

THE ASSAULT WEAPONS BAN—POLITICS, THE SECOND  
AMENDMENT, AND THE COUNTRY'S CONTINUED  
WILLINGNESS TO SACRIFICE INNOCENT LIVES FOR  
“FREEDOM”

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*So, as we set out this year to defeat the divisive forces that would take freedom away, I want to say those fighting words for everyone within the sound of my voice, to hear and to heed, and especially for you, Mr. Gore: “From my cold dead hands!”<sup>1</sup>*

I. INTRODUCTION

The Assault Weapons Ban<sup>2</sup> became the law of the land in 1994 and just ten years later, in 2004, the ban ended through a sunset provision when Congress decided not to reenact the bill. From 1994 to 2004, the ban prohibited the possession, transfer, and manufacture<sup>3</sup> of certain semiautomatic assault firearms—such firearms are the primary weapons used in mass shootings.<sup>4</sup> In 1994, the ban had major public support and was enacted with the purpose of reducing those shootings. Critics of the ban asserted that the law was a knee-jerk reaction to “several high-profile shootings in the years preceding the law’s enactment.”<sup>5</sup>

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<sup>1</sup> Charlton Heston, *From My Cold Dead Hands: Long Version*, YOUTUBE (Apr. 26, 2008), <http://www.youtube.com/watch?v=5ju4Gla2odw>.

<sup>2</sup> Throughout this note, the mention of the Assault Weapons Ban refers to the Public Safety and Recreational Firearms Use Protection Act, a subpart of the Violent Crime Control and Law Enforcement Act of 1994. The Assault Weapons Ban was codified at 18 U.S.C. §§ 921(a)(30)–(31), 922(v)–(w), 923(i), 924(c)(1) (2000) (repealed 2004). Any other mention of an assault weapons ban in this note will be preceded by information identifying the ban as something other than the Public Safety and Recreational Firearms Use Protection Act of 1994.

<sup>3</sup> 18 U.S.C. § 922(v)(1).

<sup>4</sup> See, e.g., H.R. REP. NO. 103-489, at 14 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1801, 1822.

<sup>5</sup> See, e.g., ROBERT J. SPITZER, GUN CONTROL: A DOCUMENTARY AND REFERENCE GUIDE 284 (2009) [hereinafter GUN CONTROL].

This note analyzes the flaws in the now-expired Assault Weapons Ban and proposes that a new assault weapons ban be enacted without the fundamental weaknesses of the initial ban.<sup>6</sup> Part II looks at recent mass shootings in America. Part III explores the definition of an “assault weapon.” Part IV looks to what prompted Congress to act when it passed the Assault Weapons Ban in 1994. Part V inspects the major issues with the Assault Weapons Ban and looks at the immense power the gun lobby has over our elected officials. Part VI looks to what individual states have done by enacting their own assault weapons bans.<sup>7</sup> Within that part there is also an explanation why state-by-state legislation is not a sufficient solution to the glaring problem of mass shootings in this country, and why federal legislation is a necessary step towards solving this quandary. Part VII suggests what a renewed Assault Weapons Ban would have to address in order to be a successful piece of legislation. Lastly, part VIII of this note explains why a renewed Assault Weapons Ban would not be a violation of Second Amendment rights under the analysis set forth in the 2008 United States Supreme Court decision *District of Columbia v. Heller*<sup>8</sup> and the 2010 decision *McDonald v. City of Chicago*.<sup>9</sup>

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<sup>6</sup> Although this note mentions some gun statistics, it does not argue them back and forth. Unfortunately, bipartisan statistics regarding gun violence are few and far between. In 1983, the Center for Disease Control (CDC) declared firearms violence to be a public health threat and that same year “the CDC created a unit to gather and encourage research on gun-related violence.” ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 45 (4th ed. 2008) [hereinafter *THE POLITICS OF GUN CONTROL*]. By 1995, the National Rifle Association (NRA) launched an effort “to get Congress to stop funding for CDC research on gun issues” because “[t]he concern expressed by the public health community became sufficiently threatening to gun control opponents.” *Id.* In 1996, “Congress barred the CDC from engaging in any research that ‘may be used to advocate or promote gun control’” (which, of course, allows the argument to be made that any information that shows a high rate of gun violence could be, in essence, advocating gun control). *Id.* at 46. In six years, from 1995 to 2001, the CDC’s spending for research on gun issues went from \$2.6 million annually to \$400,000 annually. *Id.* at 45–46. Similar restrictions have been imposed on other agencies, such as the National Institute of Health. Editorial, *What We Don’t Know Is Killing Us*, N.Y. TIMES, Jan. 27, 2013, at SR10. These restrictions “effectively shut down government-financed research on gun violence for 17 years.” *Id.* Real research on gun violence is “precisely what the [NRA] and other opponents of firearms regulations do not want. In the absence of reliable data . . . talk about guns inevitably lurches into the unknown, allowing abstractions, propaganda and ideology to fill the void and thwart change.” *Id.*

<sup>7</sup> California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, and New York have all enacted some form of an assault weapons ban.

<sup>8</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>9</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

## II. MASS SHOOTINGS IN AMERICA

A “mass shooting” has been defined as “[t]he discharging of firearms multiple times by one or more parties into a group of unarmed victims.”<sup>10</sup> On July 20, 2012, James Holmes walked into a theater in Aurora, Colorado during a highly publicized and newly released film, tossed two gas canisters, and then opened fire on the patrons.<sup>11</sup> Holmes proceeded to kill twelve and wound fifty-eight more, and his rampage stands as one of the worst mass shootings in American history.<sup>12</sup> That evening, Holmes carried with him two semiautomatic pistols, a semiautomatic assault-style rifle, and a shotgun.<sup>13</sup> Holmes also had with him a drum for the assault rifle which granted him the capability to fire one-hundred rounds before the weapon required reloading.<sup>14</sup>

On December 14, 2012, at approximately 9:30 a.m., Adam Lanza fired through a windowpane on his way into Sandy Hook Elementary School.<sup>15</sup> Mr. Lanza then proceeded to shoot and kill twenty children and seven adults with a .223 caliber Bushmaster semiautomatic assault rifle.<sup>16</sup> Mr. Lanza fired “dozens and dozens” of rounds.<sup>17</sup> He was able to get off so many shots so quickly by using thirty-round magazines—attaching them to his assault rifle.<sup>18</sup> Each of the victims was shot at least twice, and some were hit with as many as eleven bullets.<sup>19</sup> Mr. Lanza ended the carnage by taking

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<sup>10</sup> THE FREE DICTIONARY, <http://medical-dictionary.thefreedictionary.com/Mass+Shooting> (last visited Apr. 4, 2014); cf. Mark B. Melter, *The Kids Are Alright; It's the Grown-Ups Who Scare Me: A Comparative Look at Mass Shootings in the United States and Australia*, 16 GONZ. J. INT'L L. 33, 35–36 (2012) (discussing the lack of a concrete definition for mass shooting). The lethality of mass shootings is on the rise. Mark Follman, *The NRA Myth of Arming the Good Guys*, MOTHER JONES (Dec. 28, 2012, 1:11 PM), <http://www.motherjones.com/politics/2012/12/nra-mass-shootings-myth>.

<sup>11</sup> John M. Glionna et al., *Real Life Horror: 12 Filmgoers are Dead, 58 are Wounded at 'Dark Knight' Screening, in Worst Mass Shooting in U.S. History*, BALT. SUN, July 21, 2012, at A1.

<sup>12</sup> *Id.*

<sup>13</sup> David Olinger, *Gunman Came to Theater With Four Weapons*, DENV. POST, July 21, 2012, at 4A.

<sup>14</sup> See Joe Klein, *How the Gun Won*, TIME MAG., Aug. 6, 2012, at 26, 32.

<sup>15</sup> See Steve Vogel et al., *Wrenching Details but Few Answers: Killer's Motive Still a Mystery*, WASH. POST, Dec. 16, 2012, at A1 [hereinafter *Wrenching Details but Few Answers*].

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See Steve Vogel et al., *'You Are Not Alone in Your Grief:' Obama Speaks in Shaken Town*, WASH. POST, Dec. 17, 2012, at A1 [hereinafter *Obama Speaks in Shaken Town*].

<sup>19</sup> See *Wrenching Details but Few Answers*, supra note 15; Richard Esposito et al., *Connecticut School Shooting: President Obama Will Meet With Victims' Families on Sunday*, ABCNEWS.COM (Dec. 15, 2012), <http://abcnews.go.com/US/connecticut-school-shooting-president-obama-meet-victims-families/story?id=17981351>.

his own life as the police closed in.<sup>20</sup>

Unfortunately for America, these incidents are not isolated ones—they are but two of the many mass shootings that have taken place in this country in the last thirty years.<sup>21</sup> The killings at the McDonald's in San Ysidro, California, in 1984,<sup>22</sup> the horror at Columbine High School in Littleton, Colorado, in 1999,<sup>23</sup> and the devastation at Virginia Tech in Blacksburg, Virginia, in 2007<sup>24</sup> were among the most deadly rampages in recent history, but by no means

<sup>20</sup> *Obama Speaks in Shaken Town*, *supra* note 18.

<sup>21</sup> *See Worst U.S. Mass Shootings*, CNN (July 20, 2012, 11:05 AM), <http://www.cnn.com/2012/07/20/justice/colorado-shooting-past-us-massacres/index.html>. In the last thirty years, the vast majority of mass shootings have been done with semiautomatic assault firearms and high capacity magazines. *See, e.g.*, H.R. REP. NO. 103-489, at 15 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1820, 1823. For example, on July 18, 1984, twenty-one were killed and nineteen were wounded in a McDonald's in San Ysidro, California, where the shooter used a 9mm UZI assault rifle. LEGAL CMTY. AGAINST VIOLENCE, BANNING ASSAULT WEAPONS—A LEGAL PRIMER FOR STATE AND LOCAL ACTION 2 (2004), *available at* [http://smartgunlaws.org/wp-content/uploads/2012/05/Banning\\_Assault\\_Weapons\\_A\\_Legal\\_Primer\\_8.05\\_entire.pdf](http://smartgunlaws.org/wp-content/uploads/2012/05/Banning_Assault_Weapons_A_Legal_Primer_8.05_entire.pdf). In April of 1987, six were killed and fourteen were wounded in two shopping centers in Palm Bay, Florida, where the shooter used a semiautomatic assault rifle. *Id.* In January of 1989, five children were killed and twenty-nine others were wounded when a shooter used an AK-47 assault rifle and fired at least 106 times in two minutes in an elementary school in Stockton, California. Robert Reinhold, *After Shooting, Horror but Few Answers*, N.Y. TIMES, Jan. 19, 1989, at B6. In September of 1989, eight were killed and twelve more wounded in Louisville, Kentucky, at a printing plant where the killer used two MAC-11s and an AK-47 assault rifle with thirty-round high capacity magazines. LEGAL CMTY. AGAINST VIOLENCE, *supra*, at 2. On January 25, 1993, in Langley, Virginia, two were killed and three wounded at CIA headquarters, where the killer used an AK-47 assault rifle. *Id.* On February 23, 1993, four were killed and sixteen were wounded in Waco, Texas, where the shooters used a plethora of semiautomatic assault firearms, including AR-15s, AK-47s, Barret 50 caliber rifles, Street Sweepers, MAC-10s, MAC-11s, and high capacity magazines that held up to 260 rounds each. *Id.* In July of 1993, eight were killed in San Francisco, California, at an office building where the shooter used two semiautomatic pistols and had with him “hundreds of rounds.” *Gunman Kills 8 and Commits Suicide*, KINGMAN DAILY MINER, July 2, 1993, at 7A. In April of 1999 in Columbine, Colorado, fifteen were killed and twenty-two more wounded at a high school where the shooters used, among other weapons, a .9mm semiautomatic carbine with at least eight magazines, each one capable of holding at least ten bullets. Mark Obmascik, *Colorado, World Mourns Death at Columbine High*, DENV. POST (Apr. 22, 1999), <http://extras.denverpost.com/news/shot0422a.htm>. In April of 2007, on the campus of Virginia Tech in Blacksburg, Virginia, the shooter used a Glock 9mm and Walther .22 caliber, coupled with ten- to fifteen-round magazines, to kill thirty-two people. Ian Shapira & Michael E. Ruane, *Student Wrote About Death and Spoke in Whispers, but No One Imagined What Cho Seung Hui Would Do*, WASH. POST, Apr. 18, 2007, at A1. In 2011 in Tucson, Arizona, a shooter used a Glock semiautomatic pistol coupled with a thirty-round magazine to kill six people and wound another fourteen. James V. Grimaldi, *A Rush for New Gun Restrictions, but Odds Appear Long*, WASH. POST (Jan. 11, 2011, 11:05PM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/11/AR2011011102928.html?sid=ST2011011102926>.

<sup>22</sup> LEGAL CMTY. AGAINST VIOLENCE, *supra* note 21, at 2.

<sup>23</sup> Obmascik, *supra* note 21.

<sup>24</sup> Shapira & Ruane, *supra* note 21.

comprise an exhaustive list. The killings in Aurora, Colorado, and the other aforementioned mass shootings, as in almost every mass shooting anywhere, can be attributed to the combination of the semiautomatic assault weapon and high capacity magazines.<sup>25</sup>

### III. WHAT IS AN “ASSAULT WEAPON”?

The Assault Weapons Ban created criminal penalties for the manufacture, transfer, or possession of “semiautomatic assault weapon[s].”<sup>26</sup> It also created penalties for the possession and manufacture of certain “large capacity ammunition feeding device[s].”<sup>27</sup> One of the great critiques of the proposal to reinstate the Assault Weapons Ban is the inability to adequately define a “semiautomatic assault weapon.”<sup>28</sup> It is a fair argument and to address it, it is first necessary to understand various other definitions that are typically included in the definition of an “assault weapon.”<sup>29</sup> At its core, an assault weapon is exceedingly dangerous for two reasons: “high [ammunition] capacity and enhanced control during rapid fir[e].”<sup>30</sup>

An “assault rifle”<sup>31</sup> is defined as “any of various automatic or semiautomatic rifles with large capacity magazines designed for military use.”<sup>32</sup> The trouble for legislators is, and has always been, deciding what various factors suddenly turn a semiautomatic firearm into a semiautomatic assault weapon. In other words, the challenge rests in defining what features suddenly qualify a weapon as one that is generally militaristic in nature, produced for combat. Once a legislature can define what features of a weapon are “military features,” it can set the standard for what transforms a

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<sup>25</sup> See, e.g., Editorial, *The Deadly Fantasy of Assault Weapons*, N.Y. TIMES, Dec. 29, 2012, at A18; see sources cited *supra* note 21 (describing several mass shootings that have occurred within the past thirty years).

<sup>26</sup> 18 U.S.C. § 922(v)(1) (2000) (repealed 2004).

<sup>27</sup> *Id.* § 922(w)(1).

<sup>28</sup> See discussion *infra* Part V.C.

<sup>29</sup> See discussion *infra* Part V.B–C.

<sup>30</sup> EDUC. FUND TO STOP GUN VIOLENCE, KILLING MACHINES: THE CASE FOR BANNING ASSAULT WEAPONS 8 (2003), available at [http://www.joebrower.com/RKBA/RKBA\\_FILES/BAD\\_GUYS/CSGV-killing\\_machines-awb\\_report.pdf](http://www.joebrower.com/RKBA/RKBA_FILES/BAD_GUYS/CSGV-killing_machines-awb_report.pdf).

<sup>31</sup> An assault rifle is one form of an assault weapon. See 18 U.S.C. § 921(a)(30)(B) (2000) (repealed 2004). The Assault Weapons Ban also qualified certain pistols and shotguns as assault weapons. *Id.* § 921(a)(30)(C)–(D).

<sup>32</sup> See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003). A major issue with the Assault Weapons Ban was the generic two-feature definition Congress assigned to the term “assault weapon.” See discussion *infra* Part V.C.

legal semiautomatic firearm into an illegal semiautomatic assault weapon.

A “semiautomatic” weapon fires only one bullet when you pull the trigger; this is in contrast to a fully automatic weapon, which fires multiple shots by just holding down the trigger once.<sup>33</sup> Fully automatic weapons have been heavily regulated and virtually outlawed in the United States since the 1930s by provisions of the National Firearms Act of 1934<sup>34</sup> and later, even more so, by provisions of the Firearms Owners’ Protection Act of 1986.<sup>35</sup> A semiautomatic weapon, on the other hand, is very much attainable for the majority of citizens.<sup>36</sup> Such a weapon, by definition, is one that loads another round into the chamber with each pull of the trigger.<sup>37</sup> That is, nothing more needs to be done for another round to be ready to fire—a pull of the trigger fires the shot and reloads the weapon for the next shot contemporaneously.<sup>38</sup> Perhaps the only feature that can slow a shooter down is the amount of rounds his/her magazine can hold.<sup>39</sup>

Congress, through the Assault Weapons Ban, defined the term “large capacity ammunition feeding device.”<sup>40</sup> It was defined as “a magazine . . . that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition.”<sup>41</sup> Since the Assault Weapons Ban is no longer good law, various states that have adopted their own assault weapons ban have chosen to define the term “large capacity ammunition feeding device” differently—that is, many states differ in how many rounds constitutes a “large capacity ammunition feeding device.”<sup>42</sup> It should be noted that both the AR-15 and the one-hundred-round ammo-drum used at the Aurora, Colorado shooting would have been outlawed had the federal Assault Weapons Ban never expired.<sup>43</sup>

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<sup>33</sup> See, e.g., 18 U.S.C. § 921(a)(28) (2012); ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 37 (2011).

<sup>34</sup> 26 U.S.C. §§ 5801–5802 (2012) (taxing and creating strict registration requirements for firearm manufacturers).

<sup>35</sup> 18 U.S.C. § 922(a)(4), (o) (2012) (banning machineguns not already in lawful circulation).

<sup>36</sup> See WINKLER, *supra* note 33, at 37.

<sup>37</sup> See 18 U.S.C. § 921(a)(28); WINKLER, *supra* note 33, at 37.

<sup>38</sup> See 18 U.S.C. § 921(a)(28); WINKLER, *supra* note 33, at 37.

<sup>39</sup> See discussion *infra* Part VII.B.1.

<sup>40</sup> 18 U.S.C. § 921(a)(31) (2000) (repealed 2004). For the purposes of this note, the term “large capacity ammunition feeding device” is interchangeable with the term “high capacity magazine” and “large capacity magazine.”

<sup>41</sup> *Id.*

<sup>42</sup> See discussion *infra* Part VI.B.

<sup>43</sup> See Olinger, *supra* note 13. James Holmes also had with him a shotgun and a handgun. *Id.* He legally purchased his firearms and ammunition at a store in Colorado and online. *Id.*

## IV. LEADING TOWARDS THE ASSAULT WEAPONS BAN OF 1994

In the last fifty years or so, major federal legislation pertaining to guns has been enacted—from the Gun Control Act of 1968,<sup>44</sup> to the Firearms Owners' Protection Act of 1986,<sup>45</sup> to the Brady Bill of 1993,<sup>46</sup> and finally to the Assault Weapons Ban, a subpart of the Violent Crime Control and Law Enforcement Act of 1994,<sup>47</sup> it is clear Congress has been grappling with the issue of gun control.

In terms of the Assault Weapons Ban specifically, America became increasingly concerned with regulating semiautomatic assault rifles when a schoolyard massacre took place in Stockton, California, in 1989.<sup>48</sup> The spree resulted in the deaths of five children and the wounding of twenty-nine others at the hands of Patrick Purdy, who was armed with an AK-47 semiautomatic assault rifle.<sup>49</sup> Just weeks after that, twenty-seven states had pending legislation that would ban the possession or manufacture of many different types of semiautomatic rifles and pistols.<sup>50</sup>

President George H. W. Bush recognized the growing concern over semiautomatic assault weapons and, in March of 1989, issued his short-term solution through an executive order that placed a temporary ban on the import of certain semiautomatic assault rifles.<sup>51</sup> Bush did so by his using powers under the Gun Control Act of 1968, which required that legal rifles had to be “suitable for . . . sporting purposes.”<sup>52</sup> In 1993, President Bill Clinton took the fight against assault weapons a step further by issuing his own executive order expanding the scope of Bush's import ban by including assault-style handguns.<sup>53</sup>

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<sup>44</sup> Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921–926, 927–928 (2012)).

<sup>45</sup> Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (codified as amended at 18 U.S.C. §§ 921–931 (2012)).

<sup>46</sup> Brady Handgun Violence Protection Act of 1993, Pub. L. No. 103-159, 107 Stat. 1536 (codified as amended at 18 U.S.C. §§ 921–922 (2012)). The original Act required local police to conduct background checks, but that section was deemed unconstitutional in violation of the Tenth Amendment. *See* *Printz v. United States*, 521 U.S. 898, 933–34 (1997).

<sup>47</sup> Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, 108 Stat. 1996 (codified as amended at 18 U.S.C. §§ 921(a)(30)–(31), 922(v)–(w), 923(i), 924(c)(1) (2000) (repealed 2004)).

<sup>48</sup> THE POLITICS OF GUN CONTROL, *supra* note 6, at 129–30.

<sup>49</sup> *Id.* at 130.

<sup>50</sup> Robert Reinhold, *Effort to Ban Assault Rifles Gains Momentum*, N.Y. TIMES, Jan. 28, 1989, at 1.

<sup>51</sup> Charles Mohr, *U.S. Bans Imports of Assault Rifles in Shift by Bush*, N.Y. TIMES, Mar. 15, 1989, at A1.

<sup>52</sup> 18 U.S.C. § 922(r) (2012).

<sup>53</sup> Douglas Jehl, *Clinton Undertakes His Drive on Guns and Crime*, N.Y. TIMES, Aug. 12,

In 1991 a ban on semiautomatic assault weapons and large capacity magazines was included as a subtitle to the Omnibus Crime Control Act.<sup>54</sup> Although the bill made it out of the Judiciary Committee, the House of Representatives struck the provisions dealing with semiautomatic assault weapons and large capacity magazines by a vote of 247–177.<sup>55</sup> Perhaps the reason the ban did not pass in 1991 was because it gave the authority to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)<sup>56</sup> to subsequently add any weapon to the list of banned weapons if it “embodie[d] the same configuration” as the weapons listed.<sup>57</sup>

Less than three years later, assault weapons ban proponents conceded the provision that would potentially grant the ATF the ability to add prohibited assault weapons later on, and Congress eventually took up the Violent Crime Control and Law Enforcement Act of 1994 and specifically, the Assault Weapons Ban.<sup>58</sup> The bill passed and was signed into law on September 13, 1994.<sup>59</sup> Under the ban, it became “unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon.”<sup>60</sup> Further, it became “unlawful for a person to transfer or possess a large capacity ammunition feeding device.”<sup>61</sup> A “large capacity ammunition feeding device” was defined as “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.”<sup>62</sup> This seemingly simple ban was anything but, as it contained major loopholes that were taken advantage of by gun manufacturers.<sup>63</sup>

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1993, at A20.

<sup>54</sup> H.R. REP. NO. 103-489, at 21 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1801, 1829.

<sup>55</sup> *Id.*

<sup>56</sup> The ATF is a federal law enforcement organization within the United States Department of Justice. *About ATF*, U.S. DEP’T OF JUST., BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, <http://www.atf.gov/content/About> (last visited Apr. 4, 2014).

<sup>57</sup> H.R. REP. NO. 103-489, at 21.

<sup>58</sup> *See* 18 U.S.C. §§ 921(a)(30)–(31), 922(v)–(w), 923(i), 924(c)(1) (2000) (repealed 2004); THE POLITICS OF GUN CONTROL, *supra* note 6, at 131; WINKLER, *supra* note 33, at 38.

<sup>59</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. The bill passed the House of Representatives in a 235–195 vote and the Senate in a 61–39 vote. THE POLITICS OF GUN CONTROL, *supra* note 6, at 132–33. President Clinton signed the bill into law on September 13, 1994. *Id.* at 133.

<sup>60</sup> 18 U.S.C. § 922(v)(1).

<sup>61</sup> *Id.* § 922(w)(1).

<sup>62</sup> 18 U.S.C. § 921(a)(31).

<sup>63</sup> *See* WINKLER, *supra* note 33, at 39 (“Because the law defined the unlawful weapons by their outward appearance and features . . . manufacturers of the specific guns banned by the law were able to make slight changes in the design of their firearms to skirt the ban.”).



## V. WHY THE ASSAULT WEAPONS BAN FAILED

The Assault Weapons Ban of 1994 failed for a number of reasons, but the provisions of the ban that were the weakest were a product of political compromise. A deeper look at some of those provisions uncovers language that lacked common sense and instead was drafted with the intention of getting a bill passed, rather than language that addressed the crux of the mass-shooting problem.

### A. *The “Grandfather” Clause*

The initial problem with the Assault Weapons Ban was that it was not retroactive, meaning it did not apply to assault weapons that were already in lawful circulation; it only outlawed the manufacture, transfer, or possession of semiautomatic assault weapons that were manufactured after September 13, 1994.<sup>64</sup> This exception was known as the “grandfather” clause.<sup>65</sup> The ban did not require the registration or destruction of already existing semiautomatic assault weapons, and as a result it left countless semiautomatic assault weapons unaccounted for on the streets.<sup>66</sup> Essentially, semiautomatic assault weapons were not banned so long as they were already manufactured before the date of enactment of the statute.<sup>67</sup>

Aside from banning assault weapons the Assault Weapons Ban more importantly, banned the transfer and possession of large capacity magazines.<sup>68</sup> Again, a major issue with the ban was that the grandfather clause made legal any large capacity magazine that was manufactured on or before September 13, 1994.<sup>69</sup> Further, those magazines could continue to be transferred and no record keeping was required.<sup>70</sup> To draw the distinction between post- and pre-ban devices, the ban provided that a serial number was to be

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<sup>64</sup> See 18 U.S.C. § 922(v)(1)–(2). Semiautomatic assault weapons manufactured after the date of enactment were engraved with the date of manufacture. 18 U.S.C. § 923(i) (2000) (repealed 2004).

<sup>65</sup> “The bill protects the rights of persons who lawfully own such [assault] weapons on its date of enactment by a universal ‘grandfathering’ clause.” H.R. REP. NO. 103-489, at 12 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1801, 1820.

<sup>66</sup> See 18 U.S.C. § 922(v). With respect to the “grandfather” clause, the bill “contains no confiscation or registration provisions; however, it does establish record-keeping requirements for transfers involving grandfathered semiautomatic assault weapons.” H.R. REP. NO. 103-489, at 12.

<sup>67</sup> See 18 U.S.C. § 922(v)(2).

<sup>68</sup> *Id.* § 922(w)(1).

<sup>69</sup> See *Id.* § 922(w)(2).

<sup>70</sup> *Id.*; H.R. REP. NO. 103-489, at 12–13.

given to each new device.<sup>71</sup> The inference therefore being that large capacity magazines without a serial number, with respect to possession, were a pre-ban device.<sup>72</sup>

*B. The List, "Copies and Duplicates," and Exceptions*

One definition of a "semiautomatic assault weapon" under the ban was "any of the firearms, or copies or duplicates of the firearms in any caliber known as . . . ." and it listed nineteen semiautomatic assault firearms.<sup>73</sup> The law aimed at outlawing semiautomatic assault firearms that had the appearance of military-style guns; unfortunately, though, the law was largely targeting weapons for their appearances rather than their capabilities.<sup>74</sup> Because there was no definition of "copies or duplicates" within the statute, gun manufacturers could slightly change their firearms, rename them, and probably have no risk of violating the ban.<sup>75</sup>

Further, the ATF did not enforce the "copies or duplicates" provision of the statute:

In ATF's view, "copies or duplicates" [did] not include any assault weapons that differ[ed] from their named siblings in any way, even if the differences were only cosmetic. In effect, this interpretation excises the "copies or duplicates" provision from the statute, giving manufacturers wide latitude to evade the spirit of the law by making cosmetic modifications while preserving the functional elements of an assault weapon. Taking advantage of this loophole, Colt again slightly altered the "Sporter," itself a ban-evading variation of the AR-15, by removing the flash suppressor (which is not a central feature of an assault weapon) and renaming the gun the Colt "Match Target." The Colt Match Target [was] functionally nearly identical to the AR-15.<sup>76</sup>

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<sup>71</sup> 18 U.S.C. § 923(i) (2000) (repealed 2004). Large capacity magazines could still be manufactured for military personnel and law enforcement. See 18 U.S.C. § 922(w)(3)(A).

<sup>72</sup> See 18 U.S.C. § 922(w)(4).

<sup>73</sup> 18 U.S.C. § 921(a)(30)(A) (2000) (repealed 2004). The nineteen firearms listed were the Norinco, Mitchell, Poly Technologies Avtomat Kalashnikovs, Action Arms Israeli Military Industries UZI and Galil, Beretta Ar70, Colt AR-15, Fabrique National FN/FAL, FN/LAR, and FNC, SWD M-10, M-11, M-11/9, and M-12, Steyr AUG, INTRATEC TEC-9, TEC-DC9, and TEC-22, and revolving cylinder shotguns, such as the Street Sweeper and Striker 12. *Id.*

<sup>74</sup> See WINKLER, *supra* note 33, at 38–39.

<sup>75</sup> See 18 U.S.C. § 921(a)(30); WINKLER, *supra* note 33, at 38–39.

<sup>76</sup> EDUC. FUND TO STOP GUN VIOLENCE, *supra* note 30, at 6–7. The AR-15 was banned under the Assault Weapons Ban. See 18 U.S.C. § 921(a)(30)(A)(iv).

*C. Generic Definition of an Assault Weapon*

The ban did not limit the definition of “semiautomatic assault weapon” to exclusively those nineteen weapons and their “copies or duplicates”—the ban also defined a “semiautomatic assault weapon” as rifles, pistols, and shotguns that have two or more conditions that are generally exclusive to military-type weapons.<sup>77</sup> Specifically, the ban defined a “semiautomatic assault weapon” as a weapon that could accept a detachable magazine<sup>78</sup> and had at least two other military-type features.<sup>79</sup> Under the ban, one definition of an assault weapon was

a semiautomatic rifle that has an ability to accept a detachable magazine and has at least 2 of—(i) a folding or telescoping stock; (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon; (iii) a bayonet mount; (iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and (v) a grenade launcher.<sup>80</sup>

To get around this, gun manufacturers would remove one of those banned features from their firearms and replace it with an equally capable feature—or in some cases a more capable feature—that was not outlawed by the statute.<sup>81</sup> This would allow the firearm to operate just as it had pre-ban.<sup>82</sup>

For example, “[s]ome manufacturers replaced pistol grips with ‘thumbhole’ stocks, which serve precisely the same function. Others replaced prohibited flash suppressors (designed to conceal the shooter’s location) with non-prohibited ‘muzzle brakes,’ or [muzzle] ‘compensators.’”<sup>83</sup> Muzzle brakes and muzzle compensators are used to reduce “muzzle climb,” which is essentially a product of rapid-fire recoil that causes the shooter’s muzzle to climb and overshoot his or her target when firing at a high-rate.<sup>84</sup> Essentially, manufacturers could eliminate a flash suppressor and replace it with a more deadly feature like a muzzle compensator and not run afoul of the ban. Indeed, “[a] version of Colt’s Match Target copy-

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<sup>77</sup> See 18 U.S.C. § 921(a)(30)(B)–(D).

<sup>78</sup> This criterion did not apply to shotguns. See *Id.* § 921(a)(30)(D).

<sup>79</sup> See *Id.* § 921(a)(30)(B).

<sup>80</sup> *Id.* The Assault Weapons Ban also banned certain semiautomatic pistols and shotguns using a similar method. *Id.* § 921(a)(30)(C)–(D).

<sup>81</sup> See LEGAL CMTY. AGAINST VIOLENCE, *supra* note 21, at 4.

<sup>82</sup> The gun industry called this “sporterization.” *Id.*

<sup>83</sup> EDUC. FUND TO STOP GUN VIOLENCE, *supra* note 30, at 6.

<sup>84</sup> *Id.* at 6, 8.

cat include[d] a [muzzle] compensator in place of the banned AR-15's flash suppressor, arguably making the legal version a more effective assault weapon than its banned twin."<sup>85</sup>

Moreover, under this two feature generic definition of an assault weapon, manufacturers could legally create an assault weapon that had a detachable magazine and a pistol grip or barrel shroud and that alone could give an assault weapon the capability of controlled rapid-fire.<sup>86</sup> In contrast, under the ban, a weapon with a detachable magazine, bayonet mount, and a threaded barrel,<sup>87</sup> was illegal despite its inability to engage in controlled high-capacity firing.<sup>88</sup>

Finally, the Assault Weapons Ban created a vast number of exemptions that made clear that certain weapons could not be banned.<sup>89</sup> The ban contained a list of 661 sporting rifles that could not be outlawed by the statute, even if they otherwise fit the definition of a "semiautomatic assault rifle."<sup>90</sup> Furthermore, the ban clearly erred on the side of being under-inclusive: "[t]he fact that a firearm is not listed in [the list of exceptions] shall not be construed to mean that [it will be unlawful to own] such [a] firearm."<sup>91</sup>

#### D. *The Sunset Provision*

Perhaps the most glaring evidence that the ban was truly nothing short of a massive political compromise was that it contained a sunset provision where it would expire ten years from the date of enactment—the date of expiration being September 13, 2004.<sup>92</sup> The reasoning behind that provision was for Congress and the President to reassess whether the ban was working, and then decide if it

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<sup>85</sup> *Id.* at 6. The lack of "a pistol grip does not prevent a shooter from aiming an assault weapon, which can be both accurate and powerful, [when] firing it from the shoulder. Opponents of assault weapon bans often claim that assault weapons are actually hunting guns, because one can use them to hunt. This claim ignores the significance of the design features that are common to all assault weapons but entirely absent from hunting guns [such as pistol grips]." *Id.* at 9 n.32. A barrel shroud keeps the shooter's non-trigger hand cool even when the barrel of the gun becomes "scorching hot" from firing so many rounds in succession. See DUNCAN LONG, THE COMPLETE AR-15/M16 SOURCEBOOK: WHAT EVERY SHOOTER NEEDS TO KNOW 1 (2001).

<sup>86</sup> See EDUC. FUND TO STOP GUN VIOLENCE, *supra* note 30, at 6.

<sup>87</sup> Threaded barrels are most notoriously used for pistols and allow such firearms to accept suppressors and silencers. See *id.*

<sup>88</sup> See *id.*

<sup>89</sup> 18 U.S.C. app. A § 922 (2000) (repealed 2004).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* § 922(v)(3).

<sup>92</sup> See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 2000.

should be reenacted.<sup>93</sup> On September 13, 2004, the ban expired without much debate, even though polls revealed it still had continued public support.<sup>94</sup> The enactment of the ban in 1994 had, in all likelihood, cost the Democrats control of the House of Representatives, which they had controlled for almost fifty years prior.<sup>95</sup> Democratic members of Congress in rural states who had supported the ban especially suffered in elections thereafter.<sup>96</sup> The idea of “gun control” is a much more liberal/Democratic ideology.<sup>97</sup> The National Rifle Association (NRA)<sup>98</sup> was steadfast on ensuring that members of Congress, who voted yes on any bill having to do with gun regulation, would be highly criticized by their lobby.<sup>99</sup>

### *E. The NRA and the Gun Lobby*

The political power of the NRA and the gun lobby is undeniable and is the main reason why the Assault Weapons Ban was a watered down piece of legislation. The NRA’s political power was perhaps never more glaring than in March of 2004, just months before the Assault Weapons Ban was to expire.<sup>100</sup> A bill was in the Senate, having already passed the House, to shield gun manufacturers and dealers from lawsuits when tragedies occur with their manufactured guns.<sup>101</sup> Members of the Senate who supported gun control, in what they hoped would be viewed as a compromise,

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<sup>93</sup> See CHRISTOPHER S. KOPER, AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACT ON GUN MARKETS AND GUN VIOLENCE, 1994–2003 20 (2004), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf>.

<sup>94</sup> Sixty eight percent of Americans favored the ban. THE POLITICS OF GUN CONTROL, *supra* note 6, at 135.

<sup>95</sup> WINKLER, *supra* note 33, at 39.

<sup>96</sup> See Thomas B. Edsall, *White Democrats Have Lost Hold on South Party Platforms, Crime Bill Cost Many Lawmakers’ Jobs*, NEW ORLEANS TIMES PICAYUNE, May 26, 1996, at A10.

<sup>97</sup> See Raymond G. Kessler, *Ideology and Gun Control*, 12 Q.J. IDEOLOGY 1, 5, 7 (1988).

<sup>98</sup> The NRA is the largest gun lobby in the country and can have a profound impact on U.S. politics. For a discussion of this, see THE POLITICS OF GUN CONTROL, *supra* note 6, at 80–81. For a discussion of the NRA and the Gun Lobby, see discussion *infra* Part V(E).

<sup>99</sup> Potentially vulnerable members of Congress fear the NRA, as they can “sway key votes in Congress or swing an election.” THE POLITICS OF GUN CONTROL, *supra* note 6, at 107. A 1993 internal memo from the NRA stated:

We may not win a particular election, but our methods have an extremely efficient “political cost exchange ratio” making it exceedingly expensive, difficult and unpleasant for the target [the NRA’s political opponent] to remain in office. Victory springs from imparting excruciating political pain in unrelenting political attacks on a single politician as an example to others.

*Id.*

<sup>100</sup> See *id.* at 135.

<sup>101</sup> *Id.*

saw an opportunity to affix gun control measures to the gun manufacturer immunity bill and did so by adding an Assault Weapons Ban renewal, among other measures, which was passed by a vote of 52–47.<sup>102</sup> The NRA, in an astounding showing of political power, ordered the bill defeated, and just hours later the Senate had re-voted 90–8 against the bill.<sup>103</sup>

The NRA continues to affect the landscape of presidential, congressional, and state elections by raising large sums of money to that end. The NRA regularly endorses pro-gun candidates via their Political Action Committee (PAC).<sup>104</sup> For example, in 1988, the NRA PAC directed \$1.5 million dollars into George H. W. Bush's presidential campaign, but refused to endorse Bush in 1992 after his executive order in 1989 restricted imports on assault weapons.<sup>105</sup> Further, in the 2004 election, the NRA PAC raised and spent twenty million at the national election level alone.<sup>106</sup>

Perhaps even more influential than the money the NRA spends on its political agenda is the mass mailing technique it uses to turn its members against candidates; the NRA has demonized and vilified candidates who support gun control through propaganda-type mailings to their members.<sup>107</sup> Howard Metzenbaum, an Ohio Senator and a gun control proponent once famously said, “[t]he NRA’s position is consistent. They’re opposed to any legislation that has the word ‘gun’ anywhere in it.”<sup>108</sup> The NRA opposes any and all forms of gun regulation<sup>109</sup>—this one hundred percent purity has empowered the faithful NRA supporters, but has also had the effect of alienating those same supporters from politicians who want to meet them halfway.<sup>110</sup>

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 135, 145. California Senator Dianne Feinstein, who was one of the eight in the minority, said the NRA “had the power to turn around [that many] votes in the Senate. That’s amazing to me.” Sheryl Gay Stolberg, *Senate Leaders Scuttle Gun Bill Over Changes*, N.Y. TIMES, Mar. 3, 2004, at A1. Executive Vice President of the NRA, Wayne LaPierre, actually sent e-mail messages to senators urging them to reject the bill. *Id.* He even threatened that the NRA would evaluate the vote and use it for “future evaluations and endorsement of candidates.” *Id.*

<sup>104</sup> See THE POLITICS OF GUN CONTROL, *supra* note 6, at 87.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> TOM LOFTUS, THE ART OF LEGISLATIVE POLITICS 90–91 (1994). In 1994, a staffer for a Republican representative who supported the Assault Weapons Ban commented, “[y]ou don’t know the threats we received.” Seth Mydans, *Freshman Withstands Volley of Calls on Guns: Congressman Votes for Weapons Ban*, N.Y. TIMES, May 9, 1994, at A12.

<sup>108</sup> THE POLITICS OF GUN CONTROL, *supra* note 6, at 93.

<sup>109</sup> *Id.* at 97.

<sup>110</sup> *Id.* For example:

A rising chorus of voices is standing up against the NRA and the gun lobby’s sway over

## VI. A STEP IN THE RIGHT DIRECTION: STATE LEGISLATION

Many states around the country have taken up an assault weapons ban in some capacity—these states include California,<sup>111</sup> Connecticut,<sup>112</sup> Hawaii,<sup>113</sup> Maryland,<sup>114</sup> Massachusetts,<sup>115</sup> New Jersey,<sup>116</sup> and New York.<sup>117</sup> At least seventeen other localities, including a county,<sup>118</sup> cities,<sup>119</sup> a town,<sup>120</sup> and villages<sup>121</sup> currently ban assault weapons in some form as well. Bans around the country vary from one to the next, but taken as a whole they help us to understand what an effective federal proposal should address.

A. *Banning Assault Weapons*

The states that use the federal Assault Weapons Ban generic definition of an “assault weapon” are Massachusetts<sup>122</sup> and Hawaii.<sup>123</sup> Massachusetts, like the expired federal ban, bans

U.S. politics. Rep. Gabrielle Giffords, shot in the head in a mass shooting two years ago, and her husband Mark Kelly . . . launched a new political action committee . . . to end what they called lawmakers’ “fear” of the gun lobby.

Josh Levs, *Biden: Obama exploring executive orders to combat gun violence*, CNN (Jan. 10, 2013, 7:33 AM), [http://www.cnn.com/2013/01/09/politics/gun-control-battle/index.html?hpt=hp\\_t2](http://www.cnn.com/2013/01/09/politics/gun-control-battle/index.html?hpt=hp_t2).

<sup>111</sup> See CAL. PENAL CODE §§ 30510–31115 (West 2013).

<sup>112</sup> See CONN. GEN. STAT. §§ 53-202a–53-202o (2013).

<sup>113</sup> See HAW. REV. STAT. §§ 134-1, 134-4(e), 134-8(a) (2013).

<sup>114</sup> See MD. CODE ANN., CRIM. LAW §§ 4-301–4-306 (LexisNexis 2013).

<sup>115</sup> See MASS. GEN. LAWS ch. 140, §§ 121, 131M (2013).

<sup>116</sup> See N.J. STAT. ANN. §§ 2C:39-1(w), 2C:39-3(j), 2C:39-5(f) (West 2013).

<sup>117</sup> See N.Y. PENAL LAW §§ 265.00(22)–(23), 265.02 (7)–(8), 265.10, 265.20(8) (McKinney 2013). The District of Columbia also has its own assault weapons ban. See D.C. CODE §§ 7-2501.01(3A), 7-2502.01(a), 7-2502.02(a)(6), 7-2506.01(b), 7-2551.01–7-2551.03 (2013). Colorado has a ban on large capacity magazines. See COLO. REV. STAT. §§ 18-12-301(b), 18-12-302, 18-12-303 (2013).

<sup>118</sup> COOK CNTY., ILL., CODE OF ORDINANCES ch. 54, art. III, §§ 54-211–54-212 (2013).

<sup>119</sup> AURORA, ILL., CODE OF ORDINANCES ch. 29, art. III, § 29-49 (2013); CHI., ILL., MUNICIPAL CODE ch. 8-20, art. I, §§ 8-20-010, 8-20-035(b), 8-20-085, 8-20-170(d) (2013); EAST CHI., IND., CODE OF ORDINANCES § 136.08 (2013); GARY, IND., MUNICIPAL CODE § 28-108 (2013); ALBANY, N.Y., CODE ch. 193, art. III, §§ 193-13–193-16 (2013); BUFFALO, N.Y., CODE ch. 180, art. I, § 180-1(F)–(G) (2013); N.Y.C., N.Y., ADMINISTRATIVE CODE tit. 10, §§ 10-301(16), 10-303.1, 10-305 (2013); ROCHESTER, N.Y., CODE ch. 47, § 47-5(F)–(G) (2013); CINCINNATI, OHIO, CODE OF ORDINANCES tit. VII, ch. 708, § 708-37 (2013); CLEVELAND, OHIO, CODE OF ORDINANCES ch. 628, §§ 628.01–628.04 (2013); DAYTON, OHIO, CODE OF ORDINANCES div. 3, §§ 138.24–138.26 (2013); DUBLIN, OHIO, CODE OF ORDINANCES ch. 137, §§ 137.01, 137.08 (2013); TOLEDO, OHIO, MUNICIPAL CODE ch. 549, §§ 549.01(e), 549.02–549.03 (2013).

<sup>120</sup> CICERO, ILL., CODE OF ORDINANCES §§ 62-256, 62-260, 62-261(3) (2013).

<sup>121</sup> NILES, ILL., CODE OF ORDINANCES §§ 66-234–66-235(a) (2013); OAK PARK, ILL., VILLAGE CODE §§ 27-1-1–27-1-2, 27-2-1 (2013).

<sup>122</sup> See MASS. GEN. LAWS ch. 140, § 121 (2013) (defining an “assault weapon” as any firearm with two military-type features that can accept a detachable magazine).

<sup>123</sup> See HAW. REV. STAT. § 134-1 (2013) (defining an “assault pistol” as any firearm with two

another nineteen named assault type weapons.<sup>124</sup> Hawaii only bans “assault pistols.”<sup>125</sup> Aside from the generic definition of an assault pistol, Hawaii names no further assault pistols under their ban.<sup>126</sup>

Maryland, like Hawaii, only bans “assault pistol[s].”<sup>127</sup> Maryland law lists seventeen specific assault type pistols under their ban, but it has no generic definition of an assault pistol.<sup>128</sup> Under New Jersey’s ban, the law names specific assault type weapons that constitute an “assault firearm.”<sup>129</sup> Beyond that, under New Jersey law, a semiautomatic rifle that has a fixed magazine<sup>130</sup> that can hold more than fifteen rounds, and assault style shotguns that have more than one military-type feature, are defined as “assault firearm[s].”<sup>131</sup>

Massachusetts follows the federal model of grandfathering assault weapons lawfully possessed before the date of enactment of their ban and thus any assault weapon owned prior to September 13, 1994 can continue to be possessed and transferred.<sup>132</sup> New York followed the federal model as well, before their new law was recently enacted that requires citizens to register their grandfathered assault weapons by a certain date.<sup>133</sup> California law also requires that grandfathered assault weapons be registered, if owners want to keep them, within ninety days of their weapon being declared an “assault weapon.”<sup>134</sup> Just like the federal ban, all state bans have a grandfather provision in one form or another.<sup>135</sup>

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military-type features that can accept a detachable magazine).

<sup>124</sup> MASS. GEN. LAWS ch. 140, § 121.

<sup>125</sup> See HAW. REV. STAT. § 134-1.

<sup>126</sup> See *id.* (nothing in the statute defines an “assault pistol” as anything other than the generic definition).

<sup>127</sup> MD. CODE ANN., CRIM. LAW § 4-301 (LexisNexis 2013).

<sup>128</sup> *Id.* § 4-301(c).

<sup>129</sup> N.J. STAT. ANN. § 2C:39-1(w) (West 2013).

<sup>130</sup> A fixed magazine is actually built into the firearm as opposed to a detachable magazine, which can be detached and re-attached to different firearms depending on what that firearm has the ability to accept.

<sup>131</sup> N.J. STAT. ANN. § 2C:39-1(w)(2)–(3).

<sup>132</sup> MASS. GEN. LAWS ch. 140, § 131M (2013).

<sup>133</sup> Under New York’s new law, owners of grandfathered assault weapons may transfer the weapons only to firearm dealers or out of state buyers. See N.Y. S.B. 2230, 2013 Leg., 236th Sess. (2013) (enacted).

<sup>134</sup> CAL. PENAL CODE §§ 30900, 30920(b) (West 2013). Other states that allow continued possession of grandfathered assault weapons so long as they are registered by a certain date are Connecticut, Hawaii, Maryland, and New Jersey. CONN. GEN. STAT. § 53-202d(a) (2013); HAW. REV. STAT. § 134-4(e) (2013); MD. CODE ANN., CRIM. LAW § 4-303(b) (LexisNexis 2013); N.J. STAT. ANN. § 2C:58-12 (West 2013).

<sup>135</sup> See CAL. PENAL CODE § 30920(b); CONN. GEN. STAT. § 53-202d(a), (d); HAW. REV. STAT. § 134-4(e); MD. CODE ANN., CRIM. LAW § 4-303(b); N.J. STAT. ANN. § 2C:58-12. The transfer of grandfathered assault weapons within state lines is illegal in California, Connecticut, Hawaii,



### B. High Capacity Magazines

Like the federal ban, most state bans regulate high capacity magazines as well as assault weapons.<sup>136</sup> Under California, Colorado, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, and New York law, high capacity magazines are prohibited.<sup>137</sup> The definition of a high capacity magazine varies somewhat from state to state<sup>138</sup> and there are exceptions as to exactly what is prohibited—states may allow possession, but prohibit transfer.<sup>139</sup>

Like the federal Assault Weapons Ban, the Connecticut, Massachusetts, and New York bans allow high capacity magazines, which were lawfully possessed prior to the date of enactment of the law, to be grandfathered.<sup>140</sup> Massachusetts, like the federal ban,

Maryland, and New York. See CAL. PENAL CODE § 30910 (West 2013); CONN. GEN. STAT. § 53-202d(b); HAW. REV. STAT. § 134-4(e); MD. CODE ANN., CRIM. LAW § 4-303; N.Y. S.B. 2230.

<sup>136</sup> See CAL. PENAL CODE §§ 16740, 32310 (West 2013); Colo. H.B. 1224, 69th Gen. Assemb., Reg. Sess. (2013) (enacted); CONN. GEN. STAT. § 53-202p(a)(1) (2013); HAW. REV. STAT. § 134-8(c) (2013); MD. CODE ANN., CRIM. LAW § 4-305(b) (LexisNexis 2013); MASS. GEN. LAWS ch. 140, § 121, 131M (2013); N.J. STAT. ANN. §§ 2C:39-1(y), 2C:39-3(j) (West 2013); N.Y. PENAL LAW § 265.00(23) (McKinney 2013), amended by N.Y. S.B. 2230.

<sup>137</sup> See CAL. PENAL CODE §§ 16740, 32310; Colo. H.B. 1224; CONN. GEN. STAT. § 53-202p(a)(1); HAW. REV. STAT. § 134-8(c); MD. CODE ANN., CRIM. LAW § 4-305(b); MASS. GEN. LAWS ch. 140, § 121, 131M; N.J. STAT. ANN. §§ 2C:39-1(y), 2C:39-3(j); N.Y. PENAL LAW § 265.00(23), amended by N.Y. S.B. 2230. Prior to the Sandy Hook shooting, Connecticut did not ban high capacity magazines—their current ban of high capacity magazines was implemented as a response to the shooting.

<sup>138</sup> Under New York law, a large capacity magazine is any magazine that has the capacity to accept more than seven rounds. N.Y. S.B. 2230. Under California, Connecticut, Hawaii, Maryland, and Massachusetts law, a large capacity magazine is any magazine that has the capacity to accept more than ten rounds (the ten-round capacity may be lower for shotguns). CAL. PENAL CODE § 16740; CONN. GEN. STAT. § 53-202p(a)(1); HAW. REV. STAT. § 134-8(c); MASS. GEN. LAWS ch. 140, § 121; MD. CODE ANN., CRIM. LAW § 4-305(b). Under Colorado and New Jersey law, a large capacity magazine is a magazine capable of holding more than fifteen rounds of ammunition. Colo. H.B. 1224; N.J. STAT. ANN. § 2C:39-1(y).

<sup>139</sup> Under California and Maryland law, the possession of large capacity magazines is legal but the transfer is illegal. CAL. PENAL CODE § 32310; MD. CODE ANN., CRIM. LAW § 4-305(b). Under Connecticut, Hawaii, and Massachusetts law, the possession and transfer of large capacity magazines is illegal (subject to small exceptions). CONN. GEN. STAT. § 53-202p(b)–(c); HAW. REV. STAT. § 134-8(c); MASS. GEN. LAWS ch. 140, § 131M. Under New Jersey law, anyone knowingly possessing a large capacity magazine is guilty of a crime “unless the person has registered an assault firearm . . . and the magazine is maintained and used in connection with participation in competitive shooting matches sanctioned by the Director of Civilian Marksmanship of the United States Department of the Army.” N.J. STAT. ANN. § 2C:39-3(j).

<sup>140</sup> See MASS. GEN. LAWS ch. 140, § 131M. In Connecticut, existing owners of large capacity magazines may possess such magazines provided they registered them with the Department of Emergency Services and Public Protection within one year from the law’s date of enactment. CONN. GEN. STAT. § 53-202p(e). New York law allows owners to grandfather their ten-round high capacity magazines but allows them only to load the magazine with up to seven bullets. N.Y. S.B. 2230.

allows owners of those magazines not only continued possession, but also allows owners to continue to transfer those magazines so long as they were lawfully possessed by a specific date.<sup>141</sup> Under Hawaii and New Jersey law, magazine grandfathering is prohibited.<sup>142</sup>

### C. California and New York Set the Standard

As it pertains to state law, California and New York have the strictest laws against assault weapons in the country.<sup>143</sup> On January 15, 2013, the Governor of New York, Andrew Cuomo, signed into law the New York Secure Ammunition and Firearms Enforcement Act (NY SAFE Act),<sup>144</sup> which he called “the most comprehensive [gun] package in the nation.”<sup>145</sup> Among other requirements, the law banned magazines that can hold more than seven rounds of ammunition, down from ten,<sup>146</sup> and expanded the definition of assault weapons to include semiautomatic pistols and rifles with at least “one military-style feature.”<sup>147</sup> Prior to this law, New York State’s assault weapons ban had used the federal generic definition of assault weapons that defined such weapons as those with at least two military-style features.<sup>148</sup> Governor Cuomo

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<sup>141</sup> MASS. GEN. LAWS ch. 140, § 131M; *but see* S.B. 821, 2013 Leg., 236th Sess. (N.Y. 2013) (enacted) (closing the loophole under New York law that allowed grandfathered large capacity magazines to continue to be transferred).

<sup>142</sup> There is nothing in Hawaii’s statute that discusses large capacity magazines owned prior to the effective date of the ban—the statute simply prohibits their possession. *See* HAW. REV. STAT. § 134-8(c). Under New Jersey law, the only discussion of lawful possession of large capacity magazines for citizens is if the person has registered an assault firearm deemed appropriate for competitive shooting and the magazine is maintained and used in connection with that assault firearm. *See* N.J. STAT. ANN. §§ 2C:39-1(y), 2C:39-3(j).

<sup>143</sup> Since the Sandy Hook shooting, Connecticut has followed suit and has become a state with some of the most restrictive gun laws in the country. *See* CONN. GEN. STAT. § 53-202a(1)(E) (2013) (stating that an “assault weapon” is any firearm with one military-type feature that can accept a detachable magazine).

<sup>144</sup> Thomas Kaplan & Danny Hakim, *New York Has Gun Deal, with Focus on Mental Ills; Obama’s Plan to Be Broad: State Lawmakers Approve Bill by 43 to 18*, N.Y. TIMES, Jan. 15, 2013, at A1.

<sup>145</sup> *Id.* For a thorough discussion regarding messages of necessity in the enactment of the NY SAFE Act, see Peter J. Galie & Christopher Bopst, “*It Ain’t Necessarily So*”: *The Governor’s “Message of Necessity” and the Legislative Process in New York*, 76 ALB. L. REV. 2219, 2260–72 (2013).

<sup>146</sup> N.Y. PENAL LAW § 265.00(23) (McKinney 2013).

<sup>147</sup> Kaplan & Hakim, *supra* note 144. One definition of an “assault weapon” under New York law is a semiautomatic rifle capable of receiving a detachable magazine and has one or more of the following military characteristics: (i) folding or telescoping stock; (ii) protruding pistol grip; (iii) bayonet mount; (iv) flash suppressor or threaded barrel designed to accommodate the flash suppressor; (v) grenade launcher; (vii) muzzle brake; or (viii) muzzle compensator. N.Y. PENAL LAW § 265.00(22)(a) (McKinney 2012), *amended by* N.Y. S.B. 2230, 236th Ann. Leg. Sess. (2013) (enacted).

<sup>148</sup> *See* 18 U.S.C. § 921(a)(3)(B)–(D) (2000) (repealed 2004); N.Y. PENAL LAW §

suggested the ineptitude of such a broad definition of “assault weapons” by, rather bluntly, suggesting the preceding New York law to have “more holes than Swiss cheese.”<sup>149</sup>

Like New York, California also defines assault weapons as those that can accept a detachable magazine and have one or more military-style features.<sup>150</sup> The features that the California and New York ban prohibit are the essence of an assault weapon,<sup>151</sup> unlike the federal ban that outlawed bayonet fittings and grenade launchers. Further, California bans at least another seventy five named assault type weapons.<sup>152</sup> Coinciding with that list, California makes it clear that “any other models that are only variations of those weapons with minor differences, regardless of the manufacturer,” are also banned.<sup>153</sup> To ensure copycat weapons do not run rampant, as was the case with the federal ban, California’s ban grants their Attorney General the power to add similar firearms to the list of banned assault weapons to combat manufacturers that attempt to slightly change their weapon in an attempt to skirt the ban.<sup>154</sup>

#### *D. Problems with State-by-State Legislation*

What is clear after analyzing some of the more pertinent provisions from the bans different states have adopted is the lack of uniformity from state to state. The even more pressing issue is that only *seven* states have adopted some kind of an assault weapons ban. Unfortunately, no matter how strong one state’s laws may be, there is not much to stop a citizen of a state with strong laws from driving a short distance to another state to acquire an assault weapon where the laws are less strict.<sup>155</sup>

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265.00(22)(a)–(c) (McKinney 2012) (repealed 2013).

<sup>149</sup> Thomas Kaplan, *Cuomo to Press for Wider Curbs Over Gun Access*, N.Y. TIMES, Jan. 9, 2013, at A1.

<sup>150</sup> CAL. PENAL CODE § 30515(a) (West 2013).

<sup>151</sup> EDUC. FUND TO STOP GUN VIOLENCE, *supra* note 30, at 7. One definition of an assault weapon under California law is a semiautomatic rifle “that has the capacity to accept a detachable magazine and any one of the following: (A) A pistol grip that protrudes conspicuously beneath the action of the weapon. (B) A thumbhole stock. (C) A folding or telescoping stock. (D) A grenade launcher or flare launcher. (E) A flash suppressor.” CAL. PENAL CODE § 30515(a)(1).

<sup>152</sup> *See* CAL. PENAL CODE § 30510(a)–(c).

<sup>153</sup> *Id.* § 30510(e).

<sup>154</sup> *See id.* § 30510(d).

<sup>155</sup> For example, “California’s gun controls are among the toughest in the nation, but they’re severely weakened by Washington’s failure to pass strong national laws.” *See, e.g.*, George Skelton, *California Can’t Go it Alone; Lacking Stiff U.S. Laws, Our Gun Rules Don’t*

This idea of a need for uniformity with respect to gun laws is also evidenced by Chicago's high rate of gun crime despite their strong gun laws.<sup>156</sup> "Chicago's experience reveals the complications inherent in carrying out local gun laws around the nation. Less restrictive laws in neighboring communities and states not only make guns easy to obtain nearby, but layers of differing laws—local and state—make it difficult to police violations."<sup>157</sup> New York City also has extremely restrictive gun laws but has a low gun violence rate.<sup>158</sup> This can be attributed to New York City's surrounding communities and states that also have tight gun laws.<sup>159</sup> Conversely, in Chicago, the surrounding area of the Midwest is much more lax on gun laws and thus citizens do not have to venture far to secure a dangerous weapon.<sup>160</sup>

#### VII. FEDERAL LEGISLATION AS THE ANSWER: WHAT SHOULD BE IN THE BILL?

What states have accomplished with their own bans is commendable, but real results must be realized through federal legislation. What a flawless bill would look like is impossible to foretell, but there are glaring holes in the original federal Assault Weapons Ban that would need to be filled if this country is serious about confronting the problem of mass shootings.

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*Stand a Chance*, L.A. TIMES, Jan. 21, 2013, at A2. Assault weapons and high capacity magazines that can hold more than ten bullets are illegal in California, but "[w]hen someone can drive 20 minutes across the border into Reno [Nevada] and arm himself, no questions asked, it greatly undermines California's laws [that are intended] to hold down the number of mass-killing machines such as assault weapons equipped with high-capacity magazines." *Id.*

<sup>156</sup> Although the State of Illinois does not ban assault weapons and high capacity magazines, Chicago does. See CHI., ILL., MUN. CODE ch. 8-20, art. I, §§ 8-20-010, 8-20-035, 8-20-085, 8-20-170(d) (2013).

<sup>157</sup> Monica Davey, *Strict Chicago Gun Laws Can't Stem Fatal Shots*, N.Y. TIMES, Jan. 30, 2013, at A1. Connecticut Governor Dannel Malloy recently stated that "federal gun control action is imperative, noting there's little to stop would-be criminals from taking advantage of relatively lax laws in one state and transporting guns around the country." Michael Pearson, *Obama Says Gun Lobby Stokes Fear of Federal Action*, CNN (Jan. 15, 2013, 9:51 AM), [http://www.cnn.com/2013/01/14/politics/gun-laws-battle/index.html?hpt=hp\\_t2](http://www.cnn.com/2013/01/14/politics/gun-laws-battle/index.html?hpt=hp_t2).

<sup>158</sup> Davey, *supra* note 157. New York City has its own assault weapons ban. N.Y.C., N.Y., ADMIN. CODE §§ 10-301(16), 10-303.1, 10-305 (2013).

<sup>159</sup> See Davey, *supra* note 157. Unfortunately, the ability to mobilize in the United States is without much restriction. Governor Malloy recently said that "[a]s long as weapons continue to travel up and down I-95 . . . what is available for sale in Florida or Virginia can have devastating consequences here in Connecticut." Michael Cooper, *From State To State, Varied Responses to the Issue of Gun Violence*, N.Y. TIMES, Feb. 4, 2013, at A9.

<sup>160</sup> Davey, *supra* note 157 ("[Chicago is] only as strong as the weakest gun law in [the] surrounding states.").

### A. *Registration of Grandfathered Assault Weapons*

The first fundamental weakness with the Assault Weapons Ban was its treatment of assault weapons and large capacity magazines that were already in lawful circulation. The law did virtually nothing to address that issue. What some states have done, and what is realistic, is to have owners of assault weapons register their weapons within a specific timeframe.<sup>161</sup> That registration requirement should be an annual requirement. An alternative would be to have gun owners render their assault weapons permanently inoperable, or turn them in, but that alternative is extreme and improbable.<sup>162</sup> Under this registration technique, an annual background check could be done on the individual.<sup>163</sup> Further, a provision that holds the owner civilly liable for a crime committed with his or her registered weapon could increase that person's responsibility with the weapon.<sup>164</sup>

High capacity magazines give assault weapons the ability to kill so many so quickly. Hawaii and New Jersey do not allow their high capacity magazines to be grandfathered; they simply prohibit them.<sup>165</sup> This is the stance a new assault weapons ban would have to take to be truly effective: demand that owners sell their magazines back to a licensed firearm dealer in a buy-back program, or render them permanently inoperable.<sup>166</sup> High capacity magazines simply have no place in the hands of a citizen.

### B. *A Stronger Generic Definition of an Assault Weapon*

Properly defining an assault weapon is one of the biggest hurdles to clear. Author Harry Wilson recently said, "I wrote a book on gun

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<sup>161</sup> California, Connecticut, Hawaii, Maryland, New Jersey, and New York all do this. *See supra* notes 133–34. The argument that registration of firearms eventually leads to confiscation is unfounded. "The assumption that any regulation of firearms sets us on the path to confiscation of weapons is not only ludicrous on its face, it ignores all political reality." Richard J. Davis, *In Gun Control Debate, Logic Goes Out the Window*, CNN (Jan. 26, 2013, 1:52 PM), [http://www.cnn.com/2013/01/25/opinion/davis-gun-control-logic/index.html?hpt=hp\\_t2](http://www.cnn.com/2013/01/25/opinion/davis-gun-control-logic/index.html?hpt=hp_t2).

<sup>162</sup> *See, e.g.*, LEGAL CMTY. AGAINST VIOLENCE, *supra* note 21, at 61.

<sup>163</sup> *See id.* at 62.

<sup>164</sup> *See id.*

<sup>165</sup> *See supra* note 142 and accompanying text.

<sup>166</sup> Australia implemented a successful federally-financed buy-back program of automatic and semiautomatic firearms, where they bought back almost seven hundred thousand guns and destroyed them. John Howard, Op-Ed., *I Went After Guns. Obama Can, Too*, N.Y. TIMES, Jan. 17, 2013, at A27.

control. I don't know what an assault weapon is."<sup>167</sup> To most effectively define an assault weapon is to "focus on the presence of the two key features that make assault weapons particularly dangerous: high capacity and enhanced control during rapid firing."<sup>168</sup>

### 1. High Ammunition Capacity

High ammunition capacity is what transitions an already dangerous weapon into a weapon capable of mass carnage in seconds. Gun enthusiast and author Duncan Long described his experience with the AR-15 rifle and high capacity magazines:

The rifle seemed to put bullets right on target, about as far as I could see on the hilly Kansas field where I did this first test. And the 30-round magazines I'd bought along chugged ammunition like there was no tomorrow. Very quickly I fired several hundred rounds.<sup>169</sup>

The scene depicted by Mr. Long is troubling given the fact that a mass shooter's weapon of choice is often the AR-15 equipped with high capacity magazines.<sup>170</sup> His eerie description makes it hard to imagine why such a weapon is manufactured for civilians.<sup>171</sup>

High capacity magazines must be outlawed.<sup>172</sup> Unlike the initial Assault Weapons Ban, a new ban would have to prohibit any grandfathering of high capacity magazines.<sup>173</sup> The ban would prohibit the transfer, possession, and import of high capacity magazines. Also, like the initial Assault Weapons Ban, manufacturers of high capacity magazines succeeding the ban should be required to engrave a serial number and the date of construction on that magazine to differentiate between pre-ban and post-ban magazines.<sup>174</sup> Under the proposed ban, the definition of

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<sup>167</sup> Josh Levs, *Loaded Language Poisons Gun Debate*, CNN (Jan. 31, 2013, 7:37 PM), [http://www.cnn.com/2013/01/31/politics/gun-language/index.html?hpt=hp\\_c1](http://www.cnn.com/2013/01/31/politics/gun-language/index.html?hpt=hp_c1).

<sup>168</sup> EDUC. FUND TO STOP GUN VIOLENCE, *supra* note 30, at 8.

<sup>169</sup> LONG, *supra* note 85, at 1.

<sup>170</sup> See discussion *supra* Part II.

<sup>171</sup> One reason the AR-15 is manufactured for civilians is that it is a huge moneymaker. Natasha Singer, *The Most Wanted Gun in America*, N.Y. TIMES, Feb 3, 2013, at BU1. AR-15s are the most popular rifle in America and each one can sell anywhere from \$1100 to twice that. *Id.*

<sup>172</sup> The prevalence of high capacity magazines in mass shootings is undeniable. See generally sources cited *supra* note 21 and accompanying text (providing examples of mass shootings involving high capacity magazines).

<sup>173</sup> Under the proposed ban, weapons with fixed magazines could be lawfully grandfathered assuming the registration requirements were met.

<sup>174</sup> Obviously the manufacture of assault weapons and high capacity magazines would

“high capacity magazine” would be any ammunition-feeding device that has the capability of accepting more than seven rounds.<sup>175</sup> Thus, the new ban would render magazines with the ability of accepting more than seven rounds of ammunition illegal, whereas the original Assault Weapons Ban outlawed magazines with the capabilities of accepting more than ten rounds of ammunition.

Of course, there is little stopping a potential shooter from carrying with him many legal magazines with a capacity of the proposed seven rounds. Indeed, “[w]ith very little practice, a shooter can replace an empty magazine with a pre-loaded, full magazine in one or two seconds.”<sup>176</sup> That being said, the fewer rounds in a given magazine, the more difficult it becomes for a potential shooter to get off the enormous number of rounds that Mr. Lanza did at Sandy Hook and Mr. Holmes did in Aurora.<sup>177</sup>

For example, to the contrary, on December 7, 1993, a gunman used a semiautomatic pistol with several fifteen-round high capacity magazines to fire between thirty and fifty rounds, killing six and wounding nineteen more.<sup>178</sup> He was finally overpowered while attempting to reload another magazine.<sup>179</sup> In another case, Kip Kinkel fired fifty-one shots at a school in Springfield, Oregon.<sup>180</sup> He used a semiautomatic assault rifle to kill two and injure twenty-two others.<sup>181</sup> The carnage only stopped when Mr. Kinkel was subdued while he stopped to reload.<sup>182</sup>

## 2. Enhanced Control During Rapid-Fire

The second element of an assault weapon that makes it

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have to continue in some capacity for military and law enforcement personnel.

<sup>175</sup> This is what New York State recently did to tighten its assault weapons ban. See discussion *supra* Part VI(C).

<sup>176</sup> EDUC. FUND TO STOP GUN VIOLENCE, *supra* note 30, at 8.

<sup>177</sup> Vice President Joe Biden recently discussed the Sandy Hook shooting and stated that Mr. Lanza used thirty-round magazines and had to swap out “four or five times,” but if those magazines were limited to ten rounds the gunman would have to swap out many more times. Ashley Killough, *Biden’s Gun Advice for Earthquakes*, CNN (Jan. 24, 2013, 3:50 PM), <http://politicalticker.blogs.cnn.com/2013/01/24/bidens-gun-advice-for-earthquakes>. Biden went further, stating “Maybe if it took longer, maybe one more kid would be alive.” *Id.*

<sup>178</sup> H.R. REP. NO. 103-489, at 15 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1801, 1823.

<sup>179</sup> *Id.*

<sup>180</sup> THE POLITICS OF GUN CONTROL, *supra* note 6, at 73.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* There will always be firepower that potential mass shooters can acquire legally to inflict damage. “It would be unrealistic to suggest that no harm would have been done had these boys not been able to arm themselves easily, but the degree of death and injury would undoubtedly have been reduced if they had had less firepower.” *Id.*

exceedingly dangerous is the enhanced control during rapid-fire.<sup>183</sup> The rapid-fire capabilities of semiautomatic assault weapons can make them difficult to control.<sup>184</sup> Manufacturers use specific features on weapons to make rapid-fire more controllable.<sup>185</sup> These features are: (1) the pistol grip or thumbhole stock—this “allow[s] the shooter to exert leverage on the gun during rapid firing by holding it firmly with both hands;”<sup>186</sup> (2) another grip protruding from the front of the weapon—this allows the shooter to grip the weapon with the non-trigger hand, where the shooter is able to “gain[] leverage over an unruly weapon;”<sup>187</sup> (3) a barrel shroud—this is another way for the shooter to gain leverage over the weapon in the absence of a front grip, because the shooter can hold the actual barrel of the assault weapon;<sup>188</sup> and (4) a muzzle brake or muzzle compensator—this is designed to fight the recoil of a rapid-fire weapon, greatly increasing the weapon’s accuracy.<sup>189</sup> The foregoing are the quintessential elements of an assault weapon. Put simply, they serve the one purpose of allowing a weapon to fire at a high-rate accurately and effectively. These features allow a shooter to accurately fire multiple rounds per second, maximizing the amount of damage a potential killer can inflict.

### C. Putting It All Together

A successful ban would define an assault weapon as any semiautomatic rifle that is (1) capable of accepting a detachable magazine, and (2) has at least one military-type feature.<sup>190</sup> A military-type feature would be defined as (a) a pistol grip or thumbhole stock; (b) a front grip protruding beneath the barrel of the weapon; (c) a barrel shroud, or the equivalent; (d) a muzzle brake, muzzle compensator, or flash suppressor with the capabilities of a muzzle brake or muzzle compensator; or (e) a fixed magazine capacity of more than seven rounds. This model essentially cuts to the core of what assault weapons are by limiting their high ammunition capacity to only seven rounds and

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<sup>183</sup> EDUC. FUND TO STOP GUN VIOLENCE, *supra* note 30, at 8.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 9.

<sup>187</sup> *Id.*

<sup>188</sup> A weapon firing one round after another becomes extremely hot and the only way a shooter can continue to hold the barrel is with a barrel shroud, which keeps it cool. *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> California was the first to use the one feature test. See CAL. PENAL CODE § 12276.1 (1999) (repealed 2012).



eliminating the essential features that allow assault weapons to be so accurate during rapid-fire.

Further, a successful ban would define as an assault weapon any semiautomatic *pistol* that has an ability to accept a detachable magazine and has at least one military-type feature.<sup>191</sup> The 1994 Assault Weapons Ban required at least two military-type features.<sup>192</sup> Again, this limits the features that enhance a semiautomatic pistol's rapid-fire accuracy and changes the detachable magazine capacity from ten to seven.<sup>193</sup> Further, prohibiting any semiautomatic pistol that has a fixed magazine capacity of more than seven rounds would have to be included in a successful ban.<sup>194</sup> Finally, under a successful ban a semiautomatic shotgun would be an assault weapon, just as it had been under the Assault Weapons Ban of 1994, but the two military-type feature requirements would be changed to only one.<sup>195</sup>

In summation, under a successful ban it would be unlawful to manufacture, import, possess, purchase, and transfer an assault weapon (with the exception of possessing and registering grandfathered weapons).<sup>196</sup> Further, it would be unlawful to manufacture, import, possess, purchase, and transfer a high capacity magazine. The grandfather clause would not apply to high capacity magazines.

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<sup>191</sup> Under the Assault Weapons Ban, a semiautomatic pistol was an assault weapon if it could accept a detachable magazine and had at least two of these features:

(i) an ammunition magazine that attaches to the pistol outside of the pistol grip; (ii) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer; (iii) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the nontrigger hand without being burned; (iv) a manufactured weight of 50 ounces or more when the pistol is unloaded; and (v) a semiautomatic version of an automatic firearm.

18 U.S.C. § 921(a)(30)(C) (1996) (repealed 2004).

<sup>192</sup> *See id.*

<sup>193</sup> *See* LEGAL CMTY. AGAINST VIOLENCE, *supra* note 21, at 58.

<sup>194</sup> Most semiautomatic pistols have fixed magazine capacities of more than seven rounds and it is clear from *Heller* that a ban on handguns is unconstitutional (although the handgun at issue in *Heller* was a revolver). *See* discussion *infra* Part VIII.A. However, just because a law requires manufacturers to adjust does not mean semiautomatic handguns are effectively outlawed—it simply means they have to be designed differently.

<sup>195</sup> The new proposed ban would keep the same features as designated by the Assault Weapons Ban. Under the Assault Weapons Ban, a semiautomatic shotgun was an assault weapon if it had at least two of the following: “(i) a folding or telescoping stock; (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon; (iii) a fixed magazine capacity in excess of 5 rounds; and (iv) an ability to accept a detachable magazine.” 18 U.S.C. § 921(a)(30)(D).

<sup>196</sup> *See* LEGAL CMTY. AGAINST VIOLENCE, *supra* note 21, at 58. Under the proposed ban the transfer of grandfathered assault weapons would be prohibited.

### VIII. DOES AN ASSAULT WEAPONS BAN VIOLATE THE SECOND AMENDMENT?

The U.S. Supreme Court has recently defined the Second Amendment in two important decisions.<sup>197</sup> As a result, there has been new litigation in the area of an individual's right to bear arms. Because the Supreme Court was not explicit on how to analyze a Second Amendment challenge, there has been uncertainty in the lower federal courts. Taking the Second Amendment issue as a whole, this section attempts to predict how a Second Amendment challenge against an assault weapons ban, similar to the ban suggested in the preceding section, might be analyzed.

#### A. *The Heller and McDonald Decisions*

The Second Amendment reads: "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."<sup>198</sup> The meaning of those words was the basis of the controversy in the 2008 U.S. Supreme Court case *District of Columbia v. Heller*.<sup>199</sup>

In 2002, Dick Heller, a District of Columbia special police officer, applied for a registration certificate for a handgun that would allow him to keep a revolver at his home, but the District of Columbia refused.<sup>200</sup> He then filed a lawsuit in the U.S. District Court for the District of Columbia, alleging that the D.C. Code, which generally prohibited the possession of handguns, was in violation of the Second Amendment.<sup>201</sup> Until this point in America's history, it was

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<sup>197</sup> See *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (plurality opinion). *Heller* deals with a District of Columbia law banning handgun possession in the home and requiring any lawfully possessed firearms in the home to be disassembled or bound by a trigger lock, and thus rendered immediately inoperable for self-defense. *Heller*, 554 U.S. at 628. The Court held that the law violated the Second Amendment and held that, while not unlimited, the right secured by the Second Amendment protects the individual possession of a firearm for lawful purposes such as self-defense, irrespective of service in a militia. *Id.* at 610, 626, 635. In *McDonald*, a Chicago city ordinance banned the possession of any unregistered firearms while simultaneously banning handgun registration, thereby effectively banning handgun possession by private citizens within the city. *McDonald*, 130 S. Ct. at 3026. The Village of Oak Park enacted a similar law. *Id.* The City of Chicago and the Village of Oak Park argued that their laws were constitutional because the Second Amendment did not apply to the states. *Id.* The Court held that the Second Amendment right is incorporated by the Due Process Clause of the Fourteenth Amendment and is therefore applicable to the states. *Id.* at 3026, 3050.

<sup>198</sup> U.S. CONST. amend. II.

<sup>199</sup> See *Heller*, 554 U.S. at 576-77.

<sup>200</sup> *Id.* at 575; WINKLER, *supra* note 33, at 91-92.

<sup>201</sup> *Heller*, 554 U.S. at 575-76. Under the D.C. Code, it was a crime to carry an

virtually settled law that the Second Amendment's right to bear arms applied only via the "militia theory"—to arms that had some reasonable relationship to the efficiency of a well-regulated militia (a collective right to bear arms).<sup>202</sup> In other words, the federal courts endorsed the idea that owning a weapon was a constitutional right via the "militia theory" rather than an individual right theory.<sup>203</sup> The Bill of Rights, or the first ten amendments to the Constitution, "applies only by its terms to the federal government."<sup>204</sup> The District of Columbia is considered a federal territory and, thus, the Second Amendment applies directly.<sup>205</sup> At the time *Heller* was decided, the Second Amendment had not been incorporated<sup>206</sup> to apply to the states through the Fourteenth Amendment, and thus was only protected against infringement by the federal government.<sup>207</sup>

Eventually, Dick Heller's claim went up to the U.S. Supreme

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unregistered firearm, and the registration of handguns was prohibited. See D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2013). Further, no person could carry a handgun without a license. See *id.* §§ 22-4504(a), 22-4506. Finally, the D.C. Code also required residents to keep their lawfully owned firearms, such as registered long guns, "unloaded and disassembled or bound by a trigger lock or similar device" unless they were located in a place of business or were being used for lawful recreational activities. See *id.* § 7-2507.02.

<sup>202</sup> WINKLER, *supra* note 33, at 45.

<sup>203</sup> See, e.g., *United States v. Miller*, 307 U.S. 174, 178 (1939); *United States v. Hamblen*, 239 Fed. App'x 130, 134–35 (6th Cir. 2007); *United States v. Parker*, 362 F.3d 1279, 1284 (10th Cir. 2004); *United States v. Jackubowski*, 63 F. App'x 959, 960–61 (7th Cir. 2003); *Silveira v. Lockyer*, 312 F.3d 1052, 1063 (9th Cir. 2002); *Gardner v. Vespia*, 252 F.3d 500, 503 (1st Cir. 2001); *Fop v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999); *United States v. Scanio*, No. 97-1584, 1998 U.S. App. LEXIS 29415, at \*5 (2d Cir. Nov. 12, 1998); *United States v. Wright*, 117 F.3d 1265, 1272–73 (11th Cir. 1997); *Love v. Peppersack*, 47 F.3d 120, 123–24 (4th Cir. 1995); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942); but see *United States v. Emerson*, 270 F.3d 203, 264 (5th Cir. 2001) (endorsing the view that the Second Amendment protects the right of the individual to keep and bear arms regardless of membership in a militia).

<sup>204</sup> WINKLER, *supra* note 33, at 50 ("That is why the First Amendment says, 'Congress shall make no law.'"). There has never been a majority on the U.S. Supreme Court that has held that the entire Bill of Rights applies to the states. *Id.* at 51.

<sup>205</sup> *Id.* at 51 ("Because the District is the nation's capital, the Constitution gives Congress ultimate authority over the area.").

<sup>206</sup> See *id.* The term "selective incorporation" is really a shortcut for the theory that a particular right guaranteed by the Bill of Rights against intrusion by the federal government is also guaranteed from intrusion by the states via the Fourteenth Amendment. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034 (2010) (plurality opinion) ("[T]he Due Process Clause [of the Fourteenth Amendment] fully incorporates particular rights contained in the first eight Amendments."); HENRY J. ABRAHAM & BARBARA A. PERRY, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES* 96 (8th ed. 2003). The relevant test for which of these rights are incorporated by the Fourteenth Amendment requires an inquiry into whether a particular Bill of Rights guarantee "is fundamental to our scheme of ordered liberty and system of justice." *McDonald*, 130 S. Ct. at 3034.

<sup>207</sup> See WINKLER, *supra* note 33, at 51.

Court.<sup>208</sup> The controversial five to four *Heller* decision came down in 2008 and for the first time in America's history, Justice Scalia, writing for the majority, held that the Second Amendment "confer[s] an *individual* right to keep and bear arms" for self-defense.<sup>209</sup> The Supreme Court redefined the Second Amendment—it held that individuals had the right to own firearms irrespective of their relationship to state militia.<sup>210</sup> The *Heller* decision struck down the District of Columbia handgun restriction as being unconstitutional and in violation of the Second Amendment.<sup>211</sup> In doing so, however, the Court did not answer the question as to whether the Second Amendment applied to state action.<sup>212</sup>

The *Heller* decision was not without restriction.<sup>213</sup> Justice Scalia, recognizing the danger of such a broad holding, explained that this right was not unlimited.<sup>214</sup> Scalia spoke for the majority in finding that "nothing in [this] 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."<sup>215</sup> He found this list not to be exhaustive and that such regulatory measures are presumptively constitutional.<sup>216</sup> Scalia also found that under the Second Amendment, the types of weapons protected are those that are "in common use at the time"—although he did not expand on what that meant.<sup>217</sup> Finally, Scalia also suggested that based on reviewing the Second Amendment's "historical tradition" it is within a state legislature's or Congress's power to outlaw "dangerous and unusual weapons"—but again, Scalia did not expand on this point.<sup>218</sup> In 2010, in *McDonald v. City of Chicago*, the plurality opinion of the U.S. Supreme Court held that a Chicago handgun restriction,

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<sup>208</sup> *District of Columbia v. Heller*, 554 U.S. 570, 575–76 (2008).

<sup>209</sup> *Id.* at 595 (emphasis added); WINKLER, *supra* note 33, at 278. The Court specifically stated that "handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Heller*, 554 U.S. at 629.

<sup>210</sup> *See Heller*, 554 U.S. at 580–81, 591–92.

<sup>211</sup> *Id.* at 628–29.

<sup>212</sup> *See id.* at 620 n.23.

<sup>213</sup> *See, e.g.*, WINKLER, *supra* note 33, at 279 (noting a list of acceptable Second Amendment exceptions).

<sup>214</sup> *Heller*, 554 U.S. at 626.

<sup>215</sup> *Id.*

<sup>216</sup> *See id.* at 627 n.26.

<sup>217</sup> *See id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

<sup>218</sup> *See id.*; WINKLER, *supra* note 33, at 279. The Ninth Circuit has held that machine guns are "dangerous and unusual weapons" and thus not within Second Amendment protection. *See United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012) (quoting *Heller*, 554 U.S. at 625–26), *cert. denied*, 133 S. Ct. 996 (2013).

similar to the D.C. restriction in *Heller*, was subject to the Second Amendment.<sup>219</sup> There, the Supreme Court incorporated the Second Amendment through the Fourteenth Amendment, and thus made the individual right to bear arms fully applicable to the states.<sup>220</sup> Further, *McDonald* reinforced “that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.”<sup>221</sup>

Since *Heller* and *McDonald*, there have not been any Second Amendment challenges to state or local assault weapon bans that have reached the U.S. Supreme Court.<sup>222</sup> That being said, before these two decisions, every Second Amendment challenge to local and state assault weapon bans was dismissed.<sup>223</sup> However, these

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<sup>219</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010) (plurality opinion).

<sup>220</sup> *Id.* at 3050.

<sup>221</sup> *Id.* at 3044.

<sup>222</sup> Although they have not reached the U.S. Supreme Court, there have been a number of cases dealing with the constitutionality of assault weapons bans since the *Heller* decision. *See, e.g.*, *Shew v. Malloy*, No. 3:13CV739(AVC), 2014 U.S. Dist. LEXIS 11339, at \*39–40 (D. Conn. Jan. 30, 2014) (holding that the Connecticut ban on assault weapons and large capacity magazines passes intermediate scrutiny and thus is not a violation of the Second Amendment); *Kampfer v. Cuomo*, No. 6:13-cv-82 (GLS/ATB), 2014 U.S. Dist. LEXIS 1479, at \*18 (N.D.N.Y. Jan. 7, 2014) (holding that the SAFE ACT does not substantially burden the plaintiff’s Second Amendment rights and as such the law is constitutional); *Heller v. District of Columbia*, 670 F.3d 1244, 1262, 1264 (D.C. Cir. 2011) (holding that a local assault weapons ban passes intermediate scrutiny and thus is not a violation of the Second Amendment); *People v. James*, 94 Cal. Rptr. 3d 576, 585–86 (Cal. Ct. App. 2009) (holding that assault weapons are “dangerous and unusual weapons” and thus not within Second Amendment protection); *Wilson v. Cnty. of Cook*, 968 N.E.2d 641, 653, 657 (Ill. 2012) (holding that plaintiff did have a cause of action when he disputed the constitutionality of a countywide assault weapons ban under the Second Amendment). There have also been a number of Second Amendment challenges to other state and local firearm laws since the *Heller* and *McDonald* decisions, the majority of which have been dismissed. *See, e.g.*, *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 188 (5th Cir. 2012) (holding that a federal statute prohibiting federally licensed firearms dealers from selling handguns to persons under the age of twenty one does not violate the Second Amendment); *Hightower v. City of Boston*, 693 F.3d 61, 73 (1st Cir. 2012) (holding that the government may regulate the carrying of concealed weapons outside the home); *United States v. Colon-Quiles*, 859 F. Supp. 2d 229, 231, 235 (D. P.R. 2012) (finding that a statute that makes it unlawful to possess a firearm with an obliterated serial number that has been transported in interstate commerce does not violate the Second Amendment); *Jackson v. City & Cnty. of San Francisco*, No. C 09-2143 RS, 2012 U.S. Dist. LEXIS 116732, at \*1–2 (N.D. Cal. Aug. 17, 2012) (denying plaintiff’s motion for judgment on the pleadings which requested the court to hold that an ordinance that restricted the use of handguns in the home and an ordinance that prohibited certain types of bullets violated the Second Amendment).

<sup>223</sup> *See, e.g.*, *Silveira v. Lockyer*, 312 F.3d 1052, 1087 (9th Cir. 2002) (“[T]he Second Amendment imposes no limitation on California’s ability to enact legislation regulating or prohibiting the possession or use of firearms, including dangerous weapons such as assault weapons.”); *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 538 & n.18 (6th Cir. 1998) (holding that the Second Amendment does not apply to a local assault weapons regulation); *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 731 (9th Cir. 1992) (holding that the Second Amendment does not apply to actions taken by the states);

challenges, which were denied on Second Amendment grounds, came before the individual right theory that was established in *Heller* and before the Second Amendment was incorporated to the states in *McDonald*. Thus, before *McDonald*, state and local governments could do whatever they wanted relating to gun control and never risk violating the Second Amendment.<sup>224</sup>

*B. What Level of Constitutional Scrutiny to Apply?*

Despite being a lengthy decision, *Heller* failed to articulate the appropriate level of constitutional scrutiny that applies to a challenge of laws that restrict a person's right to bear arms.<sup>225</sup> The Court did however find that rational basis would not suffice as the appropriate level of constitutional scrutiny because rights that are explicit in the Bill of Rights require a heightened test of scrutiny.<sup>226</sup> The Court also declined to apply the "interest-balancing approach" that was devised by Justice Breyer in his dissent in *Heller*.<sup>227</sup> Thus, the question regarding what level of constitutional scrutiny to apply to challenges to firearm regulations was never answered.

In 2010, the Tenth Circuit adopted the Third Circuit's two-pronged approach from *United States v. Marzzarella*,<sup>228</sup> which calls for an examination of: (1) "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee," and, if it does, (2) whether the law passes muster under "some form of means-end scrutiny."<sup>229</sup> In *Marzzarella*, the court found that, depending on the type of restriction, the Second Amendment could trigger different levels of constitutional scrutiny.<sup>230</sup> Where the federal law did "not severely

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Citizens for a Safer Cmty. v. City of Rochester, 627 N.Y.S.2d 193, 196–97, 198 (Sup. Ct. Monroe County 1994) (holding that a city ordinance regulating certain semiautomatic weapons does not violate the Second Amendment). There have been other constitutional challenges to assault weapon bans. See, e.g., Springfield Armory, Inc. v. City of Columbus, 29 F.3d 250, 251 (6th Cir. 1994) (holding that the city of Columbus's assault weapons ban was unconstitutionally vague); Olympic Arms v. Magaw, 91 F. Supp. 2d 1061, 1069, 1074 (E.D. Mich. 2000) (holding that the federal Assault Weapons Ban did not violate the Commerce Clause or the Equal Protection Clause of the U.S. Constitution).

<sup>224</sup> They could, however, risk violating a state constitution's right to bear arms provision. See discussion *infra* Part VIII.C.

<sup>225</sup> See District of Columbia v. Heller, 554 U.S. 570, 634 (2008).

<sup>226</sup> See *id.* at 628 n.27.

<sup>227</sup> See *id.* at 634–35.

<sup>228</sup> United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010).

<sup>229</sup> United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010) (quoting *Marzzarella*, 614 F.3d at 89).

<sup>230</sup> See *Marzzarella*, 614 F.3d at 96–97.

limit the possession of firearms,” the Third Circuit applied intermediate scrutiny.<sup>231</sup> In *Heller*, the handgun ban at issue prohibited “the most popular weapon chosen by Americans for self-defense in the home,” and thus failed constitutional muster, regardless of what standard of scrutiny applied.<sup>232</sup>

In *United States v. Reese*, the Tenth Circuit applied intermediate scrutiny to a federal law that prohibited the possession of a firearm by a person subject to a domestic protection order.<sup>233</sup> In the 2010 case *United States v. Skoien*,<sup>234</sup> the Seventh Circuit also applied intermediate scrutiny to a federal law that prohibited the possession of firearms by anyone who had been convicted of a misdemeanor crime of domestic violence.<sup>235</sup>

The *Heller* and *McDonald* decisions are so recent that many federal Circuit Courts of Appeal have not yet taken up the issue. Thus far, it appears that intermediate scrutiny will apply (unless the law at issue is a complete ban on handguns), and that test generally calls for an analysis of whether the challenged law serves an important government interest and whether there is a substantial fit between the law and the asserted objective.<sup>236</sup> Strict scrutiny seemingly does not apply. This is because the list of presumptively lawful firearm regulatory measures lawmakers can enact when it comes to the Second Amendment, articulated in *Heller* by the majority, appears to be inconsistent with the meaning of strict scrutiny.<sup>237</sup>

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<sup>231</sup> *Id.* at 97.

<sup>232</sup> *Heller*, 554 U.S. at 628–29.

<sup>233</sup> *Reese*, 627 F.3d at 802.

<sup>234</sup> *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010).

<sup>235</sup> *See id.* at 639, 641–42.

<sup>236</sup> *Marzarella*, 614 F.3d at 97, 98. Other courts have also applied the intermediate scrutiny analysis to Second Amendment challenges. *See, e.g.*, *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 206–07 (5th Cir. 2012), *cert denied*, 134 S. Ct. 1364 (2014); *United States v. Carter*, 669 F.3d 411, 416–17 (4th Cir. 2012); *United States v. Chester*, 628 F.3d 673, 682–83 (4th Cir. 2010); *United States v. Laurent*, 861 F. Supp. 2d 71, 104 (E.D.N.Y. 2011); *Osterweil v. Bartlett*, 819 F. Supp. 2d 72, 84 (N.D.N.Y. 2011); *United States v. Smith*, 742 F. Supp. 2d 855, 865 (S.D. W.Va. 2010); *United States v. Walker*, 709 F. Supp. 2d 460, 466 (E.D. Va. 2010); *but see United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012) (“[H]eightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense.”), *cert. denied*, 133 S. Ct. 838 (2013).

<sup>237</sup> *See District of Columbia v. Heller*, 554 U.S. 570, 688 (2008) (Breyer, J., dissenting). Generally, under a strict scrutiny analysis, the law at issue is presumptively unconstitutional. *See, e.g.*, *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813, 817 (2000) (noting that content-based restrictions are subject to strict constitutional scrutiny and as such are presumptively invalid); *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (noting that to satisfy strict scrutiny the state must demonstrate that its law is narrowly tailored to achieve

In *United States v. Henry*,<sup>238</sup> the Ninth Circuit, citing *Heller*, held that machine guns are “dangerous and unusual weapons”<sup>239</sup> and are not protected under the Second Amendment because such weapons “allow[] a shooter to kill dozens of people within a matter of seconds.”<sup>240</sup> The court never made it to the constitutional scrutiny analysis because the court simply held that the individual right to possess machine guns is not a right recognized by the Second Amendment.<sup>241</sup> Under this analysis, semiautomatic assault weapons would not be protected under the Second Amendment either—because they too give a shooter the capability to commit mass murder in seconds.<sup>242</sup>

Further, even if the Court found that assault weapons are protected under the Second Amendment, the ban would still be constitutional because it passes intermediate scrutiny. The proposed assault weapons ban still allows gun-owners sufficient firepower to defend their “hearth and home,”<sup>243</sup> and thus the ban does not severely limit an individual’s right to bear arms.<sup>244</sup> Under intermediate scrutiny, any new assault weapons ban would have to serve an important government interest and there would have to be

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a compelling state interest).

<sup>238</sup> *United States v. Henry*, 688 F.3d 637 (9th Cir. 2012).

<sup>239</sup> *Id.* at 640 (quoting *Heller*, 554 U.S. at 627).

<sup>240</sup> *Id.*

<sup>241</sup> *See id.* In another case, a California Court of Appeal upheld the constitutionality of California’s assault weapons ban and held that the Second Amendment does not protect the right to own assault weapons, and, specifically, that “[t]hese are not the types of weapons that are typically possessed by law-abiding citizens for lawful purposes such as sport hunting or self-defense; rather, these are weapons of war.” *See People v. James*, 94 Cal. Rptr. 3d 576, 577, 586 (Cal. Dist. Ct. App. 2009). This case was decided before the *McDonald* case incorporated the Second Amendment through the Fourteenth Amendment to apply against state action. *See supra* text accompanying notes 219–21. However, the California Court of Appeal noted that the defendant “‘anticipate[d]’ that the Second Amendment [would] be incorporated . . . . Since we hold that defendant’s right to bear arms was not infringed by [California’s assault weapons ban], we do not address the incorporation issue.” *James*, 94 Cal. Rptr. 3d. at 579 n.4. The court went further to state that the “[d]efendant’s reading of *Heller* does not withstand scrutiny.” *Id.* at 579. As such, the court was treating defendant’s claim as if the Second Amendment had already been incorporated to apply against state action.

<sup>242</sup> *See discussion supra* Part II. A “30-round magazine” of an UZI can be “emptied in slightly less than two seconds on full automatic, while the same magazine [can be] emptied in just five seconds on semiautomatic.” *See Heller v. District of Columbia*, 670 F.3d 1244, 1262–63 (D.C. Cir. 2011) (quoting Testimony of Brian J. Siebel, Brady Center to Prevent Gun Violence, at 1 (Oct. 1, 2008)).

<sup>243</sup> *See Heller*, 554 U.S. at 635 (noting that, at the very least, the Second Amendment allows responsible citizens to use arms in defense of “hearth and home”).

<sup>244</sup> Under the proposed assault weapons ban, gun owners could still possess certain semiautomatic firearms with up to seven rounds of ammunition and, with practice, magazines can be quickly reloaded. *See discussion supra* Part VII.B.1.



2013/2014]

The Assault Weapons Ban

611

a substantial relationship between that government interest and the law.

The government's objective in creating an assault weapons ban would be primarily to reduce the lives lost in future mass shootings.<sup>245</sup> The ban would reduce the amount of ammunition a shooter could hold in any one magazine. Further, it would outlaw certain features that are common in assault weapons that provide the ability to accurately fire at a high rate. With that, because there is a substantial relationship between the government interest and the law, an assault weapons ban would survive intermediate scrutiny. The ban seeks to limit the firepower available to shooters and although it cannot stop mass killings, its purpose would be to make them more difficult to execute.

In fact, in 2011, the District of Columbia Circuit Court of Appeals held in *Heller v. District of Columbia* that the District of Columbia's assault weapons ban survived intermediate scrutiny because "the District has carried its burden of showing a substantial relationship between the prohibition of both semi-automatic rifles and magazines holding more than ten rounds and the objectives of protecting police officers and controlling crime."<sup>246</sup>

In *New York State Rifle and Pistol Ass'n, Inc. v. Cuomo*, plaintiffs brought a lawsuit in the Western District of New York contending that New York's SAFE ACT violated the Second Amendment.<sup>247</sup> The court recognized that "[s]tudies and data support New York's view that assault weapons are often used to devastating effect in mass shootings."<sup>248</sup> The court held that the SAFE ACT passes intermediate scrutiny finding that "New York has satisfied its burden to demonstrate a substantial link, based on reasonably relevant evidence, between the SAFE Act's regulation of assault weapons and the compelling interest of public safety that it seeks to advance."<sup>249</sup>

### *C. A State Constitutional Challenge to an Assault Weapons Ban*

One state decision that might provide insight into how the U.S.

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<sup>245</sup> The government interests in public safety and crime prevention are undoubtedly compelling. See, e.g., *United States v. Salerno*, 481 U.S. 739, 748–49 (1987); *Schall v. Martin*, 467 U.S. 253, 264 (1984).

<sup>246</sup> *Heller*, 670 F.3d at 1264.

<sup>247</sup> *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, No. 13-CV-291S, 2013 U.S. Dist. LEXIS 182307, at \*4–5 (W.D.N.Y. Dec. 31, 2013).

<sup>248</sup> *Id.* at \*48.

<sup>249</sup> *Id.* at \*54.

Supreme Court may rule on a Second Amendment challenge to a federal assault weapons ban since the *Heller* decision can be found in the case *Benjamin v. Bailey*.<sup>247</sup> In *Benjamin*, the plaintiffs brought a declaratory action in state court, asserting that Connecticut's assault weapons ban<sup>248</sup> was in violation of Connecticut's Constitution, which reads: "Every citizen has a right to bear arms in defense of himself and the state."<sup>249</sup> The Supreme Court of Connecticut held the Connecticut assault weapons ban was not a violation of the state constitution.<sup>250</sup> The court reasoned that the Connecticut Constitution "protects each citizen's right to possess a weapon of reasonably sufficient firepower to be effective for self-defense."<sup>251</sup> The court also noted that "as long as our citizens have available to them some types of weapons that are adequate[ly] reasonabl[e] to vindicate the right to bear arms in self-defense, the state may proscribe the possession of other weapons without infringing on [the Connecticut Constitution]."<sup>252</sup>

The right conferred by the Supreme Court of Connecticut, an individual right for self-defense, is similar to the right asserted in the *Heller* decision. Thus, a federal assault weapons ban could be held as constitutional under a similar analysis. The Supreme Court of Connecticut's decision in *Benjamin* is in no way a precursor for what the U.S. Supreme Court may do if a federal assault weapons ban was challenged under the Second Amendment. However, given the similarities in the definitions of what the individual right of gun ownership actually means by both Connecticut and the U.S. Supreme Court, suggesting the U.S. Supreme Court might adopt an analysis similar to the Connecticut court's is within the realm of possibility.

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<sup>247</sup> *Benjamin v. Bailey*, 662 A.2d 1226 (Conn. 1995).

<sup>248</sup> See CONN. GEN. STAT. §§ 53-202a-202o (1993) (amended 2013). In 2013, Connecticut's assault weapons ban was amended to prohibit semiautomatic handguns and rifles that have the ability to accept a detachable magazine and possess at least *one* military feature. CONN. GEN. STAT. § 53-202a(1)(E)(i), (ii), (iv) (2013). Further, the statute now bans high capacity magazines but did not previously. See *id.* § 53-202a(1)(E)(v).

<sup>249</sup> CONN. CONST. art. 1, § 15; *Benjamin*, 662 A.2d at 1228. No assault weapons ban has ever been struck down for violating a state right to bear arms provision. See, e.g., *Robertson v. City & Cnty. of Denver*, 874 P.2d 325, 333 (Colo. 1994), *appeal after remand*, 978 P.2d 156, 161 (Colo. Ct. App. 1999); *Citizens for a Safer Cmty. v. City of Rochester*, 627 N.Y.S.2d 193, 198 (Sup Ct. Monroe County 1994); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993); *City of Cincinnati v. Langan*, 640 N.E.2d 200, 205-06 (Ohio Ct. App. 1994); *Beaver v. City of Dayton*, No. 13871, 1993 Ohio App. LEXIS 4303, at \*2-3 (Ohio Ct. App. 1993); *Or. State Shooting Ass'n v. Multnomah Cnty.*, 858 P.2d 1315, 1321-22 (Or. Ct. App. 1993).

<sup>250</sup> *Benjamin*, 662 A.2d at 1235.

<sup>251</sup> *Id.* at 1232.

<sup>252</sup> *Id.*

## IX. CONCLUSION

The 1994 Assault Weapons Ban was clearly drafted with the intention of reducing mass shootings in America. With that said, it was undoubtedly a political compromise between the right (which is typically pro-gun rights) and the left (which is typically in favor of more gun control).<sup>253</sup> The result was a ban that offered much in political intensity and little in actual substance. While the reforms suggested in this article may seem extreme, they are exceedingly less extreme than the severity of the mass shooting epidemic that is currently plaguing our country. “We cannot and will not be passive in the face of such violence”—those were the words of President Barack Obama following the shootings in Tucson, Arizona in 2011.<sup>254</sup> Since then, many Americans have mourned over the lives lost following the disasters in Aurora, Colorado, Newtown, Connecticut, and elsewhere. Despite these disasters at the hands of killers with semiautomatic assault weapons and high capacity magazines, we *have* stood passively in the face of such violence.

America can stand passive no more. Meaningful legislation requires our elected officials to put aside concerns regarding re-election or compromises with their lobbyists.<sup>255</sup> Indeed, as President Obama recently stated, “[i]t is past time that elected leaders did something about it without worrying . . . about getting ‘an A grade from the gun lobby.’”<sup>256</sup>

Critics claim that gun regulations only keep firearms out of the hands of law abiding citizens and that criminals who want to commit a terrible act will always get their hands on firearms.<sup>257</sup> This line of thinking is ignorant to the fact that most gun crimes are committed with weapons that, at one time or another, were legally purchased.<sup>258</sup> An assault weapons ban will not suddenly make the

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<sup>253</sup> A Conservative/Republican ideology is generally against governmental restrictions on firearms. REPUBLICAN NAT'L COMM., 2012 REPUBLICAN PLATFORM 13 (2012), *available at* <http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf>; *see* DEMOCRATIC NAT'L COMMITTEE, *Moving America Forward: 2012 Democratic National Platform* (2012), <http://assets.dstatic.org/dnc-platform/2012-National-Platform.pdf> (“We believe that the right to own firearms is subject to reasonable regulation.”).

<sup>254</sup> *See* Klein, *supra* note 14, at 28.

<sup>255</sup> In 2013, gun activists within the state of Colorado and the NRA forced John Morse, President of the State Senate, into a recall election because of his recent backing for stronger gun legislation. Jack Healy, *After Colorado Passes Gun Laws, Two Backers Face a Recall Election*, N.Y. TIMES, July 29, 2013, at A9. When asked about it, Mr. Morse stated: “There may be a cost for me to pay, but I am more than happy to pay it.” *Id.*

<sup>256</sup> Editorial, *Gun Reform for a Generation*, N.Y. TIMES, Jan. 17, 2013, at A26.

<sup>257</sup> THE POLITICS OF GUN CONTROL, *supra* note 6, at 68.

<sup>258</sup> *Id.*

colossal amount of mass killing machines that are in lawful circulation disappear. But slowly, a consistent stance by this country that high capacity, highly accurate rapid-fire weapons will not be tolerated in civilian hands will get these weapons off of our streets. Such a ban does not overstep the rights secured by the Second Amendment, and such a ban does not keep those in need of self-protection from getting it with a more than capable firearm.

No law or set of laws will eliminate every criminal act and certainly reenacting and strengthening the federal Assault Weapons Ban would not prevent every mass shooting.<sup>259</sup> It would be shortsighted to even suggest such a black and white solution to such a complex problem. But in the end, criminal laws do more than just attempt to prevent crime:

[T]hey also send a message: This is where we draw the line. We do not permit this in our society. We think it is excessive. In this case, there is absolutely no rational or sporting reason for an individual to have a semiautomatic [assault] weapon or a gun [magazine] that can fire 50 to 100 rounds at a time.<sup>260</sup>

It becomes exceedingly more difficult for a mass killer to take the lives of so many in such little time without the weapon capacity to do so. If the law saves one more life that would not have otherwise been saved, that law would be worth it.

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<sup>259</sup> President Obama recently said that “[w]hile there is no law or set of laws that can prevent every senseless act of violence completely, no piece of legislation that will prevent every tragedy, every act of evil . . . if there is even one thing we can do to reduce this violence, if there’s even one life that can be saved, then we have an obligation to try.” *Gun Reform for a Generation*, *supra* note 256.

<sup>260</sup> Klein, *supra* note 14, at 32. As policy expert Philip Cook has said, “guns don’t kill people, they just make it [a lot] easier.” *THE POLITICS OF GUN CONTROL*, *supra* note 6, at 53.