People v. Zondorak: California’s Attack on the Second Amendment

Marc A. Greendorfer*

On October 21, 2013, the California Court of Appeal published a decision that attempts to undermine and render impotent the decision of the United States Supreme Court in District of Columbia v. Heller.

In People v. Zondorak, California’s “assault weapons” ban was challenged as violative of the Second Amendment to the United States Constitution. The Zondorak court found, however, that California’s ban was constitutional and in doing so gutted the holding of Heller by using a test that not only was not part of Heller, its application in Zondorak contradicts the words and essence of the Heller decision.

In Heller, the United States Supreme Court found that the Second Amendment to the United States Constitution protects the pre-existing right of individuals to keep and bear firearms in their homes.

Subsequent to the Heller decision, the Third Circuit Court of Appeals in United States v. Marzzarella created a two-part test to determine the level of scrutiny that would apply for Second Amendment cases. The Marzzarella test first asks whether a law burdens a right protected by the Second Amendment. If the answer is that the conduct is not protected by the Second Amendment.

* Marc A. Greendorfer received his Bachelor of Arts degree from the University of California, Davis in 1986. He received his Juris Doctorate from Benjamin N. Cardozo School of Law in 1996. He graduated magna cum laude and served as Articles Editor-Submissions of the Cardozo Law Review from 1995 to 1996. After working at AmLaw 100 law firms in New York and San Francisco, Mr. Greendorfer founded Tri Valley Law in 2008, where he is currently a partner. Mr. Greendorfer is the author of Restoring Nobility to the Constitution: A Modern Approach to a Founding Principle, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2335822.

3 CAL. PENAL CODE § 30605 (West 2013). Under this law, a long list of enumerated weapons that have cosmetic, but not functional, similarities to military weapons are banned. See CAL. PENAL CODE § 30510 (West 2013). In addition to the enumerated list of banned “assault weapons,” Section 30515 bans any firearm that has certain aesthetic features that are similar to military weapons, such as pistol grips and collapsible stocks, and further defines as an assault weapon any centerfire rifle that has a fixed magazine with a capacity of more than ten rounds.
4 United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010).
Amendment, the law is presumably valid. If, however, the conduct is protected by the Second Amendment, the Marzzarella test requires that the law be reviewed under the Heller standard of scrutiny.

While Heller explicitly failed to provide a level of scrutiny to be used for Second Amendment cases, leaving it for future courts to determine whether strict scrutiny or intermediate scrutiny would be proper, the Heller Court did explicitly reject rational basis scrutiny. So, at the very least, any Second Amendment case, even one using the Marzzarella test, has to employ nothing less than intermediate scrutiny.

The Zondorak court facially relied upon the Marzzarella test, and then misconstrued, misused, and contradicted that test to blatantly disregard the Heller decision.

In Marzzarella, the Third Circuit used United States v. Miller as a threshold for ascertaining whether there was a Second Amendment right at issue. Miller, as explained by Justice Scalia in Heller, held that the Second Amendment right does not extend to “those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”

The shotgun involved in the Miller case was not a typical shotgun. In fact, the shotgun in Miller was produced by J. Stevens Arms Company, which legally sold shotguns in great numbers. What made the Miller shotgun the subject of litigation was the fact that Mr. Miller had sawed a portion of the barrel off of the shotgun, resulting in the barrel being less than eighteen inches in length. Even that would not have been illegal had Mr. Miller registered the weapon and paid the appropriate tax on it. Thus, the Miller case did not ban shotguns generally or even J. Stevens Arms Company shotguns in particular. In fact, the Miller case did not even ban shotguns that had been altered to shorten their barrels to less than eighteen inches. All Miller did was to allow the government to require that such altered shotguns be registered.

Miller, to the extent it exempts any weapon from the protections of the Second Amendment, must be read as Justice Scalia stated in Heller: It is an exemption from the general

5 Heller, 554 U.S. at 628 n.27.
6 The Marzzarella test, in many regards, is a whole-cloth construct. Nothing in Heller ever hinted at such a test being appropriate.
8 Heller, 554 U.S. at 625.
9 Miller, 307 U.S. at 175.
10 Id.
11 Id.
proposition that the Second Amendment codifies the pre-existing right of the people to keep arms.\textsuperscript{12} That is, unless a weapon is so out of the ordinary as to be a weapon primarily used for unlawful purposes, such as a shotgun that has been altered to allow it to be concealed and used for indiscriminate fire, obviating its utility as a sport, hunting, or self-defense arm,\textsuperscript{13} it is a weapon that is protected by the Second Amendment. \textit{Heller} makes it clear that \textit{Miller} did not stand for the proposition that entire classes of commonly used firearms could be banned.

The \textit{Marzzarella} court was true to this standard. In \textit{Marzzarella}, the weapon under consideration was a mass-produced handgun that had been altered to remove its serial number. The law at issue in \textit{Marzzarella} was not a ban on handguns generally or the model of handgun that had its serial number removed in particular. What was banned in \textit{Marzzarella} was the removal of serial numbers from a weapon.\textsuperscript{14}

Furthermore, in \textit{Marzzarella}, the court did not find that a handgun with its serial number removed was not protected by the Second Amendment. In fact, the \textit{Marzzarella} court determined that the altered weapon was presumably protected by the Second Amendment and, thus, the law had to be reviewed using intermediate scrutiny. The \textit{Marzzarella} court stated that while an outright ban on a class of weapons would likely be subject to strict scrutiny, a ban on alterations to individual weapons that did not otherwise negatively impact the availability of such weapons would be subject to the lower intermediate scrutiny review.\textsuperscript{15}

In \textit{Zondorak}, however, the California court ignored the \textit{Marzzarella} test that it claimed to be relying upon, and concluded that the AK-style rifle at issue was not protected by the Second Amendment. In other words, the \textit{Zondorak} court sidestepped \textit{Heller} by mysteriously concluding that there was no Second Amendment issue involved in a case regarding a ban on a class of firearms.

To arrive at this unsupportable conclusion, the \textit{Zondorak}
court equated AK- and AR-style rifles with sawed-off shotguns, and presumably, bazookas, mortars, pipe bombs, and machine guns. This was nothing less than the bastardization beyond recognition of the first prong of the Marzzarella test, as it treated an entire class of commonly used weapons as though they were specific weapons that had been individually and illegally altered.

This treatment is without any support under Miller or Marzzarella and, in fact, clearly contradicts both cases. It is beyond question that, under Miller and related case law, a rifle that is mass produced for retail sale and that is used throughout the nation by millions of hunters, target shooters, and homeowners, cannot be excluded from the protections of the Second Amendment unless it has been altered to make it dangerous and unusual.

Ignoring this, the Zondorak court relied upon outdated California case law to erroneously conclude that AK-style rifles are not in common use by hunters and target shooters and went so far as to state that an AK- or AR-style rifle is “only slightly removed from M-16 type weapons,” notwithstanding the fact that the similarities are primarily cosmetic and not functional.

The Zondorak court based its opinion, in part, by analogizing to restrictions on speech that are allowed under the First Amendment, and then conflating the dangers posed by fully automatic weapons with the non-automatic capability of AR- and AK-style semiautomatic rifles. If the Zondorak court’s logic that a cosmetic similarity is tantamount to a functional similarity were applied to First Amendment case law, celebrated and award winning films such as Titanic, American Beauty, and Traffic, and classic literature such as Romeo and Juliet, would all be banned as child pornography. In fact, however, under Ashcroft v. Free Speech Coalition, that type of logic was found to be fatally flawed and such bans were determined to be unconstitutional.

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16 Zondorak, 163 Cal. Rptr. 3d at 498.
17 See Marzzarella, 614 F.3d at 95.
18 The Zondorak court repeatedly referred to People v. James, 94 Cal. Rptr. 3d 576 (Cal. Ct. App. 2009), a California court decision that contained fatal flaws in that it relied upon California legislative findings pertaining to the dangers and unusual nature of “assault weapons” that have since been debunked. Because James is at odds with Marzzarella and Heller in that it does not examine the subject law with the proper level of scrutiny, it is inapplicable in Zondorak for purposes of the Second Amendment. The Zondorak court impermissibly found that an entire class of common firearms in lawful use by law-abiding citizens was not protected by the Second Amendment simply because such weapons share a cosmetic similarity to military weapons.
19 Zondorak, 163 Cal. Rptr. 3d at 497.
20 Id. at 493.
22 Id. at 258. In Ashcroft, the Supreme Court found a law that banned simulations of child pornography to be overbroad and in violation of the protections provided by the First
Since the expiration of the 1994 federal “assault weapons” ban in 2004, millions of AR- and AK-style rifles have been sold in the United States and only a few states have instituted bans on such weapons. AR- and AK-style rifles are not only common, they are available in a range of calibers and configurations, making them quite popular for use in everything from varmint control to big game hunting.  

Consequently, the Zondorak court erred in ending its inquiry by concluding that the AK-style rifle at issue was not subject to the protections of the Second Amendment. Had the Zondorak court followed the Marzzarella test, as it claimed it was doing, it would have reviewed the law using, at a minimum, intermediate scrutiny.

The Zondorak court simply concluded that AK-style rifles subject to the California ban are “at least as dangerous and unusual as the short-barreled shotgun [under Miller],” but based this conclusion on cosmetic similarities only. The Zondorak court did not engage in any substantive analysis to arrive at this faulty conclusion.

To wit, in California, there is an “assault weapons” law that bans enumerated AR- and AK-style rifles. For example, Colt AR-15 series rifles are banned. However, rifles of the same style and overall functioning as the Colt AR-15, that are made from receivers that are not listed in the California law, are not illegal. Thus, millions of Californians legally own and use AR- and AK-style rifles that are built on “off list lower receivers” using “bullet buttons.” An off list lower AR is identical to a banned AR-15, other than the words engraved on the receiver.

In addition, there is a separate ban on “high capacity magazines,” defined as any magazine that holds more than ten rounds.
rounds of ammunition.25 Because there is a superseding limit on the number of rounds that any weapon can hold, any distinction between a banned AR/AK-style rifle built on a listed lower receiver and a legal AR/AK-style rifle built on an off list lower receiver is cosmetic at most. Both rifles fire the same ammunition at the same rate of fire with the same velocity for any particular configuration. If the California assault weapons ban were to be ruled unconstitutional, the high capacity magazine ban would still limit the number of rounds that could be fired to ten, exactly the same as with an off list lower rifle that is currently legal in California.

Therefore, there is no basis to conclude that an AK-style rifle subject to California’s assault weapons ban is not protected by the Second Amendment under Miller. Furthermore, assuming that the Marzzarella test is not violative of Heller, California’s assault weapons ban should have been subject to a strict scrutiny review, since it affects an entire class of weapon.

25 CAL. PENAL CODE § 32310 (West 2013). This ban was enacted in 2000, eleven years after the original Roberti-Ross Assault Weapons Control Act of 1989, and thus was not taken into consideration when the original “assault weapons” ban was debated and enacted. Consequently, even an “assault weapon,” if legalized in California, would now be subject to the ten round magazine limitation, which means that it would be functionally different (and presumably less dangerous) than the “assault weapons” that were considered under the original ban in 1989 and discussed in the Zandorak opinion.