



## University of Baltimore Law Review

Volume 47 | Issue 3

Article 2

2018

# The Bumpy Road to the Supreme Court: Does the Second Amendment Prevent States From Prohibiting Ownership of Assault-Style Rifles and High-Capacity Magazines?

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### Recommended Citation

Astrachan, James B. (2018) "The Bumpy Road to the Supreme Court: Does the Second Amendment Prevent States From Prohibiting Ownership of Assault-Style Rifles and High-Capacity Magazines?," *University of Baltimore Law Review*: Vol. 47 : Iss. 3 , Article 2.  
Available at: <https://scholarworks.law.ubalt.edu/ublr/vol47/iss3/2>

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**THE BUMPY ROAD TO THE SUPREME COURT: DOES THE  
SECOND AMENDMENT PREVENT STATES FROM  
PROHIBITING OWNERSHIP OF ASSAULT-STYLE RIFLES  
AND HIGH-CAPACITY MAGAZINES?**

**James B. Astrachan\***

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## I. INTRODUCTION

*District of Columbia v. Heller* is the most important decision relating to the right of an individual to possess a firearm since 1939.<sup>1</sup> In basic terms, the *Heller* Court held that the Second Amendment confirms an individual, not a collective, right for a person to possess a firearm.<sup>2</sup> Many cases challenging state gun restrictions have followed *Heller*, and almost all decisions have focused on the right to possess arms for the purpose of self-defense.<sup>3</sup> At least one court has declared the right of self-defense in the home to be a core Second Amendment right.<sup>4</sup> Unable to ban the possession of handguns due to *Heller*, some states, including Maryland, have imposed bans on the ownership and/or transfer of assault-style rifles<sup>5</sup> and high-capacity magazines (HCMs)—detachable magazines capable of containing more than ten cartridges.<sup>6</sup>

This article examines whether a state's ban on assault-style rifles and HCMs is constitutional under the Second Amendment, and whether the right to possession of these items in the home and proficient use outside the home, are core Second Amendment rights.<sup>7</sup> The basis for this examination is the assumption that the Second Amendment was created to prevent the government from disarming the militia, comprised of all the citizens, of weapons best suited for the purpose of self-defense, and to aid the militia in suppressing a

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1. 554 U.S. 570, 595 (2008).

2. *Id.*

3. *E.g.*, *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017).

4. *Id.* at 657, 661.

5. Assault-style rifle is a term used to describe a general category of semi-automatic rifles based on the Colt AR-15 design that is now made by many different manufacturers. *See Modern Sporting Rifle Facts*, NSSF, <http://www.nssf.org/msr/facts.cfm> (last visited Apr. 20, 2018); *see also* Thomas Gibbons-Neff, *The History of the AR-15*, WASH. POST (June 13, 2016), [https://www.washingtonpost.com/news/checkpoint/wp/2016/06/13/the-history-of-the-ar-15-the-weapon-that-had-a-hand-in-americas-worst-mass-shooting/?utm\\_term=.fd5c4497235d](https://www.washingtonpost.com/news/checkpoint/wp/2016/06/13/the-history-of-the-ar-15-the-weapon-that-had-a-hand-in-americas-worst-mass-shooting/?utm_term=.fd5c4497235d) (noting that the AR-15 is “[m]anufactured by dozens of companies nationwide”). Assault-style rifles are similar in appearance to modern military assault rifles, but military assault rifles are select-fire—meaning they are capable of sustained fire as long as the trigger is held—while the trigger of an assault-style rifle must be pushed for each shot to be fired. *See Selective Fire*, WEAPONS L. ENCYCLOPEDIA, <http://www.weaponslaw.org/glossary/selective-fire> (last updated Feb. 1, 2014). Many states define high-capacity magazines as those capable of holding more than ten rounds of ammunition. *E.g.*, MD. CODE ANN., CRIM. LAW § 4-305(b) (West 2018); N.Y. PENAL LAW § 265.00(23)(a)–(b) (McKinney 2018).

6. MD. CODE ANN., CRIM. LAW §§ 4-303(a), 4-305(b) (West 2018).

7. *See infra* Part VIII.

tyrannical government, if necessary.<sup>8</sup> This article also examines what standard of constitutional review might be adopted by courts for purposes of testing bans on the possession and transfer of assault-style rifles and HCMs, particularly bans on the right to possession in the home.<sup>9</sup> The article concludes that the appropriate standard is strict scrutiny,<sup>10</sup> by which the government is required to prove its restriction is “narrowly tailored to achieve a compelling governmental interest.”<sup>11</sup>

This article also examines the right to use these assault-style rifles outside the home for training and proficiency purposes, and suggests that state-imposed restrictions may limit their use for such purposes, but may not eliminate their possession by those qualified to own firearms.<sup>12</sup> As important as the right may be to engage in self-defense in the home, the intent of the Founders to arm citizens to suppress a tyrannical government even further implicates the core of the Second Amendment.<sup>13</sup> Courts examining laws that ban possession, transfer, and use of these weapons should reject an outright ban on possession and transfer. Instead, courts should allow possession of these weapons in the home and should more judiciously regulate their possession and use outside the home. Specifically, courts ought to examine laws governing possession and use of assault-style rifles outside the home in the same way that courts examine laws governing possession and use of handguns outside the home.<sup>14</sup>

## II. BACKGROUND

The United States is currently embroiled in a legal and cultural dispute over guns. The dispute is no longer over the right of the individual to bear and possess guns, but instead what type of guns

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8. See *Heller v. District of Columbia*, 554 U.S. 570, 592–94, 597–98 (2008).

9. See *infra* notes 263–77 and accompanying text.

10. See *infra* Part IX.

11. *Abrams v. Johnson*, 521 U.S. 74, 82 (1997).

12. See *infra* notes 319–25, 354 and accompanying text. For example, Maryland restricts the use of handguns outside the home or business by a person who does not possess a permit to carry a concealed handgun. See MD. CODE ANN., CRIM. LAW § 4-203 (West 2018). These regulations include the manner of carry and transport, where the weapon may be possessed without a license, used at sporting and training events, and the like. *Id.* § 4-203(b)(2)–(6).

13. See *Heller*, 554 U.S. at 584–85, 592–94.

14. See *infra* Part IX.

may be possessed by individuals.<sup>15</sup> In July 2017, Stephen V. Kolbe, the named plaintiff and a Maryland resident, petitioned the United States Supreme Court to hear his appeal of the Fourth Circuit Court of Appeals' en banc decision, which denied Maryland citizens the right to own or transfer rifles that Maryland law labels as assault-style rifles, otherwise known as modern sporting rifles and HCMs.<sup>16</sup> The 2008 Supreme Court decision in *District of Columbia v. Heller* held that the right to keep and bear arms is an individual right, not a collective right associated with militia service.<sup>17</sup> Although the *Heller* opinion briefly mentioned the M-16—a military rifle capable of fully automatic fire—as an example of the type of firearm not protected by the Second Amendment, the case did not concern assault-style rifles or HCMs.<sup>18</sup> Instead, it concerned the right to own a handgun in the District of Columbia, or more precisely, the inability of the District of Columbia to ban the ownership of handguns as a category of firearms.<sup>19</sup> *Heller* ultimately held that the right to possess a firearm was not unlimited.<sup>20</sup>

*Heller* also concerned the right of self-defense, as the respondent asserted that the laws banning handguns denied him his right to self-defense.<sup>21</sup> The D.C. law also prohibited possession of assembled or unlocked long guns and their use for self-defense.<sup>22</sup> *Heller* dealt a dramatic and effective defeat to the D.C. government's efforts to divest its citizens of their right to possess a handgun for any purpose, or a long gun for self-defense.<sup>23</sup> Despite holding that the right is subject to restrictions, the *Heller* decision affirmed the principle that an individual has the right to possess a handgun and other constitutionally protected firearms.<sup>24</sup> In doing so, *Heller* effectively

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15. See *Heller*, 554 U.S. at 627–29 (recognizing that banning certain types of weapons is a limitation on the right to bear arms); see also Christopher Ingraham, *What 'Arms' Looked like When the 2nd Amendment Was Written*, WASH. POST (June 13, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/06/13/the-men-who-wrote-the-2nd-amendment-would-never-recognize-an-ar-15/?utm\\_term=.ce191039fcf6](https://www.washingtonpost.com/news/wonk/wp/2016/06/13/the-men-who-wrote-the-2nd-amendment-would-never-recognize-an-ar-15/?utm_term=.ce191039fcf6) (comparing weapons in use at the time of the Founding Fathers with weapons commonly used now).

16. Petition for Writ of Certiorari, *Kolbe v. Hogan*, 138 S. Ct. 469 (2017) (No. 17-127); *Kolbe v. Hogan*, 849 F.3d 114, 121 (4th Cir.), cert. denied, 138 S. Ct. 469 (2017).

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

18. *Id.* at 574–76, 627.

19. *Id.* at 636.

20. *Id.* at 626–27.

21. *Id.* at 576.

22. *Id.* at 575.

23. See *id.* at 628–29.

24. *Id.* at 595.

created a new battleground over topics such as gun control, state bans on the purchase and possession of certain arms, such as AR-<sup>25</sup> and AK-<sup>26</sup> style rifles,<sup>27</sup> and the judicial challenge of those laws.<sup>28</sup> This new round of state legislation followed the use of assault-style rifles in mass shootings in Colorado,<sup>29</sup> Connecticut,<sup>30</sup> and California.<sup>31</sup> Yet, these recent laws are hardly unique. In 1994, Congress banned assault-style rifles and HCMs for a ten-year period.<sup>32</sup>

Although the District of Columbia, Second, Fourth, and Seventh Circuits, have followed *Heller*'s holding that individuals unconnected to service in the militia have a constitutional right to possess a gun, these courts did not recognize that all types of guns are

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25. AR is a designation for the style of rifles originally developed in the 1950s by ArmaLite, a small arms engineering company. See Jon Stokes, *The AR-15 Is More than a Gun. It's a Gadget*, WIRED (Feb. 25, 2013, 6:30 AM), <https://www.wired.com/2013/02/ar-15/>. These designs ultimately became the military M-16 rifle, and numerous semi-automatic rifles are today referred to as AR-15 and AR-10 rifles, although they are no longer made by ArmaLite, which ceased business following its 1983 sale. See *id.*; see also Tom McHale, *AR 15 Rifle – A Brief History & Historical Time Line*, AMMOLAND SHOOTING SPORTS NEWS (Apr. 15, 2016), <https://www.ammoland.com/2016/04/ar-15-rifle-historical-time-line/#axzz55Jz3AkSW> (providing a detailed history on the creation and implementation of the modern AR-15 rifle).
26. AK is a designation for the AK-47 and AK-74 Russian Kalashnikov rifles. See *Kalashnikov AK-47*, MIL. FACTORY, [https://www.militaryfactory.com/smallarms/detail.asp?smallarms\\_id=19](https://www.militaryfactory.com/smallarms/detail.asp?smallarms_id=19) (last visited Apr. 20, 2018). The military versions of these rifles are select-fire, and the civilian versions are semi-automatic. See *id.*
27. AR- and AK-style rifles are referred to herein as “assault-style rifles.”
28. See *Heller*, 554 U.S. at 635–36. In addition, citizens and organizations are challenging the rights of states, such as California and Maryland, that require citizens to establish good cause before a concealed carry permit may be issued. See, e.g., Jordan Michaels, *California “Good Cause” Concealed Carry Case on Path to Supreme Court*, GUNSAMERICA (Aug. 17, 2016), <https://www.gunsamerica.com/blog/california-may-issue-case-path-supreme-court/>; *Rifle Club Files Suit to Challenge Maryland Carry Permit Laws*, AMMOLAND SHOOTING SPORTS NEWS (Apr. 16, 2018), <https://www.ammoland.com/2018/04/rifle-club-files-suit-to-challenge-maryland-carry-permit-laws/#axzz5DEyj3GU9>.
29. Libby Nelson, *The AR-15, the Gun Behind Some of the Worst Mass Shootings in America, Explained*, VOX (June 14, 2016, 1:00 PM), <https://www.vox.com/2016/6/14/11924544/ar-15-orlando-assault-weapons>.
30. *Id.*
31. *Id.*
32. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 110,103, 110,105, 108 Stat. 1796, 1998–2000. In 2004, Congress permitted the ten-year ban to expire. *Congress Lets Assault Weapons Ban Expire*, NBC NEWS (Sept. 13, 2004, 8:28 PM), <http://www.nbcnews.com/id/5946127/ns/politics/t/congress-lets-assault-weapons-ban-expire/#.WtpBMMghIAZ>.

constitutionally protected.<sup>33</sup> Rather, these courts have applied the language of *Heller* to hold: (1) that gun rights, like First Amendment rights, are not unlimited; (2) that the Second Amendment only applies to weapons that are in common use, or that are not unusual and dangerous; and (3) that even if the weapon is protected, certain categories of guns can be outlawed by reviewing state legislative bans of assault-style rifles and HCMs, and applying intermediate scrutiny to test whether the ban relates to the stated purpose of the law.<sup>34</sup> The Fourth Circuit has gone even further afield from the Second Circuit,<sup>35</sup> Seventh Circuit,<sup>36</sup> and the D.C. Circuit,<sup>37</sup> and has held that assault-style firearms are not protected under the Second Amendment because they are most useful in military service, have a capacity to be lethal beyond other weapons, and are similar to the M-16 military rifles, which *Heller* noted were outside the protective scope of the Second Amendment because they are better suited for military service.<sup>38</sup> Assault-style rifles are unlike M-16 military rifles, despite their similar appearance.<sup>39</sup> Unlike M-16s, assault-style rifles are not fully automatic, a key reason why *Heller* highlighted the M-16 rifle as a type of firearm outside the protection of the Second Amendment.<sup>40</sup>

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33. *E.g.*, *Kolbe v. Hogan*, 849 F.3d 114, 144 (4th Cir.), *cert. denied*, 138 S. Ct. 469 (2017); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 253 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011).

34. *See* cases cited *supra* note 33.

35. *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 247–48.

36. *Friedman*, 784 F.3d at 410–12.

37. *Heller*, 670 F.3d at 1247–48.

38. *Kolbe*, 849 F.3d at 131, 134–35 (“[T]he *Heller* Court specified that ‘weapons that are most useful in military service—M-16 rifles and the like—may be banned’ without infringement upon the Second Amendment right.” (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008))). The National Firearms Act of 1934 (the 1934 Act) banned certain categories of firearms from civilian possession and transfer, including machine guns. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 I.R.C. §§ 5801–5872 (2012)). For this reason, the *Heller* Court held that machine guns, like M-16 rifles that are capable of automatic fire, were not in commerce because they were prohibited. *See* 554 U.S. at 624–28.

39. *See* Jon Stokes, *Why Millions of Americans – Including Me – Own the AR-15*, VOX (June 20, 2016, 11:00 AM), <https://www.vox.com/2016/6/20/11975850/ar-15-owner-orlando>.

40. 554 U.S. at 627–28; *Kolbe*, 849 F.3d at 121. Justice Thomas, joined by Justice Scalia, dissented in the Supreme Court’s denial of certiorari in *Friedman v. City of Highland Park*, and very likely would have found assault-style rifles to be constitutionally protected. *See* 136 S. Ct. 447, 447 (2015) (Thomas, J., dissenting) (“Despite these holdings [in *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010)], several Courts of Appeals—including the Court of Appeals for the Seventh Circuit in the

The United States defines assault rifles as “short, compact, select-fire . . . weapons that fire a cartridge intermediate in power between submachinegun and rifle cartridges.”<sup>41</sup> Military assault rifles are fully automatic or select-fire military weapons that are able to fire continuously as long as the trigger is held to the rear and the magazine contains cartridges.<sup>42</sup> The civilian versions of these weapons are not designed or adopted for military use.<sup>43</sup> They are not select-fire and each round must be fired by a separate pull on the trigger.<sup>44</sup> Indeed, any select-fire or automatic gun not registered with the federal government before May 19, 1986, may not be owned in the United States by a civilian.<sup>45</sup> And while a select-fire or automatic gun made before that date may generally be owned if state law permits, transfer and possession of a gun capable of automatic fire requires an application to the Alcohol, Tobacco, Firearms, and Explosives (ATF) Division of the United States Treasury, plus payment of a \$200 federal excise tax.<sup>46</sup>

The question then posed is whether state laws banning civilians from possessing or transferring “assault-looking rifles” or “assault-style rifles” and HCMs are constitutionally permissible.<sup>47</sup> These laws should not be permissible any more than bans on handguns are. In support of this conclusion, this article examines an issue that has not been considered in any judicial challenge to a gun ban of which the author is aware.<sup>48</sup> The issue is whether these banned semi-automatic rifles were of the type intended by the Founders, under the Second Amendment, as necessary for use by the “militia” to protect the citizenry against a tyrannical government.<sup>49</sup> In examining whether affirming the ban will deprive citizens of the right to defend

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decision below—have upheld categorical bans on firearms that millions of Americans commonly own for lawful purposes. Because noncompliance with our Second Amendment precedents warrants this Court’s attention as much as any of our precedents, I would grant certiorari in this case.”) (citation omitted).

41. *Army Gives Definition of Assault Rifle*, OUTDOOR NEWS (Oct. 1997), [http://www.tulprpc.org/attachments/File/Army\\_Gives\\_Definition\\_Of\\_Assault\\_Rifle.pdf](http://www.tulprpc.org/attachments/File/Army_Gives_Definition_Of_Assault_Rifle.pdf).
42. See EDWARD CLINTON EZELL, *SMALL ARMS OF THE WORLD* 751 (12th rev. ed. 1990).
43. See Erica Goode, *Rifle Used in Killings, America’s Most Popular, Highlights Regulation Debate*, N.Y. TIMES (Dec. 16, 2012), [https://www.nytimes.com/2012/12/17/us/lanza-used-a-popular-ar-15-style-rifle-in-newtown.html?\\_r=1&](https://www.nytimes.com/2012/12/17/us/lanza-used-a-popular-ar-15-style-rifle-in-newtown.html?_r=1&).
44. See *Selective Fire*, *supra* note 5.
45. Firearms Owners’ Protection Act, Pub. L. No. 99-308, sec. 102, § 922(o), 100 Stat. 449, 453 (1986) (codified at 18 U.S.C. § 922(o) (2012)).
46. 26 I.R.C. §§ 5811(a), 5845(b) (2012).
47. See *infra* Section VIII.A.
48. See *infra* Part IX.
49. See *infra* Part IX.



themselves, courts upholding bans on these assault-style weapons and HCMs have considered whether these guns are protected or unprotected under the Second Amendment.<sup>50</sup> If courts find that bans on these guns deprive citizens of the right to defend themselves, they will still be held constitutional if they pass intermediate scrutiny, meaning the legislation must serve an important government interest with means that are substantially related to that interest.<sup>51</sup> States that have enacted bans on assault-style rifles argue that bans on possession and transfer of these weapons further the government's interest in protecting the public, yet do not deprive citizens of self-protection in the home.<sup>52</sup> Handguns, shotguns, and deer rifles are all readily available for self-defense use in the home.<sup>53</sup> These bans, however, do deprive citizens of the most effective, legal-to-possess firearms used for opposing a tyrannical government, as intended by the Founding Fathers of our country.<sup>54</sup>

### III. *DISTRICT OF COLUMBIA V. HELLER AND UNITED STATES V. MILLER*

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>55</sup> In interpreting the Second Amendment, *Heller* affirmed an individual right to possession of a firearm, but that was not always how the right to bear arms was interpreted.<sup>56</sup> For decades, until *Heller*, almost every court that considered this issue reaffirmed a mistaken view, according to Justice Scalia,<sup>57</sup> of *Miller v. United States*.<sup>58</sup> These courts held that gun ownership was a collective, not an individual, right, meaning an individual had a right to possess a firearm solely in connection with

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50. *E.g.*, *Kolbe v. Hogan*, 849 F.3d 114, 144 (4th Cir.), *cert. denied*, 138 S. Ct. 469 (2017); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 253 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015).

51. *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 261.

52. *See id.* at 261–63.

53. *E.g.*, Chris Browning, *Multipurpose Firearms: Hunting Guns that Work for Home Defense*, GUN NEWS DAILY (Feb. 2, 2017), <https://gunnewsdaily.com/hunting-guns-for-home-defense/>; *The Best Handguns for Home Defense*, GUN CARRIER, <https://guncarrier.com/the-6-best-handguns-for-home-defense/> (last visited Apr. 20, 2018).

54. *See infra* note 88 and accompanying text.

55. U.S. CONST. amend. II.

56. *See* *District of Columbia v. Heller*, 554 U.S. 570, 622–23 (2008).

57. *See id.* at 621–23.

58. 307 U.S. 174 (1939).

military or organized militia service.<sup>59</sup> In *Miller*, Jack Miller and Frank Layton were indicted for “unlawfully, knowingly, wilfully, and feloniously transport[ing] in interstate commerce . . . a certain firearm”<sup>60</sup> in violation of the National Firearms Act of 1934 (1934 Act).<sup>61</sup> Miller’s firearm was a short-barreled shotgun, with a barrel shorter than eighteen inches.<sup>62</sup> For legal possession or transfer, such a weapon had to be registered with the government and the owner was required to pay a \$200 federal excise tax.<sup>63</sup> The indictment also accused Miller and Layton of not registering the firearm.<sup>64</sup> The weapon was illegal to possess because it was banned by the 1934 Act.<sup>65</sup> The Court held:

In the absence of any evidence tending to show that possession or use of a “shotgun having a barrel of less than eighteen inches in length” at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.<sup>66</sup>

In essence, *Miller* dealt with the constitutionality of the federal regulation of firearms under the 1934 Act.<sup>67</sup> The Court’s ruling upheld the prohibition of weapons that were not considered proper for military use nor in common use at the time.<sup>68</sup> The short-barreled shotgun that Jack Miller possessed and was indicted for could not be “in common use” because its possession or transfer had been banned by the 1934 Act, so members of the militia could not legally possess the weapon.<sup>69</sup>

As noted, until the Supreme Court’s decision in *Heller*,<sup>70</sup> courts inexplicably cited *Miller* for the proposition that the right to bear

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59. See, e.g., *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 105 (D.D.C. 2004), *rev’d*, 478 F.3d 370 (D.C. Cir. 2007).

60. *Miller*, 307 U.S. at 175.

61. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 I.R.C. §§ 5801–5872 (2012)).

62. *Miller*, 307 U.S. at 175.

63. National Firearms Act § 2 (codified as amended at 26 I.R.C. §§ 5811–5812 (2012)).

64. *Miller*, 307 U.S. at 175.

65. *Id.*

66. *Id.* at 178 (quoting National Firearms Act § 1(a)).

67. *Id.* at 176.

68. *Id.* at 178.

69. *Id.* at 175; National Firearms Act §§ 3, 4, 6.

70. 554 U.S. 570 (2008).

arms was a collective right.<sup>71</sup> Before *Heller*, only the Fifth Circuit had held that the Second Amendment created an individual right to keep and bear arms.<sup>72</sup> In *United States v. Emerson*, the Fifth Circuit held that Emerson had an individual right to possess a firearm, although he was prohibited from possessing a firearm under federal law.<sup>73</sup> Emerson's wife obtained a restraining order against him to protect herself and her daughter.<sup>74</sup> Emerson ignored the order and obtained a gun, in violation of both the restraining order and the law.<sup>75</sup> Emerson was indicted and moved to dismiss the indictment, arguing that the law banning his possession of a firearm violated his Second Amendment right.<sup>76</sup> The district court granted Emerson's motion to dismiss, and the government appealed.<sup>77</sup> Analyzing *Miller*,<sup>78</sup> the Court of Appeals for the Fifth Circuit rejected the government's collective right argument and held that the Second Amendment protects the right of individuals to bear firearms, even if the individual is not considered to be in the militia.<sup>79</sup> The court explained that the individual right to bear arms can be subject to reasonable limitations,<sup>80</sup> and reversed the district court's order granting Emerson's motion to dismiss because he violated the restraining order.<sup>81</sup> *Emerson* created a split among the Courts of Appeals, but seven years later, *Heller* became the vehicle by which to test the District of Columbia's ban on the possession of handguns and its requirement that rifles and shotguns remain disassembled, or under lock, and could only be used for sporting purposes—never self-defense.<sup>82</sup>

#### IV. ROOTS OF THE BILL OF RIGHTS

*Heller* traced the roots of the Bill of Rights in an effort to understand what the Second Amendment meant to the Framers when

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71. See, e.g., *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 105 (D.D.C. 2004), *rev'd*, 478 F.3d 370 (D.C. Cir. 2007).

72. See *United States v. Emerson*, 270 F.3d 203, 227–29 (5th Cir. 2001).

73. *Id.* at 261.

74. *Id.* at 211.

75. *Id.* at 212.

76. *Id.*

77. *Id.*

78. *Id.* at 221–27.

79. *Id.* at 260.

80. *Id.* at 261.

81. *Id.* at 264–65.

82. See *supra* note 72 and accompanying text; see also *District of Columbia v. Heller*, 554 U.S. 570, 574 (2008) (describing D.C.'s law prohibiting the possession of handguns and restricting the use of other firearms).

it was written and enacted.<sup>83</sup> The Framers feared that the government they founded could become tyrannical and deprive the people of their rights and liberties.<sup>84</sup> The Framers relied upon two recent chapters of history for their fears.<sup>85</sup> In a book, titled *To Keep and Bear Arms: The Origins of an Anglo-American Right* and cited by Justice Scalia in *Heller*,<sup>86</sup> constitutional law professor Joyce Lee Malcolm opined that the fears of the Founders were based in part on late seventeenth century events that led to the enactment of the English Bill of Rights, and in part on the British Crown's actions that led to the American Revolution.<sup>87</sup> The Second Amendment was the Founders' reaction to their belief that the citizens' right to bear arms was necessary for the preservation of liberty—a right which tyrants can take away from an unarmed citizenry.<sup>88</sup>

#### A. *The English Bill of Rights*

In the seventeenth century, James II, the Catholic King of England and Ireland (and King of Scotland as James VII) severely abused his subjects.<sup>89</sup> James abolished the ancient right to bear arms, not for reasons of public safety, but so he could exert his power without threat of meaningful opposition from an armed populace.<sup>90</sup> James confiscated guns from Protestants and armed Catholics to create a standing army comprised of his newly formed Catholic regiments.<sup>91</sup> He suspended Parliament and prosecuted the Archbishop of Canterbury.<sup>92</sup> James required that guns be registered and that gunsmiths maintain a list of their customers; his police force used registration and customer lists to verify that guns had been surrendered, to confiscate guns that had not been turned over, and to

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83. See 554 U.S. at 579–95.

84. *Id.* at 598–99.

85. See *infra* note 87 and accompanying text.

86. JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994); *Heller*, 554 U.S. at 592–93.

87. See MALCOLM, *supra* note 86, at 31–53, 135–64.

88. See *Heller*, 554 U.S. at 598–99.

89. See Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 235–36 (1983).

90. See *Heller*, 554 U.S. at 592 (citing MALCOLM, *supra* note 86, at 31–53).

91. See Kates, *supra* note 89 (first citing MARSHALL B. DAVIDSON, *THE HORIZON CONCISE HISTORY OF FRANCE* 96 (1971); then citing *THE COLUMBIA HISTORY OF THE WORLD* 738 (John A. Garraty & Peter Gay eds., 1972)).

92. John P. Kenyon, *James II: King of Great Britain*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/James-II-king-of-Great-Britain> (last updated Apr. 17, 2018).

imprison offenders.<sup>93</sup> Guns were confiscated from hunters, and the importation of guns into England was banned.<sup>94</sup> Footmen were prohibited from wearing swords.<sup>95</sup> James left Protestants, a vast majority of the population, defenseless and unable to resist his tyrannical deprivation of their liberties.<sup>96</sup>

James was ousted in the Glorious Revolution by his daughter Mary and her husband William of Orange, who invaded England at the head of a European army.<sup>97</sup> Following James's ouster, Parliament then codified the rights of Englishmen in the Bill of Rights of 1689, which recited that by disarming Protestants, James had ignored "true, ancient and indubitable rights," one of which was the right to be armed.<sup>98</sup> In order to ascend the English throne, William and Mary agreed to abide by the Bill of Rights and Parliament.<sup>99</sup> Among its many other rights, the English Bill of Rights provided: "That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law."<sup>100</sup> In addition to the rights set forth in the Second Amendment, numerous other rights set forth in the English Bill of Rights are also contained in the American Bill of Rights, such as prohibitions against cruel and unusual punishment and quartering of troops in homes.<sup>101</sup>

#### B. *The American Revolution*

Within 100 years after James II's inglorious reign, English monarchs were again riding roughshod over those they governed.<sup>102</sup> This time, the monarchs ground their boot heels into the backs of

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93. S. SUBCOMM. ON THE CONSTITUTION OF THE COMM. ON THE JUDICIARY, 97TH CONG., *THE RIGHT TO KEEP AND BEAR ARMS* 2–3 (Comm. Print 1982).

94. MALCOLM, *supra* note 86, at 52. Charles II, James's brother, began this practice in the 1660s. *Id.*

95. Kates, *supra* note 89, at 235 n.137 (citing MICHEL H. JOSSERAND & JAN A. STEVENSON, *PISTOLS, REVOLVERS, AND AMMUNITION* 271–72 (Crown Publishers, Inc. 1972) (1968)).

96. *See id.* at 235–36, 239.

97. *Id.* at 236, 239.

98. W. & M. Sess. 2, ch. 2 (1689). In the 1920s, the British Parliament disarmed the population in fear of revolution. *See* GEOFFREY L. GOODWIN, *BRITAIN AND THE UNITED NATIONS* 156 (1957). Because the English Bill of Rights was a law passed by Parliament, Parliament was able to abolish its own law. *See* Kates, *supra* note 89, at 236–38.

99. Kates, *supra* note 89, at 236.

100. W. & M. Sess. 2, ch. 2 (1689).

101. *Id.*; U.S. CONST. amends. II–III, VIII.

102. *See* BERNHARD KNOLLENBERG, *ORIGIN OF THE AMERICAN REVOLUTION: 1759–1766*, at 176–77 (1960).

their American colonists, who were English citizens.<sup>103</sup> By 1776, the British Colonies in North America were poised for rebellion against England.<sup>104</sup> The American Act of 1764 imposed taxes on the Colonies, as well as new and different restrictions on overseas trade.<sup>105</sup> Taxes were used to support a standing British army in the Colonies, without consultation or commissions offers to former colonial officers.<sup>106</sup> Trade was restricted only to Great Britain, and boats bound for the Colonies were embargoed unless they were fully loaded in Great Britain.<sup>107</sup> Wine from Madeira, the Azores, and the Canary Islands was heavily taxed.<sup>108</sup> Burdens were imposed on intercontinental trade within North America, and coastal boat traffic was highly regulated.<sup>109</sup> All of this was intended to enforce export duties to raise money on the backs of the Colonists.<sup>110</sup> Revolution fermented.<sup>111</sup> The British Parliament, more aggressive than the King, sent, at the request of General Thomas Gage, four regiments of British troops to Boston “to prevent any disturbance.”<sup>112</sup> In response, a Massachusetts provincial congress ordered that a quarter of its Minutemen militia remain on duty at all times, and allocated funds to buy arms.<sup>113</sup> Parliament refused to remove troops from the Colonies despite request from the Continental Congress.<sup>114</sup> The Colonies were in a state of defense and defiance.<sup>115</sup> English customs service officers in Massachusetts were empowered to break into and search homes and stores for goods.<sup>116</sup>

King George III and General Gage knew well that a disarmed population could not revolt.<sup>117</sup> The Crown moved to deprive the

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103. *See id.*

104. *Id.* at 1.

105. *Id.* at 176–77.

106. *See* 8 GEORGE ELLIOTT HOWARD, *THE AMERICAN NATION: A HISTORY* 102 (1905).

107. KNOLLENBERG, *supra* note 102, at 176.

108. *Id.* at 176–77.

109. *Id.* at 177–79.

110. HOWARD, *supra* note 106.

111. *See* KNOLLENBERG, *supra* note 102, at 249–50.

112. *See id.* at 250.

113. *Id.* at 249–50.

114. *Id.* at 250.

115. *See id.* at 249–51.

116. *See* 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1901, at 647 n.c (Melville M. Bigelow ed., William S. Hein & Co., Inc. 5th ed. 1994) (1833).

117. Respondent’s Brief at 23, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

Colonists of their arms, their powder, and their ability to fight.<sup>118</sup> These were desperate times for the liberty of the Colonists who opposed the British actions.<sup>119</sup> Gage executed searches for guns and powder,<sup>120</sup> and ordered that no guns be shipped to the Colonies.<sup>121</sup> Colonists were allowed to leave an embargoed Boston only if they surrendered their arms,<sup>122</sup> and powder stores were seized.<sup>123</sup>

In Boston, blood was spilled, but not over tea.<sup>124</sup> Professor David Kopel opines that British gun control precipitated the American Revolution and fueled the Colonists' fear that restrictive and oppressive laws would be imposed by the British on a soon-to-be unarmed population, who would lose the means to oppose the British.<sup>125</sup> The Colonists had a basis for their fear.<sup>126</sup> From England, Lord Dartmouth wrote to General Gage on January 27, 1775, concluding that the English Intolerable Acts could only be enforced against the colonies by armed might.<sup>127</sup> Upon receipt of Lord Dartmouth's letter on April 14, 1775,<sup>128</sup> Gage dispatched nearly 800 heavily armed troops to Concord, Massachusetts, to seize or destroy a colonial armory of arms and powder.<sup>129</sup> Intercepted by the Minutemen at Lexington, one British trooper and a horse were shot dead, while eight colonial militia were killed and eleven wounded in the skirmish.<sup>130</sup> Brushing aside the Colonists' attempt to stop them, the British marched to Concord, where they destroyed the Colonists' military stores.<sup>131</sup> On the return march, the British were ferociously attacked by an organized colonial militia; as a result of both conflicts, over 320 men from both sides were killed, wounded, or missing.<sup>132</sup> Thus, the Revolution was ignited; political tensions and the effort to

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118. *Id.* at 20–23 (citing STEPHEN P. HALBROOK, *THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* 45 (2008)).

119. *See infra* notes 120–23 and accompanying text.

120. Respondent's Brief, *supra* note 117, at 21–22.

121. *Id.* at 23.

122. *See id.* at 21–22.

123. *Id.* at 21.

124. *See generally* David B. Kopel, *How the British Gun Control Program Precipitated the American Revolution*, 6 CHARLESTON L. REV. 283 (2012).

125. *Id.*

126. *See infra* notes 127–31 and accompanying text.

127. KNOLLENBERG, *supra* note 102, at 251.

128. *Id.*

129. *Id.* at 251–52.

130. *Id.*

131. *Id.* at 252.

132. *Id.*

disarm the colonists had triggered a war against a tyrannical government.<sup>133</sup>

In *Heller*, Justice Scalia wrote that when words or efforts to negotiate fail, the Founders intended that the citizens always maintain the ability to suppress a tyrannical government through the use of arms.<sup>134</sup> He noted that at the creation of the Bill of Rights, the Founders feared “that the Federal Government would disarm the people in order to impose rule through a standing army or select militia,” as was accomplished by James II and attempted by George III.<sup>135</sup>

## V. THE MILITIA

The militia is comprised of all citizens.<sup>136</sup> It is not the National Guard, which is under the ultimate authority of the President.<sup>137</sup> At the time of the country’s founding, the militiamen had the same weapons as the government—military-style muskets.<sup>138</sup> Citizens were compelled to attend muster in many of the colonies with a musket suitable for military use, a good bayonet, and sufficient powder and lead.<sup>139</sup> While some colonial statutes only required that citizens possess a “serviceable weapon,” others mandated that only specific types of firearms would be acceptable for militia service.<sup>140</sup> Failure to comply could result in fines.<sup>141</sup> In Maryland, households were required to have a serviceable weapon, sufficient powder, a sword, and shot, and a militia member had to appear at muster with these items.<sup>142</sup> The Second Militia Act of 1792, intended to establish a federal militia, specified that the only choice of arms was between “a good musket or firelock, [with] a sufficient bayonet.”<sup>143</sup> The 1792

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133. *See id.*

134. *See* District of Columbia v. Heller, 554 U.S. 570, 598–99 (2008).

135. *Id.* at 592, 594, 598.

136. *See* Kates, *supra* note 89, at 214–18.

137. *See id.* at 249.

138. *See* Garry Wills, *Spiking the Gun Myth*, N.Y. TIMES (Sept. 10, 2000), <https://archive.nytimes.com/www.nytimes.com/books/00/09/10/reviews/000910.10willot.html>.

139. Clayton Cramer, *Colonial Firearm Regulation*, 16 J. ON FIREARMS & PUB. POL’Y 1, 2–10 (2004) (discussing the various requirements to bear arms placed upon colonists by their respective colonial governments).

140. *Id.*

141. *Id.* at 2.

142. 1 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND 77 (William Hand Browne ed., Balt., Md., Md. Historical Soc’y 1883).

143. Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 271, *repealed* by Militia Act of 1903, ch. 196, § 25, 32 Stat. 775, 780.



Act required every enrolled citizen to provide himself with, among other related items, a military arm of sufficient bore.<sup>144</sup> Justice Scalia has likened military arms from colonial times to today's M-16 rifle, a military weapon that citizens generally cannot possess unless the weapon has been registered with the ATF before May 19, 1986, when the Firearms Owners' Protection Act (the 1986 Act) went into effect.<sup>145</sup> Today, the closest an average citizen can come to owning a military assault rifle not lawfully registered before the enactment of the 1986 Act would be a semi-automatic version of the military's M-16 select-fire rifle.<sup>146</sup>

The 1934 Act required citizens to register certain types of firearms with the Secretary of the United States Treasury.<sup>147</sup> Some of these types of firearms are still used by the federal government today, such as fully automatic assault rifles and rifles with barrels shorter than eighteen inches.<sup>148</sup> There was nothing conspiratorial about the 1934 Act; it was enacted by Franklin D. Roosevelt in an effort to control organized gangster crime that local police departments were unable to stop.<sup>149</sup> In *Heller*, the United States government argued, in an amicus brief, in favor of the individual right theory of gun possession, while asserting that it must be able to continue to enforce restrictions imposed on guns, such as the prohibition on ownership of

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144. *Id.* In *Heller*, Justice Scalia acknowledged that “[i]n the colonial and revolutionary war era, weapons used by militiamen and weapons used in defense of person and home were one and the same.” 554 U.S. 570, 624–25 (2008) (quoting *State v. Kessler*, 614 P.2d 94, 98 (Or. 1980)) (internal quotation marks omitted).

145. *See Heller*, 554 U.S. at 627–28; *see also* Firearms Owners' Protection Act, Pub. L. No. 99-308, sec. 102, § 922(o), 100 Stat. 449, 453 (1986) (codified at 18 U.S.C. § 922(o) (2012)).

146. *See* Joshua Gillin, *The Difference Between Automatic and Semi-Automatic Weapons*, POLITIFACT (Oct. 2, 2017, 4:08 PM), <http://www.politifact.com/truth-o-meter/article/2017/oct/02/difference-between-automatic-and-semi-automatic-we/>. For those who do not reside in states where automatic weapons are completely banned, one must pay the ATF a fee of \$200 and pass a background check “that is as thorough as if you are getting clearance to become a federal agent.” *Id.* There are also devices, called “bump stocks,” that modify the trigger mechanism on semi-automatic weapons so that they may fire “at a rate similar to an automatic,” which are legal under federal law. *Id.*

147. National Firearms Act, ch. 757, § 5, 48 Stat. 1236, 1238 (1934) (codified as amended at 26 I.R.C. § 5841 (2012)).

148. *Id.* § 1(a)–(b).

149. Adam Winkler, *Franklin Roosevelt: The Father of Gun Control*, NEW REPUBLIC (Dec. 19, 2012), <https://newrepublic.com/article/111266/franklin-roosevelt-father-gun-control>.

machine guns and D.C.’s ban on handguns.<sup>150</sup> The Supreme Court agreed that these restrictions set forth in the 1934 Act would continue to remain enforceable, and therefore, the guns regulated by the 1934 Act were not considered to be in commerce or commonly in use because they were generally not legal to transfer or own.<sup>151</sup> And very clearly, *Heller* held that there are limits on the type of guns that can be possessed, who can possess guns, and where guns can be possessed.<sup>152</sup>

Justice Scalia was well-known to be an originalist,<sup>153</sup> and he described his originalist stance by stating: “The Constitution that I interpret and apply is not living but dead, or as I prefer to call it, enduring. It means today not what current society, much less the court, thinks it ought to mean, but what it meant when it was adopted.”<sup>154</sup> Scalia’s approval of the exclusions of machine guns, short-barreled rifles, and shotguns from the individual right to bear arms has been criticized on the grounds that, as an originalist, Scalia failed to cite any historical support for such exclusions.<sup>155</sup> Gun laws at the time of the nation’s founding demanded that citizens be armed, that they report to muster with their guns, and that they be trained.<sup>156</sup> During colonial times, the citizens possessed the exact same guns that the army possessed.<sup>157</sup> Modern sporting rifles or assault-style rifles, because they are semi-automatic and have at least sixteen-inch barrels,<sup>158</sup> are a step down from the effectiveness of a fully automatic rifle with a short barrel for military service.<sup>159</sup> This disparity of arms that prevents a citizen of some states from owning an assault-style

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150. See Brief for the United States as Amicus Curiae at 2, 10, 21–25, 30–31, *Heller*, 554 U.S. 570 (No. 07-920).

151. See *Heller*, 554 U.S. at 621–22.

152. *Id.* at 626–27.

153. *Originalism: A Primer on Scalia’s Constitutional Philosophy*, NPR (Feb. 14, 2016, 5:41 PM), <https://www.npr.org/2016/02/14/466744465/originalism-a-primer-on-scalia-s-constitutional-philosophy>.

154. *Id.*

155. ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 285–86 (2011).

156. Kates, *supra* note 89, at 215.

157. See *Heller*, 554 U.S. at 672 (Stevens, J., dissenting).

158. Wayne Anderson, *AR15 Barrels Part 2: What You Need to Know About Length, Gas Systems, and Rifling*, AT3 TACTICAL, <https://www.at3tactical.com/blogs/news/146259-81-ar-15-barrels-barrel-length-gas-systems-and-rifling-part-2> (last visited Apr. 20, 2018); *Modern Sporting Rifle Facts*, *supra* note 5.

159. See Anderson, *supra* note 158; see also *Modern Sporting Rifle Facts*, *supra* note 5 (“Confusion exists because while these [AR-15] rifles may cosmetically look like military rifles, they do not function the same way.”).

rifle is compounded when a state restricts magazine size to ten rounds because the standard military magazine holds thirty rounds.<sup>160</sup>

## VI. DON KATES

Don Kates, a lawyer, went to the segregated South to clerk and became involved in the civil rights movement while at Yale Law School.<sup>161</sup> With pistols in both hands, he helped guard houses and their occupants against “night riders.”<sup>162</sup> As a self-described “long-time liberal Democrat,” Kates had his groundbreaking 1983 article on the Second Amendment published in the *Michigan Law Review*.<sup>163</sup> In the article, Kates presented and supported the then-novel concept that the right to keep and bear arms was an individual right, not a collective right exercisable only in association with organized militia service, and that the Framers believed that the newly strengthened federal government should never be strong enough to destroy the liberties of an armed populace.<sup>164</sup> In support of his contention that the citizenry must not lose the right to bear arms, Kates cited Noah Webster, who had written at the time of the Bill of Rights: “Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe.”<sup>165</sup>

Daniel Webster, a prominent politician in the 1800s, warned that “[t]here are men, in all ages, who mean to exercise power usefully; but who mean to exercise it. They mean to govern well; but they mean to govern. They promise to be kind masters; but they mean to be masters.”<sup>166</sup> The prevailing wisdom at the time of the Founding, according to Kates, was “that to be disarmed by government was

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160. *E.g.*, D.C. CODE ANN. § 7-2506.01(b) (West 2018); MD. CODE ANN., CRIM. LAW § 4-305(b) (West 2018); *see also* Megan Schrader, *Colorado Dems Want Gunmakers Liable in Attacks*, MILITARY.COM, <https://www.military.com/daily-news/2013/02/06/colorado-dems-want-gunmakers-liable-in-attacks.html> (last visited Apr. 20, 2018) (noting that military personnel get thirty-bullet magazines).

161. Ray Downs, *The Former Civil Rights Activist Who Created the Right to Bear Arms*, VICE (Apr. 11, 2013, 11:51 AM), [https://www.vice.com/en\\_us/article/nn4pm8/the-former-civil-rights-activist-who-created-the-right-to-bear-arms](https://www.vice.com/en_us/article/nn4pm8/the-former-civil-rights-activist-who-created-the-right-to-bear-arms).

162. *See* NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 423 (2012).

163. Kates, *supra* note 89; Downs, *supra* note 161. Kates’s article was also cited in support of the majority in *Heller*. *See* *District of Columbia v. Heller*, 554 U.S. 570, 602 (2008).

164. *See* Kates, *supra* note 89, at 212, 218.

165. *Id.* at 221.

166. Daniel Webster, *Reception at New York* (Mar. 15, 1837), in 1 THE WORKS OF DANIEL WEBSTER 337, 358 (Charles C. Little & James Brown 1851).

tantamount to being enslaved by it.”<sup>167</sup> Arms in the hands of citizens were considered necessary to resist tyranny.<sup>168</sup> Justice Scalia agreed with Kates: “[H]istory showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people’s arms, enabling a select militia or standing army to suppress political opponents.”<sup>169</sup> “This,” Scalia wrote, “is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.”<sup>170</sup>

The anonymous Anti-Federalist author<sup>171</sup> of the *Letters from the Federal Farmer*,<sup>172</sup> published in 1787 and 1788, wrote, “to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught . . . how to use them.”<sup>173</sup>

While there may have been other legitimate reasons in the eighteenth century to bear arms, the chief reason for the Second Amendment was the perceived threat that the federal government would destroy the citizens’ militia by taking their arms, and thus, their ability to oppose a politically oppressive government.<sup>174</sup>

## VII. LEVINSON

Beyond Kates’s article, there was little discussion of whether the right to bear arms was an individual or a collective right until 1989, when Sanford Levinson, a liberal constitutional law professor, authored a seminal article published in the *Yale Law Review* titled *The Embarrassing Second Amendment*.<sup>175</sup> He wrote that the Second

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167. Kates, *supra* note 89, at 232.

168. *Id.*

169. *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008).

170. *Id.*

171. The author’s identity is unknown but is thought to be Richard Henry Lee or Melancton Smith. *See, e.g.*, Walter Hartwell Bennett, *Editor’s Introduction to LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN*, at xii, xiv (Walter Hartwell Bennett ed., 1978); Paul F. McKenna, Book Review, 6 UNBOUND: AN ANN. REV. LEGAL HIST. & RARE BOOKS 88 (2013) (reviewing *THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE* (Michael P. Zuckert & Derek A. Webb eds., 2009)).

172. These papers are considered some of the most important writings at the time of the Constitutional debates. *See* Bennett, *supra* note 171, at xxxiv.

173. Letter No. XVIII, *The Constitution’s Provisions for Distributing Powers Between the General and State Governments* (Jan. 25, 1788), in *LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN*, *supra* note 171, at 122, 124.

174. *See* Kates, *supra* note 89, at 221–22.

175. *See generally* Sanford Levinson, Comment, *The Embarrassing Second Amendment*, 99 *YALE L.J.* 637 (1989). *See also* Adam Liptak, *A Liberal Case for Gun Rights*

Amendment is not taken seriously by most legal scholars, and he attributed the dearth of Second Amendment scholarship to “a mixture of sheer opposition to the idea of private ownership of guns.”<sup>176</sup> He also opined that “plausible, perhaps even ‘winning,’ interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation.”<sup>177</sup> His article was cited by the Solicitor General in the United States’ amicus brief in *Heller* in support of the Court’s impending decision that the Second Amendment guaranteed an individual the right to possess and bear firearms.<sup>178</sup> This decision was in direct opposition to the seventy-year old, highly popular collective, militia-only right theory that got its unsupported start in *Miller*.<sup>179</sup>

A. *Levinson’s Rationale for Individual Rights*

Levinson offered two reasons to support why he believed the Founders wrote the Second Amendment to confirm the inalienable and individual right of citizens to keep and bear arms.<sup>180</sup> The first reason was personal and community defense.<sup>181</sup> The second was far more important to the Founders, both Federalists and Anti-Federalists.<sup>182</sup> History and experience had taught them that political corruption could result in governmental tyranny from within, and that only armed citizens could counter such tyranny.<sup>183</sup>

B. *The Need for the Second Amendment to Protect Rights*

The *Heller* majority agreed with Levinson; Justice Scalia, writing for the majority, cited opposition to tyranny and self-defense as the two main reasons why the Second Amendment was included in the Bill of Rights and why the right to possess guns was an individual right, not a collective one.<sup>184</sup> However, *Heller* involved a challenge

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*Sways Judiciary*, N.Y. TIMES (May 6, 2007), <https://www.nytimes.com/2007/05/06/us/06firearms.html> (describing the impact that “leading liberal constitutional scholars,” including Levinson, had in advancing the individual rights theory).

176. Levinson, *supra* note 175, at 642.

177. *Id.*

178. See Brief for the United States as Amicus Curiae, *supra* note 150, at 18. The Solicitor General, however, argued in its brief that the District of Columbia’s ban on handguns and restrictions on long guns were permissible examples of government regulation. *Id.* at 20–25.

179. See discussion *supra* Part III.

180. See Levinson, *supra* note 175, at 645–51.

181. *Id.* at 645–46.

182. *Id.* at 646–50.

183. *Id.*

184. See *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008).

to the denial of the right to possess handguns for self-defense in the home within the District of Columbia.<sup>185</sup> The challengers did not argue that their right to bear arms for the purpose of opposing or dissuading tyranny operated as a sufficient basis to strike down the D.C. law.<sup>186</sup> In both *Heller* and *McDonald v. City of Chicago*, another seminal Second Amendment Supreme Court case, the possibility of a tyrannical government was largely ignored in favor of self-defense.<sup>187</sup>

Yet, Scalia explained in *Heller* that the Framers of the United States Constitution considered the rights of self-defense and preservation of liberty to be inalienable rights, meaning these were rights neither granted by nor dependent upon the government, and as fundamental rights, the government could not take them away.<sup>188</sup> He wrote that the Framers feared that the federal government would disarm the people to enable a politicized standing army or militia to rule; their response to this fear was to deny Congress, through the Second Amendment of the Bill of Rights, the power to remove this ancient and inalienable right of individuals to keep and bear arms.<sup>189</sup>

Maryland's ban of assault-style rifles creates the opportunity for a unique argument about whether state governments should be able to ban civilians from possessing the most efficient arms commonly and legally available for civilian use.<sup>190</sup> The most efficient arms include HCMs and rifles that are "assault-style," but are not military rifles, like M-16s.<sup>191</sup> The Framers believed that guns in the hands of citizens, unconnected to military service, were necessary to protect against a tyrannical government, and this finds enormous support in the documents and texts that Kates, Levinson, Justice Scalia, and the dozens of amici studied in reaching similar conclusions regarding the intent of the Framers and why they developed this intention.<sup>192</sup>

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185. *Id.* at 573–76.

186. *See McDonald v. City of Chicago*, 561 U.S. 742 (2012); *Heller*, 554 U.S. at 575–76. In *McDonald*, the petitioner challenged Chicago's ban of handguns on the basis that he was left defenseless in his home. 561 U.S. at 742–43.

187. *McDonald*, 561 U.S. at 744–45; *Heller*, 554 U.S. at 613–14.

188. *Heller*, 554 U.S. at 593–94.

189. *Id.* at 598–99.

190. MD. CODE ANN., CRIM. LAW § 4-303 (West 2018); *infra* notes 250–55 and accompanying text.

191. *See infra* notes 249–54 and accompanying text. These firearms are, as Justice Scalia wrote, the types of weapons that modern citizens would bring to militia duty because they are the sort of weapons they possessed at home. *Heller*, 554 U.S. at 627.

192. *See supra* notes 164–89 and accompanying text.

For example, in Federalist No. 46, James Madison wrote of “the advantage of being armed, which the Americans possess over the people of almost every other nation.”<sup>193</sup> Madison feared the power of a central government and suggested that a strong militia be created to combat this power.<sup>194</sup> He wrote that a militia composed of all the people should always outnumber the forces the federal government could bring to bear by at least twenty to one and that this militia had to be sufficiently armed to effectively confront a tyrannical government.<sup>195</sup> In the late eighteenth century, sufficient arms were muskets, the arms possessed by the army for military purposes.<sup>196</sup> And clearly, under the Second Amendment, the right to bear arms extends beyond those arms that were in existence at the time of the founding.<sup>197</sup> On this point, Justice Scalia wrote:

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.<sup>198</sup>

The Founders believed that the right to liberty—the right for citizens to live their lives free of most government control—was fundamental and was so important that it had to be protected by arms, if necessary.<sup>199</sup>

The Founders expected the citizenry to fight if necessary to maintain the liberty won in the American Revolution and to oppose and prevent governmental abuses that could threaten the way of life they envisioned.<sup>200</sup> The Founders knew only an armed citizenry could fight an army or snip the budding bloom of a tyrannical

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193. Kates, *supra* note 89, at 228 (quoting THE FEDERALIST NO. 46, at 371 (James Madison) (John C. Hamilton ed., 1864)) (internal quotation marks omitted).

194. *See, e.g.*, LES ADAMS, THE SECOND AMENDMENT PRIMER 99–101 (2d ed. 2013); THE FEDERALIST NO. 1, at 51–53 (Alexander Hamilton) (John C. Hamilton ed., 1864).

195. *See* ADAMS, *supra* note 194, at 99–100.

196. *See Gun Timeline*, PBS, <http://www.pbs.org/opb/historydetectives/technique/gun-timeline/> (last visited Apr. 20, 2018).

197. *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008).

198. *Id.* (citations omitted).

199. *See id.* at 594.

200. *See id.* at 593–95.

government.<sup>201</sup> It was their intent that the citizens not be deprived of the necessary tools to do so.<sup>202</sup> Support for an armed opposition of a tyrant is found in the Declaration of Independence, which asserts that people have a right, and indeed a duty, to change the government when it abuses their rights and when it becomes destructive to life, liberty, and the pursuit of happiness through “a long train of abuses and usurpations.”<sup>203</sup>

Justice Joseph Story, a Supreme Court Justice who served on the Court for thirty-three years, shared Madison’s beliefs that citizens need to be armed.<sup>204</sup> In his *Commentaries on the Constitution*, drawn in large part from the *Federalist* and from interviews with living Founders, he wrote that the Second Amendment is important not only for the “natural defense of a free country,”<sup>205</sup> but also as “a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.”<sup>206</sup> Story addressed the perceived dangers and fears shared by others of his generation—and his predecessors’ generations—that the government, including Congress and the President, could seize power from a citizenry without means to resist with arms.<sup>207</sup> In 1840, Story wrote: “One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms . . . .”<sup>208</sup> Theodore Schroeder, a twentieth century defender of constitutional rights wrote: “[O]nly governments have ever disarmed any considerable class of people as a means toward their enslavement.”<sup>209</sup>

The numerous writings cited show that many of the early Founders did not trust Congress or the President with the citizens’ inalienable individual rights.<sup>210</sup> The Bill of Rights exists because some states refused to ratify the Constitution unless the rights contained in it were explicitly inalienable, meaning that these rights were not granted to

201. *See id.* at 594.

202. *See supra* notes 188–89 and accompanying text.

203. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

204. *Joseph Story*, OYEZ, [https://www.oyez.org/justices/joseph\\_story](https://www.oyez.org/justices/joseph_story) (last visited Apr. 20, 2018); *infra* notes 205–08 and accompanying text.

205. STORY, *supra* note 116, § 1897, at 646.

206. *Id.*

207. *See* JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 450, at 264 (N.Y., Harper & Bros. Publishers 1840).

208. *Id.*

209. THEODORE SCHROEDER, FREE SPEECH FOR RADICALS 104 (reprint 1969) (1916).

210. *See supra* notes 193–209 and accompanying text.



the people by government and could not be taken from the people by government.<sup>211</sup> The Second Amendment is one of these inalienable rights set forth in the Bill of Rights,<sup>212</sup> which imposes limitations on the power of government.<sup>213</sup> As the following will demonstrate, the Founders had good reason to be distrustful of a central government and to ensure that the means to resist an oppressive or tyrannical government would not be taken from the citizenry. When one examines some recent state legislative acts, including Maryland's Firearm Safety Act of 2013, some of the Founders' worst fears have effectively come to life, as the acts intend to take from citizens the most effective, legally owned weapons available to oppose a tyrannical government.<sup>214</sup>

### VIII. ASSAULT-STYLE RIFLES

Although some may not agree with *Heller* or its justification, the case makes clear that the Second Amendment confirms an individual right to keep and bear arms.<sup>215</sup> In deference to the government's position to be able to regulate guns via the restrictions of the 1934 Act, *Heller* explained that Second Amendment rights extend only to "certain types of weapons."<sup>216</sup> To be protected under the Second Amendment, the weapons must be "in common use at the time" and must not be "dangerous and unusual."<sup>217</sup> The key point is that, in order to qualify for protection under the Second Amendment, the gun must be in common use, meaning the gun in question must be of the type "possessed by law-abiding citizens for lawful purposes."<sup>218</sup> Additionally, the gun must not be dangerous and unusual.<sup>219</sup> If possession and transfer of a particular gun is illegal, as determined by the 1934 Act or the 1986 Act, the gun cannot be of a type in common use at the time by law-abiding citizens for lawful purposes because it is generally illegal to possess.<sup>220</sup> Neither the 1934 Act nor the 1986 Act make assault-style rifles illegal.<sup>221</sup>

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211. See *The Bill of Rights: A Brief History*, ACLU, <https://www.aclu.org/other/bill-rights-brief-history> (last visited Apr. 20, 2018).

212. See ADAMS, *supra* note 194, at 82–84.

213. See U.S. CONST. amends. I–X.

214. See Firearm Safety Act of 2013, ch. 427, 2013 Md. Laws 4195; see also *infra* Section VIII.A (discussing bans on assault-style rifles).

215. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

216. *Id.* at 623.

217. *Id.* at 627.

218. *Id.* at 624–25.

219. *Id.* at 627.

220. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 I.R.C. §§ 5801–5872 (2012)); Firearms Owners' Protection Act, Pub. L. No. 99-308,

What does “dangerous” mean? All guns are dangerous, and concealed handguns are insidiously dangerous. At one time, most states banned concealed carry of handguns without a license.<sup>222</sup> In 2015, the Seventh Circuit held “dangerous” to be a relative term among types of guns; for example, a semi-automatic rifle is dangerous compared to a handgun, and a pistol with fifteen rounds is dangerous compared to a revolver with six rounds.<sup>223</sup> Other than references to “dangerous and unusual” and the mention of machine guns, *Heller* provided no useful guidance as to what kind of firearm was dangerous or what was protected under the Second Amendment.<sup>224</sup> And aside from references to the military’s M-16 select-fire rifle, and those firearms regulated by the 1934 and 1986 Acts that are “uncommon,” *Heller* also failed to explain what was meant by “in common use at the time,” other than to refer to lawful weapons that “the body of all citizens capable of military service . . . possessed at home.”<sup>225</sup> For example, Justice Scalia held that fully automatic military M-16 rifles are not protected by the Second Amendment because they are not in common use, but that handguns are because they are in common use.<sup>226</sup> In terms of weapons not protected by the Second Amendment because they are not in common use, *Heller* merely provided examples of weapons regulated by the 1934 Act, classes of people who should not have guns—felons and the mentally ill, among others—and places where possession of guns could be banned, such as schools and government buildings.<sup>227</sup> *Heller* went no further in defining what restrictions courts could lawfully impose on weapons or what constitutional standard of scrutiny should be used to test gun laws.<sup>228</sup> While *Heller* represented a sea change in interpreting the rights of an individual to own a gun, it left many questions unanswered.<sup>229</sup>

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100 Stat. 449 (1986). The 1986 Act bans any civilian possession of fully automatic weapons not registered with the ATF before May 19, 1986, the effective date of the 1986 Act. Firearms Owners’ Protection Act secs. 102(9), 110(c), § 922(o).

221. National Firearms Act §§ 1–18; Firearms Owners’ Protection Act secs. 101–110.

222. Salvatore, *The History of Concealed Carry in the United States*, USA CARRY (July 31, 2017), <https://www.usacarry.com/history-concealed-carry/>.

223. See *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015).

224. See *Heller*, 554 U.S. at 624, 627.

225. *Id.* at 627.

226. *Id.* at 627–29.

227. *Id.* at 624–27.

228. See *id.* at 634–35.

229. See *id.* at 595, 634–35.

*Heller* concluded that eighteenth century militiamen, of which every able-bodied, free man of a specific age belonged, would bring weapons possessed at home that were useful for militia service, otherwise known as weapons “in common use at the time,” to gatherings.<sup>230</sup> In the eighteenth century, this meant muskets, identical to those possessed by an army, but not shotguns, as they lacked the capacity to fire a projectile farther than a short distance with lethal results.<sup>231</sup> In the twenty-first century, a citizen wishing to match the weaponry possessed by the government, without violating the prohibitions of the 1934 Act and the 1986 Act, can muster the commonly used semi-automatic sporting rifle—the civilian version of the automatic military assault rifle—and a handful of HCMs.<sup>232</sup> Such weapons are relatively light, robust, and employ the same light cartridges as the military rifles used by the United States military and many police forces.<sup>233</sup>

#### A. Assault-Style Rifle Bans

Certain semi-automatic rifles have been the target of bans in D.C. and a number of states, including Maryland.<sup>234</sup> These are generally the AR-<sup>235</sup> and AK-style rifles, incorrectly labeled “assault rifles” by the media and legislatures.<sup>236</sup> Maryland has even banned the civilian,

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230. *Id.* at 595–96, 627 (citing *United States v. Miller*, 307 U.S. 174, 179 (1939)).

231. *See Gun Timeline*, *supra* note 196.

232. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 I.R.C. §§ 5801–5872 (2012)); Firearms Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986); *Modern Sporting Rifle Facts*, *supra* note 5.

233. *See generally*, e.g., Robert Johnson & Geoffrey Ingersoll, *It’s Incredible How Much Guns Have Advanced Since the Second Amendment*, BUS. INSIDER (Dec. 17, 2012, 12:49 PM), <http://www.businessinsider.com/evolution-of-semi-automatic-weapons-2012-12> (describing semi-automatic rifles as “light” and attributing their evolution to military need); Fred Mastison, *AR-15 Corner: A Look at Patrol Rifle Evolution*, TACTICAL LIFE (Feb. 24, 2016), <https://www.tactical-life.com/lifestyle/military-and-police/ar-15-patrol-rifle-evolution/> (noting that law enforcement and military personnel use semi-automatic rifles).

234. *See, e.g.*, *Kolbe v. Hogan*, 849 F.3d 114, 121 (4th Cir.), *cert. denied*, 138 S. Ct. 469 (2017); *Heller v. District of Columbia*, 670 F.3d 1244, 1247 (D.C. Cir. 2011).

235. AR does not stand for “assault rifle.” Rather, it stands for “ArmaLite,” the company that developed the rifle in the 1950s. *See History*, ARMALITE, <https://www.armalite.com/history/> (last visited Apr. 20, 2018).

236. *See, e.g.*, D.C. CODE ANN. § 7-2501.01(3A)(A) (West 2018) (including AR- and AK-15 weapons in the definition of “assault weapon”); MD. CODE ANN., PUB. SAFETY § 5-101(r)(2) (West 2018) (listing various forms of an AR-style rifle and all forms of an AK-style rifle as being “assault weapons”); Ian Duncan, *Federal Appeals Court Upholds Maryland Assault Rifle Ban*, BALT. SUN (Feb. 21, 2017, 8:00 PM),

semi-automatic version of the M-14 rifle, called the M1A.<sup>237</sup> The M1A is a heavy, long-barreled, wood stock rifle used primarily for target and match shooting, and is similar to the select-fire rifle adopted for military use in the 1950s.<sup>238</sup> It was generally discontinued for military use by the 1970s.<sup>239</sup> All of these banned firearms are semi-automatic, meaning one pull of the trigger is required to fire one round; recycled gas from a fired cartridge pushes back the rifle's bolt after each shot is fired, ejecting the spent shell casing and stripping a fresh cartridge from the magazine as the bolt moves forward to chamber the cartridge.<sup>240</sup> These weapons are not assault rifles; they are made for civilians and armies do not use them.<sup>241</sup> Civilians cannot own "assault rifles" without compliance with the 1934 Act and can never own "assault rifles" not registered before May 19, 1986, in compliance with the 1986 Act.<sup>242</sup> These civilian assault-style guns function like other semi-automatic sporting rifles, but they look dangerous.<sup>243</sup> Their furniture, or stocks, are made from black plastic instead of wood; they have an extended pistol grip, flash suppressors or compensators, and sometimes, an adjustable buttstock.<sup>244</sup> An AR-15, for example, is a semi-automatic

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<http://www.baltimoresun.com/news/maryland/politics/bs-md-assault-rifle-ban-ruling-20170221-story.html> (referring to weapons as "assault rifles").

237. MD. CODE ANN., PUB. SAFETY § 5-101(f)(2)(xxxvii) (West 2018); MD. CODE ANN., CRIM. LAW §§ 4-301(b), (d), 4-303(a) (West 2018).
238. *See MIA Series*, SPRINGFIELD ARMORY, <https://www.springfield-armory.com/m1a-series> (last visited Apr. 20, 2018).
239. *Id.*
240. 18 U.S.C. § 921(a)(28) (2012); *supra* notes 234–37 and accompanying text. An automatic rifle, in contrast, will fire as long as the trigger is pulled, held, and there are rounds in the magazine. David Sherfinski, *What Constitutes 'Automatic' Weapons at Issue After Orlando*, WASH. TIMES (June 20, 2016), <https://www.washingtontimes.com/news/2016/jun/20/automatic-versus-assault-rifle-definition-debated-/>.
241. *See Modern Sporting Rifle Facts*, *supra* note 5.
242. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 I.R.C. §§ 5801–5872 (2012)); Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986). Some states, such as Delaware, ban the possession of assault rifles or machineguns, even if made prior to 1986 and even if they could be purchased in compliance with the 1934 Act. *See* DEL. CODE ANN. tit. 11, § 1444 (West 2018) (banning citizen possession of machineguns unless used "for scientific or experimental research and development purposes"). Some gun dealers can own full automatic guns not registered before May 19, 1986, but these guns cannot be sold to non-dealers. *See* 18 U.S.C. § 922(b) (2012).
243. *See Modern Sporting Rifle Facts*, *supra* note 5.
244. *See* Maxim Popenker, *Ar-15 – Type Rifles*, MOD. FIREARMS (2012), <http://modernfirearms.net/en/civilian-rifles/u-s-a-civilian-rifles/vintovki-tipa-ar-15-eng/>.

civilian rifle that looks like a military rifle.<sup>245</sup> It fires a small, light bullet at high velocity from a five, ten, twenty, or thirty round magazine.<sup>246</sup> Yet, self-loading or semi-automatic rifles, with detachable magazines that serve the same functions as an assault-style rifle, “began to appear on the civilian market” after World War II.<sup>247</sup>

The M-16 military rifle, an assault rifle, may have a barrel length shorter than the typical sixteen to twenty-inch barrel of a civilian AR-15 rifle and a thirty round magazine, and it will fire continuously with the flick of a switch, meaning as long as the trigger is held back, the gun fires bullets until the magazine is empty.<sup>248</sup> Outside of the Army, assault rifles are not in common use and are not protected for civilian ownership under the Second Amendment, a fact that the *Heller* majority made clear with its M-16 reference.<sup>249</sup> The civilian version, the assault-style rifle, is popular; there are estimated to be at least five million AR-15 assault-style rifles owned by civilians in the United States.<sup>250</sup> There are also many civilian semi-auto versions of the AK-47 and AK-74 rifles owned by citizens in the United States.<sup>251</sup>

Over the last twenty years or so, these assault-style rifles have been by far the most popular rifle sold in the United States.<sup>252</sup> They employ an intermediate cartridge, between rifle and pistol cartridges

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245. *Modern Sporting Rifle Facts*, *supra* note 5.

246. *See* Popenker, *supra* note 244.

247. *See* David Keene, *The Shooting Sports, the AR-15 and a Veteran Close to My Heart*, WASH. TIMES (Dec. 16, 2014), <https://www.washingtontimes.com/news/2014/dec/16/nra-shooting-sports-the-shooting-sports-the-ar-15/>.

248. *See, e.g.*, Anderson, *supra* note 158; *M16 Assault Rifle*, MIL. TODAY, <http://www.military-today.com/firearms/m16.htm> (last visited Apr. 20, 2018).

249. *District of Columbia v. Heller*, 554 U.S. 570, 627–28 (2008).

250. *See* Amicus Curiae Brief of the Cong. of Racial Equality, Nat’l Ctr. for Pub. Policy Research, Project 21, Pink Pistols, Women Against Gun Control, & the Disabled Sportsmen of N. Am. in Support of Appellants at 15, *Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016) (No. 14-1945) [hereinafter *Kolbe Amicus Curiae Brief*].

251. *See id.*; *see also, e.g.*, Tim Pack, *20 AK-47 Variants You Want to Own*, GUNS & AMMO (Nov. 18, 2013), <http://www.gunsandammo.com/military-law-enforcement/20-ak-47-variants-around-the-world/> (“The Kalashnikov AK-47 and its variants are the most widely used military rifles in the world.”).

252. *Kolbe Amicus Curiae Brief*, *supra* note 250; *see also* Joseph P. Williams, *How the AR-15 Became One of the Most Popular Guns in America*, U.S. NEWS (Nov. 7, 2017, 10:38 PM), <https://www.usnews.com/news/national-news/articles/2017-11-07/how-the-ar-15-assault-rifle-became-one-of-the-most-popular-guns-in-america> (“By the 1990s, the weapon sold well to hunters but it wasn’t a blockbuster; its fortunes turned and sales exploded, however, when President George W. Bush in 2004 repealed the ban on assault weapons his predecessor, President Bill Clinton, enacted in 1994.”).

in power, and have less power than most other centerfire rifles, meaning they have less muzzle energy.<sup>253</sup> They are used for hunting, target practice, self-defense, and in some horrible instances, killing unarmed civilians.<sup>254</sup> They are not unusual and they are in common use.<sup>255</sup> Between 2009 and 2013, handguns were the cause of significantly more deaths than rifles.<sup>256</sup> In 2013, roughly 69% of firearm murders in the United States were caused by handguns, not by assault-style rifles.<sup>257</sup> These civilian assault-style rifles should be protected by the Second Amendment under *Heller*'s standard.<sup>258</sup>

Nevertheless, challenges to state laws that ban assault-style rifles in New York, Connecticut, New Jersey, and Illinois have not been successful.<sup>259</sup> A court's inquiry as to whether a legislative ban is constitutional will follow two tracks.<sup>260</sup> The first is whether the weapon in question is protected under the Second Amendment because it is in common use.<sup>261</sup> If the weapon is not protected, the ban is constitutional and the inquiry ends.<sup>262</sup> If the weapon is found to be protected under the Second Amendment because it is in common use, the next inquiry is whether the legislation is constitutional, and courts will apply either intermediate or strict scrutiny to test the statute.<sup>263</sup>

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253. See, e.g., *Modern Sporting Rifle Facts*, *supra* note 5; Warren Redlich, *Projectiles, Kinetic/Muzzle Energy and Stopping Power*, STOP WASTING MONEY (Jan. 23, 2013, 6:13 PM), <http://wredlich.com/ny/2013/01/projectiles-muzzle-energy-stopping-power/>.

254. See, e.g., *Modern Sporting Rifle Facts*, *supra* note 5; Nick Wing, *Thousands of Americans Are Gunned Down Each Year, but Few Die by Assault-Style Rifle*, HUFFPOST (June 17, 2016, 12:52 PM), [https://www.huffingtonpost.com/entry/assault-weapons-deaths\\_us\\_5763109de4b015db1bc8c123](https://www.huffingtonpost.com/entry/assault-weapons-deaths_us_5763109de4b015db1bc8c123).

255. See Kolbe Amicus Curiae Brief, *supra* note 250.

256. *Crime in the United States: Expanded Homicide Data Table 8*, FBI (2013), [https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded\\_homicide\\_data\\_table\\_8\\_murder\\_victims\\_by\\_weapon\\_2009-2013.xls](https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_8_murder_victims_by_weapon_2009-2013.xls)

257. *Id.*

258. *Kolbe v. Hogan*, 813 F.3d 160, 178 (4th Cir. 2016), *reh'g granted*, 849 F.3d 114 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 469 (2017).

259. See, e.g., *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 269 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015); *Shew v. Malloy*, 994 F. Supp. 2d 234, 250 (D. Conn. 2014); *Burton v. Sills*, 248 A.2d 521, 522 (N.J. 1968).

260. See *infra* notes 261–63 and accompanying text.

261. See *Kolbe*, 813 F.3d at 172 (citing *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)).

262. *Id.* at 171–72 (citing *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010)).

263. *Id.* at 178–79.

Applying intermediate scrutiny, it is likely that legislation banning the possession of assault-style rifles would survive a legal challenge.<sup>264</sup> The court merely needs to answer in the affirmative “that there is a reasonable fit between the challenged regulation and a substantial government objective,” such as maintaining public safety.<sup>265</sup> In *Kolbe v. Hogan*, Maryland prevailed in a challenge to the Firearm Safety Act of 2013 in the United States District Court for the District of Maryland, lost the appeal of that decision before a three-judge panel in the Fourth Circuit Court of Appeals, and won its en banc appeal in 2017.<sup>266</sup> The Fourth Circuit, en banc, held that if scrutiny was to be applied to the Maryland legislation, the level would be intermediate.<sup>267</sup> Yet, interestingly, the three-judge panel that the en banc decision reversed had ordered remand to the United States District Court with instructions to apply strict scrutiny to the statute.<sup>268</sup> The three-judge panel adopted strict scrutiny as the appropriate level of scrutiny after considering the nature of the conduct being regulated and the degree to which the challenged law burdened the right to bear arms under the Second Amendment.<sup>269</sup> It held that a less severe regulation, one that does not encroach on the core of the Second Amendment, requires only intermediate scrutiny.<sup>270</sup> Other states have prevailed on appeal when the appellate courts applied intermediate scrutiny to the challenged statute.<sup>271</sup>

The three-judge panel in *Kolbe* also distinguished firearm rights in the home from firearm rights outside the home; the latter, it held,

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264. See *infra* notes 265–71 and accompanying text.

265. *Kolbe*, 813 F.3d at 179 (quoting *Chester*, 628 F.3d at 683) (internal quotation marks omitted).

266. *Kolbe v. O’Malley*, 42 F. Supp. 3d 768, 803 (D. Md. 2014), *aff’d in part, vacated in part sub nom. Kolbe v. Hogan*, 813 F.3d 160, 168 (4th Cir. 2016), *rev’d en banc*, 849 F.3d 114, 121 (4th Cir. 2017). Surprisingly, the Fourth Circuit, sitting en banc, added a new wrinkle to the debate by framing the question: “Are the banned assault weapons and large-capacity magazines ‘like’ ‘M-16 rifles,’ i.e., ‘weapons that are most useful in military service,’ and thus outside the ambit of the Second Amendment?” *Kolbe*, 849 F.3d at 136 (quoting *Heller*, 554 U.S. at 627). Here, the Fourth Circuit mistook the Supreme Court’s reference to M-16s to apply to the civilian versions of assault-style rifles, which are incapable of engaging in automatic fire but appear akin to the M-16. *Heller*, 554 U.S. at 637; *Kolbe*, 849 F.3d at 136.

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

268. *Id.*

269. *Kolbe*, 813 F.3d at 179.

270. *Id.* (quoting *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 195 (5th Cir. 2012)).

271. *E.g.*, *Fyock v. City of Sunnyvale*, 779 F.3d 991, 999 (9th Cir. 2015).

“have always been more limited.”<sup>272</sup> Finally, the three-judge panel distinguished the strict level of scrutiny that should be applied to possession in the home from the intermediate scrutiny that should be applied to possession of these arms outside the home.<sup>273</sup>

The decision of the United States District Court for the District of Maryland and the Fourth Circuit Court of Appeals, which ultimately affirmed the district court’s decision, held that these types of rifles are not protected, but noted that if they were protected, they would be subject to intermediate scrutiny.<sup>274</sup> Other courts, before subjecting the statute to constitutional scrutiny, have held that they are protected.<sup>275</sup> But these courts have also upheld the challenged laws by applying intermediate scrutiny to the challenged legislation.<sup>276</sup> *Heller* failed to provide guidance as to whether courts dealing with gun legislation should apply intermediate or strict scrutiny, primarily because it struck down the District of Columbia’s law as an impermissible categorical ban of handguns.<sup>277</sup>

In dismissing the constitutional challenge to the Firearm Safety Act of 2013, the United States District Court for the District of Maryland held that assault-style rifles are not protected by the Second Amendment.<sup>278</sup> The court noted that it “seriously doubts that the banned assault long guns are commonly possessed for lawful purposes, particularly self-defense in the home . . . and is inclined to find the weapons fall outside Second Amendment protection as dangerous and unusual.”<sup>279</sup> That district court, and the Fourth Circuit Court of Appeals have been the only courts to find assault-style rifles, or modern sporting rifles, not to be in common use, and thereby unprotected under the Second Amendment.<sup>280</sup> However, over five

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272. *Kolbe*, 813 F.3d at 181–82 (quoting *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011)) (internal quotation marks omitted).

273. *See id.*

274. *Kolbe v. Hogan*, 849 F.3d 114, 130, 136, 138 (4th Cir. 2017). The application of intermediate scrutiny would be consistent with other courts that have considered this question of which level of scrutiny to apply. *E.g.*, *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 260 (2d Cir. 2015).

275. *See, e.g.*, *Friedman v. City of Highland Park*, 784 F.3d 406, 411 (7th Cir. 2015) (finding that because such weapons “can” be used for self-defense, they fall within the protection of the Second Amendment at least to some degree).

276. *See, e.g.*, *Fyock*, 779 F.3d at 1001 (applying intermediate scrutiny to a city ban on large-capacity magazines and affirming the ban under the Second Amendment).

277. *See District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

278. *See Kolbe v. O’Malley*, 42 F. Supp. 3d 768, 797 (D. Md. 2014).

279. *Id.* at 788.

280. *See, e.g.*, *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015) (“Even accepting the most conservative estimates cited by the parties and by amici,



million AR platform assault-style rifles in civilian hands in 2013 does make them “common,” and it is hardly accurate or fair to claim that all assault-style rifles are being used for “unlawful purposes.”<sup>281</sup> In fact, some estimate that there are ten million AR platform assault-style rifles owned by citizens in the United States.<sup>282</sup> The number grows even more when you add the number of assault-style rifles that are assembled from parts made available for sale, as well as the AK rifles that are owned by citizens.<sup>283</sup>

Despite this widespread ownership, in early 2017 an en banc panel of the Fourth Circuit in *Kolbe* reversed the earlier decision of the three-judge panel that had remanded the case to the district court with instructions to apply strict scrutiny, and held that assault-style rifles are not protected under the Second Amendment.<sup>284</sup> “Because the banned assault weapons . . . are ‘like’ ‘M-16 rifles’—‘weapons that are most useful in military service’—they are among those arms that the Second Amendment does not shield,” the court held.<sup>285</sup> However, this is contrary to the Supreme Court’s holding in *Heller*, where the Court noted that the militia at the time of the Second Amendment was comprised of all citizens capable of military service who would bring to service those weapons they possessed at home.<sup>286</sup> Today, that would include modern sporting rifles or assault-style rifles.<sup>287</sup> The Fourth Circuit recognized that an M-16 was a gun capable of fully automatic fire—a machine gun banned by the 1934 Act and the

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the assault weapons and large-capacity magazines at issue are ‘in common use’ as that term was used in *Heller*.’); *Fyock*, 779 F.3d at 998 (holding that large-capacity magazines are “in common use”); *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (“We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in ‘common use’ . . .”).

281. John Boyle, *Military-Style AR-15 Rifles: ‘The Market Is Saturated,’* USA TODAY (Dec. 3, 2014, 1:38 PM), <https://www.usatoday.com/story/news/nation/2014/12/03/military-style-ar-rifles-market-saturated/19836755>.

282. Andy Sullivan, *Assault Rifle Used in Florida Shooting Drives Gun Control Debate*, REUTERS (June 12, 2016, 7:13 PM), <https://www.reuters.com/article/us-florida-shooting-weapon/assault-rifle-used-in-florida-shooting-drives-gun-control-debate-idUSKCN0YY13A>.

283. See, e.g., Stokes, *supra* note 25; *The Truth About “Assault Weapons,”* GOAL, <http://goal.org/newspages/AWB-truth.html> (last visited Apr. 20, 2018).

284. *Kolbe v. Hogan*, 849 F.3d 114, 121 (4th Cir.), *cert. denied*, 138 S. Ct. 469 (2017).

285. *Id.* at 135 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)); see also *Worman v. Healey*, No. 1:17-10107-WGY, 2018 WL 1663445, at \*8 (D. Mass. Apr. 5, 2018) (holding that assault-style rifles are “like M-16 rifles . . . and thus outside the ambit of the Second Amendment”) (internal quotation marks omitted) (citations omitted).

286. *Heller*, 554 U.S. at 627.

287. See *id.*

1986 Act if not registered before May 19, 1986.<sup>288</sup> As the Supreme Court declined to hear *Kolbe*'s appeal from the Fourth Circuit, it appears that, for now, the Fourth Circuit's decision that modern sporting rifles are "like" M-16 rifles will stand, as it seems they are—in the Court's eyes—like machine guns, although not regulated as such under the 1934 Act.<sup>289</sup> Despite the denial of certiorari, the argument is still ongoing.<sup>290</sup> Many will assert that assault-style rifles are not like M-16s because these assault-style rifles are not fully automatic, that "like" is meaningless in this discussion without comparison of the attributes of each weapon, and that the Fourth Circuit either does not understand the distinction, or does not care to acknowledge that one exists.<sup>291</sup>

Connecticut, New York, Illinois, California, New Jersey, and Maryland legislatures have enacted bans on the ownership—or transfer, in Maryland's case—of assault-style rifles, or variations of those rifles,<sup>292</sup> as well as bans on high-capacity magazines, with some grandfathered exceptions.<sup>293</sup> For example, Maryland does not ban possession of high-capacity magazines, but only outlaws the transfer of such magazines within Maryland or the use of them in a crime.<sup>294</sup> Maryland does not ban possession of assault-style rifles owned before the 2013 law went into effect if those rifles were registered with the state, nor does the ban affect the sale or transfer of assault-

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288. *Kolbe*, 849 F.3d at 126, 136.

289. *See id.*

290. *See infra* note 291 and accompanying text.

291. *See, e.g.*, David Kopel, *Kolbe v. Hogan: 4th Circuit Requires Strict Scrutiny for Maryland Ban on Magazines and Semiautomatics*, WASH. POST (Feb. 4, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/04/kolbe-v-hogan-4th-circuit-requires-strict-scrutiny-for-maryland-ban-on-magazines-and-semiautomatics/?utm\\_term=.1a75edf5dafc](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/04/kolbe-v-hogan-4th-circuit-requires-strict-scrutiny-for-maryland-ban-on-magazines-and-semiautomatics/?utm_term=.1a75edf5dafc); Matthew Larosiere, *How the Fourth Circuit's Support for 'Assault Weapon' Bans May End Them*, FEDERALIST (Mar. 28, 2017), <https://thefederalist.com/2017/03/28/fourth-circuits-support-assault-weapon-bans-may-end/>; Thomas Wheatley, *On Gun Violence, the 4th Circuit Chooses Fear over the Law*, WASH. POST (Feb. 24, 2017), [https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2017/02/24/on-gun-violence-the-fourth-circuit-chooses-fear-over-the-law/?utm\\_term=.b5c5c924c641](https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2017/02/24/on-gun-violence-the-fourth-circuit-chooses-fear-over-the-law/?utm_term=.b5c5c924c641).

292. *See* Firearm Safety Act of 2013, ch. 427, 2013 Md. Laws 4195.

293. *See, e.g.*, *Kolbe*, 849 F.3d at 120–21; *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 249–51 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 407 (7th Cir. 2015); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 994–95 (9th Cir. 2015); *Shew v. Malloy*, 994 F. Supp. 2d 234, 240–42 (D. Conn. 2014); *Burton v. Sills*, 248 A.2d 521, 522 (N.J. 1968).

294. MD. CODE ANN., CRIM. LAW §§ 4-305(b), 4-306(b)(1) (West 2018).

style rifles with heavy barrels, such as the Heavy Barrel AR-15, or HBAR.<sup>295</sup>

In deference to *Heller*—which held that a complete ban on handguns in the District of Columbia prohibited citizens from using the most popular form of self-defense protection, handguns—some courts that have upheld bans on assault-style rifles explain that such a ban does not leave a citizen without the ability of self-defense in the home.<sup>296</sup> Instead, citizens still have alternate choices for self-defense, such as handguns.<sup>297</sup> And, in truth, a single blast from a twelve-gauge shotgun with a one-ounce slug is more effective than a few rounds from a .223 caliber assault-style rifle in terms of being able to quickly incapacitate an attacker or an intruder.<sup>298</sup> But this misses the point when it comes to the real reason the Second Amendment exists.

In *Kolbe*, the Fourth Circuit’s three-judge panel held that *Heller* suggests “even a dangerous [but common] weapon may enjoy constitutional protection if it is widely employed for lawful purposes.”<sup>299</sup> The Fourth Circuit found handguns to be “dangerous” as they accounted for 60% of all 2006 murders—but they could not be banned categorically; they were usual, commonly owned, and in common use.<sup>300</sup> For example, out of the 310 million guns estimated to be in the United States in 2009, over 35% were handguns.<sup>301</sup> Handguns also accounted for 88% of all gun murders.<sup>302</sup>

In the Seventh Circuit, the court advanced the “public’s sense of safety,” as the basis upon which the Highland Park ordinance banning assault-style rifles and HCMs rested.<sup>303</sup> Unlike the Fourth Circuit in its three-judge panel *Kolbe* decision, the Seventh Circuit

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295. MD. CODE ANN., CRIM. LAW § 4-303 (West 2018); MD. STATE POLICE LICENSING DIV., ADVISORY NO. LD-FRS-13-004(C), 2013 FIREARM’S SAFETY ACT: ASSAULT WEAPONS AND COPYCAT WEAPONS (2014), [http://mdsp.maryland.gov/Organization/Licensing%20Division%20Documents/1-8-14%20%20LD-FRS-13-004%20\(C\)%20-%202013%20Firearm%27s%20Safety%20Act.pdf](http://mdsp.maryland.gov/Organization/Licensing%20Division%20Documents/1-8-14%20%20LD-FRS-13-004%20(C)%20-%202013%20Firearm%27s%20Safety%20Act.pdf).

296. District of Columbia v. Heller, 554 U.S. 570, 635–36 (2008); *Kolbe*, 849 F.3d at 138; *Friedman*, 784 F.3d at 411.

297. See *Friedman*, 784 F.3d at 411.

298. Even at fifty yards, a twelve-gauge slug will produce over 1,660 foot pounds of energy compared to the 1,395 foot pounds of energy produced by the smaller 5.56x45mm AR-15 cartridge. FRANK C. BARNES, CARTRIDGES OF THE WORLD 17, 508 tbl.4 (Stan Skinner ed., Gun Digest Books 11th ed. 2006) (1965).

299. *Kolbe v. Hogan*, 813 F.3d 160, 178 (4th Cir. 2016). Maryland will still permit the transfer of modern sporting rifles with a heavy sporting barrel. See *id.* at 169 n.4.

300. *Id.* at 177–78.

301. WILLIAM J. KROUSE, CONG. RESEARCH SERV., RL32842, GUN CONTROL LEGISLATION 8 (2012), <https://fas.org/sgp/crs/misc/RL32842.pdf>.

302. *Kolbe*, 813 F.3d at 178.

303. *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015).

held that assault-style weapons were not necessarily commonly used or otherwise protected under the Second Amendment.<sup>304</sup> However, the Seventh Circuit recognized that there was little empirical evidence that ownership of these assault-style rifles and HCMs actually endangered people more so than any other weapon.<sup>305</sup> Nevertheless, on the grounds of appearance of safety and citizen comfort, the bans were upheld under an intermediate scrutiny analysis.<sup>306</sup> By side-stepping the question of what level of scrutiny should be applied to gun cases, the Supreme Court, in *Heller*, left this issue open for debate among the lower courts.<sup>307</sup> The opinion was criticized by some conservative scholars for its failure to express limits on the government, the types of gun regulations that are permissible, and the level of scrutiny that courts reviewing gun laws should apply.<sup>308</sup> Frankly, the Court should have easily foreseen that issues would arise as a result of its failure to identify a specific level of scrutiny for lower courts to apply.

IX. WHAT WEAPONS WOULD TODAY'S CITIZEN BRING TO THE MILITIA? IF IN COMMON USE, MUST THOSE WEAPONS BE PROTECTED UNDER THE SECOND AMENDMENT?

A shotgun may be more effective than an assault-style rifle when dealing with a home invader at ten feet.<sup>309</sup> A shotgun, however, is not an effective weapon for purposes of a muster.<sup>310</sup> What weapon would a twenty-first century citizen bring to the militia to oppose, as Justice Scalia wrote, “modern-day bombers and tanks”?<sup>311</sup> A shotgun? A lever action deer rifle? A single shot .22 caliber squirrel gun? A revolver holding five or six rounds? An assault-style rifle with a thirty round magazine in a military caliber, if he or she could? The answer would depend on the state in which the citizen lives. The citizen's rifle of choice should be the legal, semi-automatic, civilian

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304. Compare *id.* at 408–10, with *Kolbe*, 813 F.3d at 174 (“Like a number of courts that have previously considered this question, we have little difficulty in concluding that the banned semi-automatic rifles are *in common use* by law-abiding citizens.”).

305. See *Friedman*, 784 F.3d at 409, 411–12.

306. *Id.* at 412.

307. See *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

308. See WINKLER, *supra* note 155.

309. See Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1490 (2009).

310. See *supra* notes 139–44 and accompanying text.

311. *Heller*, 554 U.S. at 627.

version of the AR—the assault-style rifle with a high-capacity twenty or thirty round magazine—rather than a shotgun or a bolt-action rifle holding one to five rounds of ammunition whose supply of ammunition may be limited and whose use may be ineffective because it is slow to operate and reload.<sup>312</sup>

When confronted with the *Heller*-esque argument that a state's assault-style rifle ban eliminates one of the most popular instruments of self-defense, courts in the Second, Seventh, and Ninth Circuits have held that these popular and usual weapons can be prohibited because the ban will not abrogate the right to self-defense as there are still many other options for self-defense, such as a double-barrel shotgun, a bolt-action hunting rifle, a revolver, or a pistol with up to ten rounds.<sup>313</sup> For example, the Seventh Circuit held: “Unlike the District of Columbia’s ban on handguns, Highland Park’s ordinance leaves residents with many self-defense options.”<sup>314</sup> According to the court, long guns and handguns give homeowners adequate means of defense.<sup>315</sup> In upholding New York and Connecticut’s bans on modern sporting rifles, the Second Circuit held that “numerous ‘alternatives remain for law-abiding citizens to acquire a firearm for self-defense.’”<sup>316</sup> This approach of deciding whether it should be permissible to ban certain guns because other self-defense alternatives are available misses the primary purpose of the Second Amendment.

#### X. ARGUMENTS TO-DATE MADE IN ASSAULT-STYLE RIFLE BAN CASES HAVE NOT ADDRESSED THE PRIMARY AND OVERRIDING PURPOSE OF THE SECOND AMENDMENT.

Justice Scalia authored the Court’s majority opinion in *Heller* on the basis of the need and the right of individuals to keep handguns for self-defense in the home.<sup>317</sup> The challenge to D.C.’s handgun ban

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312. See, e.g., Brad Fitzpatrick, *Home-Defense Shotguns: Pump-Action v. Semi-Auto*, NRA FAM. (June 9, 2016), <https://www.nrafamily.org/articles/2016/6/9/home-defense-shotguns-pump-action-vs-semi-auto/>; *How do Guns Work? Bolt-Actions*, NRA FAM. (Feb. 7, 2017), <https://www.nrafamily.org/articles/2017/2/7/how-do-guns-work-bolt-actions/>.

313. See, e.g., *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 260 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 411 (7th Cir. 2015); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 999 (9th Cir. 2015).

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

315. *Id.*

316. *N.Y. State Rifle & Pistol Ass’n*, 804 F.3d at 260 (quoting *United States v. Decastro*, 682 F.3d 160, 168 (2d Cir. 2012)).

317. *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008).

was based on self-defense, the argument being that a ban on handguns made D.C.'s citizens defenseless in the home.<sup>318</sup> Courts have held that the "Second Amendment guarantees are at their zenith within the home,"<sup>319</sup> yet self-defense was not the primary reason the Founders added the Second Amendment to the Bill of Rights.<sup>320</sup> As previously discussed, the Founders needed assurance that the central government would not disarm the citizen-militia and prevent it from opposing a tyrannical government.<sup>321</sup>

Estimates place the number of guns in the United States at over 300 million,<sup>322</sup> most types of which are legal to possess under state laws, if the possessor is otherwise qualified to own a firearm.<sup>323</sup> This includes handguns, rifles, and shotguns.<sup>324</sup> While many of these firearms are sporting arms and are all deadly, they are not all effective for the use intended by the Framers: to defend against an armed, tyrannical government—a purpose more important to the Framers than the right of self-defense.<sup>325</sup>

The Founders' concern was that a central government had tremendous power and that a tyrannical central government could take the citizens' liberties; Justice Scalia and others have asserted that this concern was the primary basis for the adoption of the Second Amendment.<sup>326</sup> Despite this expressed reason for the Second Amendment, courts have upheld state or city bans on assault-style rifles and HCMs, thereby depriving their citizens of effective means to oppose an oppressive takeover of their liberties, leaving them to do so with deer rifles, shotguns, squirrel rifles, and handguns against the modern military weapons available to the government.<sup>327</sup> In upholding bans, courts appear to ignore the Supreme Court's

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318. *See id.* at 628.

319. *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012).

320. *See supra* notes 83–88 and accompanying text.

321. *See supra* notes 83–88 and accompanying text.

322. Christopher Ingraham, *There Are Now More Guns than People in the United States*, WASH. POST (Oct. 5, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/10/05/guns-in-the-united-states-one-for-every-man-woman-and-child-and-then-some/?utm\\_term=.254a0e9d476f](https://www.washingtonpost.com/news/wonk/wp/2015/10/05/guns-in-the-united-states-one-for-every-man-woman-and-child-and-then-some/?utm_term=.254a0e9d476f). The *Washington Post* reported the existence of 310 million guns in the United States as of 2009. *Id.*

323. *See* 18 U.S.C. § 922(g)(1)–(9) (2012) (providing who is not qualified to own a firearm).

324. *See* KROUSE, *supra* note 301.

325. *See supra* Part IV.

326. *See supra* Part IV.

327. *See supra* Section VIII.A (discussing courts that have upheld state or city bans on assault-style rifles and high-capacity magazines).

conclusion in *Heller* and the history of the Second Amendment: that prevention of tyranny was the principal reason for the creation of the Second Amendment.<sup>328</sup> Lawyers have also failed to raise this argument, perhaps for fear that this rationale would appear radical.<sup>329</sup> This argument was not raised in *Kolbe*, where the appellants focused on issues of self-defense and, more generally, a right to possess assault-style rifles and HCMs because they are in common use and are protected under the Second Amendment.<sup>330</sup> Courts, including the Supreme Court, should consider that the prevention of the oppression of our liberties, and not merely our right to self-defense in the home, was the basis for the Second Amendment. They should also apply strict scrutiny to any law that prohibits the possession of an assault-style rifle in the home. Our government is armed with modern and effective armaments, the sort that citizens are not allowed to possess, such as machine guns and fully automatic assault rifles.<sup>331</sup> By banning assault-style rifles and HCMs, courts further burden the purpose of the Second Amendment. While one might ridicule the concept of citizens taking on the organized army of an oppressive government, this occurred in Angola,<sup>332</sup> Iran,<sup>333</sup> Rhodesia,<sup>334</sup> Romania,<sup>335</sup> Vietnam,<sup>336</sup> Russia,<sup>337</sup> Cuba,<sup>338</sup> Spain,<sup>339</sup> and Israel.<sup>340</sup> It

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328. See *supra* notes 296–306, 313–16 and accompanying text.

329. See *infra* note 330 and accompanying text.

330. See *Kolbe v. Hogan*, 849 F.3d 114, 128–29 (4th Cir.), *cert. denied*, 138 S. Ct. 469 (2017).

331. See *Infantry Weapons*, MILITARY.COM, <https://www.military.com/equipment/infantry-weapons> (last visited Apr. 20, 2018).

332. See Lucinda Saunders, *Rich and Rare Are the Gems They War: Hiding De Beers Accountable for Trading Conflict Diamonds*, Note, 24 *FORDHAM INT'L L.J.* 1402, 1417–19 (2001).

333. See Janet Afary, *Iranian Revolution of 1978–79*, *ENCYCLOPEDIA BRITANNICA* (Apr. 13, 2018), <https://www.britannica.com/event/Iranian-Revolution-of-1978-1979>.

334. See Paul Moorcraft, *Rhodesia's War of Independence*, *HIST. TODAY* (Sept. 1990), <https://www.historytoday.com/paul-moorcraft/rhodesias-war-independence>.

335. See Alin Andronache, *The Minority Issue in the Context of Romanian-Yugoslav Relations Between December 1989-June 1991*, *RES. & SCI. TODAY*, Mar. 2013, at 76, 78.

336. See *The August Revolution*, *ALPHA HIST.*, <http://alphahistory.com/vietnamwar/august-revolution/> (last visited Apr. 20, 2018).

337. See *Russian Revolution of 1917*, *ENCYCLOPEDIA BRITANNICA* (Mar. 21, 2018), <https://www.britannica.com/event/Russian-Revolution-of-1917>.

338. See *The Republic of Cuba*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/place/Cuba/The-Republic-of-Cuba#ref515704> (last visited Apr. 20, 2018).

339. See Henry Schurtz, *The Pyrenean Peninsula*, in 4 *THE HISTORY OF THE WORLD: A SURVEY OF MAN'S RECORD* 479, 553 (H. F. Helmolt ed., 1902) (describing the “Dos de Mayo” uprising of 1808).

also happened in the American colonies in the late eighteenth century,<sup>341</sup> and in England in the late seventeenth century.<sup>342</sup> Even in World War II, partisans often managed to stop or slow the German army, such as in the Prague Uprising.<sup>343</sup>

Justice Scalia was aware that “no amount of small arms could be useful against modern-day bombers and tanks,”<sup>344</sup> but more importantly, he wrote that these changes should not alter the way that the Court interprets the Second Amendment.<sup>345</sup> This admonishment should also include that it is not the role of the courts to take away from the citizens the means to most effectively oppose such a government. *McDonald*, a 2010 Supreme Court decision applying *Heller* to the states, quoted from *Heller*: “The Court is correct in describing the Second Amendment right as ‘fundamental’ to the American scheme of ordered liberty.”<sup>346</sup>

Assault-style rifles are abundant and in common use.<sup>347</sup> They are no more dangerous, according to the meaning of “dangerous” provided in *Heller* or *Miller*, than other rifles with semi-automatic capacity,<sup>348</sup> such as a Ruger Mini 14, or other easily concealable firearms such as handguns, which accounted for 60% of all homicides in 2006.<sup>349</sup> It is a constitutional right for a law-abiding citizen to possess a weapon in common use, similar in appearance, but not identical in function to, the weapons possessed by a potentially tyrannical government.<sup>350</sup> These are exactly the sort of weapons, at a minimum, that the Framers would have required citizens to own in order to dissuade or, if necessary, rise up against a

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340. See Kates, *supra* note 89, at 270 (stating that popular insurgencies were successful against modern armies in Israel).

341. See Chuck Dougherty, Note, *The Minutemen, the National Guard and the Private Militia Movement: Will the Real Militia Please Stand Up?*, 28 J. MARSHALL L. REV. 959, 963 (1995) (explaining that citizen-organized militias won independence from British rule).

342. Edward Vallance, *The Glorious Revolution*, BBC (Feb. 17, 2011), [http://www.bbc.co.uk/history/british/civil\\_war\\_revolution/glorious\\_revolution\\_01.shtml](http://www.bbc.co.uk/history/british/civil_war_revolution/glorious_revolution_01.shtml).

343. See Pat McTaggart, *Prague Uprising in the Spring of 1945*, WARFARE HIST. NETWORK (Oct. 10, 2016), <http://warfarehistorynetwork.com/daily/wwii/prague-uprising-in-the-spring-of-1945/> (stating that German forces frequently faced battles with Czech partisans in their attempt to move West).

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

345. *Id.* at 627–28.

346. *McDonald v. City of Chicago*, 561 U.S. 742, 746 (2010).

347. See *supra* notes 250–55 and accompanying text.

348. *Heller*, 554 U.S. at 627; *United States v. Miller*, 307 U.S. 174, 178–79 (1939).

349. *Kolbe v. Hogan*, 813 F.3d 160, 177 (4th Cir. 2016).

350. *Heller*, 554 U.S. at 624–25.



tyrannical government. These are guns that should be allowed to be stored in the closets of the homes of people who are not barred from gun possession. Rather than applying intermediate scrutiny to ban these otherwise protectable rifles and magazines, the courts should instead apply strict scrutiny when faced with a legislative ban of possession of assault-style rifles and HCMs in the home. In order for legislation to survive a challenge where the courts apply strict scrutiny, the law must: (1) be justified by a compelling governmental interest, meaning something necessary or crucial, as opposed to something merely preferred; (2) be narrowly tailored to achieve that goal or interest; and (3) must be the least restrictive means for achieving that interest.<sup>351</sup> Ownership of these modern sporting guns and magazines goes to our most sacred rights of life, liberty, happiness, and freedom from repression, or the threat thereof, by a tyrannical government.

## XI. CONCLUSION

A tyrannical government that seeks to remove all fundamental rights, such as speech, religion, and due process, will first unarm its citizens.<sup>352</sup> The possession of an effective gun by members of the militia for purposes of muster to resist a tyrannical government is a core constitutional right, as is self-defense in the home.<sup>353</sup> Laws that restrict this right by banning the possession of assault-style rifles and HCMs in the home deserve to be reviewed applying strict scrutiny because these are the firearms that are the most useful to citizens who bear arms to resist or oppose a tyrannical government. These weapons should be permitted to be possessed in the home by people who are legally permitted to possess guns. States can enact rules that govern the use of these assault-style rifles and HCMs outside of the home for training and sporting uses similar to statutes that some states, such as Maryland, have enacted for handguns.<sup>354</sup> Such laws regarding possession and use of those weapons outside the home can be tested applying intermediate scrutiny, so long as the intention is not an outright ban on such use. Considering how the Second Amendment might be employed to protect all of the enumerated fundamental rights that a tyrant might seek to eliminate, state bans on the possession of assault-style rifles and high-capacity magazines in

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351. *Kolbe*, 813 F.3d at 179 (first citing *Abrams v. Johnson*, 521 U.S. 74, 82 (1997); then citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000)).

352. *See* Levinson, *supra* note 175, at 650.

353. *See supra* notes 136–40, 184–89 and accompanying text.

354. *See* MD. CODE ANN., CRIM. LAW § 4-203 (West 2018).

the home should not be allowed to exist unless they withstand strict scrutiny analysis. Legislators and politicians will do what they think is popular. In some jurisdictions, these rifles are not popular.<sup>355</sup> When the constitutional knowledge of legislators fails, it is up to the courts to preserve the constitutional rights our legislators attempt to eliminate. In this regard, Justice Scalia wrote:

The very enumeration of the right [of the individual to keep and bear arms] takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. . . . Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.<sup>356</sup>

The fact that assault-style rifles, known to some as “modern sporting rifles,”<sup>357</sup> are dangerous is exactly the point; they would be useless for the purpose for which the Second Amendment was adopted if they were not dangerous. But they are not unusual.<sup>358</sup> They are common.<sup>359</sup> They are not machine guns like a military M-16 rifle that is capable of sustained fire as long as the trigger is pressed, and they are not prohibited by the 1934 Act.<sup>360</sup> If there ever was a fundamental constitutional right that needed to be preserved in the eyes of the people who debated the Bill of Rights, it is the right to possess and train with these arms. Their possession serves as a deterrence. This is the point of the Founders: circumstances change, and to preserve our liberties we must be prepared to defend them.

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355. See cases cited *supra* note 293.

356. *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008).

357. *Modern Sporting Rifle Facts*, *supra* note 5.

358. See *supra* notes 250–55 and accompanying text.

359. See *supra* notes 250–55 and accompanying text.

360. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 I.R.C. §§ 5801–5872 (2012)); *supra* note 248 and accompanying text.

