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

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**Abstract:** In the United States, private citizens can purchase powerful semiautomatic assault weapons and large capacity magazines. In 1994, Congress imposed a ten-year ban on the civilian use of many such weapons. Upon its expiration in 2004, Congress refused to extend the ban despite repeated calls to do so. In the wake of the law's demise, these dangerous weapons have become widely available to disturbed civilians, gangs, criminals, hate groups, terrorists, and so-called lone wolves. Most recently, a man rented a top floor room in the Las Vegas Mandalay Bay Resort and Casino in order to kill and wound innocent folks attending an outdoor concert directly below the hotel, using automatic weapons to spew thousands of bullet rounds into a crowd of 22,000. This Article explains why nothing in the Second Amendment guarantees civilian access to the most dangerous weapons, and that Congress must act to stem the availability of these dangerous weapons which have caused countless tragedies.

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INTRODUCTION



There is little doubt that our country continues to suffer from a frontier mentality when it comes to guns. Private citizens can purchase powerful semiautomatic and assault weapons, including large capacity magazines that can spray between 30 and 100 bullets with one pull of the trigger or in rapid succession without reloading (*i.e.*, in 2–3 seconds). In 1994, Congress imposed a ten-year ban on the civilian use of many such weapons.<sup>1</sup> Upon its expiration in 2004, Congress refused to extend the ban despite repeated calls to do so. In the wake of the law’s demise, these dangerous weapons have become widely available to disturbed civilians, gangs, criminals, hate groups, terrorists, and so-called lone wolves for use against victims who have no hope against an unremitting stream of bullets. The National Rifle Association (“NRA”), which promotes the sale of these weapons, defends their ready access as required by the Second Amendment. The contrary is true and the result has painted a bloody picture.

Weapons, such as multi-round assault and semiautomatic rifles and pistols, have been used for mass killings, including the killing of children in schools and ordinary folks in places of entertainment, such as movie theaters, clubs, and concerts. They have been used for mass murders in places of worship, and in many other public venues. Police, too, have been the targets of such shootings. Overall, these murders have resulted in the widely publicized deaths or injuries

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<sup>1</sup> See Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, 18 U.S.C. § 921 (1994).

of over one thousand innocent victims and have occurred in dozens of places thought to be safe.<sup>2</sup>

Most recently, the deadliest attack in modern U.S. history occurred on Sunday, October 1, 2017 during a concert attended by 22,000 music lovers. The killer, Stephen Paddock, was sixty-four years old, with no significant criminal history. The shooter armed himself with twenty-three guns capable of firing thousands of rounds, including with a bump stock device that gave his semiautomatic rifles the ability to fire rounds without pause. His vantage point was well chosen: the thirty-second floor of the Mandalay Bay Resort & Casino. His warning system included three cameras set up both inside and outside the hotel room. Within a matter of nine to eleven minutes, Paddock killed 59 citizens and wounded close to 500 others. In short, this was the worst mass killing of innocent bystanders that has been suffered in the modern era.

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

That there is a history of thousands of deaths caused by all types of guns, not just assault weapons, unfortunately is easy to demonstrate. For example, General Stanley McChrystal, a former commander of U.S. and international forces in Afghanistan and of the Joint Operations Command, and a member of the Veterans Coalition for Common Sense, publicly expressed his dismay about the “carnage” caused by lax gun laws:

We are alarmed by loopholes that let felons and domestic abusers get hold of guns without a background check. We are alarmed that a known or suspected terrorist can go to a federally licensed firearms dealer where background checks are conducted, pass that background check, legally purchase a firearm and walk out the door.<sup>3</sup>

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<sup>2</sup> Appendix A provides an updated a survey of widely reported killings and injuries caused by dangerous firearms from the 1980s to the date of this writing. The details of 1,672 victims during this period, including the types and numbers of weapons used, numbers of fatalities and injuries, and the published sources of this information are described in Appendix A. This information also is assembled according to the victims, locations and dates of these shootings and significantly understates the resulting harm when compared to the comprehensive information gathered by the government, scholars, and others cited in this paper.

<sup>3</sup> Stanley McChrystal, *Home Should Not Be a War Zone*, N.Y. TIMES (June 16, 2016), [http://www.nytimes.com/2016/06/17/opinion/home-should-not-be-a-war-zone.html?\\_r=0](http://www.nytimes.com/2016/06/17/opinion/home-should-not-be-a-war-zone.html?_r=0).

According to the General's data, "[i]n 2014, 33,599 Americans died from a gunshot wound. From 2001 to 2010, 119,246 Americans were murdered by guns, 18 times all American combat deaths in the wars in Iraq and Afghanistan."<sup>4</sup> In the General's view, this is a "national crisis."<sup>5</sup>

Similarly, in 2004, David Hemenway, Director of the Harvard Injury Control Research Center,<sup>6</sup> reported an even more devastating count of gun deaths in the United States: "five hundred thousand Americans [had been] murdered with guns" since 1960, which were more American gun deaths in this country than in "World War I and World War II, the Korean War, the Vietnam War, and the Gulf War."<sup>7</sup> Moreover, "[b]etween 1991 and 2000, forty Americans were murdered with guns on an average day."<sup>8</sup> Finally, he reports that for the same period "gun murders account[ed] for more than two-thirds of all murders" and that the "overall murder rate . . . was five times higher than the average rate for any other developed nations."<sup>9</sup>

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

As shown below, both the Supreme Court and the lower courts have endorsed the regulation of many kinds of guns, and Congress passed a ten-year statutory ban on the sale of certain assault weapons. Moreover, Justice Scalia's seminal legal analysis, described below, expressed particular concern about "dangerous and unusual weapons," which easily applies to semiautomatic and assault weapons and their large capacity magazines. There is nothing revolutionary

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> David Hemenway holds a Ph.D. in economics, directs the Harvard Injury Control Research Center, and reports that his book was funded solely by grants from the Robert Wood Johnson Foundation and the Open Society Institute. DAVID HEMENWAY, *PRIVATE GUNS, PUBLIC HEALTH XIII* (1st ed. 2004).

<sup>7</sup> *Id.* at 45.

<sup>8</sup> *Id.*

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

or unconstitutional about regulating dangerous weapons—Justice Scalia said so himself.

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

*A. Heller and Its Supreme Court Progeny*

The most important case in Second Amendment jurisprudence is *District of Columbia v. Heller*.<sup>10</sup> In a 5-4 decision, Justice Scalia, writing for the Court, held that the District of Columbia's "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."<sup>11</sup> The holding also addressed the District of Columbia's requirement that the homeowner's gun be "unloaded and disassembled or bound by a trigger lock or similar device," thereby preventing any realistic possibility of self-defense in the case of a home invasion.<sup>12</sup>

In explaining the Court's decision, Justice Scalia found that the text of the Second Amendment to the U.S. Constitution ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed") did not limit the right to bear arms to those serving in the military. To the contrary, under Justice Scalia's reading, the operative clause described an independent right, not one that was subsidiary or ancillary to a well-regulated militia. In other words, "the right of the people to keep and bear arms" was a standalone right, not a right subordinated to a "well regulated Militia" that was "necessary to the security of a free State."<sup>13</sup> The reasoning by which the Justice reached this highly debated interpretation is not the focus of this paper.<sup>14</sup> Rather, the focus will be on Justice Scalia's recognition that the "right to

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<sup>10</sup> 554 U.S. 570 (2008).

<sup>11</sup> *Id.* at 635.

<sup>12</sup> *Id.* at 575.

<sup>13</sup> *Id.* at 581 ("We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans").

<sup>14</sup> *Heller* limited the longstanding decision in *United States v. Miller*, 307 U.S. 174 (1939). *See Heller*, 554 U.S. at 623 ("*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons"). *Miller*'s rationale was quite simple, namely that in order for "a well regulated Militia" to be effective, those citizens called to serve in the militia were entitled under the Second Amendment to have their own arms for this purpose but otherwise had no independent right to bear arms free of regulation. Justice Stevens' dissent in *Heller* also read *Miller* to mean that the Second Amendment "protects the right to keep and bear arms for certain military purposes, but . . . does not curtail the Legislature's power to regulate the non-military use and ownership of weapons". *Heller*, 554 U.S. at 637-38 (Stevens, J., dissenting). For an in-depth analysis of the Second Amendment, *see generally* SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (1st ed. 2006).

keep and bear arms” is subject to limitations just as the First Amendment’s protection of free speech is subject to limitations.<sup>15</sup> In other words, according to the majority opinion, both the federal Congress and the states enjoyed significant flexibility to regulate the ownership and use of guns consistent with the Second Amendment. Thus, Justice Scalia wrote that “like most rights, the right secured by the Second Amendment is not unlimited.”<sup>16</sup> It “was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>17</sup> Justice Scalia went on to say by way of example that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”<sup>18</sup> Justice Scalia also underscored the “historical tradition of prohibiting the carrying of dangerous and unusual weapons.”<sup>19</sup>

In *McDonald v. City of Chicago*,<sup>20</sup> Justice Alito, writing for the Court, held that the Fourteenth Amendment incorporated the Second Amendment and hence applied to the states. Most important, *McDonald* understood *Heller* to hold that the fundamental purpose of the Second Amendment was to protect the “inherent right of self-defense.”<sup>21</sup> *McDonald* further understood *Heller* to explain that “the need for defense of self, family, and property is most acute in the home.”<sup>22</sup> The Court underscored *Heller*’s holding that “the American people have considered the handgun to be the quintessential self-defense weapon” and that “citizens must be permitted to use [handguns] for the core lawful purpose of self-defense.”<sup>23</sup> Justice Alito thus repeated the “assurances” made clear in *Heller* that, among other things, “prohibitions on the possession of firearms by felons and the mentally ill,” and “laws forbidding the carrying of firearms in sensitive places,” and “laws imposing conditions and qualifications on the commercial sale of arms” would continue.<sup>24</sup>

In 2016, the Court decided *Caetano v. Massachusetts*.<sup>25</sup> In that case, the Massachusetts Supreme Judicial Court held that the Second Amendment did not

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<sup>15</sup> *Heller*, 554 U.S. at 595.

<sup>16</sup> *Id.* at 626.

<sup>17</sup> *Id.* (emphasis added).

<sup>18</sup> *Id.* at 626-27.

<sup>19</sup> *Id.* at 627 (emphasis added) (quotations omitted).

<sup>20</sup> 561 U.S. 742 (2010).

<sup>21</sup> *Id.* at 767 (quotations omitted).

<sup>22</sup> *Id.* (quotations omitted).

<sup>23</sup> *Id.* at 767-68 (internal quotations and citations omitted).

<sup>24</sup> *Id.* at 786 (internal quotations omitted).

<sup>25</sup> 136 S. Ct. 1027 (2016).

protect stun guns because they “were not in common use at the time of the Second Amendment’s enactment.”<sup>26</sup> The Supreme Court rejected this standard as inconsistent with both *Heller* and *MacDonald*.<sup>27</sup>

Also in 2016, the Court decided *Voisine et al. v. United States*.<sup>28</sup> In *Voisine*, the Court considered whether federal law, which prohibits “any person who has been convicted in any court of a misdemeanor crime of domestic violence” from possessing a firearm<sup>29</sup> would also apply to misdemeanor assault convictions for reckless conduct, as contrasted with knowing or intentional conduct.<sup>30</sup> In holding that the statute did include such conduct, the Court ruled that the “language, naturally read, encompasses acts of force undertaken recklessly—*i.e.*, with conscious disregard of a substantial risk of harm.”<sup>31</sup> The Court did not find any Second Amendment problem with the statute as so interpreted.

### *B. Lower Court Decisions after Heller*

Since *Heller* and *McDonald* were decided, federal, state and local courts have had numerous opportunities to consider the scope of the Second Amendment as applied to a wide variety of factual situations.<sup>32</sup> The vast majority of rulings have upheld the regulation of guns but few have taken account of the important “historical tradition of prohibiting the carrying of dangerous and unusual weapons” identified by Justice Scalia in *Heller*.

The most important circuit court decision to consider the Second Amendment is *Stephen Kolbe v. Lawrence J. Hogan, Governor of Maryland, et al.*<sup>33</sup> This case directly addressed the question whether a state, consistent with the U.S. Constitution, could regulate or ban assault and semiautomatic weapons, as well as magazines equipped with the ability to hold more than ten rounds of bullets. Sitting *en banc*, the Fourth Circuit held that the Maryland Firearm Safety Act of 2003 (“FSA”) did not violate the Second Amendment by banning this category of

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<sup>26</sup> *Id.* at 1027.

<sup>27</sup> Writing per curiam, the Supreme Court rejected Massachusetts’s standard for three reasons. First, contrary to the state court standard, *Heller* had already held that the Second Amendment did protect arms “not in existence at the time of founding.” Second, the Court also had found that the state court’s effort to equate “unusual” with “in common use at the time” simply restated the error committed in the first point. Finally, the Court also rejected the proposition that “only those weapons useful in warfare are protected.” *Id.* at 1027-28.

<sup>28</sup> 136 S. Ct. 2272 (2016).

<sup>29</sup> 18 U.S.C. § 922 (2016).

<sup>30</sup> *Voisine*. 136 S. Ct. at 2276 (quotations omitted).

<sup>31</sup> *Id.* at 2282.

<sup>32</sup> See App. B. Appendix B provides a survey of representative decisions by federal, state, and local courts after the issuance of the most important and recent Supreme Court decisions concerning the regulation of gun ownership and use. The survey, also as of this writing, reflects 67 lower court decisions supporting the regulation of guns and seven decisions rejecting such regulation. The lower court decisions include the decisions of over 20 state courts.

<sup>33</sup> 849 F.3d 114 (4th Cir. 2017) (en banc).

weapons.<sup>34</sup> Moreover, the appellate court ruled that even if the Second Amendment could be applied to such weapons, the “district court properly subjected the FSA to intermediate scrutiny and correctly upheld [the ban] as constitutional under that standard of review.”<sup>35</sup>

The Fourth Circuit explained that the right to keep and carry firearms under *Heller* was extended to certain kinds of weapons only.<sup>36</sup> Specifically, the Fourth Circuit recognized that the historical tradition of prohibiting dangerous and unusual weapons meant that under *Heller*, “‘M-16 rifles and the like[] may be banned’ without infringing upon the Second Amendment.”<sup>37</sup> The Fourth Circuit also ruled that the AR-15 and other weapons implicated in the FSA were “simply the semiautomatic version of the M16 rifle.”<sup>38</sup> Because the weapons covered by FSA had, for all intents and purposes, the same effect as the M-16, the Fourth Circuit applied *Heller*’s ruling that the Second Amendment permitted the prohibition of weapons “like” the M-16.<sup>39</sup> As the Appellate Court explained, “the automatic firing of all the ammunition in a large-capacity thirty-round magazine takes about two seconds, whereas a semiautomatic rifle can empty the same magazine in as little as five seconds.”<sup>40</sup> Citing the extensive factual record developed by the State of Maryland, the Fourth Circuit found that semiautomatics can even fire 300-500 rounds per minute, “making them virtually indistinguishable in practical effect from machine-guns.”<sup>41</sup>

Given these findings, the Fourth Circuit affirmed the district court’s rejection of plaintiffs’ argument that they were entitled to summary judgment based on the theory that the FSA was “unconstitutional *per se*.” The court also held, in the alternative, that the FSA would survive the intermediate scrutiny test

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<sup>34</sup> *Id.* at 136-37.

<sup>35</sup> *Id.* at 121. When legislation is challenged on constitutional grounds, courts will apply one of three tests to determine whether the legislation is valid: (1) rational basis review; (2) intermediate scrutiny; or (3) strict scrutiny. The test applied depends upon the type of legislation being challenged and the individual rights that such legislation restricts. See *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194-96 (5th Cir. 2012) for an explanation of the levels of scrutiny. Intermediate scrutiny examines whether the law or policy being challenged furthers an important government interest through means substantially related to that interest. Nearly all courts apply intermediate scrutiny when evaluating legislation restricting guns.

<sup>36</sup> *Kolbe*, 849 F.3d at 130-34. The plaintiffs did not challenge FSA’s prohibition of assault pistols. *Id.* at 122 n.2.

<sup>37</sup> *Id.* at 131 (quoting *Heller*, 554 U.S. at 627).

<sup>38</sup> *Id.* at 124.

<sup>39</sup> *Id.* at 124-25 (“The difference between the fully automatic and semiautomatic versions of those firearms is slight”).

<sup>40</sup> *Id.* at 125.

<sup>41</sup> *Id.* (quotations omitted). The Fourth Circuit also discussed approvingly the record findings introduced in the district court that assault weapons did not increase the efficacy of self-defense in the home because the average number of bullets fired in a self-defense scenario was no more than between 2.1 and 2.2—far less than the plaintiffs’ purported justification that a ten-round magazine would save lives. *Id.* at 127, 129.



because intermediate scrutiny required only that “there is a reasonable fit between the challenged regulation and a substantial governmental objective”—a fit that is “reasonable, not perfect.”<sup>42</sup> The Fourth Circuit also noted that no other federal appellate court had ever applied a strict scrutiny test in a Second Amendment case.<sup>43</sup> Given that substantial evidence supported the FSA’s prohibitions against assault weapons, the appellate court concluded that the FSA also survived intermediate scrutiny and thus provided an alternative basis for upholding the district court’s grant of summary judgment.<sup>44</sup>

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

Together, these decisions reinforce and highlight, in broad strokes, the historical limits on gun ownership and use. They also demonstrate that the passage of a new assault weapons ban would not run counter to or conflict with any relevant Supreme Court precedent interpreting the Second Amendment. Indeed, Justice Scalia emphasized that the Second Amendment did not confer unlimited rights to gun ownership and use, as many politicians at the federal and state levels seem to think. To the contrary, it was “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>45</sup> *McDonald*, following the reasoning of *Heller*, also found that the Second Amendment preserved the “inherent right of self-defense” and underscored that “the handgun”—not the assault or semiautomatic rifle—is “the quintessential self-defense weapon” needed “in the home.”<sup>46</sup>

*Heller* made clear that the Supreme Court would uphold laws that impose “conditions and qualifications on the commercial sale of arms.”<sup>47</sup> The Court’s recognition of the “historical tradition of prohibiting the carrying of dangerous and unusual weapons” applies precisely to the kinds of weapons that are now widely available for the public’s purchase and have caused the slaughter of too many innocent lives and which would be banned by the passage of a new assault weapons ban.<sup>48</sup> It is reasonable to conclude that such weapons become both “unusual” and even more “dangerous” when their magazine capacity permits rapid firing with more than 10 rounds of ammunition, such as those with 30 rounds or more that “most prohibited [assault weapons] [have come] equipped

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<sup>42</sup> *Id.* at 133 (quotations and citations omitted).

<sup>43</sup> *Id.* at 120-21.

<sup>44</sup> *Id.* at 140-41.

<sup>45</sup> *Heller*, 554 U.S. at 626.

<sup>46</sup> *McDonald*, 561 U.S. at 767-68 (quotations and citations omitted).

<sup>47</sup> *Heller*, 554 U.S. at 626-27 (quotations omitted).

<sup>48</sup> *Id.* at 627 (quotations omitted). *See supra* text accompanying notes 33-44; *see also* Appendix A.

with.”<sup>49</sup> This is particularly true when, as reported, such rifles with LCMs [large capacity magazines] are “used in roughly 14% to 26% of gun crimes . . . .”<sup>50</sup>

Recent appellate court decisions have applied *Heller* in this very manner as the Fourth Circuit’s decision upholding a ban on the possession of semiautomatic and assault weapons demonstrates. The cases described in Appendix B reflect the application of *Heller* and *McDonald* (as the most important Supreme Court rulings on this subject) in federal, state, and local courts and are representative of decisions on the subject of gun regulation. As shown, the vast majority of these decisions addressing the Second Amendment have upheld the regulation of guns. These decisions have included the regulation of semiautomatic weapons, assault weapons, and certain large-capacity ammunition magazines listed below by the most recent date in the Fourth, Second, Seventh, Ninth, and District of Columbia Circuits.<sup>51</sup> The examples provided in Appendix B identified five decisions as of the time of this writing that rejected the regulation of the guns at issue, compared to 67 that upheld such regulation on pages 1-10. Thus, the authority interpreting *Heller*—and *Heller* itself—makes clear that a renewed assault weapons ban would not violate the Second Amendment.

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

## II. THE ASSAULT WEAPONS BAN AND THE DANGERS IT ADDRESSED

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

### *A. History of the Assault Weapons Ban*

The history of the Assault Weapons Ban of 1994, officially the Public Safety and Recreational Firearms Use Protection Act, highlights the gravity of this problem. The statute was enacted on September 13, 1994, as Title XI, Subtitle A of the Violent Crime Control and Law Enforcement enacted Act of 1994.

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<sup>49</sup> CHRISTOPHER S. KOPER, UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994-2003 7 (2004), <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf>.

<sup>50</sup> *Id.* at 19.

<sup>51</sup> See App. B, *Stephen Kolbe v. Lawrence J. Hogan Gov. of Maryland, et.al.*, 849 F.3d 114 (4th Cir. 2017) (en banc); *N.Y. State Rifle and Pistol Assoc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406 (7th Cir. 2015); *Fyock v. Sunnysvale*, 779 F.3d 991 (9th Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011).

The legal ban was in effect for a ten-year period, beginning immediately upon enactment in September 1994 when the Democrats in Congress controlled the Senate and the House. The statute banned 19 semiautomatic and assault weapon models and was based upon a 1989 report issued by the Bureau of Alcohol, Tobacco and Firearms (“ATF”) and was discussed in the more recent Department of Treasury Study on the Sporting Suitability of Modified Semiautomatic Assault Rifles.<sup>52</sup> The Treasury Study was commissioned by the President and the Secretary of the Treasury due to concerns expressed by Congress that “the rifles being imported were essentially the same as semiautomatic assault rifles previously determined to be nonimportable [sic] in a 1989 decision by the Bureau of Alcohol, Tobacco and Firearms (ATF).”<sup>53</sup> In its definition section, the Act listed the semiautomatic weapons by name that would be banned; listed the features of particular semiautomatic rifles that would also fall within the ban; listed the features of the semiautomatic pistols that would qualify for the ban; and listed the characteristics of semiautomatic shotguns that would be covered by the ban. The 1994 statute also outlawed the importation of large capacity ammunition feeding devices, which were interpreted by the ATF to mean “a magazine, belt, drum, feed strip, or similar device...that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition.”<sup>54</sup> Court challenges to this law were unsuccessful.<sup>55</sup>

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<sup>52</sup> DEPARTMENT OF THE TREASURY STUDY ON THE SPORTING SUITABILITY OF MODIFIED SEMIAUTOMATIC ASSAULT RIFLES 12-13 (1998), <https://www.atf.gov/file/57521/download> [hereinafter TREASURY STUDY]. The Treasury Study used the following guidelines to identify such weapons: the ability to accept a detachable magazine; folding or telescoping stocks; pistol grips; bayonets; flash suppressors; tripods; grenade launchers; night sights; other semiautomatic capabilities; and the ability of a rifle to chamber a centerfire cartridge case of 2.25 inches or less. *Id.* at 1. In sum, the semiautomatic weapons outlawed by the bill were “copies of military-style submachineguns . . . designed to kill people at close quarters with rapid fire lethal bursts.” 140 CONG. REC. 3063, 3072 (1994) (statement of Rep. Klein).

<sup>53</sup> TREASURY STUDY, *supra* note 52, at 1.

<sup>54</sup> 27 C.F.R. § 478.119 (2008).

<sup>55</sup> See *Olympic Arms v. Buckles*, 301 F.3d 384, 390 (6th Cir. 2002) (holding that the ban satisfied equal protection as “a legitimate exercise of congressional authority to regulate a significant threat to public health and safety”); *Navegar, Inc. v. United States*, 192 F.3d 1050, 1068 (D.C. Cir. 1999) (holding that the ban satisfied interstate commerce requirements and rejected a Bill of Attainder challenge based on the Telecommunications Act of 1996); *United States v. Starr*, 945 F. Supp. 257, 260 (M.D. Ga. 1996) (holding that the statute banning possession of a semiautomatic assault rifle was not unconstitutionally vague and that an indictment for violations of the ban was valid); *San Diego Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1133 (9th Cir. 1996) (holding that plaintiffs failed to show that there was injury-in-fact and that claims were ripe for adjudication); VIVIAN S. CHU, CONG. RESEARCH SERV., R42957, FEDERAL ASSAULT WEAPONS BAN: LEGAL ISSUES 7-14 (2013) (reporting on these decisions). See also James B. Jacobs, *Why Ban “Assault Weapons”?* 37 *Cardozo L. Rev.* 681, 695 (2015)

(discussing cases unsuccessfully challenging the FSA).

From 2003 to 2013, the United States Senate tried, without success, to extend and improve the law. On May 8, 2003, Senator Diane Feinstein and others introduced S. 1034, a bill to repeal the sunset date of the assault weapon ban.<sup>56</sup> On February 24, 2004, Senator Feinstein and others sought to obtain a 10-year extension of the ban.<sup>57</sup> On February 25, 2004, Congressman Michael Castle and others also sought to extend the sunset on the ban for another 10 years.<sup>58</sup> Similar efforts were made in September 2004,<sup>59</sup> March 2005,<sup>60</sup> and June 2008.<sup>61</sup> On January 24, 2013, Senator Feinstein and 21 other Senators introduced S. 150, an even more ambitious effort to restrict assault and semiautomatic weapons and large-capacity magazines.<sup>62</sup> S. 150, like prior efforts, failed.

Had S.150 been passed in the wake of the December 2012 killing of 20 first graders and six staff members of the Sandy Hook Elementary school, many hundreds of other lives might have been saved by a “reinstated and strengthened” ban on “semiautomatic assault weapons.”<sup>63</sup> More specifically, the proposed statutory ban on assault weapons, had it gone forward, would have outlawed over one hundred types of semiautomatic rifles with the capacity to accept a detachable magazine and any one of the following: “(1) a pistol grip; (2) a forward grip; (3) a folding, telescoping, or detachable stock; (4) a grenade launcher or rocket launcher; (5) a barrel shroud; or a threaded barrel.”<sup>64</sup>

The proposed statute also would have banned semiautomatic rifles with the capacity to accept more than 10 rounds, unless an attached tubular device was “designed for and only capable of accepting .22 caliber rimfire ammunition.”<sup>65</sup> In addition to this more rigorous ban on semiautomatic rifles, the proposed law would have adopted virtually identical restrictions for semiautomatic pistols.<sup>66</sup> However, as a result of this proposed statute’s rejection, the Bushmaster M-16-style semiautomatic rifle, holding 30-round magazines and used in the Sandy Hook murders, remains part of the arsenal of dangerous weapons available to the public.

### *B. Literature Assessing Effectiveness of the Assault Weapons Ban*

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<sup>56</sup> Assault Weapons Ban Reauthorization Act, S. 1034, 108th Cong. (2003).

<sup>57</sup> Assault Weapons Ban Reauthorization Act S. 2109, 108th Cong. (2004).

<sup>58</sup> H.R. 3831, 108th Cong. (2004).

<sup>59</sup> H.R. 5099, 108th Cong. (2004).

<sup>60</sup> Assault Weapons Ban Reauthorization Act, S. 620, 109th Cong. (2005).

<sup>61</sup> Assault Weapons Ban Reauthorization Act, H.R. 6257, 110th Cong. (2008).

<sup>62</sup> Assault Weapons Ban, S. 150, 113th Cong. (2013).

<sup>63</sup> See WILLIAM J. KROUSE, CONG. RESEARCH SERV., R42987, GUN CONTROL LEGISLATION IN THE 113<sup>TH</sup> CONGRESS 1 (2015).

<sup>64</sup> *Id.* at 40.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

The Assault Weapons Ban (“AWB”) provides a common-sense solution to this public health and safety crisis. Indeed, its efficacy and prudence is proven in the evidentiary studies that have been undertaken to examine its impact. It is, perhaps, surprising that there has not been a larger focus on this problem in secondary literature but as discussed below, much of the literature that does address this issue almost unanimously comes out in favor of the AWB and its ability to save lives.<sup>67</sup> Importantly, these studies provide a rebuttal to those claiming that the renewal of the AWB would not change the status quo.

In 1995, an article written by Michael G. Lenett about the genesis and efficacy of the 1994 Assault Weapons law appeared in the *University of Dayton Law Review*.<sup>68</sup> Lenett’s findings underscore the dangers of assault and semiautomatic weapons. For example, based on ATF data, between 1986 and 1993: “assault weapons were about sixteen times more likely to be traced to crime than conventional weapons during this period.”<sup>69</sup> Also “[d]uring this period, at least 29,058 assault weapons were used to commit crimes in the United States and the actual figure was probably much higher.”<sup>70</sup> Finally, “[s]ince ATF traces less than ten percent of all gun crimes, these numbers could actually be ten times higher or more—that would mean at least 290,000 assault weapon crimes over that eight-year period.”<sup>71</sup>

The author also found that the police reported that semiautomatic assault weapons were “an especially dangerous problem for law enforcement” and “that these military-style weapons have become the weapons of choice for mass murderers, drug traffickers, youth gangs, and hate groups.”<sup>72</sup> As a result, “[l]aw enforcement officials often report that they are being outgunned by criminals and

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<sup>67</sup> It is also, perhaps, not surprising given that the U.S. Centers for Disease Control and Prevention (“CDC”) which, among other things, researches how violence affects public health, is legally prohibited from studying the role firearms play in American deaths. After the CDC began studying gun violence in the early 1990s, the NRA successfully lobbied for the Dickey Amendment which prohibited the CDC from promulgating research that might “advocate or promote gun control.” Dickey Amendment, Pub. L. No. 104-208, Title II (1996); *see also* MAYORS AGAINST ILLEGAL GUNS, ACCESS DENIED: HOW THE GUN LOBBY IS DEPRIVING POLICE, POLICY MAKERS, AND THE PUBLIC OF THE DATA WE NEED TO PREVENT GUN VIOLENCE 11-19 (2013), <https://everytownresearch.org/documents/2015/04/access-denied.pdf>.

<sup>68</sup> *See* Michael G. Lenett, *Taking a Bite Out of Violent Crime*, 20 U. Dayton L. Rev. 573 (1995). Lenett served as “Counsel to the Senate Judiciary Committee during the 103d Congress and had participated in many of the events described” in his article. *Id.* at 573 n.\* (1995).

<sup>69</sup> *Id.* at 576.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 577-78.

drug dealers on the street armed with semiautomatic assault weapons.”<sup>73</sup> The article then traces the five-year legislative history that led to passage of the assault weapons ban during the 103<sup>rd</sup> Congress.<sup>74</sup>

In 2004, the Justice Department received a report on the efficacy of the Federal Assault Weapons law, which had imposed a ten-year ban on the “manufacture, transfer and possession” of certain assault weapons.<sup>75</sup> As the report makes clear, the assault weapons ban was “directed at semiautomatic firearms having features that appear useful in military and criminal applications but unnecessary in shooting sports or self-defense.”<sup>76</sup> Although nine groups of pistols, rifles, and shotguns were prohibited as assault weapons, ATF had identified 118 models and variations that were also prohibited by law.<sup>77</sup> Also banned were large capacity magazines (LCMs) which had the ability to fire more than ten bullets and were “arguably the most functionally important feature of most AWs [assault weapons], many of which have magazines holding 30 or more rounds.”<sup>78</sup>

Following the ban’s implementation, researchers found that for the period from 1995-2003, gun crimes involving assault weapons “declined by 17% to 72%” across . . . Baltimore, Miami, Milwaukee, Boston, St. Louis, and Anchorage.”<sup>79</sup> On the other hand, because assault weapons and large-capacity magazines manufactured before September 13, 1994 were exempted from the ban, more than 1.5 million assault weapons remained in circulation along with “25 million pre-ban LCMs.”<sup>80</sup> Moreover, the country’s stock of large capacity magazines continued to grow after the ban because it remained legal to import them as long as they had been made before the ban.<sup>81</sup> Thus, as of 1994, a “national survey of gun owners found that 18% of all civilian-owned firearms and 21% of civilian-owned handguns were equipped with magazines having 10 or more rounds.”<sup>82</sup> Also, “most prohibited [assault weapons] came equipped with magazines holding 30 rounds and could accept magazines holding as many as 50 or 100 rounds.”<sup>83</sup> As a result, assault weapons and large capacity magazines “were used in up to a quarter of gun crimes prior to the 1994 AW-LCM ban” and “guns equipped with LCMs—of which AWs are a subset—[were] used in roughly 14% to 26% of gun

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<sup>73</sup> *Id.* at 578.

<sup>74</sup> *Id.* at 581-602. As set forth in the Public Safety and Recreational Firearms Use Protection Act there was “1) a list of named banned firearms; 2) a ban on copies of the listed weapons; 3) a ban on all weapons meeting a specified criteria definition; and 4) a ban on large capacity ammunition magazines.” *Id.* at 602.

<sup>75</sup> KOPER, *supra* note 49, at 1 (quotations omitted).

<sup>76</sup> *Id.* at 1.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 2.

<sup>80</sup> *Id.* at 1.

<sup>81</sup> *Id.* at 1-2.

<sup>82</sup> *Id.* at 6.

<sup>83</sup> *Id.* at 7.

crimes ” and posed a “greater potential for affecting gun crime.”<sup>84</sup> Finally, “[w]hile not entirely consistent, the few available studies contrasting attacks with different types of guns and magazines generally suggest that attacks with semiautomatics—including AWs and other semiautomatics with LCMs—result in more shots fired, persons wounded, and wounds per victim than do other gun attacks.”<sup>85</sup>

Not surprisingly, once the federal assault weapons ban expired in 2004, the Police Executive Research Forum reported a significant increase in the use of such weapons, as many in Congress had feared.<sup>86</sup> Thirty-seven percent of police agencies responding to the survey reported notable increases in the use of assault weapons by criminals; 53% reported seeing increases in large-caliber handguns; and 38% reported noticeable increases in the use of semiautomatic weapons with LCMs holding more than ten rounds.<sup>87</sup>

In a detailed history of gun use, Professor Adam Winkler described the evolution of gun laws, judicial rulings, and societal effects from the post-revolutionary period to 2011.<sup>88</sup> For example, as Professor Winkler confirmed, “[t]here is already nearly one gun per person in the United States” but that has not led to an “idyllic, low-crime society that some imagine a gun-saturated world will bring.”<sup>89</sup> To the contrary, “the United States has the highest rate of gun ownership of any developed country and the highest rate of gun violence.”<sup>90</sup> Professor Winkler emphasized that from “the list of mass shootings in 2012,” there have been “mass shootings at movie theaters, day spas, coffee shops, offices, temples, and shopping malls.”<sup>91</sup>

The above evidence is consistent with the history of deaths and injuries caused by semiautomatic and assault weapons, including pistols, as listed in Appendix A. Also, consistent with these data, Professor Winkler seems to predict

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<sup>84</sup> *Id.* at 19.

<sup>85</sup> *Id.* at 97.

<sup>86</sup> POLICE EXECUTIVE RESEARCH FORUM, GUNS AND CRIME: BREAKING NEW GROUND BY FOCUSING ON THE LOCAL IMPACT 2 (2010), [http://www.policeforum.org/assets/docs/Critical\\_Issues\\_Series/guns%20and%20crime%20-%20breaking%20new%20ground%20by%20focusing%20on%20the%20local%20impact%202010.pdf](http://www.policeforum.org/assets/docs/Critical_Issues_Series/guns%20and%20crime%20-%20breaking%20new%20ground%20by%20focusing%20on%20the%20local%20impact%202010.pdf).

<sup>87</sup> *Id.* at 2.

<sup>88</sup> See ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA (1st ed. 2013).

<sup>89</sup> See *id.* at XIII.

<sup>90</sup> *Id.* (emphasis added).

<sup>91</sup> *Id.* at XIII. According to Professor Winkler, in 2011 “there [were] approximately 280 million guns in the United States, almost one per person.” *Id.* at 10. Additional research by Craig R. Whitney, a reporter, foreign correspondent and editor at the New York Times, came to a similar conclusion that in the United States “something close to 300 million guns [were] in private hands” which were “more guns than any other advanced industrial country, and more gun violence.” CRAIG R. WHITNEY, LIVING WITH GUNS: A LIBERAL’S CASE FOR THE SECOND AMENDMENT 155 (2012).

an even darker future. He writes that in America, “guns are everywhere and easy for someone with a criminal intent to acquire. Those guns are here to stay, which means—awful as it is to admit—that mass shooting are here to stay as well.”<sup>92</sup>

Nevertheless, some gun control, according to the professor, has been successful, including, for example, when Congress adopted the National Firearms Act of 1934 which “imposed an onerous tax on machine guns and on short-barreled (or ‘sawed-off’) shotguns and rifles.”<sup>93</sup> This law was “deemed so successful that four years later Congress once again asserted its authority over guns by passing the Federal Firearms Act of 1938,” a law that imposed a licensing and record-keeping obligation for gun dealers and that barred felons from obtaining firearms.<sup>94</sup> Another reported “success” was the enactment of the Omnibus Crime Control and Safe Street Act of 1968, which forbids gun shipments across state lines unless they were for federally licensed dealers and collectors and required records of all gun sales.<sup>95</sup>

On the other hand, Professor Winkler disputed the efficacy of the 1994 Assault Weapons Ban, arguing that the political capital on gun control could be more effectively spent on other policies like universal background checks. He distinguished a “military-style gun,” like a machine gun that delivers “repetitive fire with a single pull of the trigger,” from a semiautomatic that automatically “loads another round into the chamber with each trigger pull.”<sup>96</sup> He also disputed that “a detachable ammunition magazine and any combination of a pistol grip, flash suppression, telescoping-stock, or bayonet mount” would “make[] a gun considerably more dangerous, perhaps with the exception of a bayonet fitting.”<sup>97</sup> The professor further argued that “there was little evidence that [the] guns explicitly banned were unusually dangerous.”<sup>98</sup> Finally, he argued that “assault weapons are rarely used in crime” and that “[b]anning” them “would be a largely symbolic act. . . unlikely to save lives.”<sup>99</sup>

These conclusions conflict with the evidence discussed above, and with the 1989 Treasury Study findings that supported the adoption of the Assault Weapons ban. As ordered by the President and the Secretary of the Treasury, on November 14, 1997, a new study was undertaken regarding the importation of certain modified versions of semiautomatic rifles.<sup>100</sup> In 1989, the ATF had

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<sup>92</sup> WINKLER, *supra* note 88, at XIV.

<sup>93</sup> *Id.* at 203.

<sup>94</sup> *Id.* at 204.

<sup>95</sup> *Id.* at 251-52.

<sup>96</sup> *Id.* at 36-37.

<sup>97</sup> *Id.* at 38.

<sup>98</sup> *Id.* Professor Winkler also understood that the ban covered 19 gun types. *Id.*

<sup>99</sup> *See id.* at XII.

<sup>100</sup> TREASURY STUDY, *supra* note 52, at 1.



blocked the importation of “semiautomatic versions of automatic-fire military assault rifles.”<sup>101</sup> In contrast to Professor Winkler, the Treasury Study viewed the “ability to accept a detachable magazine, folding/telescoping stocks, separate pistol grips, ability to accept a bayonet, flash suppressors, bipods, grenade launchers, and night sights” as a “military configuration” that “was designed for killing and disabling the enemy.”<sup>102</sup> Moreover, this review ultimately concluded that the importation of military-style semiautomatic weapons did not have a sporting purpose justification, that large capacity military magazine rifles were not “especially suitable for sporting purposes,” and that detachable large capacity magazines “should be added to the list of disqualifying military configuration features identified in 1989.”<sup>103</sup> It was also found that such rifles were “attractive to certain criminals” and thus judged to be “not importable.”<sup>104</sup>

Finally, the study underscored several conclusions about dangers caused by these weapons. Detachable large capacity magazines “originally designed and produced for a military assault weapon should be added to the list of disqualifying military configuration features identified in 1989.”<sup>105</sup> In addition, “Congress sent a strong signal that firearms with the ability to expel large amounts of ammunition quickly are not sporting” but rather “are a crime problem.”<sup>106</sup> As found by the House Report on the 1994 law, “the ability to accept a large capacity magazine ‘serve[s] specific combat-functional ends.’”<sup>107</sup> Finally, such “capability for lethality” creates “more wounds, more serious, in more victims” and are “weapons of choice among drug dealers, criminal gangs, hate groups, and mentally deranged persons bent on mass murder.”<sup>108</sup>

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

As set forth in Appendix A, semiautomatic or assault rifles and pistols have caused the deaths of 585 innocent persons and the injury of another 1,087 innocent persons. The evidence shows that such weapons make mass murder easier and wounds more devastating. The assault weapon that sprays shots with one trigger pull is certainly “unusually dangerous” but so is the semiautomatic weapon that can make rapid-fire shots in 2-3 seconds with large capacity magazines (i.e., more than 10 rounds, and often up to 30, 50 or 100 rounds). As shown in Appendix A, these weapons are fully capable of mass killings and woundings: 49 killed and 58 injured in a June 12, 2016 attack in Orlando’s Pulse Nightclub; 12 killed and 58 injured in a July 20, 2012 attack in an Aurora Colorado movie

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

<sup>102</sup> *Id.* at 1-2.

<sup>103</sup> *Id.* at 2-3.

<sup>104</sup> *Id.* at 3.

<sup>105</sup> *Id.* at 37.

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

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

theater; and 26 killed and two wounded in a Newtown, Connecticut school for young children.<sup>109</sup> Given these data, there is every reason to conclude that banning bump stocks, as Congress has considered in the wake of the Las Vegas massacre, will not prevent mass murders or woundings with the weapons and magazines identified in this article.

Based on this history, there should be little doubt that such weapons pose a grave threat to a civil society. As a matter of practicality and experience, once these weapons and multi-round, large capacity magazines are available for purchase by private individuals, there is no effective way to prevent their use as weapons to inflict mass murders and injuries. Nor is there evidence that private ownership of assault or semiautomatic weapons has deterred the destruction of lives or the plots that preceded them. To the contrary, the growing availability of such guns has contributed to a steady pattern of violent assaults on innocent citizens. In short, the answer to such dangerous weapons is not in their proliferation and private ownership.<sup>110</sup> This evidence together with the Fourth Circuit's recent findings also refute Professor Winkler's conclusion that "assault weapons are rarely used in crime" and that "banning" them "would be a largely symbolic act."<sup>111</sup>

### III. OPTIONS FOR REDUCING ASSAULT WEAPON DANGERS

Justice Scalia established the criteria for determining whether the ownership and use of assault or semiautomatic weapons and associated large capacity ammunition magazines should be banned or strictly limited for all U.S. citizens except for those who are in the military or are law enforcement personnel. He did so by recognizing that there is an "historical tradition of prohibiting the carrying of dangerous and unusual weapons."<sup>112</sup> Unfortunately, there is concrete proof that this "historical tradition" has been ignored. Semiautomatic and assault weapons and large capacity ammunition magazines exist, have been proven to be "dangerous," and yet are available for purchase, and have been used to kill and wound innocent citizens, including children. This evidence is clear from public reports, ATF findings, and other studies. Also clear is that these weapons have

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<sup>109</sup> Even if a magazine ran out of bullets, it would be possible to replace in "two seconds." See Jacobs, *supra* note 55, at 686 n.29, 689 n.49.

<sup>110</sup> When the Appendix A data reflecting the publically reported deaths and injuries caused by "dangerous" weapons are organized into nine year periods (1980-1989, 1990-1999, and 2000-2009) and are compared to the ten year Assault Weapon ban period (1994-2004), the longer period shows a lower average of 13.43% dead or wounded compared to the higher average of the dead or wounded for the shorter periods: 24.2% for 1980-1989; 16.25% for 1990-1999; 17.07% for 2000-2016; and 17.75% for 2010-2016. These data support the conclusions reached in other studies, namely that the Assault Weapon law helped to save lives.

<sup>111</sup> WINKLER, *supra* note 88, at XII.

<sup>112</sup> *Heller*, 554 U.S. at 627 (quotations omitted).

been used offensively against civilians, not in “defense of self, family, and property [which] is most acute in the home.”<sup>113</sup> On the other hand, there is no public reporting that assault and semiautomatic weapons have been used defensively by private citizens, whether in the home or otherwise.

Given this history, the status quo is and should be unacceptable. There must be a solution notwithstanding significant barriers, including that many millions of semiautomatic and assault weapons and multi-round magazines remain in wide circulation. In this regard, Professor Winkler believes some gun reforms hold promise. For example, he points out that “federal law requires only licensed dealers to conduct a background check before selling a gun” but unfortunately also allows “anyone else” to “sell a gun without verifying that the purchaser is legally allowed to buy it.”<sup>114</sup> Thus, Professor Winkler suggests that background checks be required for “every gun purchaser, no matter who or where the seller is.”<sup>115</sup>

This recommendation makes sense and should be implemented, but it is not sufficient. Unless Congress changes course, consistent with the facts concerning the easy and growing availability of dangerous weapons (including large capacity magazines) and the steady trajectory of lost lives, the incidents of violent mass murders are likely to continue as a threat to innocent citizens in a country long thought of as a safe haven for those seeking peace and opportunity. This conclusion is strongly supported by the ATF data cited by Professor Lenett for the seven-year period between 1986 and 1993 that shows the unique dangers posed by allowing assault weapons and large capacity magazines to be permitted in public circulation.<sup>116</sup> This conclusion is also supported by the Police Executive Research Forum data that showed a significant increase in assault weapon use after the 2004 expiration of the Federal Assault Weapons ban,<sup>117</sup> and most vividly by the October 1, 2017 massacre at the Mandalay Hotel in Las Vegas.

Courts also have upheld laws that ban the use of firearms by those who have committed domestic violence, as well as the mentally ill, drug addicts or users of controlled substances, and misdemeanants.<sup>118</sup> On the other hand, Appendix A together with the data collected by Congress, federal agencies, and scholars, underscore that except for the relative success of the ten year assault

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<sup>113</sup> *McDonald*, 561 U.S. at 767 (quotations omitted).

<sup>114</sup> WINKLER, *supra* note 88, at XIV.

<sup>115</sup> *Id.*

<sup>116</sup> See *supra* text accompanying notes 69-71. Professor Lenett’s findings showed “assault weapons were about sixteen times more likely to be traced to crime than conventional weapons during this period”; that “at least 29,058 assault weapons were used to commit crimes in the United States”; and that “these numbers could actually be ten times higher or more,” i.e., the possibility of “at least 290,000 assault weapon crimes” during this period. Lenett, *supra* note 68, at 576.

<sup>117</sup> See *supra* text accompanying notes 86-87.

<sup>118</sup> See Appendix B.

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

There are several options for reversing or slowing this dangerous trend.<sup>119</sup> One remedy would be to impose a ban on the future purchase and importation of all (not just some) assault and semiautomatic rifles and pistols, including large capacity ammunition magazines and devices like bump stocks, for all U.S. citizens and for all non-citizens residing in or travelling to the United States. The only exceptions should apply to those serving in the armed services or in law enforcement. However, because millions of pre-existing weapons would continue to be in circulation, as was the case during the ten-year assault weapons ban, this option would substantially reduce or impede but not prevent a continuation of mass killings and woundings.

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

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

If a full ban on ownership by civilians of these weapons or the above alternatives cannot be achieved, at a minimum the Assault Weapons Ban of 1994 should be restored and, if possible, strengthened using as a starting point the S. 150 bill that was introduced in January of 2013 by Senator Feinstein and 21 other Senators. This fallback option at least would lower, to some degree, the potential

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<sup>119</sup> As Appendix B demonstrates, the states, themselves, have sought to address this problem by enacting state-level restrictions on firearms. However, because it is necessary not only to address gun trafficking across state lines but also to ensure a solution that can protect the citizens of all fifty states, a national solution is required.

acquisition and misuse of highly dangerous weapons as the experience reflected in Appendix A demonstrates.

Last, even if Congress could not agree to any of the above options, it is critical that a ban be imposed on all existing and future private ownership and sale of large capacity magazines (those having the ability to fire more than ten shots without reloading). A ban on bump stocks is necessary, but not sufficient given the power of semiautomatics to fire hundreds of rounds from a single magazine. For this reason, the fewer firearms with the capacity for firing over ten shots from assault and semiautomatic rifles or pistols without reloading, the safer the public will be. As detailed by the Report to the National Institute of Justice and the U.S. Department of Justice, “the LCM ban has greater potential for reducing gun deaths and injuries than does the AW ban.”<sup>120</sup> This option, like the others, would also require sanctions to compel compliance.

#### CONCLUSION

There is no escaping the fact that assault rifles, semiautomatic rifles and pistols, and large capacity magazines, have been used and, unless regulated, will continue to be used to kill and maim innocent people and to destroy families. The evidence of such actions has been highlighted again and again, most recently by the Mandalay massacre. The proposed options to remedy, or at least mitigate, these dangers are designed to shield society from such horrific and unjustifiable results. These options would be consistent with Justice Scalia’s key rulings that the Second Amendment includes an “historical tradition of prohibiting the carrying of dangerous and unusual weapons,” and upholds laws that impose “conditions and qualifications on the commercial sale of arms.”<sup>121</sup> Indeed, this very year, the Fourth Circuit has found that banning possession of semiautomatic and assault weapons does not violate the Second Amendment. A new and improved assault weapons ban would increase the protection of our country from violence caused by the misuse of assault and semiautomatic weapons and large capacity magazines in a way that is wholly consistent with the Second Amendment.



<sup>120</sup> KOPER, *supra* note 49, at 80.

<sup>121</sup> *Heller*, 554 U.S. at 626-27 (quotations omitted).