
Banning America's Rifle: An Assault on the Second Amendment?

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Other Views:

- *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*), available at <https://casetext.com/case/heller-v-district-of-columbia-10-7036-dc-cir-10-4-2011>.
- *New York State Rifle and Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015), available at <https://casetext.com/case/ny-state-rifle-amp-pistol-assn-inc-v-cuomo>.
- JOSH SUGARMANN, ASSAULT WEAPONS AND ACCESSORIES IN AMERICA (Violence Policy Center 1988), available at <http://www.vpc.org/studies/awaconc.htm>.
- Jonathan E. Lowy, *Comments on Assault Weapons, the Right to Arms, and the Right to Live*, 43 HARV. J.L. & PUB. POL'Y 375 (2014), available at <https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2020/03/Lowy-FINAL.pdf>.

The AR-15 rifle has aptly been called "America's Rifle." It is the most popular rifle in the United States, owned and used by millions of law-abiding citizens. Does prohibiting it infringe on the right of the people to keep and bear arms as guaranteed by the Second Amendment?

This article begins with an examination of the meanings of term "assault weapon," features that some lawmakers and activists have claimed define such weapons, and the rarity of their use in crime. It then analyzes how the Supreme Court's jurisprudence on the Second Amendment, which protects firearms in common use for lawful purposes, precludes bans on such firearms. After that, it examines the text, history, and tradition of the Second and Fourteenth Amendments to show that the right keeps pace with and continues to exist as technological improvements are made to firearms. It demonstrates how judicial decisions upholding laws that ban these commonly possessed firearms conflict with and undermine the right. It ends with a challenge to judges and litigants to take the Second Amendment seriously.

Some common myths must be cast aside at the outset for a serious consideration of the issue. The term "assault weapon," while usually applied to some kind of rifle, is actually a pejorative term without a definite meaning. It was invented to sow confusion in the public between semiautomatic rifles and fully automatic military weapons like the M-16 rifle.¹ So-called assault weapons are semiautomatic firearms that, just like all other semiautomatic firearms, fire one round for each pull of the trigger. The features that make an otherwise legal semiautomatic firearm an "assault weapon" under various laws do nothing to affect the firearm's functional operation and, if anything, promote safe and accurate use. One purported feature called a "conspicuously protruding pistol grip" may be found on many, diverse types of rifles, including those used in the Olympics, and it promotes accurate fire. Another frequently targeted feature, a telescoping stock, allows rifles to be better fitted to the stature of the user, much like a telescoping steering wheel, and hence promotes comfort and accuracy. Surveys frequently show that self-defense is a primary reason why individuals choose to own AR-15s and similar firearms. They are particularly attractive for women and older individuals because of their light weight and ease of use, particularly in comparison to shotguns. Rifles are used in crime more rarely than other firearms, particularly handguns, and there is no evidence that any of the features targeted by assault weapon bans has been the causal factor of any person's death in a crime.

The Supreme Court has referred to the AR-15 semiautomatic rifle in the context of discussing the "long tradition of widespread lawful gun ownership" in America.² In *District of Columbia v.*

¹ See JOSH SUGARMANN, ASSAULT WEAPONS AND ACCESSORIES IN AMERICA (Violence Policy Center 1988), available at <http://www.vpc.org/studies/awaconc.htm>.

² *Staples v. United States*, 511 U.S. 600, 610-11 (1994).

Heller, the Court held that the Second Amendment protects arms that are typically possessed or in common use by law-abiding citizens for lawful purposes like self-defense.³ The right to bear arms was held to be a fundamental right that applied to the states through the Fourteenth Amendment in *McDonald v. City of Chicago*.⁴ The Court held in a stun gun case that the Second Amendment extends to “arms . . . that were not in existence at the time of the founding.”⁵ These decisions bear heavily on whether so-called assault weapons may be banned.

After analysis of the above decisions, this article delves into the Second and Fourteenth Amendments, with a focus on text, history, and tradition. Adopted at the dawn of the age of repeating firearms, the Second Amendment was understood to protect a robust right to have “arms.” In the early republic, firearms of all kinds were considered the birthright of the citizen. Not being considered citizens, African Americans could be prohibited from possession of arms. But the Fourteenth Amendment extended the right to arms to all Americans, and such arms included repeating firearms with extended magazines.

Since the beginning of the 20th century, semiautomatic firearms with detachable magazines have been commonly possessed. Despite Jim Crow laws, semiautomatic rifles proved useful in protecting the lives and civil rights of blacks. There is no historical tradition in the United States of banning ordinary firearms or standard-capacity magazines. The first restrictions on the AR-15 and magazines of a certain capacity were only enacted in 1989 and 1990, respectively.

Notwithstanding the above, five circuits have considered “assault weapon” and magazine bans and upheld them in each case. Each case will be analyzed in depth. First to rule was the D.C. Circuit, which rejected common use as the test and relied on legislative testimony to uphold a ban; then-Judge Brett Kavanaugh wrote a spirited dissent.⁶ The Second Circuit next upheld Connecticut’s and New York’s bans without even analyzing the features that supposedly rendered the banned firearms unprotected by the Second Amendment.⁷

While these decisions conceded that the banned firearms and magazines are in common use, the Seventh Circuit (over a dissent)—upholding a local Illinois ban—questioned the viability of that test from *Heller*.⁸ In an en banc decision with dissents, the Fourth Circuit pushed the envelope further, validating Maryland’s ban, in deciding that semiautomatic firearms may be banned

because they are like machine guns, which they are not.⁹ Finally, the First Circuit upheld Massachusetts’ ban based on “combat features” that it never identified.¹⁰

The U.S. District Court for the Northern Mariana Islands saw through the haze and found that the pistol grip, adjustable stock, and flash suppressor make a rifle more accurate and safer to use for the law-abiding citizen. It therefore found that a ban violated the Second Amendment.¹¹

Bans have been enacted in only a handful of states—only six ban certain long guns and handguns, one more bans just certain handguns, and eight ban certain magazines—and that some have been upheld is hardly reason to infer that the federal judiciary in general agrees that the bans are constitutional. Judges from the few states with an anti-gun political culture may reflect that culture in their decisions.

More telling is that forty-four states have *not* defined “assault weapons” as certain long guns and handguns and banned them; this could reflect that most lawmakers consider such bans to be unconstitutional and unproductive. Of course, the courts have had no occasion to uphold or invalidate bans which do not exist in these states. It’s no accident that eight of the thirteen federal circuits have never considered, post-*Heller*, an assault weapon ban under the Second Amendment. Like the dog that didn’t bark in the Sherlock Holmes mystery,¹² the silence is deafening.

This article analyzes the apparent disconnect between the decisions of the Supreme Court and those of the five circuits that have upheld bans. The issue is informed by the text, history, and tradition of the Second and Fourteenth Amendments, which includes the development, use, and acceptance by the American public the past century and a half of repeating and semiautomatic firearms with standard-capacity magazines. Decisions upholding bans on the arms that the people commonly keep and bear are out of touch with that background, depart from the clear test provided by the Supreme Court, and substitute value-laden judicial balancing tests for the plain text of the Second Amendment.

I. “ASSAULT WEAPON” IS A POLITICAL TERM, ITS PURPORTED FEATURES ARE INNOCUOUS, AND IT IS RARELY USED IN CRIME

A. What Is an “Assault Weapon”?

Literally, an assault weapon is a weapon used in an assault.¹³ The term “assault rifle” is a military term used to describe a selective-fire rifle such as the AK-47 that fires both fully automatically and semiautomatically.¹⁴ The M-16 selective-fire

3 District of Columbia v. Heller, 554 U.S. 570, 624-25, 627 (2008).

4 McDonald v. City of Chicago, 561 U.S. 742, 764 (2010).

5 Caetano v. Massachusetts, 136 S. Ct. 1027, 1028 (2016) (per curiam).

6 Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*); *id.* at 1269 (Kavanaugh, J., dissenting). When a Second Amendment challenge to New York City’s restrictions on transport of pistols was held to be moot, Justice Kavanaugh cited this dissent along with *Heller* and *McDonald*, for a correct understanding of the Second Amendment. *New York State Rifle & Pistol Association, Inc. v. City of New York*, 140 S. Ct. 1525, 1527 (2020) (Kavanaugh, J., concurring).

7 *New York State Rifle and Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015).

8 *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406, 407 (7th Cir. 2015).

9 *Kolbe v. Hogan*, 849 F.3d 114, 125 (4th Cir. 2017) (en banc).

10 *Worman v. Healey*, 922 F.3d 26, 36 (1st Cir. 2019).

11 *Murphy v. Guerrero*, No. 1:14-CV-00026, 2016 WL 5508998, *18-20 (D. N. Mariana Islands Sept. 28, 2016).

12 Arthur Conan Doyle, *Silver Blaze*, in *THE COMPLETE SHERLOCK HOLMES* 383 (1938).

13 See *People v. Alexander*, 189 A.D.2d 189, 193, 595 N.Y.S.2d 279 (N.Y. App. Div. 1993) (“a tire iron that was believed to be the assault weapon”).

14 “Assault rifles are short, compact, selective fire weapons that fire a cartridge intermediate in power between submachinegun and rifle cartridges. Assault rifles . . . are capable of delivering effective full automatic fire” HAROLD E. JOHNSON, *SMALL ARMS IDENTIFICATION &*

service rifle came to be America's "standard assault rifle."¹⁵ Federal law defines the M-16 as a "machinegun," i.e., a "weapon which shoots . . . automatically more than one shot, without manual reloading, by a single function of the trigger."¹⁶

By contrast, a semiautomatic firearm can only fire a single shot with each pull of the trigger. These types of firearms are extraordinarily common nationwide; they have been part of the landscape in America for over 100 years.¹⁷ AR-15s have been in commercial production since *Leave it to Beaver* was on television.¹⁸ But the production of civilian rifles that fire only in semiautomatic mode and that have cosmetic features that look like those of military rifles gave gun prohibitionists the idea of calling them assault weapons to promote banning them. As a lobbyist for the Violence Policy Center wrote, "The weapons' menacing looks, coupled with the public's confusion over fully automatic machine guns versus semiautomatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons."¹⁹

In a case not related to firearms, Justice Clarence Thomas observed:

Prior to 1989, the term 'assault weapon' did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists to expand the category of 'assault rifles' so as to allow an attack on as many additional firearms as possible on the basis of undefined 'evil' appearance.²⁰

The term "assault weapon" thus became a classic case of "an Alice-in-Wonderland world where words have no meaning."²¹

Since "assault weapon" has come to be a political term with no fixed meaning, it can mean anything the speaker wants it to mean. One legislature's assault weapon warranting a prohibition and felony penalties is another legislature's sporting rifle not subject to special restrictions. Even legislatures seeking to ban assault weapons define them in different and contradictory ways.

If a law calls a firearm an assault weapon and bans it, then how should a court decide whether the law violates the Second Amendment? The label shouldn't count for much, as "no pronouncement of a Legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying

opprobrious epithets to the prohibited act . . ." ²² Nor does the label foreclose a factual inquiry, as "a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty, or property had a rational basis."²³ And as *Heller* adds, "Obviously, the same [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right . . ."²⁴

America's first rifle ban—California's Roberti-Roos Assault Weapons Control Act of 1989—was upheld on the basis that the Second Amendment did not apply to the states through the Fourteenth Amendment,²⁵ and because the Second Amendment does not protect individual rights.²⁶ America's first magazine ban—New Jersey's 1990 prohibition on detachable magazines holding over 15 rounds—was upheld without any reference to the Second Amendment.²⁷ Bans were extended to a handful of other states and cities.²⁸

In 1994, Congress passed a law defining and restricting "semiautomatic assault weapons"—itself an oxymoron because true assault weapons are fully automatic. The law began with a list of named firearms, such as "Colt AR-15," and "copies or duplicates" thereof.²⁹ It then set forth generic definitions that began with reference to a type of firearm and then described certain features that could combine to render it illegal. Most prominently, a rifle (which has a shoulder stock and shoots a projectile through a rifled barrel),³⁰ that is semiautomatic (which fires once with a single pull of the trigger and loads another cartridge),³¹ and that uses a detachable magazine (an ammunition feeding device that detaches from the rifle) was *not* an "assault weapon" per se. It became one only if two other features were present, such as a "bayonet mount" and a "pistol grip that

OPERATION GUIDE – EURASIAN COMMUNIST COUNTRIES 105 (Defense Intelligence Agency 1980). *Sturmgewehr*, the German equivalent of the term assault rifle, was first used in Nazi Germany. PETER R. SENICH, *THE GERMAN ASSAULT RIFLE 1935-1945* 79 (1987).

15 *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 804 (1988).

16 26 U.S.C. § 5845(b).

17 Mark W. Smith, "Assault Weapon" Bans: *Unconstitutional Laws for A Made-Up Category of Firearms*, 43 HARV. J.L. & PUB. POL'Y 357, 359 (2020).

18 MARK W. SMITH, *FIRST THEY CAME FOR THE GUN OWNERS* 1087 (2019).

19 Sugarmann, *supra* note 1.

20 *Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting) (citation omitted).

21 *Welsh v. United States*, 398 U.S. 333, 354 (1970) (Harlan, J., concurring).

22 *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

23 *Id.*

24 *Heller*, 554 U.S. at 629 n.27.

25 *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992).

26 *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2003), *rel'g denied*, 328 F.3d 567 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 803 (2003).

27 *Coalition of New Jersey Sportsmen, Inc. v. Whitman*, 44 F. Supp. 2d 666 (1999), *aff'd.*, 263 F.3d 157 (3rd Cir.), *cert. denied*, 534 U.S. 1039 (2001).

28 *See, e.g., Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250 (6th Cir. 1994) (holding ban unconstitutionally vague).

29 Chapter XI, Subchapter A of the Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, 108 Stat. 1796 (1994), codified at 18 U.S.C. §§ 921(a)(30)(A), 922(v) (expired 2004).

30 "The term 'rifle' means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire only a single projectile through a rifled bore for each single pull of the trigger." 18 U.S.C. § 921(a)(7).

31 "The term 'semiautomatic rifle' means any repeating rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge." 18 U.S.C. § 921(a)(28).

protrudes conspicuously beneath the action of the weapon.”³² The federal ban did not restrict possession of such firearms that were lawfully possessed on its effective date. Magazines holding more than ten rounds were similarly restricted but grandfathered.³³ After the law expired ten years later, Congress declined to reenact it.

New York defines “assault weapon” to include a rifle, which is fired from the shoulder, with the feature of “a pistol grip that protrudes conspicuously beneath the action of the weapon.”³⁴ So in New York, a rifle with a pistol grip is banned if it has a shoulder stock. But in Cook County, Illinois, a rifle with a pistol grip is banned if it *doesn't* have a shoulder stock; the Chicago-area county defines “assault weapon” as a rifle featuring “only a pistol grip without a stock attached.”³⁵ Maryland’s ban is silent on those features; one can have a rifle with a pistol grip and stock, or a rifle with a pistol grip and no stock, and it’s not necessarily an “assault weapon.”³⁶

A Florida initiative petition sought a state constitutional amendment that would throw the features out the window and define “assault weapon” as “any semiautomatic rifle or shotgun capable of holding more than ten (10) rounds of ammunition at once, either in a fixed or detachable magazine, or any other ammunition-feeding device.”³⁷ In a case brought before the Florida Supreme Court, the attorney general alleged that the language was misleading, as it would ban virtually all semiautomatic long guns, even small .22 caliber rifles with traditional wood stocks such as the Ruger 10/22.³⁸ That’s because almost all semiautomatic long guns are “capable” of holding more than ten rounds, even if one does not possess a magazine that does so.³⁹ The Sixth Circuit held a similar provision to be unconstitutionally vague, as it did not require that the person possess such magazine or have knowledge that one exists.⁴⁰

Washington exhibits the frivolousness of the term “assault weapon” with its definition: “‘Semiautomatic assault rifle’ means

any rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge.”⁴¹ That’s simply the definition of a semiautomatic rifle *of any kind*. Washington restricts sales to persons under 21 but does not ban them.

Given that the jurisdictions that ban assault weapons cannot agree on the features that make them unworthy of Second Amendment protection, it’s important to keep in mind that the vast majority of states have no such prohibitions. Bans are limited to California, Connecticut, Hawaii (certain pistols only), Illinois (certain localities only), Maryland, Massachusetts, New Jersey, and New York. No other states ban firearms in common use based on contradictory assault weapon features.

In the handful of states with bans, what was an ordinary, lawful firearm one day can become an assault weapon overnight, by the wave of a legislative magic wand. In 2000, New York passed a law nearly identical to the federal law, defining assault weapon based on a combination of two generic features.⁴² But on January 15, 2013, the day after the bill was introduced, the Secure Ammunition and Firearms (“SAFE”) Act was signed into law, declaring countless ordinary firearms to be assault weapons based on *a single* generic characteristic.⁴³ Having been so relabeled, they purportedly lost their Second Amendment protection and were banned, other than those registered by a deadline. Yet nothing changed other than how the term was used.

B. The Conspicuously Protruding Pistol Grip is an Innocuous Feature

All handguns have a pistol grip, and *Heller* held that handguns may not be banned. However, some laws define assault weapons as rifles that include the feature of a “conspicuously protruding pistol grip.” Whether on a handgun or a rifle, a pistol grip is simply a handle by which one holds the firearm. That feature raises the question of why Second Amendment protection is accorded to a pistol with a pistol grip and a rifle with a pistol grip that protrudes *inconspicuously*, but suddenly evaporates when it comes to a rifle with a pistol grip that protrudes *conspicuously*. Aside from the inherent vagueness of the term “conspicuously,” it is unclear how a constitutionally protected object loses protection because something about it is conspicuous.

In the gun industry, a “pistol grip stock” is defined as “[a] stock or buttstock having a downward extension behind the trigger guard somewhat resembling the grip of a pistol.” A “straight stock” is “[a] stock with no pistol grip Also known as: English stock, straight grip stock.”⁴⁴ Straight stocks predominated until the 20th century, when rifles with pistol grip stocks became common. Traditionally, the pistol grip is part of the complete stock, which is usually wooden, while the pistol grip on rifles like the AR-15 is usually a separate part from the shoulder stock. The

32 18 U.S.C. § 921(a)(30)(B) (expired 2004).

33 18 U.S.C. §§ 921(a)(31), 922(w) (expired 2004).

34 N.Y. PENAL LAW § 265.00(22)(a)(ii). *See also id.* (11) (“rifle” means a weapon made “to be fired from the shoulder”).

35 § 54-211(1)(A), Cook County, Ill., Ordinance No. 06–O–50 (2006).

36 *See* Md. Code, Criminal Law, §§ 4-301(h)(1) (“copycat weapon”), 4-301(d) (assault weapon) includes “a copycat weapon”).

37 BAWN, <https://bawnfl.org/banassaultweaponsnowpetition.pdf>.

38 Advisory Opinion to the Attorney General Re: Prohibits Possession of Defined Assault Weapons, SC19-1266, 2019 WL 5790251, *8 (Fla. 2019).

39 *Id.* *See also* Beyer v. Rosenblum, 363 Or. 157, 170, 421 P.3d 360 (Or. 2018) (holding that initiative petition was misleading because “different voters reasonably could draw different meanings from the term ‘assault weapons’”).

40 Peoples Rights Organization, Inc. v. City of Columbus, 152 F.3d 522, 535-36 (6th Cir. 1998). While the Florida Supreme Court did not resolve the vagueness issue regarding magazines, it held the petition to be misleading because it represented that a registered “assault weapon” would be grandfathered, when in fact only the first registrant would be grandfathered. *Advisory Opinion to the Attorney General, Re: Prohibits Possession of Defined Assault Weapons*, 296 So.3d 376, 381 (Fla. 2020).

41 WASH. REV. CODE § 9.41.010(26) (2020).

42 N.Y. PENAL LAW § 265.00, L. 2000, c. 189.

43 *Id.* L. 2013, c. 1.

44 Glossary of the Sporting Arms and Ammunition Manufacturers’ Institute, available at <https://saami.org/saami-glossary/?search=>.

term “conspicuously protruding” as applied to a pistol grip stock is a recent invention of the anti-gun movement.

If sometimes a cigar is just a cigar, as Freud is reputed to have said, sometimes a pistol grip is just a pistol grip. Like a barrel or sights, there is nothing specifically military or civilian about it. That is exemplified by the fact that, from the beginning, civilian AR-15s had some of the same parts as the military M-16. But they differed radically in that the M-16 was designed for fully automatic fire.

The semiautomatic Colt AR-15 was first marketed to the public the same year the first deliveries of the automatic M-16 were made to the armed forces. In 1963, Colt submitted to the predecessor agency of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) two firearms: an “AR-15 Sports Version Rifle” and an “AR-15 automatic rifle” (later renamed the M-16). The agency found that modifications to the automatic version that made it into the sports version “have changed the weapon in basic design to the extent that it is not a ‘firearm’ in the machine gun category” as defined in the National Firearms Act.⁴⁵ The Sports Version was then introduced to the public as the AR-15 Sporter in 1964, the same year the first M-16s were delivered to the Air Force.⁴⁶

Perhaps the most distinctive outward feature of an AR-15 is the protruding pistol grip. As discussed below, the purpose of the pistol grip is to have a comfortable grasp with the same hand that pulls the trigger while holding the stock to the shoulder and allowing the other hand to hold the forend under the barrel. But an urban myth asserts dramatically that the real purpose of the pistol grip is to enable the shooter to spray fire from the hip—that is, to kill a lot of people.⁴⁷

The myth of spray firing from the hip was created by Hollywood for second-rate action movies. That myth becomes reality in the minds of people who are ignorant about the actual workings of firearms. No person familiar with firearms would fire a rifle from the hip. No record exists of a mass shooter firing from the hip. This myth has become so entrenched that some courts rely on it when they uphold laws banning semiautomatic rifles because of their protruding pistol grips.⁴⁸

Yet identical pistol grips are found on single-shot and bolt-action rifles,⁴⁹ and even on air guns used in Olympic

competition.⁵⁰ Single-shot rifles have no magazine, hold only one cartridge at a time, and must be laboriously reloaded. Bolt-action rifles may have a magazine but require manual reloading for each shot. It is inconceivable that the purpose of the pistol grips on such rifles is to facilitate spray firing from the hip.

The M-16 military service rifle and its variations have a protruding pistol grip, so military sources are relevant and helpful. The Army manual *Rifle Marksmanship, M16-/M4-Series Weapons* (2008) illustrates firing from the kneeling, standing, and prone positions and instructs the reader to “Place the firing hand on the pistol grip, with the weapon’s buttstock between the SAPI plate and the bicep to stabilize the weapon and absorb recoil.”⁵¹ (A SAPI [Small Arms Protective Insert] plate is a type of body armor that extends to the area beside the shoulder.) It further instructs, “Grip the weapon firmly, and pull it into the shoulder securely.”⁵² The manual adds that “unaimed fire must never be tolerated,” and it instructs the soldier “to properly aim the weapon” by “Keep[ing] the cheek on the stock for every shot, align[ing] the firing eye with the rear aperture, and focus[ing] on the front sight post.”⁵³ That means aimed firing from the shoulder and not the hip. If “a target cannot be engaged fast enough using the sights in a normal manner,” the soldier is told to shoulder the rifle and fire a quick aimed shot or, if that’s not possible, to “Keep the weapon at your side” and “Quickly fire a single shot or burst.”⁵⁴ A single shot is obviously not spray fire.

A study of military training manuals published from 1923 through 2012 demonstrates the almost exclusive focus on firing from the shoulder.⁵⁵ Some earlier manuals mentioned as a minor technique firing from an underarm position (not the hip), but this

45 Director, Alcohol & Tobacco Tax Division, Internal Revenue Service, to Colt’s Patent Firearms Manufacturing Co., Dec. 10, 1963. Copy in possession of author.

46 R. STEVENS & E. EZELL, *THE BLACK RIFLE* 149-50 (1987); Jeff W. Zimba, *The Evolution of the Black Rifle*, http://smallarmsreview.com/display_article.cfm?idarticles=116.

47 Urban myths actually prevail about virtually all of the so-called assault weapon features. For an in-depth analysis, see E. Gregory Wallace, “*Assault Weapon*” Myths, 43 S. ILL. U. L.J. 193 (2018).

48 *Heller II*, 670 F.3d at 1261-62.

49 “Action, bolt. A firearm, typically a rifle, that is manually loaded, cocked and unloaded by pulling a bolt mechanism up and back to eject a spent cartridge and load another.” NSSF, *THE WRITER’S GUIDE TO FIREARMS & AMMUNITION* 6 (2017), available at <http://www3.nssf.org/share/PDF/WritersGuide2017.pdf>.

50 For example, see a single-shot air rifle with a protruding pistol grip at <https://www.feinwerkbau.de/en/Sporting-Weapons/Air-Rifles/Model-800-Evolution>.

51 RIFLE MARKSMANSHIP, M16-/M4-SERIES WEAPONS at 7-2 to 7-5 (Dep’t of Army, 2008), available at https://www.globalsecurity.org/military/library/policy/army/fm/3-22-9/fm3-22-9_c1_2011.pdf.

52 *Id.* at 7-5.

53 *Id.* at 7-9.

54 *Id.* at 7-20 to 7-21. The manual further notes, “Automatic or burst fire is inherently less accurate than semiautomatic fire,” and that “When applying automatic or burst fire, Soldiers deliver the maximum number of rounds (one to three rounds per second) into a designated target area” *Id.* at 7-12. That is exactly why semiautomatics are appropriate for individual self-defense—with accurate, aimed fire, an aggressor may be pinpointed, but full automatic fire may endanger innocent bystanders. Accurate fire is a virtue, not a vice, for lawful self-defense by civilians. The ability to spray fire in full automatic, pitting armies against armies, is the true military feature that distinguishes a machine gun from a civilian gun of any kind. The Army manual instructs: “Clearing buildings, final assaults, FPF [final protective fire], and ambushes may require limited use of automatic or burst fire.” *Id.* at 7-13. Furthermore, “Suppressive fire . . . is employed to kill the enemy or to prevent him from observing the battlefield, effectively using his weapons, or moving.” *Id.* at 7-16. Finally, “automatic weapon fire may be necessary to maximize violence of action or gain fire superiority when gaining a foothold in a room, building, or trench.” *Id.* at 7-47.

55 DENNIS CHAPMAN, *FEATURES & LAWFUL COMMON USES OF SEMI-AUTOMATIC RIFLES* 35-55 (2019), available at <https://ssrn.com/abstract=3436512>.

had nothing to do with the presence or absence of a perpendicular pistol grip.⁵⁶ A 1966 manual “identified the underarm firing position as an automatic firing position only, making no reference to it whatsoever in the section devoted to semi-automatic firing”; and a 1971 study concluded that “[f]iring from the underarm position was grossly inferior to from the shoulder position in both speed and accuracy”⁵⁷

There is a type of firearm that would be spray fired from the hip: certain submachine guns firing in full automatic in close quarters.⁵⁸ But it would *not* have a pistol grip, which would require one to torque and strain the wrist and forearm. Moreover, a submachine gun fires pistol cartridges, which makes it far more controllable than a rifle firing more powerful rifle cartridges.

A rifle with a protruding pistol grip, when held comfortably at the hip, points down to the ground. By contrast, a rifle without such a grip—such as a traditional hunting rifle or shotgun—may be held comfortably at the hip with the barrel pointing forward. One can conduct the simple exercise of holding an imaginary rifle with the rear hand even with the hip as if holding a flashlight (like holding a stock with no pistol grip) and then twisting the hand upward to a vertical position (like holding a pistol grip). The no-pistol-grip hold is comfortable, while the pistol-grip hold causes an uncomfortable strain. Just doing this simple exercise exposes the “spray fire from the hip” argument as a myth.

Protruding pistol grips—whether on semiautomatic or single-shot rifles—facilitate firing from the shoulder. Neither soldiers nor civilians are trained to fire from the hip. No record exists of a mass murderer firing a rifle from the hip. Yet states ban rifles for having the feature of a protruding pistol grip, and the only justification that has been offered for such bans is that the grips facilitate spray firing from the hip. And courts uphold the bans for the false reason that mass murderers prefer it in order to spray fire from the hip.

What kind of grip should transform an ordinary, legal rifle into a banned assault weapon? The expired federal ban defined “assault weapon” in part as “a semiautomatic rifle that has an ability to accept a detachable magazine and has at least 2” features, one of which was “a pistol grip that protrudes conspicuously beneath the action of the weapon.”⁵⁹ How conspicuous it must be—and how much of a protrusion in inches and at what angle—was left unsaid. California defines those terms in its regulations:

⁵⁶ *Id.* at 37.

⁵⁷ *Id.* at 44, 48, 50.

⁵⁸ The Sten Gun, one of World War II’s most ubiquitous submachine guns, had a shoulder stock and no pistol grip. *Sten Gun*, <https://en.wikipedia.org/wiki/Sten>. A 1942 article asked “did you attempt to lift the Sten to your shoulder? If so, you’re dead!” The article continued, “To be used in close quarters, it’s got to be fired the sudden and instinctive way it was intended—from the waist.” It conceded that it could be more accurately fired from the shoulder at longer distances, but it said that was a job for a rifle. “In Sten gun training for Rangers emphasis is laid on firing from the waist. . . . The important point always to remember is that the Sten is NOT a rifle. It is of the machine-pistol class and the natural way to fire it is from the waist or hip.” *The Sten Revives Old Art of Hip-Shooting*, THE RANGE, Sept. 1942, reprinted in 2 JOHN A. MINNERY, FIREARM SILENCERS 81-82 (1981).

⁵⁹ 18 U.S.C. § 921(a)(3)(B)(ii) (expired 2004).

“Pistol grip that protrudes conspicuously beneath the action of the weapon” means a grip that allows for a pistol style grasp in which the web of the trigger hand (between the thumb and index finger) can be placed beneath or below the top of the exposed portion of the trigger while firing.”⁶⁰ Rifles with a flat fin behind the grip that forces the thumb in an upward, “hitchhiking” position comply with that definition, but they cannot be held as firmly as rifles with the banned grip.⁶¹

It seems incredible that a rifle would lose Second Amendment protection because the web of the trigger hand may be placed “beneath or below” a certain position, but not if placed above that position. Or indeed, that a rifle with an inconspicuously protruding pistol grip is protected, but not one with a conspicuously protruding pistol grip. What kind of grip should transform an ordinary, legal rifle into a banned assault weapon? There is no non-frivolous answer to this question. If the Second Amendment protects anything, it protects a gun regardless of the position of the trigger hand or the degree of conspicuousness of its grip.

C. So-Called Assault Weapons Are Rarely Used in Assaults, and Magazine Capacity Likely Makes Little Difference

There were very few prosecutions under the federal assault weapon ban in the ten years of its existence beginning in 1994, reflecting that they were rarely used in crime in the first place. That may have been why Congress chose not to reenact the law when it expired in 2004.

The rarity of criminal misuse of the banned firearms was confirmed in a report to the National Institute of Justice by Christopher S. Koper entitled *An Updated Assessment of the Federal Assault Weapons Ban*, which noted, “AWs [assault weapons] were used in only a small fraction of gun crimes prior to the ban: about 2% according to most studies and no more than 8%. Most of the AWs used in crime are assault pistols rather than assault rifles.”⁶² The study saw a reduction in gun crime involving assault weapons in selected cities following enactment of the federal law.⁶³ This could not be attributed to the law; since all preexisting “assault weapons” were grandfathered, the quantity in civilian hands did not decrease. Koper candidly concluded:

Should it be renewed, the ban’s effects on gun violence are likely to be small at best and perhaps too small for reliable measurement. AWs were rarely used in gun crimes even before the ban. LCMs [large capacity magazines] are involved in a more substantial share of gun crimes, but it is not clear how often the outcomes of gun attacks depend

⁶⁰ 11 C.C.R. § 5471(z).

⁶¹ See *Survivor Systems Option Zero AR-15 Stock*, <https://www.vcdefense.com/option-zero-stock-ca-featureless-stock/>.

⁶² CHRISTOPHER S. KOPER ET AL., AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994-2003, at 2 (Report to the National Institute of Justice, U.S. Dep’t. of Justice 2004), <https://www.ojp.gov/pdffiles1/nij/grants/204431.pdf>.

⁶³ *Id.*

on the ability of offenders to fire more than ten shots (the current magazine capacity limit) without reloading.⁶⁴

Neither the federal law nor its expiration had any effect on the homicide rate, which had been falling since almost two years before the enactment of the law and which has remained low since the law expired in 2004. The Bureau of Justice Statistics reported in 2013 that “Firearm-related homicides declined 39%, from 18,253 in 1993 to 11,101 in 2011.”⁶⁵ Moreover, according to the same study, while the banned assault weapons were mostly rifles, rifles are used in disproportionately fewer crimes: “About 70% to 80% of firearm homicides and 90% of nonfatal firearm victimizations were committed with a handgun from 1993 to 2011.”⁶⁶ Criminals are less likely to use rifles than any other firearm.⁶⁷ Indeed, from the expiration of the ban through 2018, the percentage of rifles of all kinds used in murders has steadily continued to drop: “The percentage of firearm murders with rifles was 4.8% prior to the ban starting in September 1994, 4.9% from 1995 to 2004 when the ban was in effect, and just 3.6% after that”⁶⁸ Moreover, the federal law did not define a semiautomatic rifle with a detachable magazine as an assault weapon unless it had two particular features, such as a pistol grip and a bayonet mount.⁶⁹ Manufacturers complied by removing one feature, such as the bayonet mount, and Americans continued to buy essentially the same rifles. Of course, crime did not fall because bayonet mounts were removed from the newly-made rifles that were otherwise identical to those that had been banned.

The federal ban was never reenacted. A law that banned certain firearms only if made after a certain date and that lasted only ten years of almost two and a half centuries of the history of the American Republic can hardly be considered a longstanding tradition or cited as supportive of the constitutional validity of similar or more draconian legislation.

It is unknown whether magazine capacity makes a difference in shooting attacks, as Professor Koper noted.⁷⁰ Professor Gary Kleck studied 23 shootings in 1994–2013 in which over six victims were shot and “large capacity magazines” (LCMs) were used. Only one incident was found in which the perpetrator “may” have been stopped during a magazine change. The study concluded:

In all of these 23 incidents, the shooter possessed either multiple guns or multiple magazines, meaning that the shooter, even if denied LCMs, could have continued firing

without significant interruption by either switching loaded guns or changing smaller loaded magazines with only a 2- to 4-seconds delay for each magazine change. Finally, the data indicate that mass shooters maintain such slow rates of fire that the time needed to reload would not increase the time between shots and thus the time available for prospective victims to escape.⁷¹

Two notorious mass shootings in Florida illustrate the point. In the Orlando Pulse Nightclub incident, the terrorist used LCMs, but he had plenty of time to change magazines as the police took three hours to storm the facility and end his attack.⁷² In the Parkland school shooting, which involved a failure of law enforcement at every level, the shooter used only ten round magazines.⁷³ The Public Safety Commission on Parkland, which spent months interviewing witnesses, reviewing evidence, and studying the Parkland shooting (and produced a 100+ page report of its findings) recommended that teachers should be allowed to volunteer to be armed, and the Florida legislature agreed.⁷⁴

Perpetrators of mass shootings plan their attacks, acquiring ample weapons and choosing soft targets. Victims are caught off guard. If they are able to grab a firearm to defend themselves, it’s likely to have only one magazine available, and ten rounds may not be enough. It is unrealistic to assume that frightened and confused victims, many of whom will have limited experience firing a gun, and who may be holding a phone to call 911, would be able to secure a second loaded magazine and replace an empty magazine with it.⁷⁵

II. BANS ON AMERICA’S RIFLE ARE PRECLUDED BY SUPREME COURT PRECEDENT

A. Staples Characterized the AR-15 as Part of a “Long Tradition of Widespread Lawful Gun Ownership”

A few months before Congress passed the 1994 assault weapon ban, the Supreme Court decided in *Staples v. United States* that, to convict a person of possession of an unregistered machine gun, the government must prove that he knew that it would fire automatically. The defendant thought he had an ordinary semiautomatic AR-15 rifle, but ATF technicians were able to make the rifle fire more than one shot with a single pull

⁶⁴ *Id.* at 3.

⁶⁵ BUREAU OF JUSTICE STATISTICS, FIREARM VIOLENCE, 1993–2011, at 1 (2013), <http://www.bjs.gov/content/pub/pdf/fv9311.pdf>.

⁶⁶ *Id.*

⁶⁷ “During the offense that brought them to prison, 13% of state inmates and 16% of federal inmates carried a handgun. In addition, about 1% had a rifle and another 2% had a shotgun.” *Id.* at 13 (statistic for 2004).

⁶⁸ Crime Prevention Research Center, *How Has the Share Of Murders With Rifles Changed Over Time?* (Nov. 4, 2019), <https://crimeresearch.org/2019/11/with-all-the-concern-about-assault-weapons-how-has-the-share-of-murders-with-rifles-changed-over-time/>.

⁶⁹ 18 U.S.C. § 921(a)(30)(B).

⁷⁰ See Koper, *supra* note 62, and accompanying text.

⁷¹ Gary Kleck, *Large-Capacity Magazines and the Casualty Counts in Mass Shootings*, 17 JUSTICE RES. & POL’Y 28 (2016), available at <https://journals.sagepub.com/doi/abs/10.1177/1525107116674926>.

⁷² Nigel Duara, *Police face questions about delayed response to Orlando shooting*, L.A. TIMES, June 12, 2016, <https://www.latimes.com/nation/la-na-orlando-nightclub-police-20160612-snap-story.html>.

⁷³ Mairead McArdle, *Parkland Shooter Did Not Use High-Capacity Magazines*, NAT’L REV., Mar. 1, 2018, <https://www.nationalreview.com/2018/03/report-parkland-shooter-did-not-use-high-capacity-magazines/>.

⁷⁴ MARJORY STONEMAN DOUGLAS HIGH SCHOOL PUBLIC SAFETY COMMISSION: REPORT SUBMITTED TO THE GOVERNOR 87 (2019), <http://www.fdle.state.fl.us/MSDHS/MSD-Report-2-Public-Version.pdf>.

⁷⁵ On the magazine issue, see *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020) (holding California ban on possession of magazine that hold over ten rounds violative of the Second Amendment), *reh’g en banc granted*, 988 F.3d 1209 (9th Cir. 2021); David B. Kopel, *The History of Firearms Magazines and Magazine Prohibitions*, 88 ALBANY L. REV. 849 (2015).

of the trigger.⁷⁶ While the case involved basic mens rea issues, the Court made several comments that illuminated how common AR-15s are in American society.

The Court described the rifle as follows: “The AR-15 is the civilian version of the military’s M-16 rifle, and is, unless modified, a semiautomatic weapon. The M-16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire.”⁷⁷ “Automatic” fire means that “once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted,” and that is the definition of a “machinegun”; a “semiautomatic,” by contrast, “fires only one shot with each pull of the trigger”⁷⁸

Acknowledging “a long tradition of widespread lawful gun ownership by private individuals in this country,” *Staples* noted, “Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation. . . . [D]espite their potential for harm, guns generally can be owned in perfect innocence.”⁷⁹ Indeed, “[a]utomobiles . . . might also be termed ‘dangerous’ devices”⁸⁰ The Court contrasted ordinary firearms, such as the AR-15 rifle involved in that case, with “machineguns, sawed-off shotguns, and artillery pieces,” adding that “guns falling outside those [latter] categories traditionally have been widely accepted as lawful possessions”⁸¹

Since no evidence existed that Mr. Staples knew the rifle would fire more than one shot with a single function of the trigger—which could have been the result of malfunction—the Court remanded the case,⁸² and the court of appeals ordered his acquittal.⁸³ No Second Amendment issue was raised in the case.

B. Heller Adopted the Test of “In Common Use for Lawful Purposes”

In the 2001 case of *United States v. Emerson*, the Fifth Circuit decided that “the people” in the Second Amendment means actual people, not an elusive collective, and thus that individuals have a right to keep and bear arms.⁸⁴ The court found that a Beretta 9mm semiautomatic pistol is protected by the Second Amendment,⁸⁵

while upholding the federal prohibition on possession of a firearm by a person subject to a domestic restraining order.⁸⁶ The Beretta M9 pistol, used by the U.S. military, has a 15-shot magazine.⁸⁷

In 2007, the D.C. Circuit invalidated the District of Columbia’s handgun ban in *Parker v. D.C.*, which the Supreme Court would affirm in *Heller*.⁸⁸ To determine what arms are protected by the Second Amendment, the court asked what arms are in common use for lawful purposes. Applying that test, it found that “most handguns (those in common use) fit that description then and now.”⁸⁹ *Parker* rejected the suggestion “that only colonial-era firearms (e.g., single-shot pistols) are covered by the Second Amendment,” and instead held that the amendment “protects the possession of the modern-day equivalents of the colonial pistol.”⁹⁰ In fact, the court discussed three basic types of modern equivalents of colonial-era firearms: “The modern handgun—and for that matter the rifle and long-barreled shotgun—is undoubtedly quite improved over its colonial-era predecessor, but it is, after all, a lineal descendant of that founding-era weapon”⁹¹ Applying a categorical test, *Parker* rejected the argument that protected arms could be selectively banned:

The District contends that since it only bans one type of firearm, “residents still have access to hundreds more,” and thus its prohibition does not implicate the Second Amendment because it does not threaten total disarmament. We think that argument frivolous. It could be similarly contended that all firearms may be banned so long as sabers were permitted. Once it is determined—as we have done—that handguns are “Arms” referred to in the Second Amendment, it is not open to the District to ban them.⁹²

The District pressed forward to the Supreme Court, which granted its petition for a writ of certiorari. In briefing in what was now captioned *District of Columbia v. Heller*, the District argued that its handgun ban “do[es] not disarm the District’s citizens, who may still possess operational rifles and shotguns.”⁹³ It further argued that “the Council acted based on plainly reasonable grounds. It adopted a focused statute that continues to allow private home possession of shotguns and rifles, which some gun rights’ proponents contend are actually the weapons of choice for home defense.”⁹⁴ In short, rifles and shotguns are good, handguns are bad. As will be seen, in later litigation, the District would argue the opposite: that rifles may be banned because citizens may possess handguns.

76 *Staples*, 511 U.S. 600, *rev’g* 971 F.2d 608, 609, 615 (10th Cir. 1992).

77 *Id.* at 603.

78 *Id.* at 602 n.1.

79 *Id.* at 610-11.

80 *Id.* at 614.

81 *Id.* at 612. “The Nation’s legislators chose to place under a registration requirement only a very limited class of firearms, those they considered especially dangerous.” *Id.* at 622 (Ginsburg, J., concurring) (noting also “the purpose of the mens rea requirement—to shield people against punishment for apparently innocent activity”).

82 *Id.* at 620. In upholding his conviction, the lower court held that evidence that the rifle fired more than one shot by a single function of the trigger as a result of a malfunction, and defendant being unaware of such capability, did not matter. *Staples*, 971 F.2d at 613-16.

83 *United States v. Staples*, 30 F.3d 108 (10th Cir. 1994).

84 270 F.3d 203 (5th Cir. 2001).

85 *Id.* at 216, 227 n.22, 273.

86 *Id.* at 264-65.

87 M9, BERETTA, <http://www.beretta.com/en-us/m9/>.

88 *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

89 *Id.* at 397.

90 *Id.* at 398.

91 *Id.*

92 *Id.* at 400.

93 Brief for Petitioners, *District of Columbia v. Heller*, 2008 WL 102223, *11 (U.S. Jan. 4, 2008).

94 *Id.* at *53.

In a 5-4 opinion, the Supreme Court decided that the Second Amendment protects individual rights and that a ban on handguns infringes on the right.⁹⁵ The Court's analysis generally applies to long guns as well as handguns, both of which are "arms": "The term ['Arms'] was applied, then [in the 18th century] as now, to weapons that were not specifically designed for military use and were not employed in a military capacity."⁹⁶ Further, the technology of protected arms is not frozen in time: "Just as the First Amendment protects modern forms of communications, . . . and the Fourth Amendment applies to modern forms of search, . . . the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."⁹⁷

Heller looked back to the Court's 1939 opinion in *United States v. Miller*, which held that judicial notice could not be taken that a short-barreled shotgun "is any part of the ordinary military equipment or that its use could contribute to the common defense," precluding it from deciding "that the Second Amendment guarantees the right to keep and bear such an instrument."⁹⁸ *Heller* explained:

We think that *Miller's* "ordinary military equipment" language must be read in tandem with what comes after: "[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." . . . The traditional militia was formed from a pool of men bringing arms "in common use at the time" for lawful purposes like self-defense. . . . 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.⁹⁹

Thus, "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.'"¹⁰⁰ Use of the conjunctive "and" in that last phrase is critical. Recall that *Staples* contrasted items like AR-15 rifles and automobiles that may be dangerous but are commonplace, with items like M-16 machine guns that

are not "widely accepted as lawful possessions."¹⁰¹ Similarly, *Heller* makes clear that arms in common use are not "unusual" and may not be prohibited.

Heller did draw the line at fully automatic machine guns such as the M-16 and heavy ordnance:

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. 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.¹⁰²

In contrast to "M-16 rifles and the like," semiautomatic rifles that fire only once per trigger pull are hardly "most useful in military service," which is why they are not issued as standard service weapons to any military force in the world. But *Heller* does not suggest that *any* "military" feature disqualifies a firearm from Second Amendment protection—the original militia would "bring the sorts of lawful weapons that they possessed at home to militia duty."¹⁰³ *Heller* held that a weapon that is possessed by law-abiding citizens or in common use for lawful purposes is protected, without regard to the features it may have in common with military weapons.

Heller referred to certain longstanding restrictions as presumptively valid, but none involve a prohibition on possession of a type of firearm by law-abiding persons.¹⁰⁴ It took a categorical approach and, without any consideration of the committee report which sought to justify the handgun ban or various empirical studies, held:

The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," . . . would fail constitutional muster.¹⁰⁵

The *Heller* test for determining what the Second Amendment protects is what arms are chosen by the populace for self-defense and other lawful purposes, not what arms the government allows its subjects to have. Responding to the District's argument that

95 *Heller*, 554 U.S. 570.

96 *Id.* at 581.

97 *Id.* at 582.

98 307 U.S. 174, 178 (1939) (quoted in *Heller*, 554 U.S. at 622). *Miller* reinstated an indictment for an unregistered short-barreled shotgun under the National Firearms Act that had been dismissed by the district court on the basis that the Act violated the Second Amendment.

99 *Heller*, 554 U.S. at 624-25 (quoting *Miller*, 307 U.S. at 179).

100 *Id.* at 627 (emphasis added). *Heller* cites, *inter alia*, 4 Blackstone 148-149 (1769) ("The offense of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land."); *O'Neill v. State*, 16 Ala. 65, 67 (1849) ("if persons arm themselves with deadly or unusual weapons for the purpose of an affray, and in such manner as to strike terror to the people, they may be guilty of this offence, without coming to actual blows"). The offense thus involved "going armed" with such weapons to terrify others, not on possessing them in the home.

101 *Staples*, 511 U.S. at 610-14.

102 *Id.* at 627.

103 *Id.*

104 *Heller*, 554 U.S. at 626-27.

105 *Id.* at 628-29 (citation omitted).

rifles and shotguns are good while handguns are bad, the Court stated:

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. It is enough to note . . . that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.¹⁰⁶

Many Americans prefer long guns for self-defense for other reasons. A rifle or shotgun may also be easy to store. It would be even harder for an attacker to redirect it or wrestle it away than a handgun. Depending on caliber, a rifle may have less recoil and may be aimed more accurately than a handgun. Depending on its weight, may be held with one hand while the other dials 911. The Violence Policy Center argued in an amicus brief supporting the District that “shotguns and rifles are much more effective in stopping” a criminal; “handguns—compared with larger shotguns and rifles that are designed to be held with two hands—require a greater degree of dexterity.”¹⁰⁷

Heller rejected rational basis analysis¹⁰⁸ as well as Justice Stephen Breyer’s proposed “judge-empowering ‘interest-balancing inquiry’ that ‘asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.’”¹⁰⁹ Relying on such intermediate scrutiny cases as *Turner Broadcasting*, Breyer would have applied a standard under which “the Court normally defers to a legislature’s empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity.”¹¹⁰ Applying that test, Justice Breyer relied on the committee report which proposed the handgun ban in 1976 and which was filled with data on the misuse of the type of firearm it sought to justify banning.¹¹¹ He also cited empirical studies about the alleged role of handguns in crime, injuries, and death.¹¹² Contrary empirical studies questioning the effectiveness of the handgun ban and focusing on lawful

uses of handguns, in his view, would not suffice to overcome the legislative judgment.¹¹³ Breyer concluded: “There is no cause here to depart from the standard set forth in *Turner*, for the District’s decision represents the kind of empirically based judgment that legislatures, not courts, are best suited to make.”¹¹⁴

Heller rejected Justice Breyer’s reliance on the committee report and empirical studies:

After an exhaustive discussion of the arguments for and against gun control, Justice Breyer arrives at his interest-balanced answer: because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban. QED.

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.¹¹⁵

Indeed, like the First, the Second Amendment “is the very *product* of an interest-balancing by the people,” and “it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”¹¹⁶ Moreover, “the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.”¹¹⁷

In sum, *Heller* held categorically that handguns—which by definition have pistol grips—are commonly possessed by law-abiding persons for lawful purposes and may not be prohibited. While the subject was handguns, the same approach would be equally applicable to long guns, regardless of whether they have features like pistol grips. As will be seen, some lower courts have rejected that approach in considering bans on long guns pejoratively called assault weapons.

C. McDonald Held the Right to Arms to be “Fundamental to Our Scheme of Ordered Liberty”

In *McDonald*, the Supreme Court held that “the right to keep and bear arms is fundamental to *our* scheme of ordered liberty” and is “deeply rooted in this Nation’s history and tradition”¹¹⁸ It called the right “fundamental” multiple times.¹¹⁹ *McDonald* rejected the view “that the Second Amendment

106 *Id.* at 629.

107 Brief of Violence Policy Center, 2008 WL 136348, *30 (U.S. Jan. 8, 2008).

108 *Heller*, 554 U.S. at 629 n.27.

109 *Id.* at 634.

110 *Id.* at 690 (Breyer, J., dissenting) (citing *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195-96 (1997) (*Turner II*)).

111 *Id.* at 693.

112 *Id.* at 696-99.

113 *Id.* at 699-703.

114 *Id.* at 705.

115 *Id.* at 634.

116 *Id.* at 635.

117 *Id.* at 636.

118 *McDonald*, 561 U.S. at 764 (emphasis added).

119 *Id.* at 764-68, 770-78. “Assault weapon” bans were upheld by pre-*Heller* courts that believed that the Second Amendment did not even protect an individual right, much less a fundamental right. See *Richmond Boro Gun Club v. City of New York*, 97 F.3d 681, 684 (2d Cir. 1996)

should be singled out for special—and specially unfavorable—treatment.”¹²⁰ It refused “to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees”¹²¹

As established in other precedents, a right is “fundamental” if it is “explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny.”¹²² “[C]lassifications affecting fundamental rights . . . are given the most exacting scrutiny.”¹²³ “Under the strict-scrutiny test,” the government has the burden to prove that a restriction “is (1) narrowly tailored, to serve (2) a compelling state interest.”¹²⁴ While reliance on text, history, and tradition may be the preferable approach to protecting these fundamental rights, the alternative is to apply strict scrutiny, consistent with precedents on other constitutional rights.

Since the right to keep and bear arms is a fundamental right, one would think that strict scrutiny would apply to an outright ban on a large class of firearms. But before *Heller* and *McDonald*, some state courts upheld assault weapon bans based on a “reasonableness” test akin to rational basis, which *Heller* rejected.¹²⁵ Post-*Heller* federal courts have upheld such bans under what they call intermediate scrutiny. But even if it were applicable, true intermediate scrutiny has teeth. Moreover, “it is [the Court’s] task in the end to decide whether [the legislature] has violated the Constitution,” and thus “whatever deference is due legislative

findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law”¹²⁶ Assertions in a committee report cannot override a constitutional right.¹²⁷

Heller did not consider legislative findings relevant. *McDonald*, which refused “to allow state and local governments to enact any gun control law that they deem to be reasonable,”¹²⁸ barely mentioned Chicago’s legislative finding about handgun deaths and accorded it no discussion.¹²⁹ Instead, *McDonald* noted that “the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials.”¹³⁰ Such officials were not entitled to deference.

Dissenting in *McDonald*, Justice Breyer argued that legislatures, not courts, should resolve empirical questions such as: “What sort of guns are necessary for self-defense? Handguns? Rifles? Semiautomatic weapons? When is a gun semi-automatic?”¹³¹ But *Heller* had rejected his interest-balancing test, and the Court thus found it “incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise.”¹³²

But even if a lesser standard were applied, such as that applied to adult bookstores under the First Amendment, a legislature cannot “get away with shoddy data or reasoning. The municipality’s evidence must fairly support the municipality’s rationale for its ordinance.”¹³³ If plaintiffs “cast direct doubt on this rationale, either by demonstrating that the municipality’s evidence does not support its rationale or by furnishing evidence that disputes the municipality’s factual findings,” then “the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.”¹³⁴

The changing views of a government agency about whether the firearms at issue are “sporting” fails to buttress banning them under intermediate scrutiny. In 1989, ATF decided that it no longer considered certain firearms to be “particularly suitable for or readily adaptable to sporting purposes” as required for importation by federal law.¹³⁵ ATF had considered such firearms to meet the sporting criteria ever since it was created in the

(New York City “assault weapon” ban “does not relate to a fundamental constitutional right.”); *Olympic Arms v. Buckles*, 301 F.3d 384, 389 (6th Cir. 2002) (“Second Amendment does not create an individual right to bear arms.”). *See also* *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) (“the right to possess a gun is clearly not a fundamental right”; ruling on N.Y. handgun restrictions).

120 *McDonald*, 561 U.S. at 778.

121 *Id.* at 780. No constitutional right is “less ‘fundamental’ than” others, and “we know of no principled basis on which to create a hierarchy of constitutional values” *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982).

122 *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17, 33 (1973).

123 *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

124 *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002).

125 Some pre-*Heller* state court decisions upheld gun and magazine bans under state arms guarantees. But these decisions do not meet the standard of review required for the Second Amendment by *Heller*, not to mention that they conflict with prior decisions in those same states. *Compare* *Benjamin v. Bailey*, 234 Conn. 455, 465-66 (1995) (adopting “reasonable regulation” test and holding that if “some types of weapons” are available, “the state may proscribe the possession of other weapons”), *with* *Rabbitt v. Leonard*, 413 A.2d 489, 491 (Conn. 1979) (“[A] Connecticut citizen, under the language of the Connecticut constitution, has a fundamental right to bear arms.”); *compare* *Robertson v. Denver*, 874 P.2d 325, 328 (Colo. 1994) (“[T]his case does not require us to determine whether that right is fundamental.”), *with* *City of Lakewood v. Pillow*, 501 P.2d 744, 745 (Colo. 1972) (holding a gun ban void because a governmental “purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved”); *compare* *Arnold v. City of Cleveland*, 616 N.E.2d 163, 172 (Ohio 1993) (“reasonableness test” applies to the “fundamental right” to have arms), *with* *Harrold v. Collier*, 107 Ohio St.3d 44 (2005) (strict scrutiny applies to fundamental rights).

126 *Sable Commcns. of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989).

127 *Turner Broadcasting System v. FCC* applied intermediate scrutiny to a content-neutral regulation and held that the regulation must not burden more speech than necessary. *Turner II*, 520 U.S. at 189. Its predecessor case reiterated the holding of *Sable Communications*. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1997).

128 *McDonald*, 561 U.S. at 783.

129 *Id.* at 750-51.

130 *Id.* at 790.

131 *Id.* at 923 (Breyer, J., dissenting).

132 *Id.* at 790-91.

133 *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39 (2002).

134 *Id.*

135 18 U.S.C. § 925(d)(3).

Gun Control Act of 1968.¹³⁶ Yet the Second Amendment is not confined to firearms that a government agency deems sporting, but extends to firearms “of the kind in common use,” and to “popular weapon[s] chosen by Americans for self-defense.”¹³⁷ Labeling a firearm as “sporting” is meaningless insofar as that the same firearm may be used for recreational shooting and for self-defense. Just as at the time of the Founding muskets were used for both militia and hunting purposes, today rifles such as the AR-15 are in wide use for both self-protection and target competitions.

Nor do government agencies define the limits of constitutional rights. A politically charged report by ATF in 1994, relied on by some courts, asserted that so-called assault weapons are designed for “shooting at human beings” and are “mass produced mayhem.”¹³⁸ Such rhetoric blatantly ignores that the firearms at issue are predominantly owned by millions of law-abiding citizens who bought them after passing background checks, who use them for hunting and target shooting, and who would never use them to shoot at a human being other than in lawful self-defense.

D. Caetano Reiterated that the Second Amendment Protects “Arms That Were Not in Existence at the Time of the Founding”

A unanimous per curiam opinion, *Caetano v. Massachusetts*, reversed and remanded a decision of the Massachusetts Supreme Judicial Court that upheld a ban on stun guns.¹³⁹ The Massachusetts court erred in holding stun guns not to be protected because they were not in common use when the Second Amendment was adopted, contrary to *Heller’s* holding that the Amendment “extends . . . to . . . arms . . . that were not in existence at the time of the founding.”¹⁴⁰ It erred in concluding that stun guns were “unusual” because they are a modern invention, for the same reason. And it erred in asserting “that only those weapons useful in warfare are protected,” a test that *Heller* explicitly rejected.¹⁴¹

Significantly, the 8-0 decision included four of the Justices in the *Heller* majority (Antonin Scalia had died), two of the *Heller* dissenters (Ruth Bader Ginsburg and Breyer), and newly appointed Justices Sonia Sotomayor and Elena Kagan. The Court unanimously recognized that the state court had contradicted *Heller*, without any suggestion that *Heller* was limited to handguns.

136 ATF’s 1989 change in policy was challenged, but no final decision on the merits was rendered. *Gun South, Inc. v. Brady*, 877 F.2d 858, 866 (11th Cir. 1989) (review limited to 90-day suspension of permits), *rev’d* 711 F. Supp. 1054 (N.D. Ala. 1989). The district court found that the reinterpretation was sparked by politics rather than by ATF’s experts, who testified that the rifles at issue continued to be sporting. 711 F. Supp. at 1056-60. “All of the evidence in this case demonstrates that the Steyr AUG is designed and marketed to be predominantly a sporting weapon.” *Id.* at 1063.

137 *Heller*, 554 U.S. at 624, 629.

138 ATF, ASSAULT WEAPONS PROFILE 19 (1994), quoted in *NYSRPA*, 990 F. Supp. 2d 349, 369 (W.D.N.Y. 2013). See also *Heller II*, 670 F.3d at 1262.

139 *Caetano*, 136 S. Ct. at 1028 (per curiam).

140 *Id.* at 1027.

141 *Id.* at 1028.

Justice Samuel Alito, joined by Justice Thomas, concurred. Jaime Caetano got the stun gun for protection due to threats by her abusive former boyfriend who ignored restraining orders against him.¹⁴² Justice Alito explained the evolving technology of protected arms:

While stun guns were not in existence at the end of the 18th century, the same is true for the weapons most commonly used today for self-defense, namely, revolvers and semiautomatic pistols. Revolvers were virtually unknown until well into the 19th century, and semiautomatic pistols were not invented until near the end of that century.¹⁴³

To be banned, a weapon must be “both dangerous and unusual,” and thus “the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes.”¹⁴⁴ While *Heller* rejected a test that an arm must be suitable for militia use, it is notable that stun guns are used by the police and the military.¹⁴⁵ Nor would that exclude them from protection.

It did not matter for the common-use test, Justice Alito continued, that there are more firearms than stun guns; that handguns are the most popular weapon for self-defense would not justify a ban on other weapons. *Hundreds of thousands* of stun guns had been sold to civilians, who could lawfully possess them in 45 states.¹⁴⁶ It is noteworthy that *millions* of AR-15 rifles have been sold to civilians, who may lawfully possess them in about the same number of states. If stun guns meet the common-use test for Second Amendment protection, AR-15s certainly do too.

III. THE SECOND AND FOURTEENTH AMENDMENTS: TEXT, HISTORY, AND TRADITION

A. Adopted at the Dawn of the Age of Repeating Firearms, the Second Amendment was Understood to Protect a Robust Right to Have “Arms”

The Second Amendment provides: “A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.” Each part of the Amendment inexorably points to protection for semiautomatic firearms and standard magazines.¹⁴⁷

Such firearms and magazines are “arms” by any definition. “The right of the people” refers to a liberty of the populace at large, in the same manner that “the right of the people” to assemble is protected by the First Amendment and to be free from unreasonable searches and seizures is protected by the

142 *Id.* at 1029 (Alito, J., concurring).

143 *Id.* at 1030-31.

144 *Id.*

145 *Id.* at 1032.

146 *Id.* at 1033.

147 “Standard magazines” refers to magazines that are typically sold for various firearms and which commonly hold over ten rounds. For instance, the Glock 17 pistol is typically sold with a 17-round magazine, while the AR-15 rifle is often sold with a 20-round magazine. See *Duncan*, 970 F.3d at 1048. Magazines in multiple capacities are commonly available for the same firearm.

Fourth Amendment. Exercise of the right “shall not be infringed,” precluding a prohibition on the right.

The term “bear arms” suggests that the right includes such hand-held arms as a person could “bear,” such as rifles, shotguns, and pistols, but not artillery or other heavy ordnance which one could not carry. While one could “keep” such heavy ordnance,¹⁴⁸ the reference to “the right” suggests a preexisting right, and at the time of the Framing, such a right had historically included hand-carried arms used by law-abiding persons for lawful purposes such as self-defense, sport, hunting, and militia use.

In addition to this substantive guarantee to protect “arms” as broadly defined, the prefatory clause declaring the necessity of a militia to a free state’s security means that arms useful to a militia would have presumptive protection. Banning rifles because they “are more accurate and easier to control”¹⁴⁹ conflicts with the imperative of “a well regulated militia” capable of providing for “the security of a free state.”

State constitutional guarantees of the right to keep and bear arms began to be adopted in 1776, continued to be adopted as new states were admitted to the United States, and have continued to be revised and strengthened through current times.¹⁵⁰ This process was ongoing with every step of development of firearms technology, from single shots through repeaters using tubular magazines, and then semiautomatics with detachable magazines. The constant rejuvenation of arms guarantees alongside improvements in arms technology demonstrates that modern arms maintain constitutional protection.

All state constitutions with arms guarantees protect the right to have and bear “arms,” without language that would freeze the technology of such arms in a time period. Pennsylvania’s 1790 guarantee, that the citizens’ right “to bear arms in defence of themselves and the State shall not be questioned,”¹⁵¹ is not limited to flintlocks. For over two centuries, states continued to adopt or amend arms guarantees without language that would freeze the technology. Missouri’s 2014 guarantee, the most recent, protects the citizen’s right “to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in

defense of his home, person, family and property” from being “questioned.”¹⁵² Modern arms are obviously included.

The need to guarantee the right to bear arms stemmed in part from the confiscation of arms by the Crown. Days after Lexington and Concord, when General Thomas Gage ordered Bostonians to surrender their arms, they turned in “1778 fire-arms, 634 pistols, 973 bayonets, and 38 blunderbusses.”¹⁵³ In reaction to such disarming, the first four state declarations of rights recognized the right of the people to bear arms for defense of themselves and for the common defense.¹⁵⁴

While most firearms at the Founding had to be reloaded after each shot, repeating firearms—guns that fire multiple rounds without reloading—had been developed two centuries before that.¹⁵⁵ The first reference in America to a repeating firearm was by Samuel Niles, who wrote in 1722 that certain Indians

were also entertained with the sight of a curious gun, made by Mr. [John] Pim of Boston,—a curious piece of workmanship,—which though loaded but once, yet was discharged eleven times following, with bullets, in the space of two minutes each of which went through a double door at fifty yards’ distance.¹⁵⁶

In Boston, 9 and 11 shot repeaters were available during 1722-1756.¹⁵⁷ In 1777, Joseph Belton test fired an 8-shot musket before members of the Continental Congress, which authorized him to make 100 such firearms.¹⁵⁸ He later demonstrated a 16-shot repeater that was recommended for approval by the Congress.¹⁵⁹

The Founding generation was thus aware of improvements in firearms technology that allowed repeated shots to be fired without reloading. Such firearms were well within the right to bear arms for defense of self and state declared in the first state constitutions and later in the Second Amendment. Founders like Benjamin Franklin and Thomas Jefferson were typical of the new nation in an age of technological innovation, and the nation would soon adopt a constitution that would protect patents and copyright “[t]o promote the Progress of Science and useful Arts”¹⁶⁰

148 In the early Republic, “[c]annon are constantly manufactured . . . for sale to associations of citizens, and to individual purchasers, for use at home, or for exportation.” Tench Coxe, *Statement of the Arts & Manufacturers of the United States of America* (1814), in 2 *AMERICAN STATE PAPERS (FINANCE)* 687 (1832). Cannon were not federally regulated until 1968, and they may legally be possessed if registered with the federal government. See Gun Control Act of 1968, P.L. 90-618, Title II, 82 Stat. 1213, 1227 (1968). See also 26 U.S.C. § 5841 (firearm registry); §§ 5845(a)(8) (firearm defined to include destructive device) & (f) (destructive defined to include weapon with barrel bore over one-half inch).

149 “[T]hat the rifles are more accurate and easier to control is precisely why California has chosen to ban them.” Rupp v. Becerra, 401 F. Supp. 3d 978, 993 (C.D. Ca. 2019) (upholding “assault weapon” ban), *appeal pending*, No. 19-56004 (9th Cir.).

150 See Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions*, <http://www2.law.ucla.edu/volokh/beararms/statecon.htm> (listing the arms guarantees in all states and the years, from 1776 through the present, when they were adopted or amended).

151 Pa. Const., art. IX, § 21 (1790).

152 Mo. Const., art. I, § 23 (2014).

153 RICHARD FROTHINGHAM, *HISTORY OF THE SIEGE OF BOSTON* 95 (1903).

154 PA. DEC. OF RIGHTS, art. XIII (1776); VT. CONST., art. I, § 15 (1777); N.C. DEC. OF RIGHTS, art. XVII (1776); MASS. DEC. OF RIGHTS, XVII (1780).

155 See A Sixteenth Century 16-Shooter, <https://www.ammoland.com/2017/11/a-sixteenth-century-16-shooter/#axzz6xWtW17WS>.

156 HAROLD L. PETERSON, *ARMS AND ARMOR IN COLONIAL AMERICA* 1526-1783 215 (2000).

157 C. SAWYER, *FIREARMS IN AMERICAN HISTORY* 217 (1910); Flint-lock magazine gun, <http://collections.vam.ac.uk/item/O77720/flint-lock-magazine-cookson-john/>.

158 ROBERT HELD, *THE BELTON SYSTEMS, 1758 & 1784-86: AMERICA’S FIRST REPEATING FIREARMS* 17 (1986).

159 *Id.* at 37.

160 U.S. CONST., art. I, § 8.

The Constitution was proposed in 1787 without a declaration of rights. The Federalists initially argued that no bill of rights was needed because, in the words of Noah Webster, “[t]he supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed . . .”¹⁶¹ In *The Federalist* No. 46, James Madison heralded “the advantage of being armed, which the Americans possess over the people of almost every other nation,” including the European kingdoms, where “the governments are afraid to trust the people with arms.”¹⁶² This understanding and promise that the people would be armed and able to protect their freedom from an oppressive government was seen as the cornerstone of the Constitution. Today’s “governments [that] are afraid to trust the people with arms” such as AR-15s, to use Madison’s words, are in the tradition of the monarchies that the Founders rejected.

The Anti-Federalists demanded written guarantees of rights. The Pennsylvania Dissent of Minority declared: “That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game . . .”¹⁶³ Samuel Adams proposed in the Massachusetts ratification convention a declaration that the “peaceable citizens” would never be disarmed.¹⁶⁴ The New Hampshire convention resolved against disarming anyone unless they were involved in “actual rebellion.”¹⁶⁵

Both sides of the ratification debate thus presupposed the existence of a robust right to bear arms. The issue was whether this and other rights should be written into the Constitution. Compromise was reached and Madison introduced what became the Bill of Rights to the House of Representatives in 1789. Ten days later, Tench Coxe explained what became the arms guarantee: “As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed . . . in their right to keep and bear their private arms.”¹⁶⁶ Madison praised Coxe’s article.¹⁶⁷

The federal Militia Act of 1792 particularized the meaning of a “well regulated militia” and of the “arms” the people had a right to keep and bear. In debate, Rep. Roger Sherman “conceived it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack upon his liberty or property, by whomsoever made.”¹⁶⁸ The Act required enrollment

of “every free able-bodied white male citizen”¹⁶⁹ aged 18 to 44 years old. Each was required to “provide himself” with a musket or firelock, bayonet, and a box of “not less than twenty-four cartridges,” or alternatively with a rifle, twenty balls, and a quarter pound of powder.¹⁷⁰ “Musket” and “firelock” referred in common language to “a species of fire-arms used in war . . .”¹⁷¹ The above ammunition quantities were minimums—no maximum was set.

In sum, the arms protected under the Second Amendment, including for militia use, embraced at a minimum firearms, multiple rounds of ammunition, and bayonets. That again speaks to the broad nature of the arms protected by the Second Amendment.

B. The Early Republic: Arms for Citizens, But Not for African Americans

Commentator St. George Tucker wrote in 1803 that “wherever the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.”¹⁷² That would include prohibiting the right, using current judicial jargon, under so-called intermediate scrutiny.

The same year that Tucker wrote that, Meriwether Lewis acquired a rapid-firing air rifle with a magazine capacity of twenty-two balls.¹⁷³ It was invented in 1778 for use by the Austrian military.¹⁷⁴ Its use in the Lewis and Clark expedition was recorded in their diaries.¹⁷⁵

Antebellum judicial decisions reflected the broad scope of protected arms. The Supreme Court of Georgia in *Nunn v. State* (1846) explained, “The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not *such* merely as are used by the militia, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree . . .”¹⁷⁶ The U.S. Supreme Court in *Heller* explained that this “perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause . . .”¹⁷⁷

From colonial times, slaves could not “keep or carry a gun,” one of the many legal disabilities they suffered.¹⁷⁸ Moreover, free blacks were prohibited from possessing arms, especially defensive

161 NOAH WEBSTER, AN EXAMINATION OF THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 43 (1787).

162 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 492-93 (1984).

163 *Id.*, vol. 2, at 623-24 (1976).

164 *Id.*, vol. 6, at 1453 (2000).

165 *Id.*, vol. 18, at 188 (1995).

166 *Remarks on the First Part of the Amendments to the Federal Constitution*, FEDERAL GAZETTE, June 18, 1789, at 2, col. 1.

167 12 PAPERS OF JAMES MADISON 257 (C. Hobson ed. 1979).

168 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 92-93 (1996).

169 During Reconstruction, the term “white” was deleted. 14 Stat. 422, 423 (1867).

170 § 1, 1 Stat. 271 (1792).

171 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

172 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES, App., 300 (1803) (emphasis added).

173 *The Girandoni Air Rifle*, DEFENSE MEDIA NETWORK, May 14, 2013, <https://www.defensemedianetwork.com/stories/the-girandoni-air-rifle/>.

174 *Id.*

175 *Id.*

176 1 Ga. 243, 251 (1846).

177 *Heller*, 554 U.S. at 612.

178 ST. GEORGE TUCKER, A DISSERTATION ON SLAVERY 65 (1796).

or militia-type arms, without a license. Such laws reflected that African Americans were not recognized to be among “the people” with the rights of citizens.

Virginia law provided that “[n]o negro or mulatto slave whatsoever shall keep or carry any gun . . .”¹⁷⁹ Further, “[n]o free negro or mulatto, shall be suffered to keep or carry any fire-lock of any kind, any military weapon, or any powder or lead,” without a license.¹⁸⁰ Such limits “upon their right to bear arms,” Virginia’s high court explained, were among the “numerous restrictions imposed on this class of people [free blacks] in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States.”¹⁸¹ But that inconsistency stood because blacks were not considered citizens.

In North Carolina, it was unlawful “if any free negro, mulatto, or free person of color, shall wear or carry about his or her person, or keep in his or her house, any shot gun, musket, rifle, pistol, sword, dagger or bowie-knife,” without a license.¹⁸² This was upheld because “free people of color cannot be considered as citizens . . .”¹⁸³ Similarly, Georgia’s high court ruled that “Free persons of color have never been recognized here as citizens; they are not entitled to bear arms . . .”¹⁸⁴ And a Delaware court held that the police power justified “the prohibition of free negroes to own or have in possession fire arms or warlike instruments.”¹⁸⁵

But it was the U.S. Supreme Court in the Dred Scott case that notoriously argued against recognition of African Americans as citizens because it “would give to persons of the negro race . . . the full liberty of speech . . ., and to keep and carry arms wherever they went.”¹⁸⁶ Clearly, having no right to bear arms was an incident of slavery and of refusal to recognize African Americans as citizens.

C. The Fourteenth Amendment Was Understood to Guarantee the Right to Bear Arms, Which Included Repeating Firearms with Extended Magazines

The Fourteenth Amendment was understood to protect the right to keep and bear arms. But African Americans were deprived of this right even after the abolition of slavery through the black codes. Among the commonly-possessed arms in this epoch were repeating rifles with magazines holding more than ten rounds.

The invention of fixed cartridges paved the way for mass production of repeating, lever-action rifles with magazines of various capacities. Designed in 1856, the Volcanic rifle had a magazine that held, depending on barrel length, 20, 25, or 30

cartridges.¹⁸⁷ This developed into the Henry Repeating Rifle in 1860, which evolved into the Winchester Model 1866. The rifle version of the Winchester held 17 rounds, and the carbine version held 12.¹⁸⁸ The Spencer carbine could fire a magazine of seven cartridges in 30 seconds, and it could be reloaded quickly with extra magazine tubes. While over 94,000 Spencers were bought by the U.S. military, 120,000 were bought by civilians.¹⁸⁹ Discharged Union soldiers were allowed to buy their arms. Prices were \$6 for a musket, \$10 for a Spencer carbine, and \$8 for other carbines and revolvers.¹⁹⁰

Simultaneous with such developments in firearms technology was the extension of the right to keep and bear arms to African Americans. As *Heller* stated, “In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves.”¹⁹¹ Frederick Douglass famously said, “The best work I can do, therefore, for the freed-people, is to promote the passing of just and equal laws towards them. They must have the cartridge box, the jury box, and the ballot box, to protect them.”¹⁹²

But the slave codes were reenacted as the black codes. South Carolina provided that no person of color would, without permission, “be allowed to keep a fire arm,” except “the owner of a farm, may keep a shot gun or rifle, such as is ordinarily used in hunting, but not a pistol, musket, or other fire arm or weapon appropriate for purposes of war.”¹⁹³ An African American convention resolved that the enactment “to deprive us of arms be forbidden, as a plain violation of the Constitution . . .”¹⁹⁴

During debate in Congress on the Freedmen’s Bureau bill, Rep. Josiah Grinnell noted that “a white man in Kentucky may keep a gun; if a black man buys a gun he forfeits it and pays a fine of five dollars, if presuming to keep in his possession a musket which he has carried through the war.”¹⁹⁵ Rep. Samuel McKee added that 27,000 black soldiers who were “allowed to retain their arms” returned to Kentucky, and “[a]s freedmen they must have the civil rights of freemen.”¹⁹⁶ Rep. Thomas Eliot quoted a report from the Freedmen’s Bureau: “The civil law prohibits the

179 Va. 1819, c. 111, §§ 7 & 8.

180 *Id.*

181 *Aldridge v. Commonwealth*, 2 Va. 447, 449 (Gen. Ct. 1824).

182 *State v. Newsom*, 27 N.C. 250, 254 (1844) (Act of 1840, ch. 30).

183 *Id.*

184 *Cooper v. Savannah*, 4 Ga. 72 (1848).

185 *State v. Allmond*, 7 Del. 612, 641 (Gen. Sess. 1856).

186 *Scott v. Sanford*, 60 U.S. (19 How.) 393, 417 (1857).

187 ROBERT F. WILLIAMSON, WINCHESTER: THE GUN THAT WON THE WEST 9-13 (1952).

188 *Id.* at 22, 49.

189 *Spencer Carbine*, <https://amhistory.si.edu/militaryhistory/collection/object.asp?ID=117>.

190 General Order 101 (May 30, 1865), U.S. Congressional Serial 1497, at 167-72 (cited in *Civil War News* 15 (May 2016)).

191 *Heller*, 554 U.S. at 614, citing STEPHEN HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, & THE RIGHT TO BEAR ARMS, 1866-1876 (1998).

192 *Frederick Douglass on the American Crisis*, NEWCASTLE WEEKLY COURANT, May 26, 1865, at 6.

193 S.C. Stat., No. 4730, § XIII, 250 (1865).

194 2 PROCEEDINGS OF THE BLACK STATE CONVENTIONS, 1840-1865 302 (1980).

195 Cong. Globe, 39th Cong., 1st Sess. 651 (1866).

196 *Id.* at 654.

colored man from bearing arms; returned soldiers are, by the civil officers, dispossessed of their arms and fined for violation of the law.”¹⁹⁷ As the Commissioner of the Freedmen’s Bureau put it, “the right of the people to keep and bear arms as provided in the Constitution is *infringed*”¹⁹⁸

Muskets used in military service were thus considered arms protected by the Second Amendment. While they had to be reloaded after each shot, a typical musket was a formidable weapon: “A rifle [musket] could fire a bullet with man-killing accuracy over 800 yards”¹⁹⁹ Standard bullets were .58 caliber weighing 510 grains,²⁰⁰ which is enormous compared to today’s much smaller bullets, such as the .223 caliber bullet weighing 55 grains that is used in many AR-15s.²⁰¹ But that military utility did not preclude constitutional protection. Muskets also had civilian uses. A Freedmen’s Bureau official testified that blacks “are proud of owning a musket or fowling-piece. They use them often for the destruction of vermin and game.”²⁰²

The Freedmen’s Bureau Act declared that the rights to “personal liberty” and “personal security,” “including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race or color or previous condition of slavery.”²⁰³ And the arms of that epoch included repeating rifles with magazines holding as many as thirty rounds.

Introducing the Fourteenth Amendment, Senator Jacob Howard referred to “the personal rights guaranteed and secured by the first eight amendments,” including “the right to keep and bear arms”²⁰⁴ He averred, “The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.”²⁰⁵ In debate on the amendment, Senator Samuel Pomeroy described “the safeguards of liberty” as including “the right to bear arms for the defense of himself and family,” which would allow a freedman to protect his cabin with “a well-loaded musket.”²⁰⁶ Again, the military utility of muskets did not preclude their use in self-defense.

Congress later sought to enforce the Fourteenth Amendment through the Civil Rights Act of 1871,²⁰⁷ today’s 42 U.S.C. § 1983. Rep. George McKee argued that the bill was necessary to prevent recurrence of laws such as Mississippi’s 1865 ban on unlicensed

possession of a firearm by a freedman. He recalled that “a soldier honorably mustered out of the United States Army was entitled to keep his musket or rifle by having the sum of eight dollars stopped from his pay” and that “[m]ost of the colored soldiers availed themselves of this privilege,” but that “I have seen those muskets taken from them and confiscated under this Democratic law.”²⁰⁸

The same year the Civil Rights Act passed, the Supreme Court of Tennessee explained that “the usual arms of the citizen of the country” were “the rifle of all descriptions, the shot gun, the musket, and repeater . . . ; and that under the Constitution the right to keep such arms, can not be infringed or forbidden by the Legislature.”²⁰⁹ That included repeating rifles with magazines holding over ten rounds. Louisiana’s high court said later, “When we see a man with a musket to shoulder, or carbine slung on back, or pistol belted to his side, or such like, he is bearing arms in the constitutional sense.”²¹⁰

D. Semiautomatic Firearms with Detachable Magazines Have Been Commonly Possessed for Over a Century

Rifles and pistols with detachable magazines came into wide use toward the end of the 19th century. Winchester began making semiautomatic rifles with detachable magazines beginning with the Model 1907.²¹¹ Judge (now Justice) Kavanaugh wrote in his dissent in *Heller II*: “The first commercially available semi-automatic rifles, the Winchester Models 1903 and 1905 and the Remington Model 8, entered the market between 1903 and 1906.”²¹² Significantly, he added, “Many of the early semi-automatic rifles were available with pistol grips. . . . These semi-automatic rifles were designed and marketed primarily for use as hunting rifles”²¹³

Over a century ago, to promote the national defense, Congress provided for the sale of “magazine rifles . . . for the use of rifle clubs”²¹⁴ Sales continue today under the Civilian Marksmanship Program (CMP) in order “to instruct citizens of the United States in marksmanship,” “to promote practice and safety in the use of firearms,” and “to conduct competitions in the use of firearms”²¹⁵ The CMP sells surplus M1 Garand rifles to civilians.²¹⁶ The semiautomatic M1 Garand was America’s service rifle in World War II. The CMP promotes and sponsors competitions using, among others, the M1 Garand, an AR-15-type commercial rifle with a 20 or 30 round magazine, and an

197 *Id.* at 657.

198 Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236 (1866).

199 WILLIAM B. EDWARDS, CIVIL WAR GUNS 13 (1962).

200 *Id.* at 23-24.

201 See 5.56 NATO 55 gr GMX Superperformance, <https://www.hornady.com/ammunition/rifle/5-56-nato-55-gr-gmx-superperformance#/>.

202 Rpt. of Jt. Com. on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, at 246 (1866).

203 § 14, 14 Stat. 173, 176-77 (1866).

204 Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

205 *Id.* at 2766.

206 *Id.* at 1182.

207 17 Stat. 13 (1871).

208 Cong. Globe, 42nd Cong., 1st Sess. 426 (1871).

209 *Andrews v. State*, 50 Tenn. 165, 179 (1871). That precedent was endorsed by *Heller*, 554 U.S. at 629.

210 *State v. Bias*, 37 La. Ann. 259, 260 (1885).

211 *Williamson*, *supra* note 187, at 434.

212 *Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting) (citations omitted).

213 *Id.*

214 P.L. 58-149, 33 Stat. 986, 987 (1905).

215 36 U.S.C. § 40722.

216 36 U.S.C. § 40728(a); 32 C.F.R. § 621.2.

M1A-type semiautomatic rifle with a 10 or 20 round magazine.²¹⁷ As this reflects, rifles and magazines banned as assault weapons by some jurisdictions are not only typically possessed for lawful purposes, their use is promoted by the United States to encourage civilian marksmanship.

Some 19.8 million AR-15s or other modern sporting rifles were produced in the United States or imported between 1990 and 2018. About half of all rifles produced in 2018 were of those types.²¹⁸ A panel of the Ninth Circuit noted data “that from 1990 to 2015, civilians possessed about 115 million LCMs out of a total of 230 million magazines in circulation. Put another way, half of all magazines in America hold more than ten rounds.”²¹⁹ Semiautomatic rifles with magazines holding 10, 15, 20, and 30 cartridges have become common for use in target shooting, competitions, hunting, self-protection, protection of livestock, law enforcement, and other lawful purposes. Semiautomatic pistols with magazines holding between 8 and 20 cartridges also have come into wide use for civilian and military purposes. Indeed, the number of lawful gun owners who use the AR-15 or similar firearms for sport shooting or self-defense far exceeds the number of people who engage in such other widespread recreational activities such as swimming and jogging.²²⁰

Police nationwide are issued, or purchase their own, AR-15-type rifles. The Fourth Circuit has noted that “the standard service weapons issued to law enforcement personnel come with large-capacity magazines.”²²¹ States that ban assault weapons for civilians exempt law enforcement officers and even retired officers.²²² No one suggests that active and retired officers possess such firearms to spray fire from the hip at innocent victims. Instead, police use such rifles and magazines because they are considered well suited for self-defense, including in an urban environment. Yet when New York civilians challenged that state’s ban, the state filed “affidavits of chiefs of police opining that assault weapons may not be well suited for self-defense, especially in an urban environment . . .”²²³ So it’s self-defense for me, but not for thee.

In 1921, the North Carolina Supreme Court held that protected arms include “the rifle, the musket, the shotgun, and the pistol,” i.e., “all ‘arms’ as were in common use, and borne by the people as such when this provision was adopted.”²²⁴ Florida’s high court held in 1972 that protected arms are those that “are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such

as semi-automatic shotguns, semi-automatic pistols and rifles.”²²⁵ *Heller* followed the same traditional test in recognizing “arms ‘in common use at the time’ for lawful purposes like self-defense” as constitutionally protected.²²⁶

Laws that ban commonly-possessed arms as so-called assault weapons have no longstanding historical tradition. During the Great Depression, three states restricted or required a license for semiautomatics that would fire more than 12,²²⁷ 16,²²⁸ or 18 shots,²²⁹ and all of these laws were repealed. The District of Columbia had an odd ban dating to 1932 on automatics and semiautomatics that shot “more than twelve shots without reloading,” which thus allowed a real machine gun as long as it fired eleven or fewer shots; the definition would be revised to conform to the federal definition in 2008.²³⁰

In 1989, California passed the first state ban on assault weapons, defined by a list of names of manufacturers and models such as “Colt AR-15.”²³¹ In 1990, New Jersey became the first state to ban detachable magazines holding more than 15 rounds (later reduced to 10).²³² Since then, bans have been passed in Colorado (magazines only), Connecticut, Hawaii (certain handguns and magazines only), Maryland, Massachusetts, New Jersey, New York, and the District of Columbia. Six of these states define “assault weapon” to include mostly rifles together with some shotguns and handguns; one bans only certain handguns; and eight states ban certain magazines. The District of Columbia bans certain of all of these, but it does not count as a state.²³³

The fact that only six states ban certain long guns and handguns means there are 44 states that fully recognize Second Amendment rights.²³⁴ Four of the restrictive states—California, Maryland, New Jersey, and New York—have no arms guarantee in their state constitutions.²³⁵ The arms guarantees of the two

217 CMP, *Highpower Rifle Competition Rules* 33-38 (2019), <https://thecmp.org/wp-content/uploads/HighpowerRifleRules.pdf?vers=072319>.

218 Figures based on data from the Bureau of Alcohol, Tobacco, Firearms and Explosives. *NSSF Releases Most Recent Firearm Production Figures* (Nov. 16, 2020), <https://www.nssf.org/nssf-releases-most-recent-firearm-production-figures/>.

219 *Duncan*, 970 F.3d at 1142.

220 See Smith, *supra* note 17, at 367.

221 *Kolbe*, 849 F.3d at 147.

222 *E.g.*, Md. Code, Criminal Law, § 4-302.

223 *NYSRPA*, 804 F.3d at 256 n.63.

224 *State v. Kerner*, 181 N.C. 574, 107 S.E. 222, 224 (1921).

225 *Rinzler v. Carson*, 262 So. 2d 661, 666 (Fla. 1972).

226 *Heller*, 554 U.S. at 624.

227 1927 R.I. Acts & Resolves 256, 256–57; repealed, Ch. 278, sec. 1, § 11-47-2, 1975 R.I. Pub. Laws 738, 738–39, 742.

228 1927 Mich. Pub. Acts 888-89; repealed, Act No. 175, sec. 1, § 224, 1959 Mich. Pub. Acts 249, 250.

229 1933 Ohio Laws 189, 189; repealed, H.B. 234, § 1, 2014 Ohio Laws File 165.

230 PL. 72-275, §§ 1, 14, 47 Stat. 650, 654 (1932); amended, 2008 D.C. Laws 17-372 (Act 17-708), § 3(a)(5).

231 Ca. Stats. 1989, ch. 19, § 3, at 64.

232 N.J. L. 1990, c. 32, § 10 (1990).

233 See Ca. Penal Code §§ 30510, 30515, 30600, 30605; Colo. Rev. Stat. §§ 18-12-301(2)(a), 18-12-302; Conn. Gen. Stat. §§ 53-202a(1), 53-202b, 53-202c; Haw. Rev. Stat. §§ 134-1, § 134-4(e); Md. Code, Criminal Law, §§ 4-301(c), (d), 4-301(e)(1)(i), 4-303(a), Md. Code, Public Safety Article, § 5-101(r)(2); Mass. Gen. Laws 140 §§ 121, 131M; N.J. Stat. 2C:39-1w, 2C:39-3(j), 2C:39-5(f), 2C:39-9(g), 2C:58-5, 2C:58-12; N.Y. Penal Law §§ 265.02(7), (8), 265.10(1) - (3); D.C. Code §§ 7-2502.02(a), 7-2501.01(3A)(A)(i)(IV), 7-2506.01(b).

234 Hawaii bans only certain handguns, so it fails to change the basic score.

235 Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions*, <http://www2.law.ucla.edu/volokh/beararms/statecon.htm>.

other states—Connecticut and Massachusetts—have been gutted by judicial decisions.²³⁶ Similarly, the fact that only eight states have magazine restrictions means that 42 states see that as an infringement on the fundamental right to bear arms, or see no value in such restrictions. The bottom line is that America at large respects the right to possess the arms that a fringe group of states bans.

In *McDonald*, the Supreme Court found that the right to keep and bear arms “is fundamental to our scheme of ordered liberty” and is “deeply rooted in this Nation’s history and tradition.”²³⁷ While “we have never held that a provision of the Bill of Rights applies to the States only if there is a ‘popular consensus’ that the right is fundamental, . . . in this case, as it turns out, there is evidence of such a consensus.”²³⁸ The Court pointed to a brief submitted by 38 states taking that view.²³⁹ Similarly, the refusal of 44 states to ban the long guns and handguns denigrated by six states as assault weapons shows a broad consensus that there is a fundamental right to arms.

But despite this apparent popular consensus, all of the (admittedly few) judicial decisions on the question have upheld assault weapon bans. The handful of bans are all in blue states with long traditions of unusual gun restrictions and typically no state constitutional guarantee of the right to arms. It is not an accident that the Fifth Circuit rendered the first major decision holding the Second Amendment to be an individual right in a case arising in Texas, while the first major precedent holding it to be a “collective right” was rendered by the Ninth Circuit in a case upholding California’s assault weapon ban.²⁴⁰

New York is another example of a state where the Second Amendment often, as Rodney Dangerfield would say, gets no respect. Its 1911 Sullivan Law required a license just to keep a handgun in the home. The Second Circuit upheld a warrantless seizure of a firearm based on its “‘immediately apparent’ incriminating character” because, it said, “Under New York law, it is a crime to possess a firearm.”²⁴¹ The court in that case found that the prohibition did not offend the Second Amendment because “the right to possess a gun is clearly not a fundamental right.”²⁴² Then-Judge Sonia Sotomayor joined in the opinion, although in another case she dissented from an opinion upholding overly-harsh sentencing in a gun sale case.²⁴³ Given that history,

it is no small wonder that the Second Circuit upheld New York’s assault weapon ban.

Not only red states but most blue states don’t pass assault weapon bans, and thus unsurprisingly there are no precedents in such states about whether such bans are unconstitutional. Only six blue states (and the District of Columbia) ban certain long guns and handguns as “assault weapons,” and the precedents upholding such bans reflect the restrictive firearm traditions in those states. Those precedents should thus be seen as only a small fraction of the viewpoints of the federal judiciary (and the American people).

Finally, the handful of bans amount to an insignificant hiccup, albeit a major intrusion on Second Amendment rights, in the totality of American history. From the time of the colonial settlements of Jamestown in 1607 and Plymouth Colony in 1620, up to the enactment of California’s ban in 1989, no comparable firearm bans existed in America. The one exception was the British attempt to disarm the colonists in 1775. Other than that, in over 400 years of American history, there have been only thirty-two years of assault weapon bans, and they have been confined to 6 out of 50 states. Such laws are recent, extreme outliers that are antithetical to American history and tradition.

E. Up from Jim Crow: How Repeating Rifles Protected Civil Rights

California’s ban on named rifles had a single precedent in American legal history. In 1893, Florida made it “unlawful to carry or own a Winchester or other repeating rifle” without a license.²⁴⁴ How that came about warrants review.

Ida B. Wells famously wrote in 1892 that a “Winchester rifle should have a place of honor in every black home, and it should be used for that protection which the law refuses to give.”²⁴⁵ Earlier that year, she explained, “the only case where the proposed lynching did not occur, was where the men armed themselves in Jacksonville, Fla., and Paducah, Ky, and prevented it. The only times an Afro-American who was assaulted got away has been when he had a gun and used it in self-defense.”²⁴⁶ In the Jacksonville incident, rumors spread of a possible lynching at the jail holding a black murder suspect. The *Florida-Times Union* reported: “Every approach to the jail was guarded by crowds of negroes armed to the very teeth.”²⁴⁷ A lynching was averted and the suspect was tried and convicted.²⁴⁸ In the Paducah case, the jail holding a black man accused of being a peeping tom was being protected by members of the black community when some white rowdies showed up. With a race war rumored, the state militia was called up, and police seized over 200 guns from black homes. Hotheads cooled down and peace was restored.²⁴⁹

Along with Rev. Taylor Nightingale, who advised his congregants to obtain Winchester rifles, Wells urged members

236 *Benjamin*, 234 Conn. at 478 (“We therefore apply rational basis review, which the statutory ban on assault weapons satisfies.”); *Commonwealth v. Davis*, 369 Mass. 886, 888 (1976) (arms guarantee limited to organized militia, not individuals).

237 *McDonald*, 561 U.S. at 767.

238 *Id.* at 789.

239 *Id.*

240 *Emerson*, 270 F.3d at 227; *Silveira*, 312 F.3d at 1061.

241 *United States v. Sanchez-Villar*, 99 Fed. Appx. 256, 258 (2d Cir. 2004) (per curiam).

242 *Id.* at 258 n.1, quoting *Toner*, 728 F.2d at 128.

243 *United States v. Cavera*, 550 F.3d 180, 220 (2d Cir. 2008) (en banc) (Sotomayor, J., dissenting).

244 1893 Fla. Laws 71-72.

245 IDA B. WELLS, SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES 16 (1892).

246 *Id.*

247 NICHOLAS JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS 111-12 (2014).

248 *Id.* at 112.

249 *Id.* at 111.

of the black community to defend themselves with arms in the newspaper *Memphis Free Speech* and elsewhere. Their repeated references to the virtues of the Winchester, and the defensive use thereof by black communities, were well publicized and would have consequences.²⁵⁰

Perhaps in response to such incidents in which blacks defended themselves with effective arms, in 1893, Florida made it “unlawful to carry or own a Winchester or other repeating rifle without first taking out a license from the County Commissioner”; only with a license would a person be “at liberty to carry around with him on his person and in his manual possession” such a rifle.²⁵¹ A license required a \$100 bond from sureties to be approved by the County Commissioner.²⁵² That would be equivalent to \$2,943 today.²⁵³ The average monthly wage for farm labor in Florida in 1890 was \$19.35.²⁵⁴ The law did what it was intended to do when it effectively excluded the poor and African Americans from legal gun ownership. In 1901, the law was amended to add pistols to the list of firearms requiring a license.²⁵⁵

In 1941, the Florida Supreme Court decided *Watson v. Stone*. Mose Watson had been convicted under the statute for having a pistol in the glove box of an automobile in which he was a passenger. Holding that this did not constitute “on his person and in his manual possession,” the court reversed the conviction, adding for good measure that businessmen, tourists, “unprotected women and children,” and “all law-abiding citizens fully appreciate the sense of security afforded by the knowledge of the existence of a pistol in the pocket of an automobile”²⁵⁶ “These people,” the court concluded, “should not be branded as criminals in their effort of self preservation and protection, but should be recognized and accorded the full rights of free and independent American citizens.”²⁵⁷

Justice Rivers H. Buford, who had been a member of the Florida legislature when the 1901 amendment was enacted,²⁵⁸ wrote a concurring opinion explaining:

The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers The statute was never intended to be

applied to the white population and in practice has never been so applied.²⁵⁹

Buford concluded that “there had never been . . . any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution”²⁶⁰ But this was an epoch in which members of the black community needed to protect themselves from racial violence. Justice Buford himself in 1934 gave a stirring speech on the steps of a courthouse convincing a mob not to conduct a lynching.²⁶¹

Years later, another Florida judge recalled Buford’s opinion and added that he had reservations about whether the prohibition “singling out Winchesters, is constitutional.”²⁶² He commented, “A Winchester rifle is a most popular hunting rifle in the United States. . . . Thousands of hunters in Florida possess and carry Winchesters or other repeating rifles around during hunting season and otherwise.”²⁶³ Yet the *Watson* case was about carrying a concealed handgun. There is no reported decision directly about carrying a Winchester, reinforcing that this part of the law was never enforced.

Meanwhile, semiautomatic rifles had long since replaced lever actions as the more technologically developed firearm. Black citizens had turned to semiautomatic rifles to protect their communities from racist violence. As noted above, the federal CMP has long sold surplus military rifles, including M1 Garands, to civilians to promote marksmanship. Members of the black community in Monroe, North Carolina, formed an NRA gun club and used such rifles to defend against Klan attacks in 1957.²⁶⁴ The Deacons for Defense would often use M1 Garand rifles to protect activists. In 1966, as Martin Luther King and others gathered to support a wounded James Meredith and continue his Mississippi March against fear, Deacons armed with pistols and semiautomatic rifles patrolled the route and provided security for the marchers.²⁶⁵

During the civil rights movement of the 1960s, semiautomatic rifles helped black organizers survive racist violence. Mississippi Delta activist Hartman Turnbow halted a firebomb attack on his home with his 16-shot semiautomatic rifle.²⁶⁶ The next morning, the license plate of the local sheriff was found in Turnbow’s driveway.²⁶⁷ One county over, activist Leola Blackman repelled

250 *Id.* at 110-11, 131-32.

251 1893 Fla. Laws 71-72.

252 *Id.*

253 Value of \$1 from 1893 to 2021, <https://www.officialdata.org/us/inflation/1893?amount=1>.

254 GEORGE K. HOLMES, WAGES OF FARM LABOR 29 (USDA 1912), <https://babel.hathitrust.org/cgi/pt?id=njp.32101050723756&view=1up&seq=745>.

255 *Watson v. Stone*, 148 Fla. 516, 518-19 (1941).

256 *Id.* at 522-23.

257 *Id.* at 523.

258 3 HISTORY OF FLORIDA: PAST AND PRESENT 156 (1923).

259 *Watson*, 148 Fla. at 524 (Buford, J., concurring).

260 *Id.*

261 Rivers Henderson Buford, <https://peoplepill.com/people/rivers-h-buford/>.

262 *Cates v. State*, 408 So.2d 797, 800 (Fla. 2d DCA 1982) (Ryder, J., concurring).

263 *Id.*

264 ROBERT F. WILLIAMS, NEGROES WITH GUNS 57, 97 (1962).

265 Johnson, *supra* note 247, at 265-268, 276.

266 *Id.* at 244.

267 *Id.*

Klansmen who set a cross afire in her yard, also using a 16-shot semiautomatic rifle.²⁶⁸

In short, African Americans, including civil rights icons, have a long tradition of advocacy for and use of firearms to protect themselves and their communities.²⁶⁹ To be sure, while a majority in the black community may support gun control, the high rate of victimization from gun crime in that community reveals “both a desire to keep guns from criminals and a parallel desire to possess guns for self-defense.”²⁷⁰

The Fourteenth Amendment did not prevent facially neutral restrictions from being enforced primarily against African Americans. Despite that, the struggle of black people for the basic rights of citizenship shows that the right to arms, including semiautomatic firearms with standard magazines, has been a vital resource for minorities facing terrorism, mobs, state failure, and majoritarian tyranny.

IV. SHOOTING FROM THE HIP: HOW FIVE CIRCUITS GOT IT WRONG

Post-*Heller* decisions upholding assault weapon prohibitions have been rendered by the D.C., Second, Seventh, Fourth, and First Circuits, in that order.²⁷¹ Each decision builds on the decision before it, repeating the same ideas but not questioning the factual premises. This section analyzes these decisions, with particular focus on the differing generic definitions of assault weapon, particularly those referencing the protruding pistol grip, and how each court sought to justify the prohibitions on rifles with such features. As will be seen, the decisions have been strong on the rhetorical phrases that embody the assault weapon debate and have waxed at length on the slippery standard of intermediate scrutiny, but they have made only superficial reference to the banned features. These decisions invariably eschew *Heller*'s common-use test in favor of a watered-down version of intermediate scrutiny.

While five circuits on the mainland couldn't manage a serious analysis of why the banned features are not protected by the Second Amendment, the U.S. District Court for the Northern Mariana Islands located in Saipan considered the evidence and found that features like the pistol grip, adjustable stock, and flash suppressor make the rifles more accurate and safer. The ban was invalidated under intermediate scrutiny in that jurisdiction.

A. *Heller II in the D.C. Circuit*

After Justice Scalia announced the Court's decision in *Heller* holding the District's handgun ban violative of the Second Amendment, D.C. officials criticized the decision and vowed that the District would come back fighting. *Heller* held categorically that the District's prohibition on possession of pistols violated the Second Amendment. The Court pointed to the provisions

banning possession of an unregistered firearm and prohibiting the registration of handguns.²⁷² It did not qualify its holding by saying that certain kinds of pistols such as semiautomatics could be banned or by remanding the case for fact-finding on which handguns are protected by the Amendment and which ones are not.²⁷³

So the District knew it had to make handguns registerable, but that raised a separate problem. The District prohibited machine guns, which it curiously defined to include not just real machine guns that shoot automatically, but also any firearm that “shoots, is designed to shoot, or can be readily converted or restored to shoot . . . semiautomatically, more than twelve shots without manual reloading.”²⁷⁴ A court decision held this to apply to pistols and rifles capable of accepting magazines holding more than 12 shots, even though the owners only had magazines that held fewer.²⁷⁵ The District thus complied with *Heller* by redefining machine guns to include only automatics and to exclude semiautomatics.²⁷⁶ Semiautomatic pistols thereby became registerable.

At the same time, the District passed a ban on assault weapons, defined as rifles with a conspicuously-protruding pistol grip and other generic features, together with the laundry list of scores of names like the Colt AR-15.²⁷⁷ A committee report alleged that “assault weapons . . . are designed with military features,” but the only specific features applicable to rifles were detailed this way: “Assault weapons also have features such as pistol grips and the ability to accept a detachable magazine. Pistol grips help stabilize the weapon during rapid fire and allow the shooter to spray-fire from the hip position.”²⁷⁸ None of the other banned rifle features were mentioned.

272 *Heller*, 554 U.S. at 574. The District uses the term “pistol,” which it defines as “any firearm originally designed to be fired by use of a single hand or with a barrel less than 12 inches in length.” D.C. Code § 7-2501.01(12). That definition would also include revolvers.

273 The United States as amicus had disagreed with the court of appeals' determination that “handguns are ‘Arms’ referred to in the Second Amendment,” and that categorically “it is not open to the District to ban them.” It urged that “the best course would be to remand for application of the proper standard of review in the first instance.” Brief for the United States as Amicus Curiae at *28, *District of Columbia v. Heller*, 2008 WL 157201 (2008).

274 *Fesjian v. Jefferson*, 399 A.2d 861, 863-64 (D.C. App. 1979), citing D.C. Code 1978 Supp., § 6-1802(10).

275 *Id.* at 864-65. See also *id.* at 863 n.1-3 (reference to Browning Hi Power 9mm, semiautomatic pistol and various rifles).

276 See D.C. Code § 7-2501.01(10).

277 See D.C. Code § 7-2501.01(3A)(A). Subsection (3A)(A)(i)(IV) includes the following generic definitions:

A semiautomatic, rifle that has the capacity to accept a detachable magazine and any one of the following: (aa) A pistol grip that protrudes conspicuously beneath the action of the weapon; (bb) A thumbhole stock; (cc) A folding or telescoping stock; (dd) A grenade launcher or flare launcher; (ee) A flash suppressor; or (ff) A forward pistol grip . . .

278 Council of the District of Columbia, Committee on Public Safety & the Judiciary, Report on Bill 17-843, the “Firearms Control Amendment Act of 2008,” Nov. 25, 2008, at 7 (hereafter “Council of D.C.”).

268 *Id.*

269 See CHARLES E. COBB, JR., THIS NONVIOLENT STUFF'LL GET YOU KILLED: HOW GUNS MADE THE CIVIL RIGHTS MOVEMENT POSSIBLE (2014).

270 Johnson, *supra* note 247, at 304.

271 The Ninth Circuit upheld California's ban under the “collective rights” theory of the Second Amendment that *Heller* and *McDonald* rejected. *Silveira*, 312 F.3d at 1056, *cert. denied*, 540 U.S. 1046 (2003).

from the hip position.”²⁹² The ergonomics of this design were not analyzed to determine whether they support this proposition. Since the pistol grip was virtually the only feature of a rifle mentioned that allegedly made it an assault weapon, this assertion warranted closer scrutiny than the majority gave it. Siebel’s role as a lobbyist for the Brady Center reflected no credentials as a firearms expert. No evidence was presented as to why a person would want to spray fire single shots from the hip, which would be highly inaccurate, or that such occurred in any crimes. In fact, no evidence on topic was presented at all, just one sentence of bare assertion.

The majority further relied on Siebel for the proposition that semiautomatics “fire almost as rapidly as automatics.”²⁹³ Siebel testified to the D.C. Council that a “30-round magazine” of an UZI “was emptied in slightly less than two seconds on full automatic, while the same magazine was emptied in just five seconds on semi-automatic.”²⁹⁴ Where did that information come from? Why should it be taken as reliable? For aught it appears, this assertion was pulled out of thin air. According to the Army training manual *Rifle Marksmanship*, the “Maximum Effective Rate of Fire (rounds per min)” in semiautomatic for the M4 and M16A2 rifles is 45 rounds in sixty seconds (one minute).²⁹⁵ In other words, a semiautomatic could effectively fire one round per 1 1/3 second, not 6 rounds per second as Siebel claimed.

The reference to Siebel’s testimony was part of the majority’s attempt to compare automatic with semi-automatic firearms. The Supreme Court suggested in *Heller* that “M-16 rifles and the like” may be banned because they are “dangerous and unusual.”²⁹⁶ In *Staples*, the Court had described the “AR-15” as “the civilian version of the military’s M-16 rifle.”²⁹⁷ That made a world of difference to the Court, since civilian semi-automatics fire “only one shot with each pull of the trigger,” but a military automatic fires continuously as long as the trigger is pulled.²⁹⁸ Yet based on the testimony of Siebel, the D.C. Circuit panel majority sought, despite the best evidence, to minimize the difference by accepting that semi-automatics “fire almost as rapidly as automatics.”²⁹⁹

Other than the pistol grip and semi-automatic action, the *Heller II* majority was silent on the other features which supposedly caused the firearms to lose Second Amendment protection. For instance, a telescoping shoulder stock allows a rifle to be adjusted to an individual’s physique, particularly his or her arm length. Like a shoe, a firearm should fit the person using it. Even when retracted to the shortest length, such rifles would still have to meet the legal overall length of more than 26

inches.³⁰⁰ They can thus not be any more concealable than any other legal rifle. Yet the court approved the ban based on such features without analysis.

The majority concluded that “the *evidence* demonstrates a ban on assault weapons is likely to promote the Government’s interest in crime control in the densely populated urban area that is the District of Columbia.”³⁰¹ But the committee report’s unsupported assertions and Mr. Siebel’s bare allegations can hardly be considered “evidence.” “[E]vidence means the statements of witnesses or documents produced in court for inspection.”³⁰² The claims made by Siebel would never qualify as admissible expert testimony under the Federal Rules of Evidence, which allow testimony based on “scientific, technical, or other specialized knowledge.”³⁰³ As the Supreme Court noted in *Daubert*, “The adjective ‘scientific’ implies a grounding in the methods and procedures of science. Similarly, the word ‘knowledge’ connotes more than subjective belief or unsupported speculation.”³⁰⁴

Plaintiffs submitted the only evidence in the case, and that evidence repudiated the allegations made in the committee report, which were largely based on Mr. Siebel’s testimony at a legislative hearing. Do the unsworn allegations made at a legislative hearing by a lobbyist who has no expert qualifications overcome the actual evidence introduced in a case by sworn witnesses, expert and lay, whose testimony was not challenged? How is it appropriate for a court to uphold a law challenged as unconstitutional based on such unsupported allegations without even mentioning the adverse evidence actually submitted in the case?

There are parallels here to the challenge to New York City firearm restrictions that the Supreme Court dismissed as moot in 2020. Justice Alito, joined by Justices Gorsuch and Thomas, dissented from the dismissal, opining on the merits that the City’s restriction “burdened the very right recognized in *Heller*. History provides no support for a restriction of this type. The City’s public safety arguments were weak on their face, were not substantiated in any way, and were accepted below with no serious probing.”³⁰⁵

The panel majority in *Heller II* went on to uphold the District’s magazine ban also based on Mr. Siebel’s allegations relied on by the committee. Siebel claimed that “military-style assault weapons”—recall plaintiffs’ uncontradicted evidence that the banned rifles are not used by any military force in the world—are even more dangerous if equipped with magazines that hold more than ten rounds, which “greatly increase[s] the firepower of mass shooters.”³⁰⁶ No data or information on the actual facts in mass shootings was mentioned. The majority added, “The Siebel testimony moreover supports the District’s claim that high-capacity magazines are dangerous in self-defense

292 *Heller II*, 670 F.3d at 1261-62. The court earlier referred to Testimony of Brian J. Siebel, Brady Center to Prevent Gun Violence (Oct. 1, 2008).

293 *Id.*

294 *Id.* at 1262 (citing Siebel testimony, *supra* note 278, at 1).

295 RIFLE MARKSMANSHIP, M16-/M4-SERIES WEAPONS at 2-1.

296 *Heller II*, 670 F.3d at 1263 (quoting *Heller*, 554 U.S. at 627).

297 *Id.* (quoting *Staples*, 511 U.S. at 603).

298 *Id.* (quoting *Staples*, 511 U.S. at 602 n.1).

299 *Id.* at 1263.

300 See 26 U.S.C. § 5845(a)(4); D.C. Code § 7-2501.01(17).

301 *Heller II*, 670 F.3d at 1263 (emphasis added).

302 *United States v. Pugh*, 99 U.S. 265, 270 (1878).

303 Fed. R. Evidence 702.

304 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993).

305 *New York State Rifle & Pistol Ass’n*, 140 S. Ct. at 1544.

306 *Heller II*, 670 F.3d at 1263.

situations because ‘the tendency is for defenders to keep firing until all bullets have been expended, which poses grave risks to others in the household, passersby, and bystanders.’³⁰⁷ No factual basis was set forth for that allegation. Based on these evidence-free allegations, the majority held that the District had shown “a substantial relationship” between the rifle and magazine bans and “the objectives of protecting police officers and controlling crime.”³⁰⁸

Despite its discussion of semi-automatics, the majority did not hold that “possession of semi-automatic handguns is outside the protection of the Second Amendment,” allowing that “a ban on certain semi-automatic pistols” could be unconstitutional, but then adding that it did “not read *Heller* as foreclosing every ban on every possible sub-class of handguns or, for that matter, a ban on a sub-class of rifles.”³⁰⁹ In other words, even if the Supreme Court in *Heller* held that handguns and long guns as a class may not be banned, some of them may be banned anyway.

Then Judge Kavanaugh dissented in *Heller II*, writing, “After *Heller*, however, D.C. seemed not to heed the Supreme Court’s message. Instead, D.C. appeared to push the envelope again, with its new ban on semi-automatic rifles”³¹⁰ He averred that semiautomatic rifles and handguns were not traditionally banned and “are in common use by law-abiding citizens for self-defense in the home, hunting, and other lawful uses,” but that such handguns were used far more in crime than rifles. Yet *Heller* held that handguns may not be banned.³¹¹

Buttressing the majority’s acknowledgment that semiautomatic rifles are in common use, Judge Kavanaugh noted that they accounted for 40 percent of rifles sold in 2010; two million AR-15s, America’s most popular rifle, had been manufactured since 1986.³¹² He cited the website of the popular gun seller Cabela’s to illustrate how common such rifles are.³¹³ The dissent cited the declaration of the highly-credentialed firearms expert Harold E. Johnson for the proposition that “Semi-automatic rifles are commonly used for self-defense in the home, hunting, target shooting, and competitions. . . . And many hunting guns are semi-automatic.”³¹⁴ The majority had denied that based on the opinions of Siebel, who lacked any credentials on the subject.

Heller evaluated restrictions “based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.”³¹⁵ Judge Kavanaugh added, “Whether we apply the *Heller* history- and tradition-based approach or strict scrutiny or

even intermediate scrutiny, D.C.’s ban on semi-automatic rifles fails to pass constitutional muster.”³¹⁶

The dissent took the majority to task for suggesting that “semi-automatic handguns are good enough to meet people’s needs for self-defense and that they shouldn’t need semi-automatic rifles,” which is “like saying books can be banned because people can always read newspapers.”³¹⁷ Moreover, since semi-automatic handguns are constitutionally protected under *Heller*, it is difficult to understand why semi-automatic rifles are not. Even granting Siebel’s assertion about rate of fire—which meant “that semi-automatics actually fire two-and-a-half times slower than automatics”—the comparison was invalid in that “semi-automatic rifles fire at the same general rate as semi-automatic handguns,” which are protected.³¹⁸ Referring to rifles as assault weapons adds nothing, in that “it is the person, not the gun, who determines whether use of the gun is offensive or defensive,” and in any event handguns are used most often in violent crime.³¹⁹

The dissent would have remanded the issue of the ban on magazines holding more than ten rounds to determine whether such magazines “have traditionally been banned and are not in common use.”³²⁰ The majority had conceded that they were in common use, and that they were no more traditionally banned than were so-called assault weapons, and indeed both were part and parcel of the same recent bans.³²¹ That said, a remand would have produced additional facts to support those conclusions.

Since the banned firearms were in common use, Judge Kavanaugh apparently saw no need to discuss the specific features that were banned. While the majority only echoed without question the unsupported allegations of a lobbyist about spray firing from the hip, other courts would be only too happy to repeat such allegations, buttressing their holdings with the *Heller II* precedent.³²²

B. *The Second Circuit’s Decision in New York State Rifle & Pistol Association*

After the horrible murders at Sandy Hook Elementary School, New York and Connecticut redefined the term “assault

307 *Id.* at 1263-64.

308 *Id.* at 1264.

309 *Id.* at 1268.

310 *Id.* at 1271 (Kavanaugh, J., dissenting).

311 *Id.* at 1269-70.

312 *Id.* at 1287 (citing researcher Mark Overstreet).

313 *Id.* (citing <http://www.cabelas.com>).

314 *Id.* at 1287-88.

315 *Id.* at 1271.

316 *Id.* at 1285.

317 *Id.* at 1289.

318 *Id.*

319 *Id.* at 1290.

320 *Id.* at 1296 n.20.

321 *Id.* at 1261.

322 A California court held that, based on legislative statements that some “assault weapons” were used in crime, they were not typically possessed by law-abiding citizens for lawful purposes. *People v. James*, 174 Cal. App. 4th 662, 94 Cal. Rptr. 3d 576, 585-86 (2009). By contrast, an Illinois court opined that whether the banned firearms are “well suited for self-defense or sport” or are “dangerous and unusual weapons” is an empirical issue beyond the scope of judicial notice, adding that a legislative declaration that the banned guns were “military” weapons and were most likely to be used in crime “does not preclude inquiry by the judiciary into the facts bearing on an issue of constitutional law.” *Wilson v. County of Cook*, 968 N.E.2d 641, 656-57 (Ill. 2012) (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)).

weapon” in preexisting statutes to include more firearms, mostly semiautomatic rifles, and banned any that were not registered or declared by a specified deadline.³²³ Both states also banned magazines that would hold more than ten rounds, and New York even prohibited the loading of more than seven rounds in each magazine.³²⁴ In *New York State Rifle & Pistol Ass’n, Inc. v. Cuomo* (“*NYSRPA*”), the Second Circuit would follow *Heller II* and uphold both of these states’ expansive bans.³²⁵

The court in *NYSRPA* began by stipulating that the prohibited firearms and magazines were in common use. Specifically, noting the production of nearly four million AR-15 rifles alone between 1986 and March 2013, and countless millions of the banned magazines, the court acknowledged that “the assault weapons and large-capacity magazines at issue are ‘in common use’ as that term was used in *Heller*.”³²⁶ Moreover, it proceeded “on the assumption that these laws ban weapons protected by the Second Amendment.”³²⁷

Per *Heller*, the court should have ended its analysis there. But the court instead decided to apply intermediate scrutiny to evaluate the laws, albeit in a watered-down form that did not require narrow tailoring.³²⁸ It reasoned that while the bans “impose a substantial burden on Second Amendment rights,” the burden was not “severe,” and further that the laws were “substantially related” to the state interests in public safety and crime prevention.³²⁹ To support that conclusion, the court averred that the banned rifles are disproportionately misused in crime and that their features make them particularly dangerous. Were those findings accurate?

First, despite handguns allegedly “account[ing] for 71 percent to 83 percent of the firearms used in murders” and the holding of *Heller* that handguns cannot be banned,³³⁰ *NYSRPA*

asserted that the banned rifles “are disproportionately used in crime, and particularly in criminal mass shootings”³³¹ The court relied on the Violence Policy Center for the statistic— unsupported by data—that so-called assault weapons were used in 20% of killings of law enforcement officers between 1998 and 2001.³³² But the evidence is that the banned rifles are used in disproportionately *fewer* such crimes, as “[m]ost of the AWs [assault weapons] used in crime are assault pistols rather than assault rifles.”³³³

Second, what was the basis for the court’s finding that the banned rifles are extraordinarily dangerous? The court devotes exactly one paragraph, with no substantive discussion, to the features that supposedly make assault weapons so dangerous and unusual. The opinion stated that features such as the flash suppressor, protruding grip, and barrel shroud, according to plaintiffs, “improve a firearm’s ‘accuracy,’ ‘comfort,’ and ‘utility.’” This circumlocution is, as Chief Judge Skretny observed, a milder way of saying that these features make the weapons more deadly.³³⁴

But Chief Judge William Skretny, who wrote the district court opinion, had relied on Justice John Paul Stevens’ *dissent* in *McDonald v. Chicago* to argue that “the very features that increase a weapon’s utility for self-defense also increase its dangerousness to the public at large.”³³⁵ But the constitutional rights of law-abiding people are not forfeited because of the bad behavior of criminals; “[a]utomobiles, for example, might also be termed ‘dangerous’ devices,” but higher-performance models are not banned.³³⁶ Since sights on a firearm make it more accurate and hence more deadly, could guns be banned for having sights? Is it preferable that an

323 N.Y. Penal Law §§ 265.00(22)(b)(i)-(v) (definitions), 400.00(16a)(a) (registration); Conn. Gen. Stat. §§ 53-202a(1)(B)-(E) (definitions), 53-202D(a)(2) (declaration).

324 N.Y. Penal Law, §§ 265.00(23)(a) (ten round limit), 265.37 (seven round load limit); Conn. Gen. Stat. § 53-202w(a)(1).

325 *New York State Rifle and Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242, 257 (2d Cir. 2015). See Stephen P. Halbrook, *New York’s Not So “SAFE” Act: The Second Amendment in an Alice-in-Wonderland World Where Words Have No Meaning*, 78 ALBANY L. REV. 789 (2015). It is noteworthy that rifles in particular had long been long held to be protected by the Second Amendment in New York precedents. *People v. Raso*, 9 Misc. 2d 739, 742, 170 N.Y.S.2d 245 (Cnty. Ct. 1958) (The legislature “carefully avoided including rifles [for restrictions] because of the Federal constitutional provision.”); *Hutchinson v. Rosetti*, 24 Misc. 949, 951, 205 N.Y.S.2d 526 (1960) (Rifle used for defense against a prejudiced mob must be returned based on “the constitutional guarantee of the right of the individual to bear arms. Amendments Art. II.”); *Moore v. Gallup*, 267 A.D. 64, 68 (3d Dept. 1943) (“the arms to which the Second Amendment refers include weapons of warfare to be used by the militia, such as swords, guns, rifles and muskets”), *aff’d*, 59 N.E.2d 439 (1944).

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

327 *Id.* at 257.

328 *Id.* at 261 & n.109. See *Turner II*, 520 U.S. at 215-16 (narrow tailoring required for intermediate scrutiny).

329 *Id.* at 260-61.

330 *NYSRPA*, 804 F.3d at 256.

331 *Id.* at 262.

332 *Id.* at 262 & n.15. Given the differing and constantly changing definitions of “assault weapon,” it is unclear how any statistic would be reliable.

333 Koper, *supra* note 62, at 2. It is also noteworthy that more rifles were in circulation than pistols. In 2004, when Koper reported, 1,325,138 rifles were manufactured, while only 728,511 pistols were manufactured. ATF, *Annual Firearms Manufacturing & Export Report* (2004), <https://www.atf.gov/resource-center/docs/2004-firearms-manufacturers-export-reportpdf/download>.

334 *NYSRPA*, 804 F.3d at 262.

335 *NYSRPA*, 990 F. Supp. 2d at 368 (citing *McDonald*, 561 U.S. at 891 (Stevens, J., dissenting)). Justice Stevens used that argument in support of his beliefs that “the Court badly misconstrued the Second Amendment” in *Heller* and that it was a mistake to hold “that a city may not ban handguns.” *Id.* at 890 & n.33.

336 *Staples*, 511 U.S. at 614. The majority in *McDonald* held that the right to keep and bear arms should be incorporated into the Fourteenth Amendment, rejecting the policy argument “that the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety.” *McDonald*, 561 U.S. at 782. See *Illinois Ass’n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 942 (N.D. Ill. 2014) (“whatever burdens the City hopes to impose on criminal users also falls squarely on law-abiding residents who want to exercise their Second Amendment right.”). “Arms” by their very definition can be lethal, and yet the right to have them is what the Second Amendment guarantees.

inaccurate firearm be used in self-defense, exposing an innocent bystander to being shot?

Consider the specific features condemned by the district court. “A muzzle compensator reduces recoil and muzzle movement caused by rapid fire,”³³⁷ the court said, suggesting that the feature only benefits mass shooters. But a muzzle compensator has these same benefits in slow fire. Recoil can be painful, and muzzle movement interferes with accuracy. A telescoping stock, as plaintiffs noted, “allows the user to adjust the length of the stock,” which “like finding the right size shoe, simply allows the shooter to rest the weapon on his or her shoulder properly and comfortably.”³³⁸ The district court found that the feature could aid “concealability and portability,”³³⁹ without any reference to the overall length of the rifle, which could be quite long. As for the pistol grip “increas[ing] comfort and stability,”³⁴⁰ it also supposedly allows “‘spray firing’ from the hip.”³⁴¹ Through repetition, and without regard to evidence, myths about firearm features become part of our constitutional law. *Heller II* asserted them, the district court in the New York challenge repeated them, and the district court in the Connecticut challenge repeated them again.³⁴² The Connecticut court thought it sufficient to uphold the ban on rifles with specified features by quoting *Heller II*’s reference to “pistol grips” as purportedly “contribut[ing] to the unique function of any assault weapon to deliver extraordinary firepower.”³⁴³ No need to explain further and no need to mention the other banned rifle features.

Actually, Connecticut has its own unique, bizarrely-worded feature that transforms a rifle into an assault weapon: “[a]ny grip of the weapon, including a pistol grip, a thumbhole stock, or any other stock, the use of which would allow an individual to grip the weapon, resulting in any finger on the trigger hand in addition to the trigger finger being directly below any portion of the action of the weapon when firing.”³⁴⁴ Why a rifle should lose Second Amendment protection based on finger position was not discussed. Because of the term “when firing,” plaintiffs argued that the “provision is vague because it applies or does not apply to every rifle and shotgun depending on how it is being held, but fails to give notice of any assumption that it is being held in

a specific manner.”³⁴⁵ The district court held that the definition refers to “the normal horizontal firing position” and “is only plausibly vague when applied to a specific use of the weapon.”³⁴⁶ It conceded that “the vertical firing position may be ‘normal’ for certain activities, such as duck hunting,” adding, “Ideally, the legislation would have included a more descriptive statement than ‘when firing.’”³⁴⁷ With that wave of the wand, the court essentially crossed that term out of the definition to save it from vagueness.

In upholding the New York and Connecticut district court decisions, the Second Circuit in *NYSRPA* didn’t bother making even superficial reference to the specific features and what justified banning them. Instead it rendered a lengthy opinion upholding the bans without any substantive discussion of the features that allegedly make them dangerous and unusual.

The Second Circuit upheld the magazine bans under intermediate scrutiny with one paragraph of discussion to the effect that such magazines are disproportionately used in crime.³⁴⁸ It did not mention the overwhelming lawful use of standard magazines. That magazines holding over ten rounds are well-suited and preferred for self-defense is demonstrated by the fact that they are issued to law enforcement³⁴⁹ and bought by law-abiding citizens, who also use them for target shooting, competitions, and other sporting activities. Both police and citizens need larger-capacity magazines because they are necessarily at a disadvantage during a planned attack by a criminal. They may run out of ammunition and may not be able to change magazines, if another one is even available.

To be sure, *NYSRPA* did find two provisions violative of the Second Amendment. First, it invalidated Connecticut’s ban on the Remington Tactical 7615 pump-action rifle because the state had presented evidence only on semiautomatic firearms, although the court left the door open for evidence on pump-actions to be generated.³⁵⁰ Second, while upholding the ban on magazines holding more than ten rounds, it invalidated New York’s ban on loading such magazines with more than seven rounds, for failure “to present evidence that the mere existence of this load limit will convince any would-be malefactors to load magazines capable of holding ten rounds with only the permissible seven.”³⁵¹ Yet

337 *NYSRPA*, 990 F. Supp. 2d at 370.

338 *Id.* at 368.

339 *Id.* at 370.

340 *Id.* at 368.

341 *Id.* at 370 (citing *Heller II*, 670 F.3d at 1262-63 (relying on unsworn testimony of Brady lobbyist Brian Siebel)). The record was silent on why the SAFE Act bans semiautomatic shotguns with thumbhole stocks and a second handgrip or a protruding grip that can be held by the non-trigger hand. An ATF report on which New York relied found the latter feature sporting because it “permits accuracy and maneuverability even for activities such as bird hunting or skeet shooting.” ATF, STUDY ON THE IMPORTABILITY OF CERTAIN SHOTGUNS 3 (2012), Exhibit 19 in *NYSRPA*, 990 F. Supp. 2d 349.

342 *Shew v. Malloy*, 994 F. Supp.2d 234 (D. Conn. 2014).

343 *Id.* at 249 (quoting *Heller II*, 670 F.3d at 1264, and citing testimony of Brian J. Siebel).

344 *Id.* at 254 (quoting Conn. Gen. Stat. § 53-202a (1)(E)(II)).

345 *Id.* at 254. The court explained:

The plaintiffs argue that “[w]aterfowl shotguns are typically fired vertically when ducks are flying over a blind. When pointed upward for firing, all four fingers are directly below the action of the shotgun.” The plaintiffs argue, “[b]y contrast, a rifle with some types of pistol grips or thumbhole stocks (depending on the configuration), when held at an angle downward to fire at a deer in a valley, may be tilted sufficiently that the non-trigger fingers are not directly below the action.”

Id. at 254 n.69

346 *Id.* at 255.

347 *Id.* at 255 n.71.

348 *NYSRPA*, 804 F.3d at 263-64.

349 New York’s SAFE Act recognizes this by exempting law enforcement from its prohibitions. New York Penal Law § 265.20(a)(1)(b), (c).

350 *NYSRPA*, 804 F.3d at 257 n.73.

351 *Id.* at 264.

the limit on magazines holding more than ten rounds cannot be expected to get much respect by these same malefactors.

Now that the D.C. and Second Circuits had upheld bans, the Seventh Circuit was next in line to join the leapfrog game.

C. *The Seventh Circuit Decides* Friedman

Cook County, Illinois, and a number of other Chicago-area localities define “assault weapon” to include some of the aforementioned features and names, but one feature is the opposite of or has no counterpart in other laws and ordinances. A semiautomatic rifle that has the capacity to accept a LCM is said to be an assault weapon if it has “only a pistol grip without a stock attached.”³⁵² By contrast, most jurisdictions outside of Illinois ban a rifle with a pistol grip only if it *has* a stock attached,³⁵³ and still another does not even include a pistol grip as a prohibited feature.³⁵⁴

Highland Park, Illinois, copies the Cook County language regarding that and other features to define assault weapon in part as:

(1) A semiautomatic rifle that has the capacity to accept a Large Capacity Magazine detachable or otherwise and one or more of the following: (a) Only a pistol grip without a stock attached; (b) Any feature capable of functioning as a protruding grip that can be held by the non-trigger hand; (c) A folding, telescoping or thumbhole stock; (d) A shroud attached to the barrel, or that partially or completely encircles the barrel, allowing the bearer to hold the Firearm with the non-trigger hand without being burned, but excluding a slide that encloses the barrel; or (e) A Muzzle Brake or Muzzle Compensator³⁵⁵

The ban was upheld by the district court in *Friedman v. City of Highland Park*, the Seventh Circuit affirmed, and the Supreme Court denied certiorari. Neither the district court nor the Seventh Circuit articulated any justification for upholding the bans of these features; they barely mentioned some features and upheld their prohibition for superficial reasons.

The district court in *Friedman* decided that “the particular features banned by the Ordinance were developed for or by militaries to increase lethality.”³⁵⁶ It quoted from a single declaration for the city alleging that:

- “[p]rotruding foregrips allow increased stability . . . thus increasing the hit probability of successive shots”
- “[f]olding and/or telescoping stocks allow the operator to more easily conceal or maneuver the rifle in a confined

space” and facilitate “firing from positions other than the shoulder”

- the M1 Garand Rifle features “a wooden handguard . . . to steady and control the rifle during rapid, repeat firing without getting burned by the hot barrel”
- a “muzzle brake . . . allow[s] the operator to control the rifle during rapid, repeat firing without taking time to reacquire the target.”³⁵⁷

Although the case was in the posture of cross motions for summary judgment—such that the court should have viewed all evidence in the light most favorable to the non-moving party—the court made no mention of any of the plaintiffs’ contrary evidence.³⁵⁸ Nor did the court state any justification for allowing the city to ban guns featuring “only a pistol grip without a stock attached,”³⁵⁹ a thumbhole stock, or a muzzle compensator. Indeed, it ignored the statement in the declaration for the city that “[t]humbhole stocks have traditionally been utilized on firearms for sport and target shooting,” and disregarded the declarant’s statement that the M1 Garand Rifle “incorporated a traditional wooden stock similar to most hunting and sporting rifles of the period”³⁶⁰ Of the features listed, no mention was made of the ordinary civilian uses, such as the utility of a telescoping stock to adjust a rifle to one’s physique.

The Seventh Circuit, in an opinion by Judge Frank Easterbrook, affirmed the decision of the district court in *Friedman* and upheld the ordinance. It listed some features in the definition of assault weapon as “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.”³⁶¹ But it did not discuss the features.

The court made several assertions without citing to the record, such as “assault weapons generally are chambered for small rounds (compared with a large-caliber handgun or rifle), which

352 § 54-211(1)(A), Cook County, Ill., Ordinance No. 06–O–50 (2006).

353 *E.g.*, N.Y. PENAL LAW § 265.00(22)(a)(ii). *See also id.* (11) (“rifle” means a weapon made “to be fired from the shoulder”).

354 Md. Code, Criminal Law, §§ 4-301(h)(1) (“copycat weapon”), 4-301(d) (“assault weapon” includes “a copycat weapon”).

355 *Friedman v. City of Highland Park*, 68 F. Supp. 3d 895, 898 (N.D. Ill. 2014) (quoting Highland Park, Ill., City Code § 136.005(a)(2)).

356 *Id.* at 908.

357 *Id.* (quoting from Dkt. No. 45, Ex. C ¶ 33 (Declaration of James E. Yurgealitis)).

358 *See* Dkt. Nos. 42 & 49, *Friedman v. City of Highland Park*, Case No. 1:13-cv-9073 (N.D. Ill.).

359 The city’s declarant averred about this feature:

A semiautomatic rifle which includes only a pistol grip (or does not include a shoulder stock) increases the ability of the operator to conceal the firearm, maneuver the firearm in confined space and facilitates easier firing from positions other than the shoulder (firing from the hip or a point position directly in front of the operator). Rifles traditionally considered sporting firearms are generally not designed and produced as such.

Id. at Dkt. No. 45, Ex. C ¶ 33. But that dramatic statement means nothing more than that removing the shoulder stock converts the rifle into a large handgun. As the city’s declarant also stated, “*Handguns* are generally defined as a firearm having a short stock (grip), and are designed to be held, and fired, with one hand.” *Id.* at ¶ 6. That left no articulated reason in the record for banning the feature in question.

360 *Id.* at Dkt. No. 45, Ex. C ¶ 33.

361 *Friedman v. City of Highland Park*, Ill., 784 F.3d 406, 407 (7th Cir. 2015).

emerge from the barrel with less momentum and are lethal only at (relatively) short range,” and thus “that they are less dangerous per bullet—but they can fire more bullets. And they are designed to spray fire rather than to be aimed carefully.”³⁶² It added that they are thus more dangerous to innocent persons “yet more useful to elderly householders and others who are too frightened to draw a careful bead on an intruder or physically unable to do so.”³⁶³

The court criticized *Heller*’s common-use test as circular and as incapable of application.³⁶⁴ Eschewing “[t]he problems that would be created by treating such empirical issues [common use] as for the judiciary rather than the legislature,”³⁶⁵ the court asserted the test to be “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.”³⁶⁶ The court continued:

The features prohibited by Highland Park’s ordinance were not common in 1791. . . . Semi-automatic guns and large-capacity magazines are more recent developments. Barrel shrouds, which make guns easier to operate even if they overheat, also are new; slow-loading guns available in 1791 did not overheat. And muzzle brakes, which prevent a gun’s barrel from rising in recoil, are an early 20th century innovation.³⁶⁷

Yet *Heller* rejected such tests, holding that the Second Amendment protects modern firearms, does not require them to have a militia nexus, and precludes arms from being banned on the basis that the government deems other arms to be adequate. The court’s further assertion that “states, which are in charge of militias, should be allowed to decide when civilians can possess military-grade firearms”³⁶⁸ conflicts with *McDonald*’s holding that states may not violate the Second Amendment.³⁶⁹

While conceding that “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,” the court found them to be “more dangerous in aggregate” and thus balanced the right away.³⁷⁰ It further justified the ban on the basis that it “may increase the public’s sense of safety.”³⁷¹ Diminishing

a constitutional right on the basis that it might make some members of the public feel better would leave the right without objective meaning and would subject it to manipulation based on propaganda.

Judge Daniel Manion dissented, noting that under *Heller*, “the ultimate decision for what constitutes the most effective means of defending one’s home, family, and property resides in individual citizens and not in the government.”³⁷² Moreover, “[t]he court ignores the central piece of evidence in this case: that millions of Americans own and use AR-type rifles lawfully.”³⁷³ Nor was there any evidentiary basis for the finding that the ordinance “may increase the public’s sense of safety.”³⁷⁴

The Supreme Court denied certiorari in *Friedman*. But Justice Thomas, joined by Justice Scalia, dissented from the denial.³⁷⁵ The ordinance banned common firearms “which the City branded ‘Assault Weapons,’” but that are “modern sporting rifles (e.g., AR-style semiautomatic rifles), which many Americans own for lawful purposes like self-defense, hunting, and target shooting.”³⁷⁶

The Seventh Circuit erroneously asked whether the banned firearms were common in 1791, when the Second Amendment was adopted, Justice Thomas continued, but *Heller* recognized protection for bearable arms generally without regard to whether they existed at the Founding.³⁷⁷ The Seventh Circuit also asked whether the banned firearms relate to a well regulated militia, which states and localities would decide. But the scope of the Second Amendment “is defined not by what the militia needs, but by what private citizens commonly possess,” and states and localities do not have “the power to decide which firearms people may possess.”³⁷⁸

The dissenting Justices argued that it did not suffice that other alternatives allegedly existed for self-defense. The ban was suspect because “[r]oughly five million Americans own AR-style semiautomatic rifles. . . . The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting.”³⁷⁹ Nor could the ban be upheld “based on conjecture that the public might *feel* safer (while being no safer at all) . . .”³⁸⁰ Declining to review a decision that flouted *Heller* and *McDonald*, according to Justice Thomas, contrasted

362 *Id.* at 409.

363 *Id.*

364 *Id.* at 408-09.

365 *Id.* at 409.

366 *Id.* at 410 (citing *Heller*, 554 U.S. at 622–25, and *Miller*, 307 U.S. at 178–79).

367 *Id.* Despite the court’s confident assertion otherwise, long guns at the Founding generally had wooden shrouds that covered the barrel. See GEORGE C. NEUMANN, *THE HISTORY OF WEAPONS OF THE AMERICAN REVOLUTION* ch. 4 & 5 (1967).

368 *Id.*

369 *McDonald*, 561 U.S. 742.

370 *Friedman*, 784 F.3d at 411.

371 *Id.*

372 *Id.* at 413 (Manion, J., dissenting).

373 *Id.* at 420.

374 *Id.*

375 *Friedman*, 784 F.3d 406, cert. denied, 136 S. Ct. 447 (2015) (Thomas, J., dissenting from denial of cert.).

376 *Friedman*, 136 S. Ct. at 447.

377 *Id.* at 448.

378 *Id.* at 449.

379 *Id.*

380 *Id.*

with the Court's summary reversal of decisions that disregarded other constitutional precedents.³⁸¹

D. *The Fourth Circuit Decides Kolbe*

Maryland applies the term "assault weapon" to what it calls an "assault long gun," which includes a list of some 68 rifles and shotguns identified mostly by the names of manufacturers and models.³⁸² The term "assault weapon" also encompasses a "copycat weapon," which is defined generically as:

a semiautomatic centerfire rifle that can accept a detachable magazine and has any two of the following:

1. a folding stock;
2. a grenade launcher or flare launcher; or
3. a flash suppressor³⁸³

Given that flares are distress signals for emergencies, it is unclear why this feature was included. A folding stock does not make a rifle concealable, and in any event gives it the profile of a very large pistol. A flash suppressor reduces blinding flash when firing in low light conditions, which could occur in home defense or hunting coyote at night. A grenade launcher means nothing without a grenade, and both grenades and grenade launchers are so strictly regulated by the federal law as to be virtually banned.³⁸⁴ No evidence exists that these features have ever played any role in facilitating a crime.

If this is the list of objectionable features, one is left to wonder why the specifically named models of assault long guns are objectionable. While most of those named appear to be semiautomatic centerfire rifles that can accept a detachable magazine, they need not have any of the listed generic features, *i.e.*, a folding stock, grenade or flare launcher, or flash suppressor. Moreover, this list of generic features is strikingly small compared to those of other jurisdictions, and it does not include the protruding pistol grip, either with or without a stock. This again illustrates the arbitrary and contradictory nature of the features that legislative bodies use to define the slippery term "assault weapon."

Maryland's ban was challenged in *Kolbe v. Hogan*. On appeal, a panel of the Fourth Circuit found that "law-abiding citizens commonly possess semi-automatic rifles such as the AR-15."³⁸⁵ The court found *Heller II's* claim that such rifles may be banned because other weapons are available for home defense as "plainly contrary to the Supreme Court's logic and statements in *Heller*"³⁸⁶ Holding that the banned rifles and magazines are protected by

the Second Amendment, the court remanded the case for further consideration under the exacting strict scrutiny standard.³⁸⁷

However, in an en banc rehearing, a majority held that the banned firearms are not protected by the Second Amendment because they are "exceptionally lethal weapons of war," and that the AR-15 and other listed firearms "are unquestionably most useful in military service."³⁸⁸ It further claimed that "[t]he difference between the fully automatic and semiautomatic versions of those firearms is slight."³⁸⁹ The court transposed *Heller's* reference to "M-16 rifles and the like" (which the *Heller* Court said are fully automatic and not in common use) to say that the banned rifles are "like" "M-16 rifles" that are not protected by the Second Amendment.³⁹⁰

Instead of discussing the features of a copycat weapon as defined in the law at issue, the court dramatically singled out nine features, six of which aren't listed in the statute: "flash suppressors, which are designed to help conceal a shooter's position by dispersing muzzle flash," "barrel shrouds, which enable 'spray-firing' by cooling the barrel and providing the shooter a 'convenient grip,'" "folding and telescoping stocks, pistol grips, grenade launchers, night sights, and the ability to accept bayonets and large-capacity magazines."³⁹¹ The court lists these "military combat features" in the opinion without providing any further explanation of how they make the banned firearms more "lethal" than other semiautomatic firearms.³⁹² Nor did the court explain how these firearms were "exceptionally lethal" even though, due to the relatively small caliber of most "assault weapons," they are typically less powerful than hunting rifles routinely used across the nation to shoot deer and other medium-sized game.³⁹³

The dissenting opinion by Judge William Traxler, joined by three other judges, emphasized *Heller's* holding that firearms in common use are protected by the Second Amendment.³⁹⁴ The banned semiautomatic rifles overwhelmingly meet the common-use test, as over 8 million were made in or imported into the U.S. during 1990-2012, and accounted for 20% of retail firearm sales in 2012.³⁹⁵ Moreover, these semiautomatic rifles "are not in regular use by any military force, including the United States Army, whose standard-issue weapon has been the fully automatic M-16- and M-4-series rifles."³⁹⁶ Contrary to the majority's assertion that the difference is slight, a U.S. Army manual states that M-4 and

381 *Id.* at 449-50.

382 Md. Code, Criminal Law, § 4-301(b) & (d); Public Safety, § 5-101(r)(2).

383 Md. Code, Criminal Law, § 4-301(h)(1)(i). "Copycat weapon" also includes a semiautomatic centerfire rifle that has "a fixed magazine with the capacity to accept more than 10 rounds" or "an overall length of less than 29 inches." § 4-301(h)(1)(ii) & (iii).

384 26 U.S.C. § 5845(f).

385 *Kolbe v. Hogan*, 813 F.3d 160, 174 (2016).

386 *Id.* at 183.

387 *Id.* at 182-84.

388 *Kolbe*, 849 F.3d at 121.

389 *Id.* at 125.

390 *Id.* at 135 (citing *Heller*, 554 U.S. at 627).

391 *Id.* at 125.

392 *Id.* at 137.

393 Smith, *supra* note 17, at 359.

394 *Kolbe*, 849 F.3d at 155 (Traxler, J., dissenting).

395 *Id.* at 153.

396 *Id.* at 158.

M-16 rifles fire only 45 to 65 rounds per minute in semiautomatic mode, but fire 150 to 200 rounds per minute in fully automatic.³⁹⁷

As noted, the *Kolbe* majority barely mentioned in passing what it incorrectly supposed to be the features of the banned rifles, and it offered virtually no comment on why those features are supposedly dangerous.³⁹⁸ As the dissent explained, these features “increase accuracy and improve ergonomics.”³⁹⁹ In particular:

A telescoping stock, for example, permits the operator to adjust the length of the stock according to his or her physical size so that the rifle can be held comfortably. . . . Likewise, a pistol grip provides comfort, stability, and accuracy, . . . and barrel shrouds keep the operator from burning himself or herself upon contact with the barrel. And although flash suppressors can indeed conceal a shooter’s position—which is also an advantage for someone defending his or her home at night—they serve the primary function of preventing the shooter from being blinded in low-lighting conditions.⁴⁰⁰

The dissent would have held that the banned rifles are commonly possessed arms protected by the Second Amendment. It added, “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.”⁴⁰¹ (The dissent did not discuss the alternative test of text, history, and tradition.) The dissent put the majority opinion in perspective:

Today the majority holds that the Government can take semiautomatic rifles away from law-abiding American citizens. . . . [T]he Government can now tell you that you cannot hunt with these rifles. The Government can tell you that you cannot shoot at targets with them. And, most importantly, the Government can tell you that you cannot use them to defend yourself and your family in your home. In concluding that the Second Amendment does not even apply, the majority has gone to greater lengths than any other court to eviscerate the constitutionally guaranteed right to keep and bear arms.⁴⁰²

397 *Id.* (citing U.S. Dep’t of Army, Field Manual 3-22.9, Rifle Marksmanship, M16-/M4-Series Weapons, Table 2-1 (2008)). The majority’s focus on the semiautomatic feature being dangerous and unusual actually is a non-sequitur, because Maryland does not ban any firearm just for being semiautomatic. While one can only guess at what features the 68 named assault long guns have in common, the generic definition of a copycat weapon is “a semiautomatic centerfire rifle that can accept a detachable magazine” with at least two other features. Md. Code, Criminal Law, § 4-301(h)(1)(i). Semiautomatic rifles without two such features, if not on the list of named rifles, are not restricted at all. So nothing *Kolbe* says about the rate of fire of a semiautomatic is even relevant.

398 *Kolbe*, 849 F.3d at 125, 137.

399 *Id.* at 158-59 (Traxler, J., dissenting).

400 *Id.* at 159.

401 *Id.* at 160.

402 *Id.* at 151.

E. *The First Circuit’s Decision in Worman*

Massachusetts bans what it derogatorily calls “assault weapons,” defined in part as “the weapons, of any caliber, known as . . . Colt AR-15” and other makes and models and “copies or duplicates” thereof.⁴⁰³ It incorporates the same definitions that applied in the now-expired federal law, which in turn included the following partial generic definitions:

A semiautomatic rifle that has an ability to accept a detachable magazine and has at least 2 of—

- (i) a folding or telescoping stock;
- (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;
- (iii) a bayonet mount;
- (iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and
- (v) a grenade launcher⁴⁰⁴

Also banned are “large capacity feeding devices,” defined as a magazine “capable of accepting . . . more than ten rounds of ammunition or more than five shotgun shells.”⁴⁰⁵

These provisions were enacted in 1998. In 2016, without any change in the statute, the attorney general issued an Enforcement Notice expanding the meaning of “copies or duplicates” of the listed firearms to include firearms in which (a) the “internal functional components are substantially similar” to a listed firearm, or (b) the receiver “is the same as or interchangeable with” that of a listed firearm.⁴⁰⁶

The statute and the Enforcement Notice were challenged in *Worman v. Healey*. The district court followed *Kolbe*, holding that AR-15 rifles are “like” M-16 rifles, are “most useful in military service,” and thus have no Second Amendment protection.⁴⁰⁷ The court listed some “characteristics of a military weapon,” such as “folding/telescoping stocks, advantageous for military purposes”—but equally advantageous for civilian purposes.⁴⁰⁸ It also mentioned “pistol grips designed to allow the shooter to fire and hold the weapon or aid in one-handed firing of the weapon in a combat situation”—but also helpful in freeing the other hand to call 911.⁴⁰⁹ The court also said, “The AR-15 is also lightweight, a characteristic important for the military”—but also preferable for many civilians, including women, the handicapped, and the elderly.⁴¹⁰ “Other similarities between the M16 and the AR-15”

403 M.G.L. 140 § 121.

404 *Id.* (incorporating 18 U.S.C. § 921(a)(30) (expired)).

405 *Id.*

406 *Worman v. Healey*, 293 F. Supp. 3d 251, 258 (D. Mass. 2018).

407 *Id.* at 264 (citing *Kolbe*, 849 F.3d at 136). While rejecting a vagueness challenge to the Notice, *id.* at 267-71, the court did not explain how an ordinary person would know that a firearm is a copy or duplicate under these criteria.

408 *Id.* at 265.

409 *Id.* (internal quotation marks and citation omitted).

410 *Id.*

include “the ammunition,” “[t]he way in which it is fired and the availability of sighting mechanisms,” “[t]he penetrating capacity,” and “[t]he velocity of the ammunition as it leaves the weapon”—even though many civilian firearms can use the same cartridge as the AR-15.⁴¹¹ The court disregarded the unique feature of military rifles: their ability to fire in the full automatic mode.

The district court concluded that “because the undisputed facts convincingly demonstrate that AR-15s and LCMs are most useful in military service, they are beyond the scope of the Second Amendment.”⁴¹² That was a rather odd conclusion given that it is “undisputed” that the military services exclusively use fully automatic firearms and do not use semiautomatic AR-15s.

The First Circuit affirmed in *Worman*, but it did not agree with the assertion that the banned firearms are “like” M-16 machine guns.⁴¹³ It assumed without deciding that “the proscribed weapons have some degree of protection under the Second Amendment” and that “the Act implicates the core Second Amendment right of self-defense in the home by law-abiding, responsible individuals.”⁴¹⁴ It claimed that “*Heller* provides only meager guidance,” despite its “common use” test and the acknowledgment that in 2013 “nearly 5,000,000 people owned at least one semiautomatic assault weapon.”⁴¹⁵ It found the record sparse as “to actual use” of the banned firearms and magazines for self-defense in the home.⁴¹⁶

The court went on to uphold the law under intermediate scrutiny on the basis that the ban does not “heavily burden” self-defense in the home.⁴¹⁷ It prohibits “only” the named firearms, magazines of a certain capacity, and firearms with “certain combat-style features.”⁴¹⁸ The court did not explain what makes any of the specific features “combat-style.” In the course of its intermediate scrutiny analysis, the court asserted that “such weapons can fire through walls.”⁴¹⁹ But that would depend on the caliber, it could be said about any firearm, and the act bans the described firearms “of any caliber.”⁴²⁰ This assertion is one among many that show how courts are often content to be ignorant of the facts upon which they are supposedly basing their decisions about laws that burden constitutional rights. The First Circuit upheld the Massachusetts ban without any discussion, meaningful or otherwise, of the specific features that cause a firearm to fall into the assault weapon category and therefore lose Second Amendment protection.

411 *Id.*

412 *Id.* at 266.

413 *Worman*, 922 F.3d at 36.

414 *Id.* at 30.

415 *Id.* at 35.

416 *Id.*

417 *Id.* at 37.

418 *Id.*

419 *Id.*

420 M.G.L. 140 § 121 (“Assault weapon”).

F. How the District for the Northern Mariana Islands Got It Right

The issue of how the Second Amendment applies to assault weapon bans is far from settled. That is demonstrated by the dissents by then-Judge Kavanaugh in *Heller II*, Judge Manion and Justice Thomas (joined by Justice Scalia) in *Friedman*, and Judge Traxler in *Kolbe*. But it fell to the U.S. District Court for the Northern Mariana Islands—which sits in Saipan, the site of a hard-fought American victory against Japan in 1944—to get the law right in a binding decision.

The ban at issue listed the usual features seen in other assault weapon bans such as a pistol grip, telescoping stock, and flash suppressor.⁴²¹ In a case styled *Murphy v. Guerrero*, Chief Judge Ramona V. Manglona found that the law failed intermediate scrutiny because “the banned attachments actually tend to make rifles easier to control and more accurate—making them safer to use.”⁴²² There was expert evidence from an officer of the Department of Public Safety, who testified that a flash suppressor “reduces noise and potentially increases accuracy,” and that “there is no law enforcement concern for pistol grips or thumbhole stocks, which simply assist a shooter in absorbing recoil.”⁴²³ Illustrations showed legal and banned rifles to be, aside from these features, essentially the same.

Regarding a telescoping stock, the expert confirmed that “there is essentially no difference between a short standard stock and a shortened retractable stock, except that the former is legal and the latter is not. . . . Both would be legal under federal law, which requires that rifles be 26 inches in length.”⁴²⁴ An illustration showed a rifle with its stock retracted to be no shorter than one with a fixed stock.

Judge Manglona concluded that “none of the Commonwealth’s evidence shows that restricting any particular attachment makes any particular public safety impact,” but “[t]o the contrary, it appears that several of the attachments would actually make self-defense safer for everyone.”⁴²⁵ She added, “To the extent that the Commonwealth worries about stray bullets striking innocent bystanders, features that make guns more accurate—as it appears most of the grips and the flash suppressor may do—actually serve public safety by making such stray shots less likely.”⁴²⁶

While the appellate court opinions upholding bans include little meaningful discussion of the actual verboten features, Judge Manglona’s opinion details each feature and explains, even using illustrations, why each serves lawful purposes and is protected by the Second Amendment. Hers is a far cry from the overly-lengthy

421 *Murphy v. Guerrero*, No. 1:14-CV-00026, 2016 WL 5508998, *18 (D. N. Mariana Islands Sept. 28, 2016).

422 *Id.*

423 *Id.* at *19.

424 *Id.*

425 *Id.* at *19-20.

426 *Id.* at *20.

appellate opinions with endless discussion of levels of scrutiny that never quite get to the particulars of what is banned and why.⁴²⁷

V. CONCLUSION

By now the pattern should be clear. Legislatures prohibit so-called assault weapons, but that term has no fixed meaning, and thus its features can be defined in contradictory and meaningless ways. Cook County bans generically a rifle with pistol grip and no stock, Massachusetts bans a rifle with pistol grip and a stock, and Maryland does not ban either one. The courts reviewing these bans repeat the terms “assault weapon” and “military style,” throw in some intermediate-scrutiny hocus pocus, and *voilà*—no Second Amendment violation. Rarely is there any meaningful analysis of the specific features that are supposedly so dangerous and unusual that they lose Second Amendment protection.

Beginning in the 1960s, the Second Amendment was a subject never to be discussed in polite company, and some judges (and Justices) reacted to the *Heller* decision with disdain.⁴²⁸ A significant element of the judiciary is only too happy to uphold any and every restriction on Second Amendment rights, no matter how outlandish.

Perhaps the most extreme example is *NYSRPA v. City of New York*, which upheld New York City’s prohibition on transporting an unloaded, inaccessible, locked handgun away from the premises where it is licensed, on the basis that public safety so required.⁴²⁹ After the Supreme Court granted certiorari, the city amended the law to make it slightly less restrictive, leading the Court to hold the case to be moot.⁴³⁰ Although he concurred in the opinion, Justice Kavanaugh cited his *Heller II* dissent (in which as a D.C. Circuit judge he would have invalidated the District of Columbia’s assault weapon ban) and expressed “concern that some federal and state courts may not be properly applying *Heller* and *McDonald*.”⁴³¹ Justice Alito, joined by Justices Gorsuch and Thomas, dissented. Besides finding the controversy still live, Justice Alito would have invalidated the law, partly on the basis that the city “points to no evidence of laws in force around the time of the adoption of

the Second Amendment” like the one at issue.⁴³² That historical approach would doom any of today’s rifle bans.

Gun design is not a required class in law school, and it is no surprise that judges are not experts in the subject. Given the political and media adoption of the term “assault weapon,” it is no small wonder that judges who know little about firearms may be readily persuaded to uphold prohibitions. The complexity of the assault weapon definitions contributes to judges’ failure to systematically and seriously review the specifics to decide whether bans are really warranted. Faced with ten or twenty generic definitions together with scores of mostly unfamiliar firearm names, not to mention “copies or duplicates” thereof, the easiest route is to throw up one’s hands and defer to the legislature. But that forfeits the judicial function.

Judicial review could perhaps be simplified if litigants would forego across-the-board challenges and focus only on one or two features of the banned rifles. The tendency has been to challenge everything in a statutory ban all at once, which makes it easier for courts to avoid serious discussion of any specific feature. If the validity of a single feature were to be challenged as a starting point, it could be more difficult for a court to dismiss the legitimacy of the feature with a single phrase of jargon. The ban on that specific feature would have to be justified. And that would prove impossible.

The notorious protruding pistol grip would be a good choice for such focus, particularly since it is a defining feature of the AR-15 rifle. The urban myth that the purpose of this design is to spray fire from the hip evaporates when seriously discussed. The purpose of the pistol grip is to enable the user to hold the rifle comfortably to take a precise shot. That’s the case regardless of whether the rifle is semiautomatic or—as Olympic competitors know—a bolt-action, single-shot.

In a broader sense, it is important that courts not spray-fire from the hip in denigrating or belittling unpopular constitutional rights. To have a checklist of excuses to uphold every restriction that comes down the pike is to disrespect the Constitution. Going down that path on the Second Amendment creates an atmosphere in which other constitutional liberties are endangered.

All of that said, decisions upholding bans must be put in context. That only six states ban certain long guns and handguns as assault weapons, and that 44 states do not, reflects a national, popular consensus that such bans violate the Second Amendment and are ineffectual. Judges from the mainstream states have had no occasion to opine on the issue because no such bans exist in those states. Instead, many of these states have a long tradition of judicial recognition of Second Amendment rights. The absence of prohibitions and correspondingly of judicial decisions across the heartland is a silence that is deafening.

427 Judge Manglona also authored the opinion declaring unconstitutional the last handgun ban in an American jurisdiction. *Radich v. Guerrero*, 2016 WL 1212437 (D. N. Mariana Islands Mar. 28, 2016).

428 J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 99 VA. L. REV. 253 (2009); Richard Posner, *In Defense of Looseness*, NEW REPUBLIC, Aug. 27, 2008, <https://newrepublic.com/article/62124/defense-looseness>. See also John Paul Stevens, *The Supreme Court’s Worst Decision of My Tenure*, THE ATLANTIC, May 14, 2019, <https://www.theatlantic.com/ideas/archive/2019/05/john-paul-stevens-court-failed-gun-control/587272/>; Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump. Critiques Latest Term*, N.Y. TIMES, July 10, 2016 (“I thought *Heller* was a very bad decision.”), <https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html>.

429 *New York State Rifle & Pistol Association, Inc. v. City of New York*, 883 F.3d 45 (2018) (not an infringement to prohibit taking a handgun out of one’s home), *vacated & remanded*, 140 S. Ct. 1525 (2020).

430 *Id.* at 1526.

431 *Id.* at 1527 (Kavanaugh, J., concurring) (citing *Heller II*, 670 F.3d 1244 (Kavanaugh, J., dissenting)).

432 *Id.* at 1541 (Alito, J., dissenting).

