

WHY THE CIVILIAN PURCHASE, USE, AND SALE OF ASSAULT WEAPONS AND SEMI-AUTOMATIC RIFLES AND PISTOLS, ALONG WITH LARGE CAPACITY MAGAZINES, SHOULD BE BANNED

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In the United States, private citizens can purchase powerful and semi-automatic assault weapons and large capacity magazines. In 1994, Congress passed the Violent Crime Control and Law Enforcement Act, which imposed a ten-year ban on the civilian use of many such weapons. Upon its expiration in 2004, Congress refused to extend the ban despite repeated calls to do so. In the wake of the law's demise, these dangerous weapons have become widely available to disturbed civilians, gangs, criminals, hate groups, terrorists, and so-called "lone wolves." Most recently, a man rented a top floor room in the Las Vegas Mandalay Bay Resort and Casino in order to kill and wound hundreds of innocent individuals attending an outdoor concert directly below the hotel, using semi-automatic weapons modified with a bump stock to spew thousands of bullets into a crowd of 22,000. This Article explains why nothing in the Second Amendment guarantees civilian access to the most dangerous weapons and urges Congress to again limit the availability of these dangerous weapons, which have caused countless tragedies.

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INTRODUCTION

There is little doubt that our country continues to suffer from a frontier mentality when it comes to guns. Private citizens can purchase powerful semiautomatic and assault weapons, including large capacity magazines that can spray between thirty and one hundred bullets in rapid succession without reloading (i.e., in two to three seconds). In 1994, Congress imposed a ten-year ban on the civilian use of many such weapons through the Violent Crime Control and Law Enforcement Act.¹ Upon its expiration in 2004, Congress refused to extend the ban despite repeated calls to do so.² In the wake of the law's demise, these dangerous weapons have become widely available to disturbed civilians, gangs, criminals, hate groups, terrorists, and so-called "lone wolves" for use against victims who have no hope against an unremitting stream of bullets. The National Rifle Association (NRA), which promotes the sale of these weapons, contends that the accessibility of these weapons is constitutionally protected by the Second Amendment. As this Article will show, this is not the case and the availability of these weapons has painted a bloody picture.

Weapons such as multi-round assault and semiautomatic rifles and pistols have been used in mass killings in elementary schools, in places of entertainment, such as movie theaters, clubs, and concerts, in places of worship, and in many other public venues. Police, too, have been the targets of such shootings, especially when they arrive at an active shooter scene. Overall, these attacks have resulted in the widely

1. Violent Crime Control and Law Enforcement Act of 1994, Pub .L. No. 103-322, 18 U.S.C. § 921 (1994).

2. *See, e.g.*, Press Release, Congressman José E. Serrano, Serrano Outraged Over Impending Expiration of Assault Weapons Ban, Calls on President and Congress to Act (Sept. 7, 2004), <https://serrano.house.gov/media-center/press-releases/serrano-outraged-over-impending-expiration-assault-weapons-ban-calls>; *see also* Sheryl Gay Stolberg, *Effort to Renew Weapons Ban Falters on Hill*, N.Y. TIMES (Sept. 9, 2004), <http://www.nytimes.com/2004/09/09/politics/effort-to-renew-weapons-ban-falters-on-hill.html?>; David Weigel, *Clinton Calls for a New Ban on Assault Weapons, 12 Years After the Last One Expired*, WASH. POST (June 13, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/06/13/clinton-calls-for-a-new-assault-weapons-ban-12-years-after-the-last-one-expired/?utm_term=.297913756af7.

publicized deaths or injuries of over one thousand innocent victims and have occurred in dozens of places once thought to be safe.³

Most recently, the deadliest attack in modern U.S. history occurred on Sunday, October 1, 2017 during a concert attended by 22,000 music lovers.⁴ The killer, Stephen Paddock, was sixty-four years old, with no significant criminal history. He had twenty-three guns capable of firing thousands of rounds of ammunition and also used a bump stock device that gave his semiautomatic rifles the ability to fire consecutive rounds without pause. His vantage point was well chosen: the thirty-second floor of the Mandalay Bay Resort & Casino. He even deployed a warning system, which included three cameras set up both inside and outside his hotel room, to monitor any police approach. Within a matter of nine to eleven minutes, Paddock killed fifty-nine citizens and wounded close to five hundred others,⁵ making this the worst mass killing of innocent bystanders in the modern era.

The deaths and injuries caused by these dangerous weapons have nonetheless failed to stir Congress to renew, much less strengthen, a federal ban on assault weapons that had previously been in effect for ten years. Instead, Congress has yielded to the politics of gun ownership rather than safeguard its citizens. Bluntly put, the congressional failure to renew and strengthen an assault weapons ban will only continue to accelerate the loss of innocent lives.

It is uncontroverted that thousands of deaths have been caused by all types of guns, not just assault weapons. For example, General Stanley McChrystal, a former commander of U.S. and international forces in Afghanistan and of the Joint Operations Command, and a member of the Veterans Coalition for Common Sense, publicly expressed his dismay about lax gun laws and the “carnage” they produce:

We are alarmed by loopholes that let felons and domestic abusers get hold of guns without a background check. We are alarmed that a known or suspected terrorist can go to a federally licensed firearms dealer where background checks are conducted, pass that

3. Appendix A provides an updated survey of widely-reported killings and injuries caused by dangerous firearms from the 1980s to the date of this writing. The details of these incidents—which claimed 1726 victims—including the types and numbers of weapons used, numbers of fatalities and injuries, and the published sources of this information are also described. This information is assembled chronologically and significantly understates the resulting harm when compared to the comprehensive information gathered by the government, scholars, and others cited in this Article.

4. Lynh Bui, et al., *At Least 59 Killed in Las Vegas Shooting Rampage, More Than 500 Others Injured*, WASH. POST. (Oct. 2, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/10/02/police-shut-down-part-of-las-vegas-strip-due-to-shooting/?utm_term=.64cc836fe6cc.

5. *Id.*

background check, legally purchase a firearm and walk out the door.⁶

According to the General's data, "[i]n 2014, 33,599 Americans died from a gunshot wound. From 2001 to 2010, 119,246 Americans were murdered by guns, 18 times all American combat deaths in the wars in Iraq and Afghanistan."⁷ In the General's view, this "is a national crisis."⁸

Similarly, in 2004, David Hemenway, Director of the Harvard Injury Control Research Center, reported an even more devastating count of gun deaths in the United States: "[F]ive hundred thousand Americans [have been] murdered with guns" since 1960, which is more American gun deaths in this country than deaths in each of "World War I and World War II, the Korean War, the Vietnam War, and the Gulf War."⁹ Moreover, "[b]etween 1991 and 2000, forty Americans were murdered with guns on an average day."¹⁰ For that same period "gun murders account[ed] for more than two-thirds of all murders," which contributed to an "overall murder rate . . . five times higher than the average rate for any other developed nations."¹¹

In light of the above, the questions presented here are twofold. First, as a matter of law, does the Second Amendment guarantee civilian access to the most dangerous weapons, namely assault or semiautomatic rifles and pistols and multi-round ammunition magazines? Second, has the availability of such weapons to persons living in the United States helped or hurt us? The answers are straightforward. Those who believe that the Second Amendment provides an absolute right to the possession of assault and semiautomatic weapons, as augmented by multi-round magazines or devices like bump stocks, are wrong. Also wrong are those who believe that the answer to gun violence is to ensure the continuing availability of such dangerous weapons to the general public.

As shown below, both the Supreme Court and lower courts have endorsed regulation of many kinds of guns, and Congress passed a ten-year statutory ban on the sale of certain assault weapons. Moreover, Justice Scalia's seminal legal analysis, described below, expressed particular concern about "dangerous and unusual weapons,"¹²

6. Stanley McChrystal, *Home Should Not Be a War Zone*, N.Y. TIMES, June 16, 2016, at A29.

7. *Id.*

8. *Id.*

9. DAVID HEMENWAY, *PRIVATE GUNS, PUBLIC HEALTH* 45 (1st ed. 2006).

10. *Id.*

11. *Id.*

12. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

which clearly applies to semiautomatic and assault weapons and their large capacity magazines. There is nothing revolutionary or unconstitutional about regulating dangerous weapons—Justice Scalia said so himself.

I.

HOW THE SECOND AMENDMENT HAS BEEN CONSTRUED AND APPLIED BY THE SUPREME COURT AND BY LOWER COURTS

A. *Heller and Its Supreme Court Progeny*

The most important case in Second Amendment jurisprudence is *District of Columbia v. Heller*.¹³ In *Heller*, a special policeman challenged a D.C. regulation that banned the registration (and therefore ownership) of handguns. In a 5-4 decision, Justice Scalia, writing for the Court, held that the District of Columbia's "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."¹⁴ The holding also addressed the District of Columbia's requirement that the homeowner's gun be "unloaded and disassembled or bound by a trigger lock or similar device," thereby preventing any realistic possibility of self-defense in the case of a home invasion.¹⁵

In explaining the Court's decision, Justice Scalia found that the text of the Second Amendment to the U.S. Constitution—"[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"¹⁶—did not protect the right to bear arms only for those serving in a militia. To the contrary, under Justice Scalia's reading, the operative clause described an independent right, not one that was subsidiary or ancillary to a well-regulated militia. In other words, "the right of the people to keep and bear arms" was a standalone right, not a right limited to service in a "well regulated Militia" that was "necessary to the security of a free State."¹⁷ The reasoning underlying this highly-debated conclusion is not the focus of this Article.¹⁸ Rather, the focus

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

14. *Id.* at 635.

15. *Id.* at 575.

16. U.S. CONST. amend. II.

17. *Heller*, 554 U.S., at 581.

18. *Heller* limited the longstanding decision in *United States v. Miller*, 307 U.S. 174 (1939), which held that the Second Amendment right extends only to certain types of weapons. See *Heller*, 554 U.S. at 623. ("Miller stands only for the proposi-

will be on Justice Scalia's recognition that the "right to keep and bear arms" is subject to limitations just as the First Amendment's protection of free speech is subject to limitations.¹⁹ In other words, according to the majority opinion, both Congress and the states enjoyed significant flexibility to regulate the ownership and use of guns consistent with the Second Amendment. Thus, Justice Scalia wrote that "like most rights, the right secured by the Second Amendment is not unlimited."²⁰ It "was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."²¹ Justice Scalia went on to say by way of example that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms,"²² and underscored the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"²³

Two years later, in *McDonald v. City of Chicago*,²⁴ Justice Alito, writing for the Court, held that the Fourteenth Amendment incorporated the Second Amendment and applied to the states. Most important, *McDonald* understood *Heller* to hold that the fundamental purpose of the Second Amendment was to protect the "inherent right of self-defense,"²⁵ a right which, *Heller* explained, was "most acute in the home."²⁶ The Court underscored *Heller*'s holding that "the American people have considered the handgun to be the quintessential self-

tion that the Second Amendment right, whatever its nature, extends only to certain types of weapons." *Miller*'s rationale was quite simple: In order for "a well regulated Militia" to be effective, those citizens called to serve in the militia were entitled under the Second Amendment to have their own arms, but otherwise had no independent right to bear arms free of regulation. *Miller*, 307 U.S., at 180–81. Justice Stevens's dissent in *Heller* also read *Miller* to mean that the Second Amendment "protects the right to keep and bear arms for certain military purposes, but . . . does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons." *Heller*, 554 U.S. at 637–38 (Stevens, J., dissenting). For an in-depth analysis of the Second Amendment, see generally SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (1st ed. 2008).

19. *Heller*, 554 U.S. at 595.

20. *Id.* at 626.

21. *Id.*

22. *Id.* at 626–27.

23. *Id.* at 627 (referencing a number of historical treatises).

24. 561 U.S. 742 (2010).

25. *Id.* at 767 (quoting *Heller*, 554 U.S. at 628).

26. *Id.* (quoting *Heller*, 554 U.S. at 628) ("[T]he need for defense of self, family, and property is most acute" in the home.").

defense weapon” and that “citizens must be permitted ‘to use [hand-guns] for the core lawful purpose of self-defense.’”²⁷ Justice Alito thus repeated the “assurances” in *Heller* that, among other things, “prohibitions on the possession of firearms by felons and the mentally ill,” “laws forbidding the carrying of firearms in sensitive places,” and “laws imposing conditions and qualifications on the commercial sale of arms” would continue to be valid.²⁸

In 2016, the Court once again had the opportunity to interpret its decision in *Heller*. In *Caetano v. Massachusetts*,²⁹ the Court reviewed a Massachusetts Supreme Judicial Court order upholding a Massachusetts law prohibiting the possession of stun guns. Specifically, the Massachusetts court had held that the Second Amendment did not protect stun guns because they “were not in common use at the time of the Second Amendment’s enactment.”³⁰ The Supreme Court rejected this standard as inconsistent with both *Heller* and *MacDonald*.³¹

Also in 2016, the Court decided *Voisine v. United States*.³² In *Voisine*, the Court considered whether a federal law prohibiting “any person who has been convicted in any court of a misdemeanor crime of domestic violence” from possessing a firearm,³³ would also apply to misdemeanor assault convictions for reckless conduct, as contrasted with knowing or intentional conduct.³⁴ In holding that the statute *did* include such conduct, the Court ruled that the “language, naturally read, encompasses acts of force undertaken recklessly—i.e., with conscious disregard of a substantial risk of harm.”³⁵ The Court did not find any Second Amendment problem with the statute interpreted in this way.

27. *Id.* at 767–68 (alteration in original) (quoting *Heller*, 554 U.S. at 29–30).

28. *Id.* at 786 (quoting *Heller*, 554 U.S. at 626–27).

29. 136 S. Ct. 1027 (2016).

30. *Id.*

31. Writing per curiam, the Supreme Court rejected Massachusetts’s standard for three reasons. First, contrary to the state court standard, *Heller* had already held that the Second Amendment did protect arms “not in existence at the time of founding.” *Id.* at 1027. Second, the Court also had found that the state court’s effort to equate “unusual” with “in common use at the time” simply restated the error committed in the first point. *Id.* at 1028. Finally, the Court rejected the proposition that “only those weapons useful in warfare are protected.” *Id.*

32. 136 S. Ct. 2272 (2016).

33. 18 U.S.C. § 922(g)(9) (2012).

34. *Voisine*, 136 S. Ct. at 2276.

35. *Id.* at 2282.

B. Lower Court Decisions After *Heller* and *McDonald*

Since *Heller* and *McDonald* were decided, federal, state, and local courts have had numerous opportunities to consider the scope of the Second Amendment as applied to a wide variety of factual situations.³⁶ The vast majority of rulings have upheld the regulation of guns, but few have taken account of the important “historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons’” identified by Justice Scalia in *Heller*.³⁷

The most important circuit court decision to consider the Second Amendment is *Kolbe v. Hogan*.³⁸ This case directly addressed the question whether a state, consistent with the U.S. Constitution, could regulate or ban assault and semiautomatic weapons, as well as magazines equipped with the ability to hold more than ten bullets. Sitting en banc, the Fourth Circuit held that the Maryland Firearm Safety Act of 2003 (FSA), which banned assault weapons and large capacity magazines, did not violate the Second Amendment.³⁹ Moreover, the appellate court ruled that even if the Second Amendment could be applied to such weapons, the “district court properly subjected the FSA to intermediate scrutiny and correctly upheld it as constitutional under that standard of review.”⁴⁰

36. See Appendix B. Appendix B provides a survey of representative decisions by federal, state, and local courts after the issuance of the most important and recent Supreme Court decisions concerning the regulation of gun ownership and use. The survey, also as of this writing, reflects sixty-seven lower court decisions supporting the regulation of guns and seven decisions rejecting such regulation. The lower court decisions include decisions from over twenty state courts.

37. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (referencing a number of historical treatises).

38. 849 F.3d 114 (4th Cir. 2017) (en banc).

39. *Id.* at 136–37.

40. *Id.* at 121. *Heller* declined to set a standard of scrutiny for reviewing these regulations, apart from its rejection of rational basis review. *United States v. Rene E.*, 583 F.3d 8, 11 n.4 (1st Cir. 2009). Most of the lower federal and state courts have interpreted *Heller* to apply a two-part test: First, the court asks whether the regulation falls within the ambit of Second Amendment protection. Second, if it does, the court determines the level of scrutiny based upon the type of legislation being challenged and the individual rights that such legislation restricts. See *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194–96 (5th Cir. 2012). Courts will typically apply one of three levels of scrutiny to determine whether the legislation is valid: (1) rational basis review; (2) intermediate scrutiny; or (3) strict scrutiny. Compare *Chief of Police v. Holden*, 26 N.E.3d 715 (Mass. 2015) (applying rational basis review), with *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012) (applying intermediate scrutiny), and *Grace v. District of Columbia*, 187 F. Supp. 3d 124 (D.D.C. 2016) (applying strict scrutiny). Intermediate scrutiny examines whether the law or policy being challenged furthers an important government interest through means substantially related to that interest. *Kachalsky*, 701 F.3d 81, at 96. Nearly all courts apply intermediate scrutiny when evaluating legislation restricting

The Fourth Circuit explained that the right to keep and carry firearms under *Heller* was extended to certain kinds of weapons only.⁴¹ Specifically, the Fourth Circuit recognized that the historical tradition of prohibiting dangerous and unusual weapons meant that, under *Heller*, “‘M-16 rifles and the like[] may be banned’ without infringing upon the Second Amendment.”⁴² The Fourth Circuit also ruled that the AR-15 and other weapons implicated in the FSA were “simply the semiautomatic version of the M16 rifle.”⁴³ Because the weapons covered by the FSA had, for all intents and purposes, the same effect as the M-16, the Fourth Circuit applied *Heller*’s ruling that the Second Amendment permitted the prohibition of weapons “like” the M-16.⁴⁴ As the Appellate Court explained, “the automatic firing of all the ammunition in a large-capacity thirty-round magazine takes about two seconds, whereas a semiautomatic rifle can empty the same magazine in as little as five seconds.”⁴⁵ Citing the extensive factual record developed by the State of Maryland, the Fourth Circuit found that semiautomatics can even fire 300 to 500 rounds per minute, “making them virtually indistinguishable in practical effect from machine-guns.”⁴⁶

Given these findings, the Fourth Circuit affirmed the district court’s rejection of plaintiffs’ argument that they were entitled to summary judgment based on the theory that the FSA was “unconstitutional *per se*.”⁴⁷ The court also held, in the alternative, that the FSA would survive the intermediate scrutiny test because intermediate scrutiny required only that “there is a reasonable fit between the challenged regulation and a substantial governmental objective”—a fit that is “reasonable, not perfect.”⁴⁸ The court further noted that no other federal appellate court had ever applied a strict scrutiny test in a

guns. *See, e.g.*, *State v. Christian*, 307 P.3d 429 (Or. 2013) (noting that “the majority of federal courts to date have applied an intermediate scrutiny standard of review to most Second Amendment challenges”).

41. *Kolbe v. Hogan*, 849 F.3d 114, 130–34 (4th Cir. 2017) (en banc). The plaintiffs did not challenge FSA’s prohibition of assault pistols. *Id.* at 122 n.2.

42. *Id.* at 131 (quoting *Heller*, 554 U.S. at 627).

43. *Id.* at 124.

44. *Id.* at 124–25 (“The difference between the fully automatic and semiautomatic versions of those firearms is slight.”).

45. *Id.* at 125.

46. *Id.* (quoting the Joint Appendix). The Fourth Circuit also discussed approvingly the district court’s record findings that assault weapons did not increase the efficacy of self-defense in the home because the average number of bullets fired in a self-defense scenario was no more than between 2.1 and 2.2—far less than the plaintiffs’ purported justification that a ten-round magazine would save lives. *Id.* at 127, 129.

47. *Id.* at 130.

48. *Id.* at 133 (quoting *Woollard v. Gallagher*, 712 F.3d 865, 878 (4th Cir. 2013)).

Second Amendment case.⁴⁹ Given that substantial evidence supported the FSA's prohibitions against assault weapons, the appellate court concluded that the FSA also survived intermediate scrutiny and thus provided an alternative basis for upholding the district court's grant of summary judgment.⁵⁰ Finally, the Supreme Court denied certiorari in *Kolbe v. Hogan*, thereby leaving the Fourth Circuit decision intact.⁵¹

C. *Heller Does Not Preclude the Passage of a
New Assault Weapons Ban*

Together, these decisions reinforce and highlight, in broad strokes, the historical limits on gun ownership and use. They also demonstrate that the passage of a new assault weapons ban would not contradict or conflict with any relevant Supreme Court precedent interpreting the Second Amendment. Indeed, Justice Scalia emphasized that the Second Amendment did not confer unlimited rights to gun ownership and use, as many politicians at the federal and state levels seem to think. To the contrary, it was “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁵² *McDonald*, following the reasoning of *Heller*, also found that the Second Amendment preserved the “inherent right of self-defense” and underscored that “the handgun”—not the assault or semi-automatic rifle—is “the quintessential self-defense weapon” needed “in the home.”⁵³

Heller made clear that the Supreme Court would uphold laws that impose “conditions and qualifications on the commercial sale of arms.”⁵⁴ The Court's recognition of the “historical tradition of prohibiting the carrying of dangerous and unusual weapons” applies precisely to the kinds of weapons that are now widely available for the public's purchase—those that have caused the deaths of too many innocent lives, and which would be banned by the passage of a new assault weapons ban.⁵⁵ It is reasonable to conclude that such weapons become both “unusual” and even more “dangerous” when their magazine capacity permits rapid firing with more than ten rounds of ammu-

49. *Id.* at 120–21.

50. *Id.* at 140–41.

51. *Kolbe v. Hogan*, No. 17-127, 2017 WL 3173130 (U.S. Nov. 27, 2017) (mem) (denying petition for a writ of certiorari).

52. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

53. *McDonald v. City of Chicago*, 561 U.S. 742, 767–68 (quoting *Heller*, 554 U.S. at 628–29).

54. *Heller*, 554 U.S. at 626–27.

55. *Id.* at 627 (quotations omitted) (referencing a number of historical treatises); see also *infra* Appendix A.

nition, such as those with thirty rounds or more that “most prohibited [assault weapons] [have come] equipped with.”⁵⁶ This is particularly true when, as reported, such rifles with large capacity magazines (LCMs) “used in roughly 14% to 26% of gun crimes.”⁵⁷

Similar to the Fourth Circuit’s *Kolbe* decision, recent appellate court rulings have applied *Heller* to uphold bans on possession of semiautomatic and assault weapons. The cases described in Appendix B reflect the application of *Heller* and *McDonald* (as the most important Supreme Court rulings on this subject) in federal, state, and local courts. As shown, the vast majority of these decisions have upheld regulations being challenged—including the regulation of semiautomatic weapons, assault weapons, and certain large-capacity ammunition magazines.⁵⁸ The examples provided in Appendix B identify five decisions as of the time of this writing rejecting the regulation of the guns at issue, compared to sixty-seven that upheld such regulation. Thus, the vast majority of courts interpreting *Heller*—and *Heller* itself—make clear that a renewed assault weapons ban would not violate the Second Amendment.

The question then becomes, why has Congress failed to act?

II.

THE ASSAULT WEAPONS BAN AND THE DANGERS IT ADDRESSED

For a period of ten years, between 1994 and 2004, federal law banned the public ownership and use of many obviously dangerous weapons, consistent with the “historical tradition” cited by Justice Scalia.⁵⁹ The expiration of that law and the opposition of Congress to renew and expand it has created a vacuum in which those seeking to do extreme or serious harm have capitalized, and based on history, will continue to cause the deaths of innocent victims.

56. CHRISTOPHER S. KOPER, NAT’L CRIMINAL JUSTICE REFERENCE SERV., UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994–2003, at 7 (2004).

57. *Id.* at 19.

58. See *infra* Appendix B (citing *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc); *N.Y. State Rifle & Pistol Assoc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015); and *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011)).

59. See notes 14–23 and accompanying text.

A. *History of the Assault Weapons Ban*

The history of the Assault Weapons Ban of 1994 (AWB) highlights the gravity of this problem. The statute was enacted on September 13, 1994, as part of the Violent Crime Control and Law Enforcement Act of 1994.⁶⁰ The legal ban was in effect for ten years, beginning immediately upon enactment in September 1994 when the Democrats in Congress controlled the Senate and the House. The statute banned nineteen semiautomatic and assault weapon models and was based upon a 1989 report issued by the Bureau of Alcohol, Tobacco and Firearms (ATF). The ban was also discussed in the Department of the Treasury's *Study on the Sporting Suitability of Modified Semiautomatic Assault Rifles*.⁶¹ The Treasury Study was commissioned by President Clinton and the Secretary of the Treasury due to concerns expressed by Congress that "the rifles being imported were essentially the same as semiautomatic assault rifles previously determined to be nonimportable [sic] in a 1989 decision by the Bureau of Alcohol, Tobacco and Firearms."⁶² In its definition section, the Act listed the semiautomatic weapons by name that would be banned; listed the features of particular semiautomatic rifles that would also fall within the ban; listed the features of the semiautomatic pistols that would qualify for the ban; and listed the characteristics of semiautomatic shotguns that would be covered by the ban. The AWB also outlawed the importation of large capacity ammunition feeding devices, which were interpreted by the ATF to mean "a magazine, belt, drum, feed strip, or similar device . . . that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition."⁶³ Court challenges to this law were unsuccessful.⁶⁴

60. Pub. L. No. 103-694, 108 Stat. 1796, §§ 110101–110106 (1994).

61. DEP'T OF THE TREASURY STUDY ON THE SPORTING SUITABILITY OF MODIFIED SEMIAUTOMATIC ASSAULT RIFLES 12–13 (1998) [hereinafter TREASURY STUDY], <https://www.atf.gov/file/57521/download>. The study used the following guidelines to identify such weapons: "ability to accept a detachable magazine, folding/telescoping stocks, separate pistol grips, ability to accept a bayonet, flash suppressors, bipods, grenade launchers, and night sights." *Id.* at 1. It also identified other characteristics of the modern military assault rifle, including military configuration, the ability to fire automatically, and whether the weapon was "chambered to accept a centerfire cartridge case of 2.25 inches or less." *Id.* at 9. In sum, the semiautomatic weapons outlawed by the bill were "copies of military-style submachineguns . . . designed to kill people at close quarters with rapid fire lethal bursts." 140 CONG. REC. 3063, 3072 (1994) (statement of Rep. Klein).

62. TREASURY STUDY, *supra* note 61, at 1.

63. 27 C.F.R. § 478.119 (2008).

64. See *Olympic Arms v. Buckles*, 301 F.3d 384, 390 (6th Cir. 2002) (holding that the ban satisfied equal protection as "a legitimate exercise of congressional authority to regulate a significant threat to public health and safety"); *Navegar, Inc. v. United*

From 2003 to 2013, there were various unsuccessful attempts to renew and improve the law. On May 8, 2003, Senator Diane Feinstein and others introduced a bill to repeal the sunset date of the assault weapon ban.⁶⁵ On February 24, 2004, Senator Feinstein and others sought to obtain a ten-year extension of the ban.⁶⁶ On February 25, 2004, Congressman Michael Castle and others also sought to extend the sunset on the ban for another ten years.⁶⁷ Similar efforts were made in September 2004,⁶⁸ March 2005,⁶⁹ and June 2008.⁷⁰ On January 24, 2013, Senator Feinstein and twenty-one other Senators introduced S.150, which was an even more ambitious effort to restrict assault and semiautomatic weapons and large-capacity magazines.⁷¹ Like prior proposals, it failed.

Had S.150 been passed in the wake of the December 2012 killing of twenty first graders and six staff members of the Sandy Hook Elementary School, many hundreds of other lives might have been saved by a “reinstated and strengthened” ban on “semiautomatic assault weapons.”⁷² More specifically, the proposed statutory ban on assault weapons, had it gone forward, would have outlawed over one hundred types of semiautomatic rifles with the capacity to accept a detachable magazine and any one of the following: “(1) a pistol grip; (2) a forward grip; (3) a folding, telescoping, or detachable stock; (4) a grenade launcher or rocket launcher; (5) a barrel shroud; or a threaded barrel.”⁷³

The proposed statute also would have banned semiautomatic rifles with the capacity to accept more than ten rounds, unless an attached tubular device was “designed for and only capable of accepting

States, 192 F.3d 1050, 1068 (D.C. Cir. 1999) (holding that the ban satisfied interstate commerce requirements and rejected a Bill of Attainder challenge based on the Telecommunications Act of 1996); *San Diego Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1133 (9th Cir. 1996) (holding that plaintiffs failed to show that there was injury-in-fact and that claims were ripe for adjudication); *United States v. Starr*, 945 F. Supp. 257, 260 (M.D. Ga. 1996) (holding that the statute was not unconstitutionally vague and that an indictment for violations of the ban was valid); *see generally* VIVIAN S. CHU, CONG. RESEARCH SERV., R42957, FEDERAL ASSAULT WEAPONS BAN: LEGAL ISSUES 7–14 (2013) (reporting on these decisions).

65. Assault Weapons Ban Reauthorization Act, S. 1034, 108th Cong. (2003).

66. Assault Weapons Ban Reauthorization Act, S. 2109, 108th Cong. (2004).

67. H.R. 3831, 108th Cong. (2004).

68. H.R. 5099, 108th Cong. (2004).

69. Assault Weapons Ban Reauthorization Act, S. 620, 109th Cong. (2005).

70. Assault Weapons Ban Reauthorization Act, H.R. 6257, 110th Cong. (2008).

71. Assault Weapons Ban, S. 150, 113th Cong. (2013).

72. *See* WILLIAM J. KROUSE, CONG. RESEARCH SERV., R42987, GUN CONTROL LEGISLATION IN THE 113TH CONGRESS 1 (2015).

73. *Id.* at 40.

.22 caliber rimfire ammunition.”⁷⁴ In addition to this more rigorous ban on semiautomatic rifles, the proposed law would have adopted virtually identical restrictions for semiautomatic pistols.⁷⁵ However, as a result of this proposed statute’s rejection, the Bushmaster M-16-style semiautomatic rifle, which can hold thirty-round magazines and was used in the Sandy Hook murders, remains part of the arsenal of dangerous weapons available to the public.

B. Literature Assessing Effectiveness of the Assault Weapons Ban

The AWB provides a common-sense solution to this public health and safety crisis. Indeed, its efficacy and prudence is proven in the evidentiary studies that have been undertaken to examine its impact. It is, perhaps, surprising that there has not been a larger focus on this problem in secondary literature. But as discussed below, much of the literature that addresses the AWB concludes that the AWB was an overwhelming success and was able to save lives.⁷⁶ Importantly, these studies provide a rebuttal to those claiming that the renewal of the AWB would not change the status quo.

In 1995, an article written by Michael G. Lenett about the genesis and efficacy of the 1994 Assault Weapons law appeared in the *University of Dayton Law Review*.⁷⁷ Lenett’s findings underscore the dangers of assault and semiautomatic weapons. For example, based on ATF data, between 1986 and 1993 “assault weapons were about sixteen times more likely to be traced to crime than conventional weapons during this period.”⁷⁸ Also “[d]uring this period, at least 29,058 assault weapons were used to commit crimes in the United States and the actual figure was probably much higher.”⁷⁹ Finally, “[s]ince ATF

74. *Id.*

75. *Id.*

76. One reason for the lack of research on the AWB is that the U.S. Centers for Disease Control and Prevention (CDC) which, among other things, researches how violence affects public health, is legally prohibited from studying the role firearms play in American deaths. After the CDC began studying gun violence in the early 1990s, the NRA successfully lobbied for the Dickey Amendment, which prohibited the CDC from promulgating research that might “advocate or promote gun control.” Pub. L. No. 104-208, 1110 Stat. 3009 (1996); *see also* MAYORS AGAINST ILLEGAL GUNS, ACCESS DENIED: HOW THE GUN LOBBY IS DEPRIVING POLICE, POLICY MAKERS, AND THE PUBLIC OF THE DATA WE NEED TO PREVENT GUN VIOLENCE 11–19 (2013), <https://everytownresearch.org/documents/2015/04/access-denied.pdf>.

77. Michael G. Lenett, *Taking a Bite Out of Violent Crime*, 20 U. DAYTON L. REV. 573 (1995). Lenett served as “Counsel to the Senate Judiciary Committee during the 103rd Congress and had participated in many of the events described” in his article. *Id.* at 573 n.* (1995).

78. *Id.* at 576.

79. *Id.*

traces less than ten percent of all gun crimes, these numbers could actually be ten times higher or more—that would mean at least 290,000 assault weapon crimes over that eight-year period.”⁸⁰

Lenett also found that the police reported that semiautomatic assault weapons were “an especially dangerous problem for law enforcement” and “that these military-style weapons have become the weapons of choice for mass murderers, drug traffickers, youth gangs, and hate groups.”⁸¹ As a result, “[l]aw enforcement officials often report that they are being outgunned by criminals and drug dealers on the street armed with semiautomatic assault weapons.”⁸² The article then traces the five-year legislative history that led to passage of the AWB during the 103rd Congress.⁸³

In 2004, the Justice Department received a report on the efficacy of the Federal Assault Weapons law, which had imposed a ten-year ban on the “manufacture, transfer and possession” of certain assault weapons.⁸⁴ As the report makes clear, the AWB was “directed at semi-automatic firearms having features that appear useful in military and criminal applications but unnecessary in shooting sports or self-defense.”⁸⁵ Although nine groups of pistols, rifles, and shotguns were prohibited as assault weapons, ATF had identified 118 models and variations that were also prohibited by law.⁸⁶ Also banned were large capacity magazines (LCMs) which had the ability to fire more than ten bullets and were “arguably the most functionally important feature of most [assault weapons], many of which have magazines holding 30 or more rounds.”⁸⁷

Following the ban’s implementation, researchers found that, for the period from 1995 to 2003, gun crimes involving assault weapons “declined by 17% to 72% across . . . Baltimore, Miami, Milwaukee, Boston, St. Louis, and Anchorage.”⁸⁸ On the other hand, because assault weapons and large-capacity magazines manufactured before September 13, 1994 were exempted from the ban, more than 1.5 million assault weapons remained in circulation along with “25 million pre-

80. *Id.*

81. *Id.* at 577–78.

82. *Id.* at 578.

83. *Id.* at 581–602. As set forth in the Public Safety and Recreational Firearms Use Protection Act there was “(1) a list of named banned firearms; 2) a ban on copies of the listed weapons; 3) a ban on all weapons meeting a specified criteria definition; and 4) a ban on large capacity ammunition magazines.” *Id.* at 602.

84. KOPER, *supra* note 56, at 1.

85. *Id.* at 1.

86. *Id.*

87. *Id.*

88. *Id.* at 2.

ban LCMs.”⁸⁹ Moreover, the country’s stock of LCMs continued to grow after the ban because it remained legal to import them as long as they had been made before the ban.⁹⁰ Thus, as of 1994, a “national survey of gun owners found that 18% of all civilian-owned firearms and 21% of civilian-owned handguns were equipped with magazines having 10 or more rounds.”⁹¹ Also, “most prohibited [assault weapons] came equipped with magazines holding 30 rounds and could accept magazines holding as many as 50 or 100 rounds.”⁹² As a result, assault weapons and LCMs “were used in up to a quarter of gun crimes prior to the 1994 AW-LCM ban” and “guns equipped with LCMs—of which [assault weapons] are a subset—[were] used in roughly 14% to 26% of gun crimes ” and posed a “greater potential for affecting gun crime.”⁹³ Finally, “[w]hile not entirely consistent, the few available studies contrasting attacks with different types of guns and magazines generally suggest that attacks with semiautomatics—including [assault weapons] and other semiautomatics with LCMs—result in more shots fired, persons wounded, and wounds per victim than do other gun attacks.”⁹⁴

Not surprisingly, once the federal assault weapons ban expired in 2004, the Police Executive Research Forum reported a significant increase in the use of such weapons, as many in Congress had feared.⁹⁵ Thirty-seven percent of police agencies responding to the survey reported notable increases in the use of assault weapons by criminals; fifty-three percent reported seeing increases in large-caliber handguns; and thirty-eight percent reported noticeable increases in the use of semiautomatic weapons with LCMs holding more than ten rounds.⁹⁶

In a detailed history of gun use, Professor Adam Winkler described the evolution of gun laws, judicial rulings, and societal effects from the post-revolutionary period to 2011.⁹⁷ For example, as Professor Winkler confirmed, “[t]here is already nearly one gun per person in the United States” but that has not led to an “idyllic, low-crime

89. *Id.* at 1.

90. *Id.* at 1–2.

91. *Id.* at 6.

92. *Id.* at 7.

93. *Id.* at 19.

94. *Id.* at 97.

95. POLICE EXEC. RESEARCH FORUM, GUNS AND CRIME: BREAKING NEW GROUND BY FOCUSING ON THE LOCAL IMPACT 2 (2010).

96. *Id.* at 2.

97. See ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA (2011).

society that some imagine a gun-saturated world will bring.”⁹⁸ To the contrary, “the United States has the highest rate of gun ownership of any developed country and the highest rate of gun violence.”⁹⁹ Professor Winkler emphasized that from “the list of mass shootings in 2012,” there have been “mass shootings at movie theaters, day spas, coffee shops, offices, temples, and shopping malls.”¹⁰⁰

The above evidence is consistent with the history of deaths and injuries caused by semiautomatic and assault weapons, including pistols, as listed in Appendix A. Indeed, Professor Winkler seems to predict these trends will continue. He writes that in America, “guns are everywhere and easy for someone with a criminal intent to acquire. Those guns are here to stay, which means—awful as it is to admit—that mass shooting are here to stay as well.”¹⁰¹

Despite this bleak picture, some gun control, according to the professor, has been successful, including the National Firearms Act of 1934, which “imposed an onerous tax on machine guns and on short-barreled (or ‘sawed-off’) shotguns and rifles.”¹⁰² This law was “deemed so successful that four years later Congress once again asserted its authority over guns by passing the Federal Firearms Act of 1938,” a law that imposed a licensing and record-keeping obligation for gun dealers and that barred felons from obtaining firearms.¹⁰³ Another reported “success” was the enactment of the Omnibus Crime Control and Safe Street Act of 1968, which forbids gun shipments across state lines unless they were for federally licensed dealers and collectors and required records of all gun sales.¹⁰⁴

On the other hand, Professor Winkler disputed the efficacy of the 1994 Assault Weapons Ban. In particular, Winkler argued that the political capital on gun control could be more effectively spent on other—likely more successful—policies, such as universal background checks. He distinguished a “military-style gun,” like a machine gun that delivers “repetitive fire with a single pull of the trigger,” from

98. See *id.* at XIII. According to Professor Winkler, in 2011 “there [were] approximately 280 million guns in the United States, almost one per person.” *Id.* at 10. Additional research by Craig R. Whitney, a reporter, foreign correspondent and editor at the New York Times, came to a similar conclusion that in the United States “something close to 300 million guns [were] in private hands” which were “more guns than any other advanced industrial country, and more gun violence.” CRAIG R. WHITNEY, *LIVING WITH GUNS: A LIBERAL’S CASE FOR THE SECOND AMENDMENT* 155 (2012).

99. WINKLER, *supra* note 97, at XIII.

100. *Id.* at XIII.

101. *Id.* at XIV.

102. *Id.* at 203.

103. *Id.* at 204.

104. *Id.* at 251–52.

a semiautomatic that automatically “loads another round into the chamber with each trigger pull.”¹⁰⁵ He also disputed that “a detachable ammunition magazine and any combination of a pistol grip, flash suppression, telescoping-stock, or bayonet mount” would “make[] a gun considerably more dangerous, perhaps with the exception of a bayonet fitting.”¹⁰⁶ Winkler further argued that “there was little evidence that [the] guns explicitly banned were unusually dangerous.”¹⁰⁷ Finally, he argued that “assault weapons are rarely used in crime” and that “[b]anning” them “would be a largely symbolic act . . . unlikely to save lives.”¹⁰⁸

By contrast, Professor Winkler’s conclusions regarding the AWB conflict with the evidence discussed above, and with the 1989 Treasury Study findings that supported the adoption of the Assault Weapons ban. As ordered by the President and the Secretary of the Treasury, on November 14, 1997, a new study was undertaken regarding the importation of certain modified versions of semiautomatic rifles.¹⁰⁹ In 1989, the ATF had blocked the importation of “semiautomatic versions of automatic-fire military assault rifles.”¹¹⁰ In contrast to Professor Winkler, the Treasury Study viewed the “ability to accept a detachable magazine, folding/telescoping stocks, separate pistol grips, ability to accept a bayonet, flash suppressors, bipods, grenade launchers, and night sights” as a “military configuration” that “was designed for killing and disabling the enemy.”¹¹¹ Moreover, this review ultimately concluded that the importation of military-style semiautomatic weapons did not have a sporting purpose justification; that large capacity military magazine rifles were not “especially suitable for sporting purposes;” and that detachable large capacity magazines “should be added to the list of disqualifying military configuration features identified in 1989.”¹¹² It also found that such rifles were “attractive to certain criminals” and thus judged to be “not importable.”¹¹³

Finally, the study underscored several conclusions about the dangers caused by these weapons. Detachable LCMs “originally designed and produced for a military assault weapon should be added to the list

105. *Id.* at 36–37.

106. *Id.* at 38.

107. *Id.*

108. *See id.* at XII.

109. TREASURY STUDY, *supra* note 61, at 1.

110. *Id.*

111. *Id.* at 1–2.

112. *Id.* at 2–3.

113. *Id.* at 3.

of disqualifying military configuration features identified in 1989.”¹¹⁴ In addition, “Congress sent a strong signal that firearms with the ability to expel large amounts of ammunition quickly are not sporting” but rather “are a crime problem.”¹¹⁵ As found by the House Report on the 1994 law, “the ability to accept a large capacity magazine ‘serve[s] specific combat-functional ends.’”¹¹⁶ Finally, such “capability for lethality” creates “more wounds, more serious, in more victims” and are “weapons of choice among drug dealers, criminal gangs, hate groups, and mentally deranged persons bent on mass murder.”¹¹⁷

C. *The Public Health and Safety Impact of Assault Weapons Today*

As set forth in Appendix A, semiautomatic or assault rifles and pistols have caused the deaths of 606 innocent persons and the injury of another 1120 innocent persons. The evidence shows that such weapons make mass murder easier and injuries more devastating. The assault weapon that sprays shots with one trigger pull is certainly “unusually dangerous” but so is the semiautomatic weapon that can make rapid-fire shots in two to three seconds with large capacity magazines (i.e., more than ten rounds, and often up to thirty, fifty, or one hundred rounds). As shown in Appendix A, these weapons are fully capable of mass killings and injuries¹¹⁸: forty-nine killed and fifty-eight injured in a June 12, 2016 attack in Orlando’s Pulse Nightclub; twelve killed and fifty-eight injured in a July 20, 2012 attack in an Aurora, Colorado movie theater; twenty-six killed and two wounded in a December 12, 2012 attack at a Newtown, Connecticut school for young children; and fifty-nine killed along with hundreds wounded at the Las Vegas Mandalay Bay Resort and Casino.¹¹⁹ Given this data, there is every reason to conclude that banning bump stocks, as Congress has considered in the wake of the Las Vegas massacre, will not prevent mass murders or woundings with the weapons and magazines identified in this Article.

Based on this history, there should be little doubt that such weapons pose a grave threat to a civil society. As a matter of practicality and experience, once these weapons and multi-round, large capacity

114. *Id.* at 37.

115. *Id.*

116. *Id.* (alteration in original) (quoting H.R. REP. NO. 103-489, at 18 (1994)).

117. *Id.*

118. Even if a magazine ran out of bullets, it would be possible to replace in “two seconds.” See James B. Jacobs, *Why Ban “Assault Weapons”?* 37 CARDOZO L. REV. 681, 686 n.29, 689 n.49 (2015).

119. See *infra* Appendix A.

magazines are available for purchase by private individuals, there is no effective way to prevent their use as weapons to inflict mass murders and injuries. Nor is there evidence that private ownership of assault or semiautomatic weapons has deterred the destruction of lives or the plots that preceded them. To the contrary, the growing availability of such guns has contributed to a steady pattern of violent assaults on innocent citizens. In short, the answer to such dangerous weapons is not in their proliferation and private ownership.¹²⁰ This evidence together with the Fourth Circuit's recent findings also refute Professor Winkler's conclusion that "assault weapons are rarely used in crime" and that "banning" them "would be a largely symbolic act."¹²¹

III.

OPTIONS FOR REDUCING ASSAULT WEAPON DANGERS

Justice Scalia established the criteria for determining whether the ownership and use of assault or semiautomatic weapons and associated large capacity ammunition magazines should be banned or strictly limited for all U.S. citizens except for those who are in the military or are law enforcement personnel. He did so by recognizing that there is an "historical tradition of prohibiting the carrying of dangerous and unusual weapons."¹²² Unfortunately, there is concrete proof that this "historical tradition" has been ignored. Semiautomatic and assault weapons and large capacity ammunition magazines exist, have been proven to be "dangerous," yet are available for purchase and have been used to kill and wound innocent citizens, including children. This evidence is clear from public reports, ATF findings, and other studies. Also clear is that these weapons have been used offensively against civilians, not in "'defense of self, family, and property [which] is most acute' in the home."¹²³ On the other hand, there is no public reporting that assault and semiautomatic weapons have been

120. When the data in Appendix A, reflecting the publically reported deaths and injuries caused by "dangerous" weapons, are organized into nine-year periods (1980–1989, 1990–1999, and 2000–2009) and are compared to the ten-year period during which the AWB was intact (1994–2004), the longer period shows a lower average of 13.43% dead or wounded compared to the higher average of the dead or wounded for the shorter periods: 24.2% for 1980–1989; 16.25% for 1990–1999; 17.07% for 2000–2016 and 17.75% for 2010–2016. These data support the conclusions reached in other studies, namely that the Assault Weapon law helped to save lives.

121. WINKLER, *supra* note 97, at XII.

122. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (referencing a number of historical treatises).

123. *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (quoting *Heller*, 554 U.S. at 628).

used defensively by private citizens, whether in the home or otherwise.

Given this history, the status quo is and should be unacceptable. There must be a solution notwithstanding significant barriers, including that many millions of semiautomatic and assault weapons and multi-round magazines remain in wide circulation. In this regard, Professor Winkler believes some gun reforms hold promise. For example, he points out that “federal law requires only licensed dealers to conduct a background check before selling a gun” but unfortunately also allows “anyone else” to “sell a gun without verifying that the purchaser is legally allowed to buy it.”¹²⁴ Thus, Professor Winkler suggests that background checks be required for “every gun purchaser, no matter who or where the seller is.”¹²⁵

This recommendation makes sense and should be implemented, but it is not sufficient. Unless Congress changes course, consistent with the facts concerning the easy and growing availability of dangerous weapons (including LCMs) and the steady trajectory of lost lives, the incidents of violent mass murders are likely to continue as a threat to innocent citizens in a country long thought of as a safe haven for those seeking peace and opportunity. This conclusion is strongly supported by the ATF data cited by Professor Lenett for the seven-year period between 1986 and 1993, which shows the unique dangers posed by allowing assault weapons and LCMs to be permitted in public circulation.¹²⁶ This conclusion is also supported by the Police Executive Research Forum data, which showed a significant increase in assault weapon use after the 2004 expiration of the AWB,¹²⁷ and most vividly by the October 1, 2017 massacre at the Mandalay Hotel in Las Vegas.

Courts also have upheld laws that ban the ownership or possession of firearms by those who have committed domestic violence, as well as the mentally ill, drug addicts or users of controlled substances, and misdemeanants.¹²⁸ On the other hand, Appendix A, together with the data collected by Congress, federal agencies, and scholars, under-

124. WINKLER, *supra* note 97, at XIV.

125. *Id.*

126. *See supra* notes 78–80 and accompanying text. Professor Lenett’s findings showed “assault weapons were about sixteen times more likely to be traced to crime than conventional weapons during this period;” that “at least 29,058 assault weapons were used to commit crimes in the United States;” and that “these numbers could actually be ten times higher or more,” i.e., the possibility of “at least 290,000 assault weapon crimes” during this period. Lenett, *supra* note 77, at 576.

127. *See supra* notes 95–96 and accompanying text.

128. *See* Appendix B.

score that, except for the relative success of the ten-year assault weapons ban, mass murders and injuries caused by dangerous weapons have not abated. To the contrary, given that over one million dangerous weapons remained in circulation after passage of the 1994 statute and that upon the law's demise in 2004 the volume of such weapons in circulation significantly increased, it is certain that mass murders will continue, if not accelerate, unless common sense remedies are adopted.

There are several options for reversing or slowing this dangerous trend.¹²⁹ One remedy would be to impose a ban on the future purchase and importation of all (not just some) assault and semiautomatic rifles and pistols—including large capacity ammunition magazines and devices like bump stocks—for all U.S. citizens and for all non-citizens residing in or travelling to the United States. The only exceptions should apply to those serving in the armed services or in law enforcement. However, because millions of pre-existing weapons would continue to be in circulation, as was the case during the ten-year assault weapons ban, this option would substantially reduce or impede, but not prevent, a continuation of mass killings and wounding.

There are two options that would complement the first in addressing the millions of assault and semiautomatic rifles and pistols and related large capacity ammunition magazines already in circulation. The most effective option would be to adopt a statutory requirement that the owners of such weapons and ammunition magazines capable of holding more than ten rounds (including those who sell them) return them to a designated agency by a date certain in exchange for a reasonable price established by law. The failure to do so would be treated as a criminal offense.

An alternative would permit persons already in possession of such weapons and large capacity ammunition magazines to retain them (excluding bump stocks) if they acquired or renewed a license for their firearms and magazines within one year of the effective date of the new law. Those who failed to do so and were discovered would be subject to substantial fines, weapon confiscation and other sanctions, depending on the circumstances. Moreover, the resale of such weapons by existing owners would be banned to prevent avoidance of the one-year licensing requirement.

129. As Appendix B demonstrates, the states, themselves, have sought to address this problem by enacting state-level restrictions on firearms. However, because it is necessary not only to address gun trafficking across state lines but also to ensure a solution that can protect the citizens of all fifty states, a national solution is required.

If a full ban on civilian ownership of these weapons or either of the above alternatives cannot be achieved, at a minimum the AWB, as enacted in 1994, should be restored and, if possible, strengthened, using as a starting point the S.150 bill introduced in January 2013 by Senator Feinstein and twenty-one other Senators. This fallback option would at least lower, to some degree, the potential acquisition and misuse of highly dangerous weapons, as the experiences reflected in Appendix A demonstrates.

Finally, even if Congress could not agree to any of the above options, it is critical that a ban be imposed on all existing and future private ownership and sale of LCMs (those having the ability to fire more than ten shots without reloading). A ban on bump stocks is necessary, but not sufficient, given the power of semiautomatics to fire hundreds of rounds from a single magazine. For this reason, the fewer firearms with the capacity for firing over ten shots from assault and semiautomatic rifles or pistols without reloading, the safer the public will be. As detailed by the Report to the National Institute of Justice and the U.S. Department of Justice, “the LCM ban has greater potential for reducing gun deaths and injuries than does the [AWB].”¹³⁰ This option, like the others, would also require sanctions to compel compliance.

CONCLUSION

There is no escaping the fact that assault rifles, semiautomatic rifles and pistols, and large capacity magazines, have been used and, unless regulated, will continue to be used to kill and maim innocent people and to destroy families. The evidence of such actions has been highlighted again and again, most recently by the Mandalay Bay massacre. The proposed options to remedy, or at least to mitigate, these dangers are designed to shield society from such horrific and unjustifiable results. These options would be consistent with Justice Scalia’s key ruling that the Second Amendment includes an “historical tradition of prohibiting the carrying of dangerous and unusual weapons,” and upholds laws that impose “conditions and qualifications on the commercial sale of arms.”¹³¹ Indeed, just this year, the Fourth Circuit found that banning possession of semiautomatic and assault weapons does not violate the Second Amendment.¹³² A new and improved as-

130. KOPER, *supra* note 56, at 80.

131. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008) (referencing a number of historical treatises).

132. *See supra* Section I.B (discussing *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc)).

sault weapons ban would increase the protection of our country from violence caused by the misuse of assault and semiautomatic weapons and large capacity magazines in a way that is wholly consistent with the Second Amendment.

**APPENDIX A:
PUBLISHED ACCOUNTS OF DEATHS AND IN-
JURIES CAUSED BY DANGEROUS FIREARMS***

Incident	Date	Type of Incident	Summary	Dead**	Injured	Weapons
Las Vegas, NV ¹	10/1/2017	Public	Largest mass shooting in U.S. history: Stephen Paddock, 64, opened fire into a 22,000-person crowd at a country music festival from the windows of a hotel room in the Mandalay Bay Resort & Casino.	59	527	23 firearms found in the suite, including a "bump stock" that enables gun fire of hundreds of rounds per minute, a .223 caliber weapon and a .308 caliber weapon. All are believed to have been purchased legally.
Antioch, TN ²	9/24/2017	Places of Worship	Emanuel Kidega Samson, 25, shot a woman and seven others before accidentally shooting himself.	1	7	.40-caliber and 9mm handguns.
Rockford, WA ³	9/13/2017	Schools & Colleges	Caleb Sharpe, 15, took these weapons without permission from his father and killed one student and opened fire at a group of others.	1	3	One AR-15 semi-automatic rifle and .32 caliber handgun.
Plano, TX ⁴	9/10/2017	Domestic	Spencer Hight, 32, shot his wife and seven other individuals at a football watching party in their home, before being killed by police.	8	0	.38 caliber handgun and an AR-15 rifle.
New York, NY ⁵	6/30/2017	Public	Dr. Henry Michael Bello, 45, a family physician, opened fire at Bronx-Lebanon Hospital Center before committing suicide.	1	6	AR-15 rifle.

* This list is current as of October 2017. The incidents documented here may not constitute an exhaustive list.

** Excluding shooters.

1. Alex Hortin, *The Las Vegas Shooter Modified a Dozen Rifles to Shoot Like Automatic Weapons*, WASH. POST (Oct. 3, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/10/02/video-from-las-vegas-suggests-automatic-gunfire-heres-what-makes-machine-guns-different/?utm_term=.623411d36671.

2. Joel Ebert, Natalie Allison & Anita Wadhvani, *Nashville church shooting: Masked gunman kills woman, injures seven in Antioch, police say*, TENNESSEAN (Sept. 24, 2017), <http://www.tennessean.com/story/news/2017/09/24/nashville-police-responding-shooting-antioch-church/697968001/>; Joe Sterling, Jamiel Lynch & Emanuella Grinberg, *New details emerge about suspected gunman in Tennessee church shooting*, CNN (Sept. 26, 2017), <http://www.cnn.com/2017/09/25/us/tennessee-shooting-probe/index.html>.

3. Sheriff Ozzie Knezovich, Spokane County Sheriff's Office, Press Conference on Freeman High School Shooting (Sept. 14, 2017), *available at SCSCO Holds Press Conference After Freeman High School Shooting*, K5 (Sept. 14, 2017, 1:44 PM), <http://www.king5.com/news/scso-holds-press-conference-after-freeman-high-school-shooting/474915215>; Chad Sokol, et al., *One Student Dead, Three in Hospital After Classmate Opens Fire at Freeman High School*, Spokesman-Review (Sept. 13, 2017, 8:49 PM), <http://www.spokesman.com/stories/2017/sep/13/shooting-reported-at-freeman-high-school/#/0>.

4. *Plano mass shooting: Details revealed about gunman Spencer Hight*, CBS (Sept. 14, 2017), <https://www.cbsnews.com/news/plano-mass-shooting-details-revealed-about-gunman-spencer-hight/>.

5. Sarah Maslin Nir, *Bronx Hospital Shooting: What We Know and What We Don't Know*, N.Y. TIMES (June 30, 2017), <https://www.nytimes.com/2017/06/30/nyregion/henry-bello-bronx-lebanon-hospital.html>.

Incident	Date	Type of Incident	Summary	Dead**	Injured	Weapons
Alexandria, VA ⁶	6/14/2017	Gov't Facilities	James T. Hodgkinson, 66, opened fire at a Congressional baseball practice in Virginia wounding Rep. Steve Scalise (R-Louis.) and four others. The gunman was killed in a gun battle with police.	0	5	9 mm handgun and SKS 7.62 caliber rifle.
San Francisco, CA ⁷	6/14/2017	Workplace	Jimmy Lam, 38, opened fire on his coworkers at UPS before killing himself.	3	5	MAC-10 pistol equipped with an extended 30-round magazine an automatic pistol.
Eaton Township, PA ⁸	6/8/2017	Workplace	Randy Stair, 24, opened fire on coworkers at Weis grocery before killing himself.	3	0	Two pistol grip pump action shotguns.
Orlando, FL ⁹	6/5/2017	Workplace	Former soldier John Robert Neumann Jr., 45, opened fire on his former colleagues and himself.	5	0	Semi-automatic handgun.
Fort Lauderdale, FL ¹⁰	1/6/2017	Public	Esteban Santiago-Ruiz, 26, opened fire at victims' heads at Fort Lauderdale-Hollywood International Airport, killing five, wounding six directly.	5	6	One Walther PPS 9mm semi-automatic pistol.
Burlington, WA ¹¹	9/24/2016	Malls	Arcan Cetin opened fire inside Cascade Mall in Burlington, Washington.	5	0	Ruger rifle with 25 round magazine.

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Incident	Date	Type of Incident	Summary	Dead**	Injured	Weapons
Baton Rouge, LA ¹²	7/17/2016	Law Enforcement	Gavin Long, a former Marine who served in Iraq, killed three police officers responding to a call about a man with a gun, and wounded three others. He was killed in a shoot-out with other officers responding to the scene.	3	3	Two assault-style rifles and one handgun.
Dallas, TX ¹³	7/7/2016	Law Enforcement	Micah Xavier Johnson, a 25-year-old Army veteran, targeted police at a peaceful Black Lives Matter protest, killing five officers, injuring nine others including two civilians. Law enforcement killed Johnson using a robot-delivered bomb.	5	9	Izhmash-Saiga high-powered variation of an AK-style military rifle, and semi-automatic handguns.
Orlando, FL ¹⁴	6/12/2016	Public	Omar Mateen, 29, attacked the Pulse nightclub in Orlando in the early morning hours of June 12. He was killed by law enforcement after a prolonged standoff.	49	58	A SIG-Sauer MCX assault rifle and a Glock 17 handgun.
Hesston, KS ¹⁵	2/25/2016	Workplace	Cedric L. Ford, who worked as a painter at a manufacturing company, shot victims from his car and at his workplace before being killed by police at the scene.	3	14	AK-47 assault rifle.

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Kalamazoo County, MI ¹⁶	2/20/2016	Workplace	Jason B. Dalton, a driver for Uber, apparently selected his victims randomly as he went on a rampage over several hours in three different locations. 30 or more rounds were fired.	6	2	9mm semi-automatic handgun.
San Bernardino, CA ¹⁷	12/2/2015	Workplace	Syed Rizwan Farook left a Christmas party held at Inland Regional Center, later returning with Tashfeen Malik. The two opened fire, killing 14 and wounding 21, ten critically. The two were later killed by police as they fled in an SUV.	14	21	Two .223 assault rifles and two semi-automatic pistols were used in the attack. In the suspects' car were an additional 1,400 rounds for the rifles and 200 for the handguns.
Colorado Springs, CO ¹⁸	11/27/2015	Public	Robert Lewis Dear, 57, shot and killed a police officer and two citizens when he opened fire at a Planned Parenthood health clinic in Colorado Springs, Colorado. Nine others were wounded. Dear was arrested after an hours-long standoff with police.	3	9	One AK-47 style rifle and an unspecified number of additional rifles and handguns.
Roseburg, OR ¹⁹	10/1/2015	Schools & Colleges	26-year-old Chris Harper Mercer opened fire at Umpqua Community College in southwest Oregon. The gunman committed suicide after being wounded in a shootout with police.	9	7	One Glock 9mm pistol and one .40-caliber Smith & Wesson.

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Chattanooga, TN ²⁰	7/16/2015	Military Facilities	Mohammad Youssuf Abdulazez, 24, a naturalized US citizen, opened fire at a Naval reserve center, and then at a military recruitment office where he killed four Marines and wounded a Navy service member, a police officer and another service member. He was then fatally shot by law enforcement officers.	4	3	2 rifles including an AK-47-style weapon and 30-round magazines; 1 handgun.
Charleston, SC ²¹	6/17/2015	Places of Worship	Dylann Storm Roof, 21, shot and killed 9 people in a racially-motivated attack after opening fire at the Emanuel AME Church in Charleston, South Carolina.	9	0	.45-caliber Glock handgun.
Santa Barbara, CA ²²	5/23/2014	Schools & Colleges	Elliot Rodger, 22, shot three people to death in the college town of Isla Vista near the University of California, Santa Barbara. He also shot others as he drove around town. He committed suicide in his car as police closed in.	3	7	One SIG-Sauer P226 9mm semi-automatic pistol.
Washington, D.C. ²³	9/16/2013	Military Facilities	Aaron Alexis, a military veteran and contractor from Texas, opened fire in the Navy installation, killing 12 people and wounding 3 (though 8 total suffered injuries related to the shooting) before being shot dead by police.	12	8	Remington pump-action shotgun, 2 boxes of shells; also a .45-caliber handgun.

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Incident	Date	Type of Incident	Summary	Dead**	Injured	Weapons
Hialeah, FL ²⁴	7/26/2013	Domestic	Pedro Vargas, 42, set fire to his apartment, killed six people in the complex, and held another two hostages at gunpoint before a SWAT team fatally shot him.	6	0	Glock 17 handgun.
Santa Monica, CA ²⁵	6/7/2013	Domestic	John Zawahri, 23, armed with an assault rifle and high-capacity magazines, killed his brother and father at home and then headed to Santa Monica College, where he was eventually killed by police.	5	3	.223-caliber assault rifle and high capacity magazines holding 30 rounds each.
Federal Way, WA ²⁶	4/21/2013	Domestic	Dennis Clark III, 27, shot and killed his girlfriend in their shared apartment, and then shot two witnesses in the building's parking lot and a victim in another apartment, before being killed by police.	4	0	.40-Caliber Taurus semi-automatic pistol and pistol grip Mossberg 500 pump shotgun with a four-round saddle.
Newtown, CT ²⁷	12/14/2012	Schools & Colleges	Adam Lanza, 20, shot his mother dead at their home then drove to Sandy Hook Elementary school. He forced his way inside and opened fire, killing 20 children and six adults before committing suicide.	26	2	A high-powered semi-automatic Bushmaster rifle.

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Minneapolis, MN ²⁸	9/27/2012	Workplace	Andrew Engeldinger, 36, upon learning he was being fired, went on a shooting rampage, killing the business owner, three fellow employees, and a UPS driver. He then killed himself.	5	1	One 9mm Glock semi-automatic handgun.
Oak Creek, WI ²⁹	8/5/2012	Places of Worship	U.S. Army veteran Wade Michael Page, 40, opened fire in a Sikh gurdwara before he died from a self-inflicted gunshot during a shootout with police.	6	3	One Springfield Armory XDM with three 19-round magazines.
Aurora, CO ³⁰	7/20/2012	Public	James Holmes, 24, opened fire in a movie theater and was later arrested outside.	12	58	One 12-gauge Remington 870 Express Tactical shotgun, One Smith & Wesson M&P 15 semi-automatic rifle with a 100-round drum magazine, two Glock 22 .40 caliber handguns.
Seattle, WA ³¹	5/20/2012	Public	Ian Stawicki, 40, killed four patrons at a cafe, and another during a carjacking nearby, then shot himself as police closed in. (He died later that day in a Seattle hospital.)	5	1	Two .45 caliber semi-automatic handguns.
Oakland, CA ³²	4/2/2012	Schools & Colleges	One L. Goh, 43, a former student, opened fire in a nursing classroom. He fled the scene by car and was arrested nearby a few hours later.	7	3	One semi-automatic handgun.

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Norcross, GA ³³	2/22/2012	Workplace	Jeong Soo Paek, 59, returned to a Korean spa from which he'd been kicked out after an altercation. He gunned down two of his sisters and their husbands before committing suicide.	4	0	One .45 caliber handgun.
Seal Beach, CA ³⁴	10/14/2011	Public	Scott Evans Dekraai, 42, opened fire inside a hair salon.	8	1	Springfield 9mm, a Smith & Wesson .44 Magnum, and H&K .45-caliber handgun.
Carson City, NV ³⁵	9/6/2011	Public	Eduardo Sencion, 32, opened fire at an International House of Pancakes restaurant and later died from a self-inflicted gunshot wound.	4	7	One semi-automatic AK-47 and one Norinco MAK-90 (which had been illegally modified to a fully-automatic weapon), and two handguns.
Tucson, AZ ³⁶	1/8/2011	Gov't Facilities	Jared Loughner, 22, opened fire outside a Safeway during a constituent meeting with Congresswoman Gabrielle Giffords (D-Ariz.) before he was subdued by bystanders and arrested.	6	13	One Glock 19 semi-automatic handgun.

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Manchester, CT ³⁷	8/3/2010	Workplace	Omar S. Thornton shot up his Hartford Beer Distributor workplace after facing disciplinary issues and alleging racial discrimination. Thornton then committed suicide.	8	2	Two 9mm handguns.
Fort Hood, TX ³⁸	11/5/2009	Military Facilities	Army psychiatrist Nidal Malik Hasan opened fire on an Army base. Hasan was injured during the attack and later arrested. Investigators recovered 214 rounds expended by Hasan at the shooting scene.	13	32	FN Five-Seven handgun, easy to fire rapidly with 5.7 X 28mm ammunition.
Binghamton, NY ³⁹	4/3/2009	Gov't Facilities	Jiverly Wong, 41, fired 98 shots from two handguns in about one minute at an American Civic Association center for immigrants before committing suicide.	13	4	45-caliber Beretta and a 9mm Beretta.
DeKalb, IL ⁴⁰	2/14/2008	Schools & Colleges	Steven Kazmierczak, 27, opened fire in a lecture hall, then shot and killed himself before police arrived.	5	16	One Glock 9mm semi-automatic pistol; one Remington shotgun; one Hi Point 380; one SIG Sauer 9mm. shotgun.
Omaha, NE ⁴¹	12/5/2007	Malls	Robert A. Hawkins, 19, opened fire inside Westroads Mall before committing suicide.	8	5	One AK-47 assault rifle used to spray 30 rounds.

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39. Manny Fernandez & Nate Schweber, *An Eldest Son's Failure and Paranoia, Unspoken Until a Sudden, Final Barrage*, N.Y. TIMES, Apr. 11, 2009, at A23; Robert McFadden, *Upstate Gunman Kills 13 at Citizenship Class*, N.Y. TIMES, Apr. 3, 2009, at A1.

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41. Renee Montagne, *Omaha Teen's Shooting Rampage Kills 8, Himself*, NPR (Dec. 6, 2007, 6:00 AM), <https://www.npr.org/templates/story/story.php?storyId=16962485>; Nicholas Riccardi & DeeDee Correll, *Mall Victims Were Just Ordinary Folks*, L.A. TIMES (Dec. 7, 2007), <http://www.latimes.com/nation/la-na-mall7dec07-story.html>; Matthew Weaver, *The Nebraska Gunman: Robert Hawkins*, GUARDIAN (Dec. 6, 2007, 05:29 AM), <https://www.theguardian.com/world/2007/dec/06/usa.usgunviolence2>.

Incident	Date	Type of Incident	Summary	Dead**	Injured	Weapons
Crandon, WI ⁴²	10/7/2007	Domestic	Off-duty sheriff's deputy Tyler Peterson, 20, opened fire inside an apartment after an argument at a homecoming party. He fled the scene and later committed suicide.	6	0	One assault rifle.
Blacksburg, VA ⁴³	4/16/2007	Schools & Colleges	Virginia Tech student Seung-Hui Cho, 23, opened fire on his school's campus killing professors and students before committing suicide.	32	24	Two semi-automatic handguns: one Glock 9mm and one Walther .22 caliber pistol.
Lancaster County, PA ⁴⁴	10/2/2006	Schools & Colleges	Charles Carl Roberts, 32, shot 10 young girls in a one-room schoolhouse in Bart Township, killing 5, before taking his own life.	5	7	One semi-automatic handgun, one rifle, one shotgun.
Seattle, WA ⁴⁵	3/25/2006	Public	Kyle Aaron Huff, 28, opened fire at a rave after-party in the Capitol Hill neighborhood of Seattle before committing suicide.	6	0	One 12-gauge pistol grip shotgun and several loaded bandoliers.
Goleta, CA ⁴⁶	1/30/2006	Workplace	Former postal worker Jennifer Sanmarco, 44, shot dead a former neighbor then drove to the mail processing plant where she used to work. Inside, she opened fire, killing five employees before committing suicide.	5	0	15 round, 9mm Smith & Wesson model 915.

42. Heather Schaefer, *Crandon families make final argument*, NORTHWOOD RIVER NEWS (Apr. 5, 2011), <http://www.rivernewsonline.com/main.asp?SectionID=6&SubSectionID=47&ArticleID=368>.

43. Christine Hauser & Ian Urbina, *Virginia Tech Struggles to Return to Normal*, N.Y. TIMES, Apr. 24, 2007; *Mental Health Reporting*, GIFFORDS LAW CTR., <http://smartgunlaws.org/mental-health-reporting-policy-summary/> (last visited Nov. 14, 2017); Ned Potter, et al., *Killer's Note: 'You Caused Me to Do This,'* ABCNEWS (Apr. 17, 2007), <http://abcnews.go.com/US/story?id=3048108&page=1>.

44. Nickel Mines, *Gunman Reportedly Bent on "Revenge" Kills Girls, Self at Amish School*, FOX NEWS (Oct. 3, 2006), <http://www.foxnews.com/story/2006/10/03/gunman-reportedly-bent-on-revenge-kills-girls-self-at-amish-school.html>; Cal Thomas, *Not Even Schools Are Safe Places*, TIMES NEWS, Oct. 7, 2006, at 6A; Nickel Mines, *5th Girl Dies After Amish Schoolhouse Shooting*, NBCNEWS.COM (last updated Oct. 3, 2006, 7:13 AM), http://www.nbcnews.com/id/15105305/ns/us_news-crime_and_courts/t/th-girl-dies-after-amish-schoolhouse-shooting/#.WguqGbYrInd.

45. Maria Newman, *Seattle Police and Partygoers Still Puzzle Over Attack*, N.Y. TIMES (Mar. 28, 2006), <http://www.nytimes.com/2006/03/28/us/seattle-police-and-partygoers-still-puzzle-over-attack.html>.

46. Randal C. Archibold, *Ex-Employee Kills 5 Others and Herself at California Postal Plant*, N.Y. TIMES (Feb. 1, 2006), <http://www.nytimes.com/2006/02/01/us/health/exemployee-kills-5-others-and-herself-at-california-postal-plant.html>; Associated Press, *Postal Killer Believed She Was Target of a Plot*, MSNBC, http://www.msnbc.msn.com/id/11167920/ns/us_news-crime_and_courts/t/postal-killer-believed-she-was-target-plot/#.U1xy7kLwTE (last updated Feb. 3, 2006, 8:42 PM).

Incident	Date	Type of Incident	Summary	Dead**	Injured	Weapons
Red Lake, MN ⁴⁷	3/21/2005	Schools & Colleges	Jeffrey Weise, 16, murdered his grandfather, who was a police officer, and his grandfather's girlfriend. Weise then drove his grandfather's squad car to Red Lake Senior High School and opened fire on the reservation campus, killing another seven people before committing suicide.	9	5	Two semi-automatic handguns and one shotgun.
Brookfield, WI ⁴⁸	3/12/2005	Places of Worship	Living Church of God member Terry Michael Ratzmann, 44, opened fire at a church meeting at a Sheraton hotel before committing suicide.	7	4	One 9mm handgun which fired 22 rounds.
Columbus, OH ⁴⁹	12/8/2004	Public	Nathan Gale, 25, gunned down former Pantera guitarist Dimebag Darrell and three others at a Damageplan show before being killed by police.	4	2	One Beretta 9 mm semi-automatic handgun.
Meridian, MS ⁵⁰	7/8/2003	Workplace	Assembly line worker Doug Williams, 48, opened fire at his Lockheed Martin workplace in a racially motivated attack before committing suicide.	6	9	One semi-automatic rifle, and one 12-gauge shotgun.
Wakefield, MA ⁵¹	12/26/2000	Workplace	Michael McDermott, 42, opened fire on co-workers at Edgewater Technology and was later arrested.	7	0	One AK-47 assault rifle (49 shots), shotgun (6 shots) and semi-automatic pistol.

47. FBI: *School Rampage Apparently Planned*, Fox News (Mar. 23, 2005), <http://www.foxnews.com/story/2005/03/23/fbi-school-rampage-apparently-planned.html>.

48. Chris Hawke, *Job, Sermon Upset Church Gunman*, CBS News (Mar. 12, 2005, 5:26 PM), <https://www.cbsnews.com/news/job-sermon-upset-church-gunman/>; Associated Press, *Cops: Church Gunman Angry Over Sermon*, Fox News (Mar. 14, 2005), <http://www.foxnews.com/story/2005/03/14/cops-church-gunman-angry-over-sermon.html>.

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Incident	Date	Type of Incident	Summary	Dead**	Injured	Weapons
Tampa, FL ⁵²	12/30/1999	Workplace	Hotel employee Silvio Leyva, 36, gunned down four coworkers at the Radisson Bay Harbor Inn before killing a woman outside.	5	3	Lorcin 9mm pistol and a Charter Arms revolver.
Honolulu, HI ⁵³	11/2/1999	Workplace	Byran Koji Uyesugi, 40, a Xerox service technician, opened fire inside the building with a 9mm Glock	7	0	One 9mm Glock 17 model.
Fort Worth, TX ⁵⁴	9/15/1999	Places of Worship	Larry Gene Ashbrook, 47, opened fire inside the Wedgwood Baptist Church during a prayer rally before committing suicide.	7	7	Ruger P85 9mm pistol and .380 pistol.
Atlanta, GA ⁵⁵	7/29/1999	Workplace	Day trader Mark O. Barton, 44, who had recently lost a substantial sum of money, went on a shooting spree at two day-trading firms.	9	13	A Glock 17 9mm pistol and a Colt 1911A1.45 pistol.
Littleton, CO ⁵⁶	4/20/1999	Schools & Colleges	Eric Harris, 18, and Dylan Klebold, 17, opened fire throughout Columbine High School before committing suicide.	13	24	One semi-automatic assault handgun, one assault rifle, and two shotguns.
Springfield, OR ⁵⁷	5/21/1998	Schools & Colleges	After he was expelled for having a gun in his locker, Kipland P. Kinkel, 15, a freshman at Thurston High, killed his parents at home and two students at school.	4	25	.22 caliber semi-automatic Ruger rifle with a 50-round clip, a Glock 9mm pistol and a .22 caliber Ruger pistol.

Shootings, 1963 to 2001, VIOLENCE POL'Y CTR., <http://www.vpc.org/studies/wgun001226.htm> (last visited Nov. 17, 2017).

52. *Where'd They Get Their Guns?*, *supra* note 51.

53. *Id.*

54. *Id.*; Jim Yardley, *Death in a Church: The Overview; With Questions of 'Why' Unanswered*, *Fort Worth Mourns*, N.Y. TIMES (Sept. 18, 1999), <http://www.nytimes.com/1999/09/18/us/death-in-a-church-the-overview-with-question-of-why-unanswered-fort-worth-mourns.html>.

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Incident	Date	Type of Incident	Summary	Dead**	Injured	Weapons
Jonesboro, AK ⁵⁸	3/24/1998	Schools & Colleges	Mitchell Scott Johnson, 13, and Andrew Douglas Golden, 11, two juveniles, ambushed students and teachers as they left the school. They were apprehended by police at the scene.	5	10	One Remington 742 .30-6 rifle; a .30 M1 Carbine replica; a Smith & Wesson .38 revolver; a Ruger Security Six .357; a Double Deuce Buddie .22 two-shot derringer; a Star .380 pistol; a FIE .380 pistol; a Davis Industries .38 two-shot derringer; and a Charter Arms .38 revolver.
Newington, CT ⁵⁹	3/6/1998	Workplace	Lottery worker Matthew Beck, 35, gunned down four bosses over a salary dispute before committing suicide.	4	0	One Glock 9mm.
Orange, CA ⁶⁰	12/18/1997	Workplace	Former Caltrans employee Arturo Reyes Torres, 41, opened fire at a maintenance yard after he was dropped for allegedly selling government materials he'd stolen from work. He was killed by police.	4	2	7.62mm assault rifle.
Aiken, SC ⁶¹	9/15/1997	Workplace	Ex-con Hastings Arthur Wise, 43, opened fire at the R.E. Phelon Company in retaliation for being fired after an argument with a supervisor.	4	3	One 9mm semi-automatic pistol.
Fort Lauderdale, FL ⁶²	2/9/1996	Workplace	Fired city park employee Clifton McCree, 41, opened fire on former coworkers he called "racist devils" inside their municipal trailer.	5	1	One Glock 9mm.

58. *Where'd They Get Their Guns?*, *supra* note 51.

59. Jonathan Rabinovitz, *Rampage in Connecticut: The Overview; Connecticut Lottery Worker Kills 4 Bosses, Then Himself*, N.Y. TIMES (Mar. 7, 1998), <http://www.nytimes.com/1998/03/07/nyregion/rampage-connecticut-overview-connecticut-lottery-worker-kills-4-bosses-then.html>.

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61. *Victims: Wise Had Targets*, AUGUSTA CHRON. (Sep. 18, 1997), http://chronicle.augusta.com/stories/1997/09/18/met_214833.shtml; *Where'd They Get Their Guns?*, *supra* note 51.

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Incident	Date	Type of Incident	Summary	Dead**	Injured	Weapons
Corpus Christi, TX ⁶³	4/3/1995	Workplace	Disgruntled former metallurgist James Daniel Simpson, 28, opened fire throughout the Walter Rossler Company where he had worked.	5	0	One 9mm semi-automatic pistol and one .32-caliber revolver.
Fairchild Air Force Base, WA ⁶⁴	6/20/1994	Military Facilities	Former airman Dean A. Mellberg, 20, opened fire inside a hospital at the Fairchild Air Force Base before he was shot dead by a military police officer outside.	5	23	One MAK-90 semi-automatic assault rifle, equipped with a 75-round drum.
Garden City, NY ⁶⁵	12/7/1993	Public	Colin Ferguson, 35, opened fire on an eastbound Long Island Rail Road train.	6	19	One Ruger P89 9-millimeter handgun and 160 rounds of additional ammunition.
Watkins Glen, NY ⁶⁶	10/15/1992	Gov't Facilities	John T. Miller, 50, killed four child-support workers in a county office building before turning the gun on himself.	4	0	9mm semi-automatic handgun.
Killeen, TX ⁶⁷	10/16/1991	Public	George Hennard, 35, drove his pickup truck into a Luby's cafeteria and opened fire before committing suicide.	23	At least 20	Two semi-automatic 9mm pistols: one Gloc 17 and one Ruger P-89.
Louisville, KY ⁶⁸	9/14/1989	Workplace	Joseph T. Wesbecker, 47, gunned down seven people at his former workplace before committing suicide.	7	13	AK-47 semi-automatic rifle, 2 semi-automatic MAC-11 pistols and a SIG-Sauer 9mm pistol.

63. 6 Die in Texas Office Shooting, N.Y. TIMES (Apr. 4, 1995), <http://www.nytimes.com/1995/04/04/us/6-die-in-texas-office-shooting.html>.

64. Doug Conner & Louis Sahagun, *Air Force Ousted Gunman Over Emotional Problems*, L.A. TIMES (June 22, 1994), http://articles.latimes.com/1994-06-22/news/mn-7137_1_air-force; *An Airman's Revenge—5 Minutes of Terror*, N.Y. TIMES (June 22, 1994), <http://www.nytimes.com/1994/06/22/us/an-airman-s-revenge-5-minutes-of-terror.html>.

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66. Sam Dillon, *Shooting Followed Tougher Efforts to Collect Child Support*, N.Y. TIMES (Oct. 17, 1992), <http://www.nytimes.com/1992/10/17/nyregion/shooting-followed-tougher-efforts-to-collect-child-support.html>; Alessandra Stanley, *Gunman Kills 4 Who Collected Child Payments*, N.Y. TIMES (Oct. 16, 1992), <http://www.nytimes.com/1992/10/16/nyregion/gunman-kills-4-who-collected-child-payments.html?pagewanted=all&src=PM>; *Watkins Glen Killings Called Planned*, N.Y. TIMES (Oct. 24, 1992), <http://www.nytimes.com/1992/10/24/nyregion/watkins-glen-killings-called-planned.html>.

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68. Ronald Smothers, *Disturbed Past of Killer of 7 Is Unraveled*, N.Y. TIMES (Sept. 16, 1989), <http://www.nytimes.com/1989/09/16/us/disturbed-past-of-killer-of-7-is-unraveled.html?pagewanted=all&src=PM>.

Incident	Date	Type of Incident	Summary	Dead**	Injured	Weapons
Stockton, CA ⁶⁹	1/17/1989	Schools & Colleges	Patrick Purdy, 26, an alcoholic with a police record, launched an assault at Cleveland Elementary School, where many young Southeast Asian immigrants were enrolled. Purdy killed himself with a shot to the head.	5	29	A semi-automatic AK-47 rifle loaded with 75 bullets.
Edmond, OK ⁷⁰	8/20/1986	Workplace	Postal worker Patrick Sherrill, 44, opened fire at a post office before committing suicide.	14	6	Three pistols.
San Ysidro, CA ⁷¹	7/18/1984	Public	James Oliver Huberty, 41, opened fire in a McDonald's restaurant before he was shot dead by a police officer.	21	19	One 9mm Uzi model A Carbine, one 12-gauge shotgun, and one Browning P-35 HiPower 9mm pistol.
Dallas, TX ⁷²	6/29/1984	Public	Abdelkrim Belachheb, 39, opened fire at an upscale nightclub after a woman rejected his advances. He was later arrested.	6	1	One 9mm handgun.
TOTAL			606	1120		

69. Rogers Phillips, *Purdy Recalled as Bigot and "Sick, Sick Man"*, RECORDNET.COM (Jan. 18, 2009, 12:01 AM), http://www.recordnet.com/article/20090118/A_NEWS/901170304.; Robert S. Tokunaga, *Final Months of Patrick Purdy*, LODI NEWS-SENTINEL, Oct. 12, 1989, at 2; *Slaughter in A School Yard*, TIME (June 24, 2001), <http://content.time.com/time/magazine/article/0,9171,151105,00.html>.

70. Jacob V. Lamar, Jr., *"Crazy Pat's" Revenge*, TIME (June 24, 2001), <http://content.time.com/time/magazine/article/0,9171,144859,00.html>; William Robbins, *The Loner: From Shy Football Player to "Crazy Pat"*, N.Y. TIMES (Aug. 22, 1986), <http://www.nytimes.com/1986/08/22/us/the-loner-from-shy-football-player-to-crazy-pat.html>.

71. *Where'd They Get Their Guns?*, *supra* note 51.

72. GARY M. LAVERGNE, *WORSE THAN DEATH: THE DALLAS NIGHTCLUB MURDERS AND THE TEXAS MULTIPLE MURDER LAW* (2003) (ebook); *6 Die in Dallas Club as Enraged Man Fires Wildly*, N.Y. TIMES (June 30, 1984), <http://www.nytimes.com/1984/06/30/us/6-die-in-dallas-club-as-enraged-man-fires-wildly.html>.

APPENDIX B

I.

LOWER COURT APPROVALS OF GUN REGULATIONS POST- *HELLER*

A. *State and Federal Courts within the First Circuit*

1. *Morin v. Leahy*, 862 F.3d 123 (1st Cir. 2017)

- Held: Massachusetts law prohibiting issuance of a Class A license to persons convicted of use or possession of weapons or ammunition did not violate the Second Amendment right to possess a firearm within one's home, because those denied may still apply for an FID card and a license to purchase, which together would permit possession in and delivery to the home. *Id.* at 127.
- Level of Scrutiny: Unspecified. *See id.* at 127–28 (no clear violation of the constitutional right to possess a firearm in appellant's home and no standing for an as-applied challenge).

2. *United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009)

- Held: Federal law banning juvenile possession of handguns, with exceptions such as for self- and other-defense in the home, national guard duty, and hunting, did not violate the Second Amendment. *Id.* at 16.
- Level of Scrutiny: Unspecified. Court refuses to use a particular standard, clarifying only that scrutiny should be stricter than rational review. *Id.* at 11 n.4 (“The *Heller* Court did not identify a standard of review for regulations that restrict Second Amendment rights, apart from rejecting rational basis review and ‘interest-balancing.’”).

3. *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011)

- Held: Upheld life prohibition of persons convicted of domestic violence from possessing firearms. *Id.* at 25–26.
- Level of Scrutiny: Unspecified. Court refuses to use term “intermediate scrutiny,” instead requiring “some form of ‘strong showing,’ necessitating a substantial relationship between the restriction and an important governmental objective.” *Id.* at 25 (quoting *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010)).

4. *Williams v. Puerto Rico*, 910 F. Supp. 2d 386 (D.P.R. 2012)
 - Held: Statute requiring an individual provide payments and documentation regarding background, health, and character in order to obtain a weapons license did not violate the Second Amendment. *Id.* at 398.
 - Level of Scrutiny: Intermediate. *Id.* at 397.
5. *Commonwealth v. McGowan*, 982 N.E.2d 495 (Mass. 2013)
 - Held: A statute allowing a licensed gun owner to keep a loaded firearm in his home for self-defense and preventing those who are unlicensed from gaining access to guns was constitutional. *Id.* at 503.
 - Level of Scrutiny: Rational basis, claiming the statute falls outside scope of Second Amendment. *Id.*
6. *Chief of Police v. Holden*, 26 N.E.3d 715 (Mass. 2015)
 - Held: A “suitable person” standard for eligibility to obtain a concealed weapon license did not violate the Second Amendment. *Id.* at 724.
 - Level of Scrutiny: Rational basis. *Id.* at 723.
7. *Gendreau v. Canario*, 188 F. Supp. 3d 140 (D.R.I. 2016).
 - Held: A town’s requirement that there be proof of a need for a concealed weapon permit did not violate the Second Amendment. *Id.* at 144.
 - Level of Scrutiny: None specified because statute falls outside scope of Second Amendment and is presumptively lawful. *Id.* at 144–45 (quoting *Powell v. Tompkins*, 783 F3d 332, 347 (1st Cir. 2015)) (“[F]irearm possession regulation in ‘the public sphere context’ does not ‘even reach the safe haven of the Second Amendment.’”)

B. State and Federal Courts within the Second Circuit

1. *United States v. Decastro*, 682 F.3d 160 (2d Cir. 2012)
 - Held: The prohibition against transporting firearms from outside of a state to an in-state residence did not substantially burden the defendant’s Second Amendment right to own a firearm for defense of the home. *Id.*
 - Level of Scrutiny: Rational basis. *Id.* at 169.

2. *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012)
 - Held: New York law requiring a showing of “proper cause” as a condition to obtain a full-carry concealed handgun license did not violate the Second Amendment. *Id.* at 97–100.
 - Level of Scrutiny: Intermediate. *Id.* at 96 (“The proper cause requirement passes constitutional muster if it is substantially related to the achievement of an important governmental interest.”)
3. *Kwang v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013)
 - Held: City’s \$340 residential handgun license fee did not violate Second Amendment. *Id.* at 168–69.
 - Level of Scrutiny: Intermediate. *Id.* at 168. However, the court notes, without holding, that heightened scrutiny may not be warranted. *Id.* at 167 (quoting *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012)) (“[W]here the burden imposed by a regulation in firearms is a ‘marginal, incremental or even appreciable restraint on the right to keep and bear arms,’ it will not be subject to heightened scrutiny.”).
4. *Aron v. Becker*, 48 F. Supp. 3d 347 (N.D.N.Y. 2014)
 - Held: New York statute allowing an officer to deny an application for a pistol permit “for good cause” and requiring good moral character, did not violate the Second Amendment. *Id.* at 372.
 - Level of Scrutiny: Intermediate. *Id.* at 371 (noting that the regulations “do not present a substantial burden on the core protection of self-defense inside hearth and home for law-abiding, responsible citizens”).
5. *N.Y. St. Rifle & Pistol Ass’n v. City of New York*, 86 F. Supp. 3d 249 (S.D.N.Y. 2015)
 - Held: New York City law requiring handguns transported to and from shooting ranges be unloaded, in a locked container, with ammunition carried separately, did not violate the Second Amendment. *See id.* at 262–63
 - Level of Scrutiny: Intermediate. *Id.* at 259–60.

6. N.Y. St. Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242 (2d Cir. 2015), cert. denied sub nom. Shew v. Malloy, 136 S. Ct. 2486 (2016) (*mem.*)
 - Held: The New York prohibition of private ownership of semiautomatic assault rifles with military style features and large-capacity magazines did not violate the Second Amendment. *Id.* at 261–63.
 - Level of Scrutiny: Intermediate. *Id.* at 260. The court noted that heightened scrutiny was warranted, because the laws “impose a substantial burden on Second Amendment rights” but strict scrutiny was not necessary because the burden “is real, but is not severe.” *Id.* at 259–60.
7. New York v. Perkins, 62 A.D.3d 1160 (2d Cir. 2009)
 - Held: Statute permitting conviction for criminal possession and use of a firearm in an assault on a victim by a defendant who was neither in his own home nor had a valid pistol permit did not violate the Second Amendment. *Id.* at 1161.
 - Level of Scrutiny: Rational basis. *Id.* (“[The Second Amendment right to bear arms] is not absolute and may be limited by reasonable governmental restrictions.”).
8. Knight v. Bratton, 48 Misc. 3d 536 (N.Y. Sup. Ct. 2015)
 - Held: Licensing requirements regarding handguns did not violate the Second Amendment, and therefore did not violate N.Y. State Civil Rights Law § 4, which conferred the right to bear arms. *Id.* at 540.
 - Level of Scrutiny: Intermediate. *Id.* (citing *Matter of Delgado v. Kelly*, 127 A.D.3d 644, 644 (N.Y. Sup. Ct. 2015)).
9. (*per curiam*)
 - Held: Statutory restrictions on the right to bear arms of those whom the trial court had adjudged to pose a risk of imminent personal injury to himself or others did not violate the Second Amendment. *Id.* at 524.
 - Level of Scrutiny: None, as prohibited conduct was outside the scope of the Second Amendment. *Id.* (using two-pronged approach from *Heller*).

C. *State and Federal Courts within the Third Circuit*

1. *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010)
 - Held: State prohibition on the possession of firearms with “removed, obliterated, or altered” serial numbers did not violate the Second Amendment. *Id.* at 93, 98–99.
 - Level of Scrutiny: Intermediate. *Id.* at 96–97.
2. *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013)
 - Held: A New Jersey law requiring permit applicants to demonstrate a “justifiable need” to carry a handgun for self-defense, first to police and then to a Superior Court, did not violate the Second Amendment. *Id.* at 427, 429.
 - Level of Scrutiny: None, as prohibited conduct was outside the scope of the Second Amendment. *Id.* (using two-step approach under *Marzzarella*). But, the court engages in intermediate scrutiny as a “second, independent basis for concluding that the standard is constitutional.” *Id.* at 430.
3. *United States v. Huet*, 665 F.3d 588 (3d Cir. 2012)
 - Held: District Court dismissal of an indictment for aiding possession of a firearm by a convicted felon was reversed and remanded, in part because the court erroneously ruled that the indictment violated defendant’s Second Amendment right to bear arms. *Id.* at 601.
 - Level of Scrutiny: None, as prohibited conduct was outside the scope of the Second Amendment. *Id.* at 602 (using two-step approach under *Marzzarella*).
4. *Pennsylvania v. McKown*, 79 A.3d 678 (Pa. Super. Ct. 2013)
 - Held: Pennsylvania’s licensing requirement for a resident who wanted to carry a concealed weapon in the state did not violate the Second Amendment. *Id.* at 689–91.
 - Level of Scrutiny: Intermediate. *Id.* at 689.
5. *In re Wheeler*, 81 A.3d 728 (N.J. Super. Ct. App. Div. 2013)
 - Held: The requirement that “justifiable need” be demonstrated to support issuance of permit to carry a handgun for lawful defensive use in public places did not violate the Second Amendment. *Id.* at 756–57.
 - Level of Scrutiny: Intermediate. *Id.* at 753–55.

D. State and Federal Courts within the Fourth Circuit

1. *United States v. Smith*, 742 *F. Supp. 2d* 855 (S.D. W. Va. 2010)
 - Held: Prohibiting domestic violence misdemeanants from firearm possession per 18 U.S.C. § 922(g)(9) did not violate the Second Amendment. *Id.* at 870.
 - Level of Scrutiny: Intermediate. *Id.* at 863–67.
2. *United States v. Tooley*, 468 *F. App'x* 357 (4th Cir. 2012)
 - Held: Prohibiting persons convicted of domestic violence misdemeanors from possessing guns for life did not violate the Second Amendment. *Id.* at 359.
 - Level of Scrutiny: Intermediate. *Id.* at 359.
3. *United States v. Masciandaro*, 638 *F.3d* 458 (4th Cir. 2011)
 - Held: Regulation prohibiting the carrying or possession of a loaded handgun in a motor vehicle in a national park did not violate the Second Amendment. *Id.* at 473–74.
 - Level of Scrutiny: Intermediate. *Id.* at 469.
4. *United States v. Staten*, 666 *F.3d* 154 (4th Cir. 2011)
 - Held: Prohibition against possession of firearms for life as applied to persons convicted of domestic violence misdemeanors did not violate Second Amendment. *Id.* at 168.
 - Level of Scrutiny: Intermediate. *Id.* at 159–60.
5. *Woollard v. Gallagher*, 712 *F.3d* 865 (4th Cir. 2013)
 - Held: Maryland's requirement that an applicant demonstrate "good and substantial reason" for the issuance of a handgun permit did not violate the Second Amendment. *Id.* at 876, 882.
 - Level of Scrutiny: Intermediate. *Id.* at 876.
6. *United States v. Hosford*, 843 *F.3d* 161 (4th Cir. 2016)
 - Held: Statutes regulating the commercial sale of firearms by requiring a license did not violate the Second Amendment. *Id.* at 169–70.
 - Level of Scrutiny: Intermediate. *Id.* at 168.

7. *Williams v. State*, 10 A.3d 1167 (Md. 2011)

- Held: A statute that prohibits wearing, carrying, or transporting a handgun without a permit and outside one's home did not violate the Second Amendment. *Id.* at 1169, 1178.
- Level of Scrutiny: None, as the prohibited conduct was outside the scope of the Second Amendment. *Id.* at 1178.

8. *United States v. Chester*, 514 F. App'x 393 (4th Cir. 2013)

- Held: A statute that prohibits possession of firearms after having been convicted of a misdemeanor crime of domestic violence did not violate the Second Amendment. *Id.* at 395.
- Level of Scrutiny: Intermediate. *Id.* at 394–95.

9. *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017), *cert. denied*, 2017 WL 3173130 (U.S. Nov. 27, 2017)

- Held: A Maryland statute that banned law-abiding citizens from possessing semi-automatic weapons and large-capacity detachable magazines did not violate the Second Amendment.
- Level of Scrutiny: Intermediate. *Id.* at 121.

E. State and Federal Courts within the Fifth Circuit

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

- Held: Federal law prohibiting 18–20 year-old adults from possessing a gun did not violate the Second Amendment. *Id.* at 207–11.
- Level of Scrutiny: Intermediate. *Id.* at 205–07.

F. State and Federal Courts within the Sixth Circuit

1. *United States v. Miller*, 604 F. Supp. 2d 1162 (W.D. Tenn. 2009)

- Held: Statute prohibiting possession of guns by convicted felons did not violate the Second Amendment. *Id.* at 1172 (finding that “laws barring possession of firearms by felons are substantially related to crime prevention”).
- Level of Scrutiny: Intermediate. *Id.* at 1169–71.

2. *United States v. Greeno*, 679 F.3d 510 (6th Cir. 2012)

- Held: A “dangerous weapon enhancement” to a sentence for possession of a dangerous weapon during a drug offense did not violate the Second Amendment because the Second Amendment does not protect the possession of weapons by individuals engaged in criminal activity. *Id.* at 520.
- Level of Scrutiny: None, as prohibited conduct was outside the scope of the Second Amendment. *Id.* at 519–20 (adopting two-pronged approach followed in “several circuits”).

G. *State and Federal Courts within the Seventh Circuit*

1. *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010)

- Held: A life prohibition on firearm possession for persons convicted of domestic violence misdemeanors did not violate the Second Amendment. *See id.* at 641–42.
- Level of Scrutiny: Heightened. *See id.* at 641 (“The United States concedes that some form of strong showing (‘intermediate scrutiny,’ many opinions say) is essential, and that [the prohibition] is valid only if substantially related to an important governmental objective.”).

2. *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010).

- Held: Legislation prohibiting illegal drug users from possessing firearms did not violate the Second Amendment. *Id.* at 686–87.
- Level of Scrutiny: Heightened, “strong showing.” *Id.* at 683 (quoting *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) and *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010)) (internal citations omitted) (“But though Congress may exclude certain categories of persons from firearm possession, the exclusion must be more than merely ‘rational,’ and must withstand ‘some form of strong showing.’”).

3. *Horsley v. Trame*, 808 F.3d 1126 (7th Cir. 2015)

- Held: Illinois statute requiring applicants for a Firearm Owner’s Identification (“FOID”) Card that are between eighteen and twenty-one years of age to obtain a parent or guardian signature did not violate the Second Amendment. *Id.* at 1134.
- Level of Scrutiny: Intermediate. *Id.* at 1131.

4. *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015), cert. denied, 136 S. Ct. 447 (2015)
 - Held: A city ordinance prohibiting the possession, sale, or manufacture of assault weapons or large-capacity magazines—i.e., those that can accept more than ten rounds of ammunition—did not violate the Second Amendment. *Id.* at 410.
 - Level of Scrutiny: Heightened. *See id.* (declining to adopt a standard of scrutiny but noting that rational basis is not enough).
5. *Redington v. State*, 992 N.E.2d 823 (Ind. Ct. App. 2013)
 - Held: A firearm seizure and retention statute rationally advanced the public purpose of preventing the mentally ill from obtaining firearms and did not violate the Second Amendment.
 - Level of Scrutiny: Rational basis. *Id.* at 832.
6. *People v. Garvin*, 994 N.E.2d 1076 (Ill. App. 2013)
 - Held: A state statute prohibiting convicted felons from possessing firearms or ammunition did not violate the Second Amendment. *Id.* at 1084.
 - Level of Scrutiny: None, as prohibited conduct was outside the scope of the Second Amendment. *Id.* at 1085.
7. *People v. Aguilar*, 2 N.E.3d 321 (Ill. 2013), modified sub. nom *People v. Burns*, 79 N.E.3d 159 (Ill. 2015)
 - Held: State statute prohibiting the possession of handguns by minors did not violate the Second Amendment, but categorical prohibition of possession and use of an operable firearm outside the home did.
 - Level of Scrutiny: None, as prohibited conduct was outside the scope of the Second Amendment. *Id.* at 329.
8. *People v. Rush*, 19 N.E.3d 1196 (Ill. App. 2014)
 - Held: State statute prohibiting convicted felons from applying for a firearm owner identification card for twenty years after the conviction did not violate the Second Amendment. *Id.* at 1202.

- Level of Scrutiny: None, as prohibited conduct was outside the scope of the Second Amendment, and therefore “categorically unprotected.” *Id.* at 1201.

H. State and Federal Courts within the Eighth Circuit

1. United States v. Bena, 664 F.3d 1180 (8th Cir. 2011)

- Held: Prohibition of firearms by those who pose “a credible threat to the physical safety of [an] intimate partner or child,” 18 U.S.C. § 922(q)(8)(c)(i), is “consistent with a common-law tradition that the right to bear arms is limited to peaceable or virtuous citizens.” *Id.* at 1184.
- Level of Scrutiny: None, as prohibited conduct was outside the scope of the Second Amendment. *Id.*

2. United States v. Fincher, 538 F.3d 868 (8th Cir. 2008)

- Held: Possession of machine guns “are not in common use by law-abiding citizens for lawful purposes and therefore” are “dangerous and unusual weapons that the government can prohibit for individual use.” *Id.* at 874.
- Level of Scrutiny: Unspecified. *See id.* (finding that “under *Heller*, [defendant’s] possession of the guns is not protected by the Second Amendment”).

I. State and Federal Courts within the Ninth Circuit

1. Fortson v. Los Angeles City Attorney’s Office, 852 F.3d 1190 (9th Cir. 2017), cert. denied, No. 16-8871, 2017 WL 1495791 (U.S. Oct. 2, 2017)

- Held: California’s ten-year ban on possession of firearms after a misdemeanor domestic violence conviction did not violate the Second Amendment. *Id.* at 1194.
- Level of Scrutiny: Intermediate. *Id.* at 1194.

2. United States v. Dugan, 657 F.3d. 998 (9th Cir. 2011)

- Held: Prohibiting users of controlled substances from shipping and receiving firearms through interstate commerce did not violate the Second Amendment. *Id.* at 999–1000.
- Level of Scrutiny: Unspecified. *Id.*

3. *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012)
 - Held: A requirement that firearms be secured to prevent unauthorized use in gun show did not violate the Second Amendment. *Id.* at 1044.
 - Level of Scrutiny: Rational basis. *Id.* at 1043 n.2.
4. *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013)
 - Held: Prohibiting persons convicted of domestic violence misdemeanors from possessing firearms for life was constitutional on its face and did not violate the Second Amendment. *Id.* at 1139–41.
 - Level of Scrutiny: Intermediate. *Id.* at 1138–39.
5. *Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016), cert. denied sub nom. *Wilson v. Sessions*, 137 S. Ct. 1396 (2017)
 - Held: Prohibiting the sale of firearms to any person whom the seller had a reasonable cause to believe is an unlawful user of a controlled substance did not violate the Second Amendment. *Id.* at 1095.
 - Level of Scrutiny: Intermediate. *Id.* at 1093.
6. *Jackson v. City & County of San Francisco*, 746 F.3d 953 (9th Cir. 2014)
 - Held: San Francisco’s legislation requiring that handgun storage is in a locked container or disabled with a trigger lock, and its prohibition of the sale of hollow-point bullets within the city, did not violate the Second Amendment. *Id.* at 966, 970.
 - Level of Scrutiny: Intermediate. *Id.* at 965, 968.
7. *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015)
 - Held: In reviewing the denial of a preliminary injunction banning the use of large-capacity magazines, the Court of Appeals held that the city was permitted to rely upon evidence that showed that “the use of large-capacity magazines results in more gunshots fired, results in more gunshot wounds per victim, and increases the lethality of gunshot injuries”; that the ban was likely to survive intermediate scrutiny and be upheld on the merits; and that the district court’s denial of the preliminary junction should be affirmed. *Id.* at 1000-01.

- Level of Scrutiny: Intermediate. *Id.* at 999.
8. *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016), cert. denied sub nom. *Peruta v. California*, 137 S.Ct. 1995 (2017)
 - Held: A town may condition the grant of a permit to carry a concealed weapon outside of an individual’s home, business and land on a showing of good cause without violating the Second Amendment.
 - Level of Scrutiny: Intermediate. *Id.* at 942.
 9. *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016)
 - Held: A law requiring a ten-day waiting period for gun sales was upheld as necessary to provide time for buyer background checks to provide buyer time for “second thoughts that might prevent gun violence.” *Id.* at 829.
 - Level of Scrutiny: Intermediate. *Id.* at 827.
 10. *People v. Flores*, 86 Cal. Rptr. 3d 804 (Ct. App. 2008)
 - Held: Prohibiting misdemeanor offenders from owning firearms did not violate the Second Amendment. *Id.* at 809.
 - Level of Scrutiny: A “mid-level” standard of scrutiny. *Id.* at 809 n.5.
 11. *People v. Jason K.*, 116 Cal. Rptr. 3d 443 (Ct. App. 2010)
 - Held: Requiring a finding that a patient admitted into a mental facility would not be likely to use firearms safely under a “preponderance of the evidence”—as opposed to the more stringent “clear and convincing evidence” —standard did not violate due process or unduly burden the patient’s Second Amendment rights. *Id.* at 453.
 - Level of Scrutiny: The court determined it did not need to apply a standard of scrutiny because the patient did not challenge the constitutionality of the statute, but rather used a due process balancing test to determine the appropriate burden of proof. *Id.* at 450.
 12. *State v. Christian*, 307 P.3d 429 (Or. 2013)
 - Held: An ordinance regulating the possession and use of firearms in public places did not violate the Second Amendment. *Id.* at 444.

- Level of Scrutiny: Intermediate. *Id.* at 443–44 (noting that “the majority of federal courts to date have applied an intermediate scrutiny standard of review to most Second Amendment challenges”).

13. *State v. Jorgenson*, 312 P.3d 960 (Wash. 2013)

- Held: A statute did not violate Second Amendment if it prohibited firearms possession by an individual released on bond where a judge determined probable cause existed that the person committed a serious offense. *Id.* at 968.
- Level of Scrutiny: Intermediate. *Id.* at 967.

14. *People v. Brown*, 173 Cal. Rptr. 3d 812 (Ct. App. 2014), modified on denial of reh’g, (July 21, 2014)

- Held: Ban on possessing shotguns less than 26 inches long did not violate the Second Amendment. *Id.* at 827.
- Level of Scrutiny: Rational basis. *Id.* at 826–27.

J. State and Federal Courts within the Tenth Circuit

1. *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010).

- Held: Defendant’s conviction of firearms possession while under a domestic protection order did not violate the Second Amendment. *Id.* at 802–03 (“No matter how you slice these numbers, people convicted of domestic violence remain dangerous to their spouses and partners.”).
- Level of Scrutiny: Intermediate. *Id.* at 802 (comparing the statute to those at issue in *Marzarella*, in the Third Circuit, and *Skoien*, in the Seventh Circuit).

2. *Peterson v. LaCabe*, 783 F. Supp. 2d 1167 (D. Colo. 2011)

- Held: Colorado requirement that an applicant for a permit to carry a concealed handgun must be a resident of the state did not violate the Second Amendment. *Id.* at 1777–78.
- Level of Scrutiny: Intermediate. *Id.* at 1177.

3. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015), cert. denied, 136 S. Ct. 1486 (2016).

- Held: Regulation prohibiting storage and carrying of guns on USPS property did not violate the Second Amendment. *Id.* at 1127–29.

- Level of Scrutiny: Intermediate. *Id.* at 1126.

K. State and Federal Courts within the Eleventh Circuit

1. *United States v. White*, 593 F.3d 1199 (11th Cir. 2010)
 - Held: A statutory prohibition against possession of firearms by persons convicted of a misdemeanor crime of domestic violence did not violate the Second Amendment. *Id.* at 1206.
 - Level of Scrutiny: None, because law is presumptively lawful. *Id.* at 1206.
2. *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244 (11th Cir. 2012)
 - Held: The Second Amendment did not provide a right to carry a firearm at a place of worship against the owner's wishes. *Id.* at 1266.
 - Level of Scrutiny: None, as prohibited conduct was outside the scope of the Second Amendment. *Id.* at 1260 n.34.
3. *GeorgiaCarry.Org., Inc. v. U.S. Army Corps of Eng'rs*, 788 F.3d 1318 (11th Cir. 2015)
 - Held: Prohibiting possession of loaded firearms or ammunitions at the Army Corps' water resource development project did not violate the Second Amendment.
 - Level of Scrutiny: Intermediate, for the purposes of affirming the granting of a preliminary injunction below. *Id.* at 1321, 1324.
4. *Norman v. State*, 215 So.3d 18 (Fla. 2017), cert. denied sub nom. *Norman v. Florida*, 2017 WL 3036682 (U.S. Nov. 27, 2017)
 - Held: Florida's prohibition of open-carry firearms while permitting concealed-carry weapons did not violate the Second Amendment. *Id.* at 41.
 - Level of Scrutiny: Intermediate. *Id.* at 38.
5. *Fla. Carry, Inc. v. Univ. of Fla.*, 180 So. 3d. 137 (Fla. 2015)
 - Held: The prohibition of firearms in university's housing was authorized by law, consistent with *Heller*, and not preempted by firearms regulation. *Id.* at 147–48.
 - Level of Scrutiny: Unspecified. *Id.* at 156.

L. Federal and Municipal Courts within the District of Columbia

1. *Smith v. United States*, 20 A.3d 759 (D.C. 2011)

- Held: The right to use arms in defense of the home cannot justify carrying a loaded firearm in a car on a public street on the way to a wife’s apartment. *Id.* at 763–64.
- Level of Scrutiny: No analysis under *Heller* or the Second Amendment because appellant’s guilty plea waived a Second Amendment claim. *Id.* at 764. Even assuming the claim could be asserted, the activity at issue was not in “defense of the hearth or home” and the Second Amendment did not apply. *Id.*

2. *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011)

- Held: The prohibition of assault weapons and magazines holding more than ten rounds did not violate the Second Amendment. *Id.* at 1263–64.
- Level of Scrutiny: Intermediate. *Id.* at 1261–62.

II.

LOWER COURT DISAPPROVALS OF GUN REGULATIONS
POST-*HELLER*

A. State and Federal Courts within the Second Circuit

1. *N.Y. St. Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015), cert. denied sub nom. *Shew v. Malloy*, 136 S.Ct. 2486 (2016).

- Held: While the core provisions withstood scrutiny, *id.* at 261–64, the specific provision of a New York law prohibiting the possession of a magazine for a firearm loaded with more than seven rounds, violated the Second Amendment, *id.* at 264.
- Level of Scrutiny: Intermediate. *Id.* at 260, 264. *See also id.* at 258 (“In determining whether heightened scrutiny applies, we consider two factors: (1) ‘how close the law comes to the core of the Second Amendment right’ and (2) ‘the severity of the law’s burden on the right.’”)

B. State and Federal Courts within the Seventh Circuit

1. *Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017)
 - Held: City zoning regulations restricting commercial shooting ranges and creating distancing restrictions, *id.* at 893–95, and a regulation barring anyone under the age of eighteen from entering a shooting range, violated Second Amendment, *id.* at 896–98.
 - Level of Scrutiny: Intermediate. *Id.* at 892–93.
2. *Gowder v. City of Chicago*, 923 F. Supp. 2d 1110 (N.D. Ill. 2012)
 - Held: Ordinance barring non-violent misdemeanor from use of firearm in home for self-defense violated the Second Amendment under either a strict scrutiny standard, *id.* at 1124, or an intermediate scrutiny standard, *id.* at 1125.
 - Level of Scrutiny: Strict. *Id.* at 1123–24 (viewing *Skoien* as instructive).

C. State and Federal Courts within the Ninth Circuit

1. *Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017)
 - Held: California regulations using a portion of firearm sale fees to fund a firearms-related law enforcement program violated the Second Amendment. *Id.* at 1223–24.
 - Level of Scrutiny: Intermediate. *Id.* at 1221–23 (assuming, but not deciding, that the law burdens conduct protected by the Second Amendment, and thus warrants heightened scrutiny).
2. *Morris v. U.S. Army Corps of Eng’rs*, 60 F. Supp. 3d 1120 (D. Idaho 2014)
 - Held: Army regulations that ban carrying a loaded firearm for self-defense and ban carrying an unloaded firearm along with ammunition violated the Second Amendment. *Id.* at 1125.
 - Level of Scrutiny: Unspecified, as an outright ban is unconstitutional under any level of scrutiny. *Id.*

D. Federal Courts within the District of Columbia

1. *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017).
 - Held: D.C. law limiting the issuance of concealed-carry licenses to those with a special need for self-defense violated the Second Amendment. *See id.* at 667.
 - Level of Scrutiny: Unspecified, as an outright ban is unconstitutional under any level of scrutiny. *Id.* (noting that “traditional limits” on Second Amendment rights does not include “bans on carrying absent a special need for self-defense”).

2. *Grace v. District of Columbia*, 187 F. Supp. 3d 124 (D.D.C. 2016).
 - Held: Court granted a preliminary injunction to prohibit the District of Columbia from violating the Second Amendment by denying concealed carry licenses. *Id.* at 147–48 (“On the record before me, I must agree with plaintiffs that defendants are unlikely to be able to show the ‘good reason’ requirement is narrowly tailored to [achieve public safety].”).
 - Level of Scrutiny: Strict. *Id.* at 143 (noting that the “good reason” requirement “imposes a *substantial burden* upon the core right of self-defense,” as opposed to a “less substantial burden,” thus warranting strict scrutiny).