable to a ban on firing ranges as "not quite 'strict scrutiny,'" and the court's formulation of its standard was noticeably different from the traditional strict scrutiny formula. The panel decision in *Tyler v. Hillsdale Cty. Sheriff's Dept*., 775 F.3d 308 (6th Cir. 2014), which applied strict scrutiny, had been vacated when en banc review was granted.

31 *See Kolbe*, 813 F.3d at 192–202 (King., J., dissenting in part, concurring in part).

32 Nine judges joined the opinion, and Judge Albert Diaz concurred on the narrower ground that the statute survives intermediate scrutiny. *Kolbe*, 849 F.3d at 119.

33 Some courts have assumed, without deciding, that semi-automatic rifles with a military appearance are protected by the Second Amendment, and then proceeded to use intermediate scrutiny at step two of the analysis. *See, e.g.*, *Heller II*, 670 F.3d at 1260–61; *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 257, 260.

34 *Kolbe*, 849 F.3d at 151 (Traxler, J., dissenting).

Maryland's claim that the banned weapons are well-suited for use by the military but ill-suited for self-defense by civilians.[35] That proposition is debatable for a number of reasons, including the fact that semi-automatic rifles seem to have been universally *rejected* by military organizations the world over.[36] But even assuming that problem away,[37] one must ask whether the court correctly interpreted and relied on the following passage from *Heller*:

> It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause [*viz*., "A well regulated Militia, being necessary to the security of a free State"]. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.[38]

The *Kolbe* majority argues that because the guns banned by the Maryland statute are more useful for military and law enforcement functions than for civilian self-defense, and thus are "like" M16 rifles within the meaning of the first sentence of this passage from *Heller*, those weapons are therefore not protected by the Second Amendment.

It is reasonably plain that the Supreme Court meant to suggest that M16s may be banned, though it did not actually say so. But even assuming what the Court suggested, the quotation above does not allow one to infer with any certainty which weapons are "like" the M16 in the relevant respects. For example, the Court could have meant rifles capable of fully automatic fire, which are indeed "highly unusual in society at large," as the Court says in this paragraph. That interpretation would be supported by the fact that standard military rifles like the M16 are all capable of fully automatic fire, and by the fact that *Heller* also says that it would be "startling" to read *United States v. Miller* to mean that machineguns are protected by the Second Amendment.[39]

A narrow interpretation of the *Heller* passage would also be consistent with the fact that the rifles banned by Maryland are at least as similar to other semi-automatic rifles that are *not* banned as they are to the machineguns that

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35 *Id*. at 138 (majority opinion).

36 The M16 and AK-47, for example, are "selective fire" weapons that can be operated either in semi-automatic mode or as fully automatic machineguns. *See AK-47 vs. M16 Rifle*, DIFFEN, http://www.diffen.com/difference/AK-47_vs_M16_Rifle (last visited August 20, 2017).

37 The dissent objected that the majority misapplied the summary judgment standard by failing to view the facts in the light most favorable to the nonmoving party (i.e. the plaintiffs). *Kolbe*, 849 F.3d at 155–56, 156 n.5 (Traxler, J., dissenting).

38 554 U.S. at 627–28.

39 *Id*. at 622–24.

have long been very tightly restricted under federal law. The *Kolbe* majority claims that semi-automatic weapons can fire almost as rapidly as fully automatic weapons, which is probably not true.[40] But even if it were, nothing in *Heller* says or implies that the rate of fire is what would allow M16s to be banned, if in fact the Second Amendment does allow them to be banned. Nor does anything in *Heller* support the rather odd suggestion in *Kolbe* that features like an adjustable stock or a pistol grip, which may have a marginal effect in helping users hit what they are aiming at, are "military features" that can take a rifle outside the scope of the Second Amendment.[41] Could the Supreme Court really have meant to imply that the Second Amendment favors weapons that make their users more likely to *miss* what they aim at?

It is true that the phrase "most useful in military service" could as a linguistic matter mean "more useful in military service than elsewhere," though it could just as easily mean "more useful in military service than alternatives like semi-automatic rifles." Accepting the first reading allows one to argue, as the majority does,[42] that semi-automatic rifles have some of the critical features that the military looks for in the rifles it adopts for combat operations, and that these features are even more useful in military combat than in civilian life. But virtually *all* rifles have some characteristics that the military wants its combat weapons to have. And virtually all rifles suitable for hunting medium or large game could reasonably be thought to be more useful in military service than for civilian self-defense. After all, an infantryman in a combat zone is more likely than a civilian to have occasion to fire his rifle, and in that sense it is more useful to him than to a civilian. As the dissent points out, however, one could argue with equal plausibility that the muskets that the militia were required to bring with them from home when called to duty in the eighteenth century were "most useful" as weapons of war.[43] To conclude that those muskets were not protected by the Second Amendment would make nonsense of the language and history of the Second Amendment, as *Heller* understood them, and of *Heller*'s felt need to reject the view that *only* weapons of war are protected.[44]

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40 *See* 849 F.3d at 136 (asserting that the M16 machinegun and the semi-automatic AR-15 can empty a 30-round magazine in two seconds and five seconds respectively). As the dissent points out, the M16 can fire 45 to 65 rounds per minute in semi-automatic mode and 150-200 rounds in fully automatic mode, while the AK-47 can fire about 40 rounds per minute in the former mode and 600 rounds per minute in the latter mode. *Id.* at 158 (Traxler, J., dissenting). There are probably many people who would like to see someone who is not Mr. Data from the *Star Trek* television show fire 30 rounds from an AR-15 in five seconds. In any event, if the rate of fire in both modes were virtually identical, one wonders why the military would bother making all of its battle rifles capable of automatic fire.

41 *See id*. at 125 (majority opinion).

42 *Id.* 849 F.3d at 121.

43 *Id.* at 156–57 (Traxler, J., dissenting).

44 *Kolbe*'s logic could be used to declare the vast majority of American hunting rifles outside the protection of the Second Amendment, even though such rifles are kept for lawful purposes and even though such rifles are useful both for hunting and for self-defense. One would think that if the Supreme

If *Kolbe*'s legal analysis of the semi-automatic rifles at issue is extremely dubious, its treatment of large-capacity magazines verges on the bizarre. The Maryland statute does not merely ban large-capacity magazines used in rifles that have a superficial resemblance to weapons like the M16, it bans the sale of *all* magazines that can hold more than ten rounds of ammunition.[45] A very large proportion of ordinary handguns accept such magazines, and the majority provides no reason to think that handguns equipped with such magazines are any more useful in the military than they are in ordinary law enforcement and civilian contexts.[46]

In sum, *Kolbe* adopts a willfully imaginative interpretation of one sentence in *Heller*, then uses that interpretation to reach a novel conclusion that has no discernable basis in the Supreme Court's opinion. That conclusion, moreover, is hard to reconcile with other statements in *Heller*, and *Kolbe*'s logic points toward results that seem quite implausible.

Judge Traxler's dissent also purports to find clear guidance in *Heller* at step one of the analysis:

> [T]he Second Amendment protects those weapons "typically possessed by law-abiding citizens for lawful purposes." By contrast, "the carrying of 'dangerous and unusual weapons'" has been prohibited as a matter of "historical tradition." If a weapon is one "typically possessed by law-abiding citizens for lawful purposes," then it cannot also be a "dangerous and unusual" weapon in a constitutional sense. . . . Simply put, if the firearm in question is commonly possessed for lawful purposes, it falls within the protection of the Second Amendment.[47]

Because large-capacity magazines and the rifles banned by Maryland are perfectly legal in a large majority of the states,[48] and very commonly possessed by civilians for lawful purposes,[49] the dissent had no difficulty in drawing a conclusion diametrically opposed to the majority's.

The majority objects that this kind of "popularity test" makes no sense because it would allow dangerous and unusual weapons to slip under the protection of the Second Amendment if a lot of them were purchased before legislatures got around to banning them.[50] The dissent responds that a similar objection had been raised by Justice Stephen Breyer in his dissenting opinion

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Court meant to imply that conclusion, it would say something that actually carries such an implication. And if the Court meant to imply such a thing, one would wonder why the *Heller* opinion goes out of its way to say that most Americans at the time of the founding "undoubtedly" thought that the ancient right to keep and bear arms was "even more important for self-defense *and hunting*" than for preserving the militia. *Heller*, 554 U.S. at 599 (emphasis added).

45 MD. CODE ANN., CRIM. LAW § 4-303(a) (West 2017).

46 The *Kolbe* majority repeatedly conflates law enforcement with military service, notwithstanding the absence of any suggestion of such an equivalence in the passage from *Heller* on which the court purports to base its analysis.

47 849 F.3d at 152–53 (Traxler, J., dissenting) (citations to *Heller* omitted).

48 *Id*. at 153–54.

49 *Id*. at 153.

50 *Id*. at 141–42 (majority opinion).

in *Heller*, but the *Heller* majority was unpersuaded.[51] Accordingly, says the *Kolbe* dissent, the objection may not be used as a reason to ignore the Court's plain instruction that if a firearm is commonly possessed for lawful purposes, it falls within the protection of the Second Amendment.[52]

The *Kolbe* majority offers no real counterargument, and the dissent's position seems irrefutable. Or at least it looks that way until you read the entire sentence in *Heller* from which Judge Traxler quotes: "We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[53] Note the awkward, and obviously deliberate use of a double negative in this sentence. All the Court has said is that if a weapon is *not* typically possessed by law-abiding citizens for lawful purposes, it is *not* protected by the Second Amendment. It does not follow that every weapon that *is* typically possessed by law-abiding citizens for lawful purposes therefore *is* protected by the Second Amendment.[54] The *Kolbe* dissent quotes a part of the Supreme Court's sentence in a way that affirmatively misrepresents what the Court said.

It is true that *Heller* later attributes to *Miller* a statement "that the sorts of weapons protected [by the Second Amendment] were those 'in common use at the time.'"[55] But *Heller* immediately characterizes this as a "limitation" that is supported by the historical tradition of bans on the carrying of "dangerous and unusual weapons."[56] *Miller* did indeed say that during the founding period, "ordinarily when called for service these [militia] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[57] *Heller* had already discussed the significance of the historical fact that the same weapons were commonly used for both civilian and military purposes in the eighteenth century. That is not true today (at least with respect to rifles, in contradistinction to handguns), which is why *Heller* felt a need to explain why it did *not* think that fully automatic military weapons like the M16 are necessarily protected by the Second Amendment. Both the earlier discussion on which the *Kolbe* dissent relies and the subsequent allusion to the quotation from *Miller* occur in contexts that make it unmistakably clear that *Heller* is reading *Miller* "to say *only* that the Second Amendment does *not* protect those weapons *not* typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[58] Neither passage says or implies that all weapons "in common use" or "typically possessed" by civilians are necessarily protected by the Second Amendment.

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51 *Id.* at 153 (Traxler, J., dissenting).

52 *Id.* at 152–55.

53 554 U.S. at 625.

54 Saying that non-human animals will not be granted entrance to Heaven does not imply that all human beings *will* be admitted.

55 *Id.* at 627 (quoting *Miller*, 307 U.S. at 179).

56 *Id.*

57 307 U.S. at 179.

58 554 U.S. at 625 (emphasis added).

Both the majority and the dissent base their diametrically opposite conclusions on untenable readings of *Heller*. One of them must be right about whether the Second Amendment protects the weapons at issue, but whichever opinion arrived at the correct conclusion, its author only pretended that *Heller* told him how to get there.

B. *What is the Appropriate Level of Scrutiny?*

Having concluded that the weapons banned by the Maryland statute are not protected by the Second Amendment, the *Kolbe* majority could have stopped right there and dismissed the constitutional challenge. Instead, the court offered an alternative holding, under which the statute survives intermediate scrutiny because it "is reasonably adapted to a substantial governmental interest."[59] This section of the opinion resembles the analysis used by other circuit courts that have ruled on similar regulations. Briefly stated, the court found that intermediate scrutiny is appropriate because the challenged statute "leav[es] citizens free to protect themselves with a plethora of other firearms and ammunition."[60] Finding substantial evidence that the statute's provisions will advance the state's public-safety goals, the court held that intermediate scrutiny was satisfied: the design of the statute reflects "precisely the type of judgment that legislatures are allowed to make without second-guessing by a court."[61]

Intermediate scrutiny has now been used by every circuit court that has considered statutes of this kind. This practice, however, has no clear basis in *Heller*, which confined itself to rejecting the use of rational basis review.[62] The *Kolbe* dissent, moreover, has a striking objection to the majority's analysis. In *Heller*, the Court expressly rejected the proposition that a ban on one kind of weapon can be justified on the ground that other weapons are not banned: "It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed."[63] The *Kolbe* majority responds that *Heller* treated the handgun as "the quintessential self-defense weapon,"[64] and that the Maryland statute puts a much smaller burden on the core Second Amendment right than a ban on handguns would.[65] As the dissent points out, this logic would seemingly leave legislatures free to ban every kind of firearm except handguns.[66]

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59 849 F.3d at 133 (quoting U.S. v. Masciandaro, 638 F.3d 458, 471 (4th Cir. 2011)).

60 *Id*. at 138.

61 *Id*. at 140.

62 554 U.S. at 634.

63 *Id.* at 628–29.

64 849 F.3d. at 138 (quoting *Heller*, 554 U.S. at 629).

65 *Id*. at 145.

66 *Id.* at 161–62. Indeed, it might be permissible to ban certain kinds of handguns, such as those with a semi-automatic operating system (which are what the military uses), so long as other kinds, such

Intermediate scrutiny is a notoriously pliable standard of review, which makes it hard to say that it has indisputably been misapplied in any of the Second Amendment cases where it has been deployed. According to the *Kolbe* dissent, however, that makes no difference because *Heller* requires the use of strict scrutiny:

> Maryland's ban on the AR-15 and other semiautomatic rifles forbids its law-abiding citizens from purchasing commonly possessed firearms for use in their homes for the protection of self and family. By reaching into private homes, where the protection afforded by the Second Amendment is at its greatest, Maryland's law clearly implicates the "core" of the Second Amendment: "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." The Supreme Court in *Heller* made clear that the "inherent right of self-defense has been *central* to the Second Amendment," and that this central component of the Second Amendment is at its strongest within "the home where the need for defense of self, family, and property is most acute."
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> The majority is incredulous that we would apply strict scrutiny to a law prohibiting the possession of a commonly used firearm to protect family and home. But, of course we would apply strict scrutiny—we have no other alternative in these circumstances. Once it is determined that a given weapon is covered by the Second Amendment, then obviously the in-home possession of that weapon for self-defense is core Second Amendment conduct and strict scrutiny must apply to a law that prohibits it.[67]

Heller does say: "[W]hatever else it leaves to future evaluation, [the Second Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[68] This sentence comes at the end of a paragraph in which Justice Scalia rejects the "freestanding 'interest-balancing'" approach that he attributes to Justice Breyer.[69] This may suggest that if a tiers-of-scrutiny approach is adopted, strict scrutiny should be used in all cases that involve the in-home possession of constitutionally protected arms. But this paragraph does not necessarily imply that tiers-of-scrutiny analysis is applicable to all Second Amendment cases, or even to those cases that involve bans on certain kinds of weapons.[70] If anything, the Court's categorical reference to elevating this right "above all other interests" would seem to imply that even strict scrutiny would give too much discretion to legislatures and judges. Because the Court elsewhere

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as revolvers, were permitted. And perhaps double-action revolvers could be banned on the ground that they are capable of a higher rate of fire than single-action revolvers.

67 *Id.* at 160 (citations to *Heller* omitted).

68 554 U.S. at 635.

69 *Id.* at 634.

70 The closest *Heller* came to suggesting that the tiers of scrutiny might properly be used in Second Amendment cases is in this hypothetical: "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' would fail constitutional muster." *Id.* at 628–29 (internal footnote and citation omitted).

strongly suggests that bans on the in-home possession of "dangerous and unusual" weapons like the M16 are permissible, this allusion to the right "to use arms in defense of hearth and home" leaves unspecified both the line between permissible and impermissible regulations of particular arms and the correct mode of locating that line. The *Kolbe* dissent is wildly exaggerating when it claims that there was no alternative to the application of strict scrutiny.

Here again, as in their conclusions at step one of the analysis, both the majority and the dissent read into *Heller* guidance that is just not there.

CONCLUSION

Most federal courts of appeals have decided that *Heller* recognized (or allowed them to recognize) only a very narrow Second Amendment right. Many courts have treated *Heller*'s unexplained list of "presumptively lawful" regulations as per se constitutional, or even expanded that list to include any regulation that has been in place for a long time.[71] Others have applied intermediate scrutiny in a way that gives extremely broad discretion to the government, effectively adopting the approach used in Justice Breyer's *Heller* dissent. These narrow readings of *Heller* are not compelled by the Court's opinion, and many of them are based on untenable interpretations of *Heller*'s text. But *Heller* was also careful not to include language clearly ruling out what these courts have done.

The Fourth Circuit's *Kolbe* decision vividly illustrates how much latitude the lower courts have found in *Heller*. Rather than simply take the easy path of applying intermediate scrutiny to uphold Maryland's ban on semi-automatic military lookalikes and large-capacity magazines, the majority used an aggressive and ill-supported argument to conclude that *Heller* excludes such devices from Second Amendment coverage altogether. The *Kolbe* dissent, in turn, offered little more than unsubstantiated assertion in support of its claim that *Heller* requires that the statute be subjected to strict scrutiny. But if neither conclusion is implied by *Heller*, it is also true that the neither was clearly rejected by the Court.

The large doctrinal space left open by *Heller* is inevitably being filled according to the policy views of judges on the lower courts. Those views are no doubt influenced to some extent by judges' opinions about the desirability of the gun control regulations they review. In a distinct and more important sense, the approach of the judges is determined by their views about the value of the Second Amendment and the right it secures. *Heller* contains a lot of rhetoric supporting those, like the *Kolbe* dissenters, who place a high value

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71 *Heller* described a few specified regulations as "longstanding." *Id*. at 626–27. Some courts have mistakenly inferred that the Court must have meant that *all* longstanding regulations are at least presumptively lawful. *See, e.g.*, *Heller II*, 670 F.3d at 1253.

on Second Amendment rights. But that rhetoric is undermined by the opinion's pro-regulation dicta,[72] and the Court has subsequently declined to back its rhetoric up with any decisions actually rejecting the dismissive approach adopted by the *Kolbe* majority and many other courts.

We know that Justices Clarence Thomas and Neil Gorsuch are dissatisfied with the Court's refusal to review any of the numerous lower court decisions that read *Heller* narrowly.[73] We also know that Justice Thomas and Justice Samuel Alito were both unhappy with the Court's mild response to a state court decision that thumbed its nose at *Heller* and displayed a cavalier attitude toward the right of self-defense.[74] It therefore seems reasonably clear that the majority of the Court remains content with what the lower courts have been doing.

The Supreme Court has not yet been presented with a petition for certiorari from a decision invalidating a major gun control law like Maryland's assault weapon statute. If that happens, we are likely to get a significant new decision from the Supreme Court. And if it happens while all the Justices currently on the Court remain there, those who favor a robust reading of the Second Amendment may be in for a nasty surprise.

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72 As the Justices were undoubtedly very well aware when they issued the *Heller* opinion, the lower courts almost universally treat Supreme Court dicta as though they were holdings. For empirical evidence of this phenomenon, *see* David Klein & Neal Devins, *Dicta Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2044 (2013).

73 *See, e.g.*, Jackson v. San Francisco, 135 S. Ct. 2799 (2015) (Thomas, J., dissenting from the denial of certiorari); Friedman v. City of Highland Park, 136 S. Ct. 447 (2015) (Thomas, J., dissenting from the denial of certiorari); Peruta v. California, 582 U.S. ___, 137 S. Ct. 1995 (Thomas, J., joined by Gorsuch, J., dissenting from the denial of certiorari).

74 Caetano v. Massachusetts, 136 S. Ct. 1027, 1029 (2016) (Alito, J., concurring in the judgment).