

Current Topics in Law and Policy

Ending the Other Arms Race: An Argument for a Ban on Assault Weapons

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The most enduring images of the recent Los Angeles riots featured weapons. Guns were, it seemed, everywhere and in the hands of everyone. Rioters and shopkeepers, looters and police: all were armed. More weapons are on the way. In the first eleven days of May, Californians responded to the riots by purchasing over 20,000 guns.¹

In America's violent inner cities, semiautomatic weapons are rapidly replacing handguns as the currency of prestige and power. During the riots, Los Angeles residents fired semiautomatic assault weapons at police cars.² Across the nation, criminals obtain assault weapons to outgun and intimidate rivals and victims; law abiding citizens, duly intimidated, buy the same guns, in the hope of deterring and outgunning criminals. The result is an arms race of epic and disastrous proportions.³

The unchecked proliferation of assault weapons is worrisome enough. In conjunction with the increasing violence in American society it is particularly alarming. In 1991, 24,020 Americans were murdered.⁴ This number, the highest in our history, represents a 2.5% increase from the 1990 record of 23,440, a number itself 9% higher than in 1989.⁵ Proposals for reducing the murder rate offer familiar remedies:⁶ build more and better prisons; increase

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1. Timothy Egan, *Los Angeles Riots Spurring Big Rise in Sales of Guns*, N.Y. TIMES, May 14, 1992, at A1. Presidential candidate Bill Clinton, among others, reacted to the riots by urging stricter gun control measures including a ban on assault weapons. See Adam Nagourney, *Bill Clinton: Our Divided Society Must Become One*, GANNETT NEWS SERVICE, May 2, 1992.

2. Charles Bremner, *Bush Sends in Troops*, TIMES NEWSPAPERS, May 2, 1992.

3. Both gun control advocates and those opposed to gun control foresee gains from the Los Angeles riots. Gun control advocates stress the dire need to control the proliferation of weapons, while those opposing the measures claim that the riots demonstrate the need for such weapons as a means of self-protection. Since sales of weapons skyrocketed in the aftermath of the riots, as did membership requests to the National Rifle Association (N.R.A.), it would appear that many have determined that purchasing a weapon is a necessary risk. See Egan, *supra* note 1.

4. Tom Squitieri, *Slayings Set Record in '91; No End in Sight*, USA TODAY, Jan. 7, 1992, at 5A.

5. *Id.*

6. There is a diversity of opinion both between and among members of gun-control and gun-advocacy groups. For example, Eric Morgan, a gun advocate, suggests that to curb the problems associated with assault weapons a task force should be created to "exert informal pressure on the entertainment industry to encourage industry officials to reduce the portrayal of criminal misuse of military-style semi-automatic firearms." Eric C. Morgan, *Assault Rifle Legislation: Unwise and Unconstitutional*, 17 AM. J. CRIM. L. 143, 173 (1990) [hereinafter *Unwise*]; see also ERIC MORGAN & DAVID KOPEL, *THE ASSAULT WEAPON PANIC: "POLITICAL CORRECTNESS" TAKES AIM AT THE CONSTITUTION* 45 (Independence Institute 1991)

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funding for law enforcement; assure an increased police presence and add prosecutors and judges; enact stiffer punishments for crimes committed with guns; and otherwise take steps to demonstrate that criminals will be punished for their crimes.

While the vast majority of Americans also support legislation banning assault weapons,⁷ others vehemently oppose it.⁸ The interchange heard in the debate over assault weapons echoes the rhetoric of most gun control debates. Assault weapons don't kill people, people kill people, say gun advocates. Perhaps, retort gun control advocates, but easy access to assault weapons makes it unconscionably simple to do so.

Increasing numbers of jurisdictions have enacted some type of assault weapon law. In May 1989, California banned the future sale, production, and possession of certain assault weapons.⁹ One year later, New Jersey followed suit, passing an even more stringent assault weapon law.¹⁰ The New Jersey law does not permit gun owners to register assault weapons legally, whereas the California law contains a "grandfather" provision.¹¹ Over thirty major cities have enacted assault weapon laws as well.¹² On December 25, 1991, for example, a Washington D.C. law took effect holding dealers, manufacturers, and importers of assault weapons strictly liable for injury or death caused by the weapons.¹³ The only national effort to ban assault weapons, however, came in a unsuccessful attempt to pass the federal "Antidrug Assault

[hereinafter MORGAN & KOPEL, PANIC]. Even gun advocates do not uniformly support this proposal.

7. Seventy-two percent of Americans responded favorably to the question "Would you favor or oppose federal legislation banning the manufacture, sale, and possession of ... [s]emi-automatic assault guns, such as the AK-47?" 55 GALLUP POLL NEWS SERVICE, No. 20, Sept. 26, 1990, at 3. Most recently, in response to the question "Would you favor a ban on assault weapons—that is, semi-automatic military-style rifles that can hold up to 30 bullets?," 79% of the general population responded affirmatively as did 76% of gun owners. Neil A. Lewis, *Hurt in Gun-Control War, N.R.A. Rejects Retreat*, N.Y. TIMES, Mar. 12, 1992, at A1.

8. See MORGAN & KOPEL, PANIC, *supra* note 6.

9. Roberti-Roos Assault Weapons Control Act of 1989, CAL. PENAL CODE §§ 12275-90 (West 1992).

10. N.J. REV. STAT. § 2C:39-5 (West Supp. 1991).

11. An effort to introduce substitute legislation that included a grandfather clause was vetoed by Governor Florio in July of 1991. Peter Kerr, *Florio Defiantly Vetoes Softer Assault Rifle Ban*, N.Y. TIMES, July 9, 1991, at B1.

Virginia and Maryland have also passed legislation which has specific provisions for assault weapons. See VA. CODE ANN. § 18.2-287.4 (Michie 1991) (prohibiting possession in public areas of certain semiautomatic weapons); MD. ANN. CODE art. 27, § 481E (1991) (defining the assault weapons that apply to various provisions of the Maryland Code).

12. Richard Tapscott, *Schaefer Lobbies Governors for U.S. Ban on Assault Weapons*, WASH. POST, Aug. 18, 1991, at A8.

13. The Assault Weapons Manufacturers Strict Liability Act of 1990, D.C. CODE ANN. § 6-2391(4) (1991). The law was passed, repealed and finally reenacted following a referendum in the November 1991 election. Kurt Jenkins Jr., *Gun Law to Take Effect*, WASH. POST, Dec. 23, 1991, at C5. This type of legislation poses unique questions not addressed in this article. See Joshua M. Horowitz, *Kelley v. R.G. Industries: A Cause of Action for Assault Weapons*, 15 U. DAYTON L. REV. 125 (1989); Markus Boser, *Go Ahead, State, Make Them Pay: An Analysis of Washington D.C.'s Assault Weapon Manufacturing Strict Liability Act*, 25 COLUM. J. L. & SOC. PROBS. 313 (1992).

Weapons Limitation Act of 1991," otherwise known as the Deconcini Bill.¹⁴ The bill would have banned the domestic transfer, importation, or possession of nine types of assault weapons.¹⁵ Senator Deconcini's (D-AZ) proposal targeted the specific weapons thought to be most often used by drug dealers.¹⁶

While the Senate passed the Deconcini bill as part of a comprehensive crime bill,¹⁷ the House of Representatives rejected it and, most recently, the crime bill conferees of the House and Senate dropped its provisions altogether.¹⁸ Jack Brooks (D-TX), Chairman of the House Judiciary Committee, proclaimed that the proposal was "just not going to fly" in the House.¹⁹ Constitutional questions, confusion over the definition of an assault weapon, the popularity of some semiautomatic weapons among hunters, and the argument that, like most weapons, assault weapons can be used for self-defense were all factors leading to the legislation's demise.

In an effort to demonstrate that opposition to this legislation is unfounded in law and public policy, and in the hope that future federal legislation banning assault weapons will finally "fly," I will address most of the challenges and questions facing legislators: (1) is there a realistic and accurate way to define assault weapons?; (2) are assault weapons even a particular problem?; (3) what type of law should be enacted?; (4) would the law be constitutional? and if so; (5) would legislation actually curb the gun-related violence and generally offer benefits outweighing its costs? I will argue that all semiautomatic weapons whose benefits do not outweigh their potential dangers should be banned.

A Senate Judiciary Report evaluating the Administration's annual report, *National Drug Control Strategy*, concludes that:

The single most glaring deficiency in the Administration's National Drug Control Strategy is the total failure to address the problem of assault weapons in this country. Neither the first or second National Drug Control Strategies mentioned one word about this problem, despite the clear link between the drug trade, assault weapons, and violence.²⁰

Given the link between the drug trade, assault weapons, and violence, it makes sense to spend some of the vast sums of money earmarked for our endless "war" on drugs on a program to eliminate assault weapons. So far, no such

14. S. 1241, 102d Cong., 1st Sess. tit. VII (1991) [hereinafter Deconcini Bill].

15. *Id.* This law also includes a grandfather clause.

16. Letter from Senator Dennis Deconcini to Editor of Editorial Pages, CHANDLER ARIZONAN TRIB. (Nov. 6, 1991) (on file with author); Sam Stanton, *Senate Backs Deconcini Gun Curbs*, ARIZ. REPUBLIC, May 24, 1990, at A8.

17. Susan F. Rasky, *Senate Backs Curb on Assault Rifles by a Vote of 50-49*, N.Y. TIMES, May 24, 1990, at A1.

18. Helen Dewar, *Conferees Approve Crime Bill; GOP Predicts Veto Over Mild Curb on Death Row Appeals*, WASH. POST, Nov. 25, 1991, at A1.

19. *Id.*

20. See MAJORITY STAFF OF SENATE COMM. ON JUDICIARY & INT'L NARCOTICS CONTROL CAUCUS, 102d Cong., 1st Sess., FIGHTING DRUG ABUSE: NEW DIRECTIONS FOR OUR NATIONAL STRATEGY 118-19 (Comm. Print 1991).

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transfer of funds has been seriously considered. Furthermore, despite recent interest in assault weapon legislation and its connection to the well-publicized war on drugs, relevant statistical analysis is sparse and the quality of the entire debate surprisingly limited.²¹ Nonetheless, the existing information strongly supports a ban on assault weapons.

I. BACKGROUND

A mass murder in Stockton, California focused public opinion on assault weapon legislation. Patrick Purdy purchased an imitation AK-47 assault weapon in Oregon in order to avoid disclosure of a criminal record in California.²² On January 17, 1989, he murdered five children and wounded twenty-nine others.²³ His story is cited in nearly every article on the subject.²⁴ Most legislatures supporting bans on assault weapons, however, are concerned not with isolated mass murders, but rather with the global war on drugs.²⁵ Time and again legislators refer to these weapons as the "weapons of choice" for drug dealers.²⁶ Restrictions on, and elimination of, these weapons is thus viewed as a first step towards reducing the drug trade's sinister violence. While some claim that drug laws should not be enforced because drug use is a "victimless crime," no one claims that drug-related violence is victimless.

A. What Is An Assault Weapon?

Assault weapons are certain types of semiautomatic weapons that require depressing the trigger to release each bullet.²⁷ After pressing the trigger and firing, the cartridge automatically reloads in preparation for the next shot. With fully automatic weapons or machine guns, on the other hand, numerous bullets

21. This may be because all of this legislation has been enacted in the past three years.

22. The weapon was actually an AKS, a Chinese-made semiautomatic version of the fully automatic AK-47. Both weapons are commonly called AK-47s. George J. Church, *The Other Arms Race*, TIME, Feb. 6, 1989, at 20, 20.

23. *Id.*

24. *Time* devoted its cover story to the topic of assault weapons using the Stockton incident as the focus. *Id.*

25. *See, e.g.*, Deconcini Bill, *supra* note 14.

26. *See, e.g.*, Church, *supra* note 22, at 23; MAJORITY STAFF OF SENATE COMM. ON THE JUDICIARY, 102d Cong., 1st Sess., FIGHTING CRIME IN AMERICA: AN AGENDA FOR THE 1990's 28 (Comm. Print 1991) [hereinafter AGENDA].

27. While the *Gallup Poll News Service*, *supra* note 7, demonstrated strong support for legislation banning assault weapons, and the survey questions specifically stated that the guns were "semiautomatic", the fact that the terms "assault guns" and "AK-47" were used may have led those unfamiliar with the difference between automatic and semi-automatic weapons to state that they supported the ban. This potential for confusion, however, was eliminated in the N.Y. TIMES poll, *supra* note 7, by explicitly defining the type of weapon involved in each question.

can be shot by simply pressing the trigger once. Legislation passed in 1986 banned the transfer and possession of fully automatic weapons.²⁸ The current debate and proposed legislation relate to specific types of semiautomatic weapons.

In 1989, the Bureau of Alcohol, Tobacco and Firearms (BATF), with the support of President Bush, banned importation of 43 "semiautomatic assault rifles."²⁹ According to the BATF, these weapons lacked a "sporting purpose" as set forth in 18 U.S.C. 925(d) (3).³⁰ The BATF Working Group identified assault weapons using the following criteria: military appearance, the likelihood that they were originally, or could easily be transformed into, fully automatic weapons, and cartridge size.³¹

Seven features were considered in determining military appearance:

(1) large capacity magazines that enable the weapon to shoot more rounds without reloading; (2) folding stocks, which provide better concealability and portability and which are not generally present on traditional sporting rifles; (3) pistol grips, which enhance control when firing with one hand, a maneuver not generally used in hunting; (4) flash suppressors, which conceal the shooter's location; (5) bipods for stability; (6) capacity to accept bayonets or grenade launchers; and (7) night sights (since nighttime hunting is generally illegal).³²

The Working Group also examined whether the weapons originally had been, or could easily be transformed into, fully automatic weapons. In general, guns that were originally fully automatic were suspected of having been transformed into semiautomatics solely to evade import laws and thus were classified as "military" in nature. Meanwhile, to help identify a weapon's overall sporting purpose, the Working Group examined advertisements and articles about the weapons and sent out questionnaires to experts, magazines, and shooting clubs.³³

Using these criteria, the BATF classified forty-three weapons as assault weapons. In so doing, it established a non-arbitrary method for distinguishing assault weapons from other semiautomatic weapons.

28. 18 U.S.C.A. § 922(o) (West Supp. 1992).

29. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, REPORT AND RECOMMENDATION OF THE BATF WORKING GROUP ON THE IMPORTABILITY OF CERTAIN SEMIAUTOMATIC RIFLES 6 (1989) [hereinafter BATF REPORT]. The increasing number of weapons imported stimulated support for an import ban. Whereas the U.S. imported only 4,000 assault guns in 1986, the number climbed to 40,000 in 1987 and 44,000 in 1988. *Mr. Bennett on Gun Imports*, WASH. POST, Mar. 15, 1989, at A22 (Editorial). Prior to 1989, importation permits were denied to only two weapons. See BATF REPORT 4-5.

30. Only weapons that are "generally recognized as particularly suitable for or readily adaptable to sporting purposes" are importable. 18 U.S.C. § 925(d)(3) (1988). See BATF REPORT, *supra* note 29, at 2-5.

31. BATF REPORT, *supra* note 29, at 1.

32. *Id.* at 6-8.

33. *Id.* at 12.

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B. *Why Assault Weapons Laws?*

Why are assault weapons being singled out? Are they truly the “weapons of choice for drug dealers” or would including assault weapon provisions as part of the drug war merely divert blame to a visible scapegoat?

Law enforcement officials are probably best suited to answer these questions. Virtually every major law enforcement organization in the country including the Fraternal Order of Police, the International Association of Chiefs of Police, the National Troopers Coalition, the National Sheriffs Association, the National Association of Police Organizations, the National Organization of Black Law Enforcement Executives, the Police Executive Research Forum, and the Federal Law Enforcement Officers Association has endorsed a ban on certain assault weapons.³⁴ Law enforcement officials argue that criminals often have more advanced weapons than the police and that officers are “suffering because of these guns.”³⁵ Lieutenant Kenneth McCann, co-commander of the New York City Police Department’s Joint Firearms Task Force, reported that the TEC-9 assault gun is now “the weapon of preference for drug dealers....”³⁶

Gun advocates respond that police chiefs may not represent the majority of police officers. A recent Independence Institute article argues that while “most major police chiefs do support some kind of restrictive legislation ... chiefs do not speak for rank-and-file officers any more than Lee Iococca speaks for all the auto workers.”³⁷ Little support is offered for this proposition, however; only a few quotations from selected law enforcement officials who contend that handguns are confiscated more often than assault weapons or who make the obvious point that assault weapons are not necessarily the weapons of choice for certain criminals. The article also cites a study of attitudes among Florida members of the Fraternal Order of Police that the authors concede is not “necessarily a statistically valid sample of police opinion.”³⁸

Are statistics a reliable guide for objectively determining the need for assault weapon legislation? A 1968 law review criticizing a statistical analysis opposing gun control applies with as much force today as it did twenty-four years ago:

34. See AGENDA, *supra* note 26, at 29-30 (regarding support for the Deconcini legislation).

35. *Id.* at 11. Many medical professionals have also strongly advocated more stringent gun control measures including assault weapon legislation due to the havoc gunshot wounds are wreaking on the nation’s emergency rooms and hospitals. See Jerome P. Kassirer, *Firearms and the Killing Threshold*, 325 NEW ENG. J. MED. 1647, (1991). See also Tamar Lewin, *Gunshots Cost Hospitals \$429 Million, Study Says*, N.Y. TIMES, Nov. 29, 1988, at A16 (stating that hospitals are filled with gunshot victims and that taxpayers cover 85.6% of the cost.).

36. Larry Rohter, *Pistol Packs Glamour, Power and Reputation as a Menace*, N.Y. TIMES, Mar. 10, 1992, at A18.

37. MORGAN & KOPEL, PANIC, *supra* note 6, at 17.

38. *Id.* at 55 n.96.

The United States Congress is not by design or inclination an efficient research organization. To a significant extent, it must depend upon the fact finding of others. At a time when the nation is divided by a bitter controversy over the need for comprehensive weapons control legislation, many must wonder where Congress arms itself with the empirical information on firearms and crime required to make the difficult but necessary judgments about the need for such legislation.³⁹

Since police organizations so uniformly support the legislation, one might expect overwhelming statistical evidence favoring a ban on these weapons.⁴⁰ This, however, is not the case. Reports conflict as to the effect of gun control laws, and only one recognized statistical analysis addresses the unique problem that assault weapons—as opposed to other types of firearms—pose in our society.

In May 1989, Cox News Service reported in the *Atlanta Journal and Constitution* that an “assault gun is 20 times more likely to be used in a crime than a conventional weapon.”⁴¹ The study analyzed 42,758 gun trace requests submitted to the BATF from police departments around the nation between January 1, 1988 and March 27, 1989.⁴² Cox came up with its figure by first determining, from information supplied by BATF spokesman Tom Hill, that of the approximately 200 million privately owned firearms about 1 million or 0.5% were assault weapons.⁴³ The newspaper then determined that 10% of the traced weapons were assault weapons. Since assault weapons represented 0.5% of all privately owned weapons and 10% of the guns traced, Cox concluded that assault weapons were 20 times more likely to be used in criminal activity than other weapons.

Gun advocates such as the N.R.A. correctly point out that the BATF issued a disclaimer stating that they “do not necessarily agree with the conclusions of Cox Newspapers....”⁴⁴ Since members of Congress,⁴⁵ the Senate Subcommittee on the Judiciary,⁴⁶ and many others use this report as determinative

39. Franklin E. Zimring, *Games with Guns and Statistics*, 1968 WIS. L. REV. 1113, 1113 (1968).

40. Such a body of statistical evidence will necessarily be thin given that the coining of the term “assault weapon” and the legislation that has been considered with it are both quite recent.

41. Jim Stewart & Andrew Alexander, *Assault Weapons Muscling in on the Front Lines of Crime*, ATLANTA J. & CONST., May 21, 1989, at A1.

42. The BATF, through the Treasury Department, not only conducts traces, but is responsible for enforcing federal firearms laws restricting importation of weapons. Because the BATF lacked the funds to continue keeping these statistics, and since its tracing system was not computerized, the agency allowed the *Atlanta Journal and Constitution* to enter the data from each trace request into the newspaper's computers. The data included the location and type of crime, the model of the weapon, the manufacturer of that weapon, and its serial number. *Id.*

43. *Id.* at A5.

44. NATIONAL RIFLE ASS'N INST. FOR LEGISLATIVE ACTION, TWELVE TALL TALES 3 (1990).

45. See, e.g., 135 CONG. REC. S7006-7007 (daily ed. June 20, 1989) (remarks of Sen. Chafee); Deconcini, *supra* note 16.

46. See MAJORITY STAFFS OF SENATE COMM. ON THE JUDICIARY & INT'L NARCOTICS CONTROL CAUCUS, 102d Cong., 1st Sess., THE PRESIDENT'S DRUG STRATEGY: TWO YEARS LATER IS IT WORKING? 61 (Comm. Print 1991) [hereinafter TWO YEARS LATER].

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evidence of the need for assault weapon legislation, it is important to understand why, and to what extent, the BATF did not support the Cox findings. The N.R.A. argues that "BATF data show that because of the heightened interest in these firearms due to the increased attention from the media, law enforcement agencies were more likely to run a firearms trace *merely if one was found, regardless of whether any crime was involved.*"⁴⁷

Jack Killorin, Chief of Public Affairs for the BATF, indicated that while "all of the data is real and correct, we do not necessarily support [Cox's] findings."⁴⁸ Mr. Killorin stated that the problem with the twenty times as likely figure is that only 1% of all guns used in crimes are traced. According to Mr. Killorin, the BATF did not support the findings because Cox concluded that these weapons were twenty times more likely to be used in crime rather than making the more modest claim that they came up in 10% of the trace requests. He dismissed as simply "untrue," however, the N.R.A. claim that heightened media interest in these guns affected the number that were traced. N.R.A. literature further argues that the study incorrectly assumed that all of the traced guns were used in criminal acts when, in fact, gun traces are not necessarily tied to a crime. Mr. Killorin, however, explained that an "overwhelming" number of the traces are related to crimes because in almost all cases the trace occurs as part of an investigation "in order to link a perpetrator to a crime."⁴⁹

With these caveats in mind, the study offers statistics that strongly support the need for assault weapon laws. Assault weapons accounted for 30% of the 1,428 guns traced to "organized crime," which includes drug cartels, arms traffickers and suspected terrorists.⁵⁰ Of 7,443 guns traced to narcotics crimes, 12.4% were assault weapons.⁵¹ Since the BATF generally tracks more sophisticated crimes such as those involving narcotics, Mr. Killorin observed that "assault weapons may be more likely to be found."⁵²

The increase in the number of assault weapons found from 1986 to 1989 is also telling. In 1986 and 1987, 5.6% and 5.5% of the guns traced were assault weapons. The figures increased to 9.8% in 1988 and to 10.5% for the first three months of 1989.⁵³ According to Steven Higgins, Director of the

47. See NATIONAL RIFLE ASS'N INST. FOR LEGISLATIVE ACTION, *supra* note 44.

48. Telephone Interview with Jack Killorin, Public Affairs Department, Bureau of Alcohol, Tobacco and Firearms (Dec. 19, 1991).

49. *Id.*

50. See Stewart & Alexander, *supra* note 41.

51. *Id.* This figure does not include fully automatic weapons.

52. See Killorin, *supra* note 48.

53. Stewart & Alexander, *supra* note 41. Other less conclusive statistics exist as well. For example, of the estimated 100,000 TEC-9 assault guns in circulation, federal authorities traced 1,546 in 1990 and 1991. In contrast with the 9,599 Smith and Wesson handguns traced out of a total estimated to be in the tens of millions, the number of trace requests for the TEC-9 was disproportionately high. See Rohter, *supra* note 36.

BATF, tracings of "assault-type weapons" increased by 57% from 1986 to 1988.⁵⁴

Gun advocates point to the low number of assault weapons confiscated or involved in urban crime as evidence of their insignificance to the crime problem.⁵⁵ While it may be true that assault weapons still comprise only a small percentage of all guns traced and confiscated, the disproportionately high number of those traced relative to the total number of assault guns owned, and the significant increase in the number of assault guns turning up from the traces, provide substantial evidence of a growing problem worthy of national attention.

II. WHAT TYPE OF LAW IS NEEDED?

Various assault weapon proposals might achieve limited goals without significantly curtailing assault weapon violence. As a result, it is important to distinguish among the various options.

A. A *Waiting Period*

A waiting period for purchasing assault weapons, for example, would ensure a "cooling off period" so as to prevent an individual from using the weapon in the heat of anger and to allow gun dealers to run a background check to determine if the purchaser has a criminal record or a history of psychiatric problems.⁵⁶ Allowing the sale of weapons to anyone except previously convicted criminals or the mentally impaired, however, will do little to reduce the supply of these weapons. Background checks are sensible, but far more sweeping assault weapon legislation is needed.

54. Declaration of Stephen E. Higgins, Director, BATF at 6, *Gun South v. Brady*, 877 F.2d 858, 866 (11th Cir. 1989) ("For each of the fiscal years 1986 and 1987, approximately 2,525 assault-type weapons were traced by ATF. In 1988, 3,977 assault-type weapons were traced, representing a 57% increase in tracings for this type of weapon over a two year period.")

55. See MORGAN & KOPEL, PANIC, *supra* note 6, at 14-15.

56. See, e.g., VA. CODE ANN. § 18.2-308.2:2 (Michie 1991). On the federal level, the House and Senate recently passed the Brady Bill which also incorporated this type of legislative model. Gwen Ifill, *Senate Approves Handgun Controls*, N.Y. TIMES, June 28, 1991, at 1. It remains part of the crime bill which is currently being held up in the Senate. See Carol Bradley, *Craig, Symms Block Senate Crime Bill*, GANNETT NEWS SERVICE, Nov. 18, 1991.

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B. *Registration*

Similarly, legislation requiring weapon registration seems unlikely to substantially reduce the number of weapons. Registration of assault weapons has two primary purposes: to monitor the prevalence of the weapons in private possession and to link a suspect to a crime if a weapon is found. A registration requirement would be less effective at reducing crime directly than in aiding in the apprehension of suspects by tracking the origin of their guns. There is always the possibility that a criminal would be less likely to use a weapon with a registration number for fear of ultimately being linked to the weapon; but this, of course depends upon how the weapon was obtained. Registration laws are also difficult to enforce absent a herculean effort,⁵⁷ and are generally ineffective as crime-fighting tools. Consequently, crime reduction *per se* may be an unrealistic goal of registration legislation.

The limited utility of registration laws nonetheless, argues for, not against, banning particular weapons. Making any sale or possession of the semiautomatic assault weapons illegal would eliminate the opportunity to obtain the weapons legally and at the same time remove the implicit legality of those weapons (which may lead people to dismiss “mere” registration laws). Because such weapons have been deemed legal, registration laws may be prone to non-compliance: people may view them more as bureaucratic inconveniences than as binding laws. At the least, this potential non-compliance with registration laws argues for more severe legislation.

C. *Licensing*

Legislation requiring licensing would restrict assault weapon possession to certain individuals. While it is conceivable that handguns may be needed for self-defense (and consequently that a license might be granted for that purpose) it is difficult to make the same claim for most semiautomatic weapons in a nation where other types of firearms are readily available. If high powered semiautomatic weapons are necessary for self defense, then it is difficult to explain why the police do not regularly carry those weapons or even fully automatic ones.⁵⁸ Most feel that the potential danger is simply too great. In reference to TEC-9 semiautomatic assault guns, Leroy Martin, Superintendent of Police in Chicago said, “they are not even in our arsenal because of the

57. Wayne King, *New Jersey Law to Limit Guns Is Being Ignored*, N.Y. TIMES, Oct. 26, 1991, at A22 (noting that the New Jersey State Police have made little effort to enforce the law).

58. While many police forces now carry semiautomatic pistols, those weapons (often 9 millimeter semiautomatic pistols) have nowhere near the firepower of most of the semiautomatic rifles included in the BATF import ban.

hazard they present to innocent people."⁵⁹ Thus, an assault weapon license should be granted only in rare circumstances.

D. *An Import Ban*

A ban only on assault weapon imports is also inadequate. The BATF Working Group's conclusion that 43 weapons should be prohibited from importation says nothing about the domestic sale of those weapons.⁶⁰ The Cox study demonstrated that two thirds of the confiscated weapons were domestic and thus unaffected by an import ban in effect at the time.⁶¹ In fact, in response to the import ban, domestic manufacturers increased production of the targeted weapons.⁶² Clearly, more than an import ban is needed to reduce the widespread availability of these weapons.

E. *Banning Weapons By Name*

The Cox study also found that ten weapons accounted for 90% of all traced assault weapons. This evidence supports the concept of banning by name weapons most often linked to criminals.⁶³ The Deconcini Bill, and the California and New Jersey laws, for example, identify outlawed weapons by name and allow others to be added if necessary. The advantage of this type of bill is that it is clear which weapons are covered; it may also be politically safer by affecting only a limited number of weapons. Moreover, according to the Congressional Budget Office, the Deconcini legislation would "result in no significant additional costs to the federal government, and would have no significant effect on Federal revenues."⁶⁴

Yet in other ways this type of legislation is problematic. "If the real difference between an AK-47 and other semi-automatic firearms is only the people who are using the AK-47 this month," asks law professor Franklin Zimring of the University of California, Berkeley, "what is to stop them from switching to other semi-automatic weapons?"⁶⁵ Furthermore, this type of legislation outlaws one weapon reputed to be used by criminals even if it is not as lethal as another legal weapon.

59. Rohter, *supra* note 36.

60. The BATF's jurisdiction extends only to the importation of weapons and not to domestic sales. 18 U.S.C. § 925(d) (1988).

61. See Stewart & Alexander, *supra* note 41.

62. Kirk Johnson, *Gun Import Ban Enriches Small U.S Arms Makers*, N.Y. TIMES, July 14, 1989, at A1.

63. See Stewart & Alexander, *supra* note 41.

64. THE ANTIDRUG ASSAULT WEAPONS LIMITATION ACT OF 1989, S. REP. NO. 160, 101st Cong., 1st Sess. 12 (1989).

65. Franklin E. Zimring, *The Problem of Assault Firearms*, 35 CRIME & DELINQ. 538, 542-3 (1989); see *supra* note 22.

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F. Banning Weapons Based Upon Readily Identifiable Characteristics

Since a criminal can switch weapons far more easily than a legislature can add weapons to a list, it makes more sense to use some of the BATF standards to determine which weapons should be subject to the ban. Colorado, for example, enhances the punishment for certain crimes committed with an assault weapon, defined as “any semiautomatic center fire firearm that is equipped with a detachable magazine with a capacity of twenty or more rounds of ammunition.”⁶⁶ In addition to naming weapons, New Jersey’s ban covers any “semi-automatic shotgun with either a magazine capacity exceeding six rounds, a pistol grip, or a folding stock [and any] semi-automatic rifle with a fixed magazine capacity exceeding fifteen rounds.”⁶⁷ Even the Bush Administration, before reversing itself, announced that it would support a fifteen round limit on magazine capacity.⁶⁸ These flexible definitions cover more weapons than do statutes that identify outlawed weapons by name and thus do not afford a criminal the opportunity to substitute an equally powerful or dangerous weapon.

But outlawing a weapon based upon identifiable characteristics is relatively arbitrary. Since magazines are easy to change, someone could disperse three ten-round and two fifteen-round magazines in approximately the same time.⁶⁹ Furthermore, some features that make a weapon “military-like” and, consequently, more attractive to drug dealers, also enhance the weapon’s use for hunting. For example, two of the factors taken into account by the BATF Working Group—existence of a bipod for stability and a folding stock for transportability—may also enhance a weapon’s sporting utility. Unfortunately, it is difficult to distinguish characteristics that enhance the sporting utility of a weapon from ones that add allure to drug dealers.

G. An Alternative: Shifting the Burden to Gun Advocates

The most effective approach would be to shift the burden to hunters and shooting clubs to demonstrate that a semiautomatic weapon’s utility outweighs its potential danger. Only after a gun’s advocates demonstrate that the weapon should be legal would the sale or possession of that weapon be permitted.

66. COLO. REV. STAT. § 16-11-103(6)(f.5) (1990). The Virginia law discussed *supra* note 11, does not use the term assault weapon, but defines the “firearms” in that section as any (i) semi-automatic center-fire rifle or pistol which expels a projectile by action of an explosion and is provided by the manufacturer with a magazine which will hold more than twenty rounds of ammunition or designed by the manufacturer to accommodate a silencer or bayonet or equipped with a bipod, flash suppressor or folding stock or (ii) shotgun with a magazine which will hold more than seven rounds of ammunition.” VA. CODE ANN. § 18.2-287.4 (Michie 1991).

67. N.J. STAT. ANN. § 2C:39-1w (West Supp. 1991).

68. 135 CONG. REC. S6718 (June 15, 1989); AGENDA, *supra* note 26, at 29.

69. See MORGAN & KOPEL, PANIC, *supra* note 6, at 8.

Unlike the current system, which forces legislators to prove that a particular weapon is especially threatening, under this new approach possession of certain semiautomatic weapons would be treated as a "privilege," not as a "right."⁷⁰ There is precedent for such a system: the current New Jersey law, for example, exempts assault weapons that the Attorney General determines "[are] used for legitimate target shooting purposes."⁷¹ Licenses should be granted only for those weapons that are particularly suited to hunting or some other valid purpose, and only to individuals who have passed a background check. This would allow "honest citizens" the privilege of owning a hunting weapon, and possibly, a licensed handgun for self-defense.

A federal law could be modeled after Maryland's handgun law, which only permits the sale of handguns that have a legitimate sporting, self-defense, or law enforcement purpose.⁷² In Maryland, "a person may not manufacture for distribution or sale any handgun that is not included on the handgun roster in the State."⁷³ The Governor appoints a nine member "Roster Board" comprising state officials, at large citizen members, a handgun professional, an N.R.A. representative, and a gun control representative.⁷⁴ The board determines which weapons should be sold by considering concealability, ballistic accuracy, weight, quality of materials, quality of manufacture, reliability as to safety, caliber, detectability, as well as any legitimate sporting, self-defense or law enforcement utilities the guns might have.⁷⁵ The law further provides that, "a person who petitions for placement of a handgun on the handgun roster shall bear the burden of proof that the handgun should be placed on the roster."⁷⁶ The board either approves or denies the petition within forty-five days. Hearings are available after the denial of a petition.⁷⁷

The factors considered by the BATF "Working Group" and the Roster Board in Maryland could serve as guidelines for a national assault weapon Roster Board. In particular, whether the weapon could easily be converted into a fully automatic model would be a significant factor.⁷⁸ Since "a skilled gunsmith can accomplish the conversion for almost all semiautomatics,"⁷⁹ almost all semiautomatic weapons would be suspect. This sort of legislation

70. This is consistent with an understanding of the Second Amendment discussed in the following section.

71. N.J. STAT. ANN. § 2C:58-12(a) (West Supp. 1991).

72. MD. ANN. CODE art. 27, § 36J(b) (1992).

73. *Id.* at § 36I(a).

74. *Id.* at § 36J(a) (3).

75. *Id.* at § 36J(b) (2).

76. *Id.* at § 36J(d).

77. *Id.* at § 36J(e).

78. Many gun publications carry advertisements for manuals demonstrating how to convert various assault weapons into fully automatic weapons. The anonymous author of one of these manuals acknowledges that conversions violate the law, but proceeds to say "had our forefathers not broken a few laws we would still be an English colony." *Do-It-Yourself Machine Guns*, N.Y. TIMES, Apr. 29, 1992, at A24 (Editorial).

79. See Church, *supra* note 22, at 23.

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might initially incur more political opposition than other proposals, but this risk appears worth taking in light of the potential benefits.

III. ARE THESE LAWS CONSTITUTIONAL?

In the *Johnson v. Texas* flag burning case, Justice Kennedy in concurrence wrote, "The hard fact is that sometimes we must make decisions that we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result."⁸⁰ Should the Court also protect the unpopular notion that those who want to possess assault weapons have a right to do so under the Second Amendment? Would making the possession of certain weapons a privilege deprive some people of a constitutional right? Are Gregory Johnson, the flag burner, and Patrick Purdy, the Stockton murderer, simply examples of people who misused a constitutional guarantee?

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.*"⁸¹ Debate over the Amendment centers on whether it is a "collective right" designed to preserve the state militias, thereby limiting the right to bear arms to the militia context, or an "individual right" for all people to "bear arms." Of particular importance in considering assault weapons is a third, often dismissed theory, that the amendment embodies an individual right which applies only to weapons that are military in nature.

Academic analysis of the Second Amendment is sparse. Most legal scholars believe that the Amendment clearly affords no individual right; consequently, it is rarely mentioned in casebooks on Constitutional Law.⁸² A number of scholarly articles on the subject written by practicing attorneys, however, support the individual rights theory⁸³ and according to one national poll, 87%

80. *Texas v. Johnson*, 109 S. Ct. 2533, 2548 (1990) (Kennedy, J., concurring).

81. U.S. CONST. amend. II.

82. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 299 n.6 (2d ed. 1988) (Dismissing anything but a "states' rights" interpretation). Even Don Kates, who strongly advocates an individual rights position, concedes that "the individual right view is endorsed by only a minority of legal scholars...." Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 206 (1983). See also Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 639 (1989) ("To put it mildly, the Second Amendment is not at the forefront of constitutional discussion, at least as registered in what the academy regards as venues for such discussion....").

83. See, e.g., Kates, *supra* note 82. This may be explained by the fact that an essay advocating the view commonly accepted by the legal community would not be considered "interesting" or "original." Legal commentary rarely involves restating what is seen as obvious. On the other hand, Sanford Levinson's comment may ring true: "I cannot help but suspect that the best explanation for the absence of the Second Amendment from the legal consciousness of the elite bar, including that component found in the legal academy, is derived from a mixture of sheer opposition to the idea of private ownership of guns and perhaps a subconscious fear that altogether plausible, perhaps even 'winning,' interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation." Levinson, *supra*

of the public believes that they have a constitutional right to bear arms.⁸⁴ There have also been many articles written in newspapers and magazines to which there are always an abundance of letters in response.⁸⁵ Of particular importance in affording new respect to the Second Amendment and in particular to the individual rights view, is University of Texas law professor Sanford Levinson's *Yale Law Journal* article entitled *The Embarrassing Second Amendment*.⁸⁶ Professor Levinson advances the view that the Amendment was intended to protect an individual's right to bear arms but that this interpretation is ignored because it "embarrasses" those who seek to enact gun control legislation.⁸⁷ In order to refute that analysis and to demonstrate that a ban on assault weapons would pass constitutional muster, I will examine the text of the amendment and its relationship to the rest of the Constitution, the relevant events that have occurred since its enactment, and finally, how courts have interpreted the Amendment.⁸⁸

note 82, at 642.

84. Kates, *supra* note 82, at 207 n.11. William Bennett, who led the fight to ban the importation of certain assault weapons, has stated that he would not support a national ban on assault weapons because it would lead to "serious constitutional problems." *Review of the National Drug Control Strategy: Hearings on the Oversight of the President's National Drug Control Strategy Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 23 (1989) (statement of William J. Bennett).

In the debate over the Deconcini proposal, many U.S. Senators expressed this sentiment as well. *See* 136 CONG. REC. S6741 (daily ed. May 22, 1990) (statement of Sen. McClure); 136 CONG. REC. S6743 (daily ed. May 22, 1990) (statement of Sen. Hatch); 136 CONG. REC. S6748-49 (daily ed. May 22, 1990) (statement of Sen. Heflin).

85. *See, e.g.*, Michael Kinsley, *Second Thoughts*, NEW REPUBLIC, Feb. 26, 1990, at 4; Warren Burger, *The Right To Bear Arms*, PARADE MAG., Jan. 14, 1990, at 4; Daniel Abrams, *What Right To Bear Arms?*, N.Y. TIMES, July 20, 1989, at A23.

86. Levinson, *supra* note 82. To bolster the argument that the Deconcini proposal was unconstitutional, Senator Heflin read large portions of Professor Levinson's article into the Congressional Record. 136 CONG. REC. S6749 (daily ed. May 22, 1990).

87. Levinson, *supra* note 82.

88. "Any serious effort to discover the thought or reference behind the language of a statute must be based upon a painstaking endeavor to reconstruct the setting or context in which the ... words were employed," JONES ET AL., LEGAL METHOD 344. As a result, I will leave to those better versed in legal history the interpretation of (1) the events leading up to the enactment of the amendment, and (2) the debates and ratification including outside letters and articles written by those involved, which shed some light on the sentiments prevalent at the time. After reading extensive amounts of material on each side I remain unconvinced that there is conclusive or even strongly supportive evidence that any one interpretation of the history is more correct. Each side of the debate can, and has, interpreted various statements and events as supportive of its view. To avoid becoming caught up in a complicated discussion in which there are two ways to interpret most of the events leading up to the amendment's enactment, I will merely recommend articles that I found to be particularly powerful on each side. *See* Kates, *supra* note 82 (advocating individual right); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989) (advocating collective right); *see also* David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991) (analyzing the history of the Second Amendment from a republican perspective, while explicitly adopting neither the collective nor the individual rights view).

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A. Text and Context

The first part of the Second Amendment states: “A well-regulated militia being necessary to the security of a free state....” Based on that passage, the amendment appears to set forth a collective right. Collective right advocates maintain that the amendment was enacted to ensure that a standing state force would be armed. Consequently, assault weapon laws restricting individuals from possessing or transferring these weapons would pose no constitutional problem. It seems equally plausible that the amendment sets forth an individual right if one solely looks to the words “the right of the people to keep and bear arms shall not be infringed.” The extreme view of this interpretation maintains that most gun control laws are unconstitutional because those laws restrict an individual’s right to have a weapon. With these potentially conflicting phrases combined in the Second Amendment, it should come as no surprise that interpretations differ.

“Militia” is the most debated term in the Amendment. In colonial times,⁸⁹ in the United States Code,⁹⁰ and in some dictionaries today, the militia was and is defined as every able bodied male between the ages of 18 and 45.⁹¹ This definition alone seems consistent with the right of all people to keep and bear arms. In the Second Amendment, however, “militia” is explicitly qualified by the words “well-regulated” and by the phrase “being necessary to the security of a free-State.” Therefore, when the word “militia” is used in the context of the Second Amendment, the relationship to organized military service becomes paramount: “[T]he militia comprised all males physically capable of acting in concert for the common defense. ‘A body of citizens enrolled for military discipline.’ And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves....”⁹² It is undoubtedly true that the Framers envisioned men keeping weapons in their homes for use in the militia,⁹³ but their Second Amendment right to do so was conditioned upon service as part of a military force.⁹⁴ Even staunch gun advocates concede that the Second Amendment had nothing to do with hunting, target shooting, or any other non-militia purpose.⁹⁵

89. Act of May 8, 1792, ch. 33, 1 Stat. 271.

90. See 10 U.S.C. § 311(a) (1988).

91. WEBSTER’S NEW WORLD DICTIONARY 901 (2d coll. ed. 1986). *But see* RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1220 (2d ed. 1987) (“A body of citizens enrolled for military service, and called out periodically for drill, but serving full time only in emergencies”).

92. *United States v. Miller*, 307 U.S. 174, 179 (1939).

93. Act of May 8, 1792, ch. 33, 1 Stat. 271.

94. *Miller*, 307 U.S. at 179.

95. See, e.g., Gregory Inskip, *Our Right to Bear Arms*, 8 DEL. LAW. 21, 24 (1991) (“The reason that we have a constitutional right to bear arms is not so we can go deer hunting or skeet shooting. It is so that the general militia—the armed citizenry—will be ready at need to repel foreign invasion, to rise against domestic tyranny, and to suppress insurrection or crime.”).

The phrase "well-regulated" further indicates a desire to protect only those *individuals* actively serving as part of a *collective* militia.⁹⁶ A plain reading of the amendment thus demonstrates that were it not for the need to preserve a "well-regulated militia" for "the security of a free state" the amendment would not exist at all. The goal was the security of a free-state, and the way to achieve that was through a citizenry "enrolled for military discipline"⁹⁷ equipped with their own weapons. It is difficult to support the counterclaim that the preamble of the amendment indicates that keeping and bearing arms by all people for all purposes leads to a free people rather than that a well-regulated militia leads to a free state.

In questioning the collective rights theory, Professor Levinson queries why, if the Framers meant to emphasize the "militia" in the amendment, they "did not simply say 'Congress shall have no power to prohibit state-organized and directed militias.' Perhaps they in fact meant to do something else."⁹⁸ By its terms alone, however, the amendment did not aim to protect against the prohibition of state-militias, but to ensure their continued existence by preventing the federal government from prohibiting citizens from keeping and bearing weapons that would be used for militia service. Levinson's posited change in the words of the amendment does not make their intent any clearer than do the words "well-regulated" and "for the security of a free state." The better question to ask is, if the Framers intended the amendment to apply to all individuals, then why did they include the preamble at all?

The only other area in the Constitution where such a revealing preamble sets forth its goal is the Copyright clause. Article I, Section 8, Clause 8 sets forth the power of Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁹⁹ All of copyright law is determined with this goal of "progress," in mind.¹⁰⁰ This is the reason, for example, that expressive form, as opposed to an idea, is copyrightable. A determination was made that more progress occurs when we allow people to build on each other's ideas without being permitted to copy the form.¹⁰¹ To read only the second part of the clause would lead to the same sort of unintended absolutism that some individual right theorists of the Second

96. Some have gone a bit further. *See, e.g.,* *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942) ("It is abundantly clear both from the discussions of this amendment contemporaneous with its proposal and adoption and those of learned writers since, that this amendment, unlike those providing for protection of free speech and freedom of religion, was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power."), *rev'd on other grounds*, 319 U.S. 463 (1943).

97. *Miller*, 307 U.S. at 179.

98. Levinson, *supra* note 82, at 644-45.

99. U.S. CONST. art. I, § 8, cl. 8.

100. *See* MELVIN NIMMER, NIMMER ON COPYRIGHT § 1.03(A) (1991).

101. *See id.* at § 2.03(D).

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Amendment advocate. As with the preamble to the Second Amendment, were it not for the Framers' desire in the Copyright clause to promote science and the arts, the Copyright clause would not exist.

Individual rights supporters argue that by looking to other parts of the Bill of Rights, it is clear that the term "the people" does not mean the state. This is true: the Tenth Amendment specifically distinguishes the state from the people,¹⁰² and the First, Fourth and Ninth Amendment's references to the people clearly do not mean the state.¹⁰³ Nor does the Second Amendment's reference to "the people" grant a right to the state; rather, it grants a right to individuals serving as part of a "well-regulated" organization. Moreover, textual emphasis by individual rights proponents on the word "people" can hardly preclude reference to the Amendment's bow to the "well-regulated militia"—a body comprised only of (white) men between the ages of 18 and 45. Do the individual rights proponents maintain that the Second Amendment offers no protection to older people, blacks and women?¹⁰⁴ The response may be that today it would apply to women and blacks since they have been afforded all of the other constitutional rights. But doesn't looking to modern interpretations work against individual rights proponents since the militia envisioned by the framers no longer exists?

A structural argument can also be made that the Second Amendment and the Third Amendment ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law")¹⁰⁵ were enacted together as a response to the framers fear of federal standing armies and that the only goal of both amendments was to protect against that threat. Based on the following analysis, the Second Amendment and the "militia" referred to in it have as little relevance today as the Third Amendment's prohibition of quartering soldiers in any house.

The militia clauses of Article I, Section 8, are also helpful in determining

102. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

103. See *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1060-61 (1990) ("The people' seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by 'the People of the United States.' The Second Amendment protects 'the right of the people to keep and bear Arms,' and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to 'the people'.... [W]hile this textual exegesis is by no means conclusive, it suggests that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments ... refers to a class of persons who are part of a national community, or who have otherwise developed sufficient connection with this country to be considered part of that community.").

104. While discrimination against blacks and women was consistent with many "rights" that existed at the time, the seemingly purposeful exclusion of the elderly was not. "The restriction of membership to a defined age group supports the idea of the militia as a *military* force; membership was restricted to those perceived by the colonial governments to be best able to engage in military activity." Dennis A. Henigan, *Arms, Anarchy, and the Second Amendment*, 26 VAL. U. L. REV. 107, 113 n.24 (1991).

105. U.S. CONST. amend. III.

the intent of the framers with regard to the Second Amendment. Article I, Section 8, Clauses 15 and 16 empowered Congress to call forth the militia "to execute the Laws of the Union" and to "provide for organizing, arming, and disciplining, the Militia."¹⁰⁶ With the power of the militia clauses and without the Second Amendment, the federal government could have decided not to arm the militia, potentially rendering it useless. More importantly, Congress might have been able to disarm it, thereby suppressing it completely. This potential for federal power frightened the anti-federalists and the Second Amendment served to allay those fears.¹⁰⁷ Protection of a state militia is consistent with the compromise between the federalists and the anti-federalists from which the Constitution developed.¹⁰⁸

B. *The Militia and Its Current Meaning*

Justice Holmes wrote: "[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking words and a dictionary, but by considering their origin and the line of their growth."¹⁰⁹ The dictionary definition of "militia," however, provides the strongest argument for individual rights theorists. Interpretations of, and changes in, the militia since 1791 demonstrate that the Second Amendment would not bar any of the proposed assault weapon laws much less almost any gun control measures.

Debate centers on whether today's National Guard serves as the modern day militia. If it does, the argument goes, the Second Amendment would apply only to members of the National Guard, rendering the Amendment all but meaningless. In 1792, Congress established the Militia Act,¹¹⁰ "but its detailed command that every able-bodied male citizen between the ages of 18 and 45 be enrolled therein and equip himself with appropriate weaponry was virtually ignored for more than a century, during which time the militia proved to be a decidedly unreliable fighting force."¹¹¹ The statute was eventually repealed in 1901.¹¹² At that time, President Theodore Roosevelt (himself a member of the N.R.A.) declared: "our militia law is obsolete and worthless.

106. U.S. CONST. art. I, § 8, cl. 15, 16.

107. See *Perpich v. Department of Defense*, 110 S. Ct. 2418, 2422 (1990) ("On the one hand, there was a widespread fear that a national standing army posed an intolerable threat to individual liberty and to the sovereignty of the separate States, while on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense.").

108. *Id.*

109. *Gompers v. United States*, 233 U.S. 604, 610 (1914).

110. Act of May 8, 1792, ch. 33, 1 Stat. 271.

111. *Perpich*, 110 S. Ct. at 2423. See Frederick B. Weiner, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 187-194 (1940).

112. See Act of Feb. 2, 1901, ch. 192, 31 Stat. 748, 758.

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The organization and armament of the National Guard of the several States, which are treated as militia in the appropriations by the Congress, should be made identical with those provided for the regular forces.”¹¹³

In 1903, Congress passed The Dick Act which divided the militia into an “organized militia” to be known as the National Guard, and a “Reserve militia”¹¹⁴ which later statutes have referred to as the “unorganized militia.”¹¹⁵ The statute aimed to revitalize the defunct militia. Individual rights proponents claim that this act solidified the National Guard as a federal fighting force, and that consequently, “[i]t is obvious that the National Guard—whose every member, whose every weapon, whose every move is subject to the authority of the President - cannot be the militia protected by the Second Amendment.”¹¹⁶ Federalizing the National Guard, it is argued, would have been unthinkable to the framers. Why?

As stated above, Article I, Section 8, Clause 16, empowers Congress to organize, arm, and discipline the militia. That being so, how can there be any question but that some federal involvement was intended? The National Guard remains primarily a non-professional, civilian state fighting force¹¹⁷ which, if needed, can be called to battle by the federal government.¹¹⁸ Its potential federal role is wholly consistent with the Congressional power to govern “such Part of them as may be employed in the Service of the United States.”¹¹⁹ It was never intended that the militia be free of all federal control. In fact, the Supreme Court in 1820, referring to the militia clauses stated: “a national militia grew out of the federal constitution.... [i]t is in its very nature one indivisible object, and of the utmost importance to the support of the federal authority and government.”¹²⁰ The Second Amendment was enacted to ensure that the federal government did not completely usurp the power of the militia, thereby eliminating state control. The federal government did just the opposite. It revitalized a completely ignored and powerless state force.

The Dick Act also defined the militia as something other than all able-bodied males. Individual rights proponents actually cite the Act, claiming that the “unorganized militia” is the militia that the framers had envisioned since all able-bodied males remain a part of that force. A more radical view holds

113. First Annual Message to Congress (Dec. 3, 1901), in 14 MESSAGES AND PAPERS OF THE PRESIDENTS 6670.

114. Act of Jan. 21, 1903, ch. 196, 32 Stat. 775.

115. 10 U.S.C. 311(b) (1988).

116. NRA INST. FOR LEGISLATIVE ACTION, THE RIGHT OF THE PEOPLE TO KEEP AND BEAR ARMS SHALL NOT BE INFRINGED 8 (1991) [hereinafter NRA].

117. According to National Guard General David Gay, “virtually all guard members have jobs outside the military.” John M. Moran, *U.S. Confirms Cutbacks for Reserve Units*, HARTFORD COURANT, Mar. 27, 1992, at A1.

118. See *Perpich*, 110 S. Ct. 2418.

119. U.S. CONST. art. 1, § 8, cl. 16.

120. *Houston v. Moore*, 18 U.S. 1, 5 (1820).

that “the unorganized militia continues to exist as the final check against military tyranny and the ultimate protection in foreign defense.”¹²¹ These arguments are specious for two reasons. First, the Militia Act of 1792 instructed that “every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints....”¹²² These requirements of notification, enrollment and providing one’s own arms are absent in the “unorganized militia”; yet notification, enrollment and possessing arms are obviously requirements of the present day National Guard. Secondly, it is self-evident that an “organized” militia is far closer to a “well-regulated militia” than an “unorganized” one.¹²³

C. Caselaw

Regardless of what one decides the framers intended, no federal court and only two state court decisions in history have adopted the individual rights approach to the Second Amendment.¹²⁴ As the forthcoming analysis demon-

121. NRA, *supra* note 116, at 8; *see also* Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257, 1316 (1991) (“I have been arguing that nuclear weapons themselves constitute a large tear in the social contract.... Either we ourselves can bear arms and change the situation by revolution, or as seems more plausible and desirable, we can bring into view the pre-revolutionary situation and call for judicial recognition of the distributive intent of the right to bear arms.”).

The recent Los Angeles riots are as close as this country has come to “revolution” in many years. Are the well-armed citizens of the Los Angeles riots what the framers had in mind?

122. Act of May 8, 1792, ch. 33, 1 Stat. 271.

123. A recent note argues that state assault weapon laws may be unconstitutional because “the militia clauses protect the federal militia from attempts by states to ‘disarm’ it, [while] the second amendment performs an analogous function in protecting state militias from attempts by the federal government to disarm them.” Keith R. Fafarman, Note, *State Assault Rifle Bans and the Militia Clauses of the United States Constitution*, 67 IND. L.J. 187, 194 n.65 (1991). The author misapprehends the fundamental difference between the militia clauses which like all of Article I, Section 8, empower Congress to take certain action, and the Second Amendment which, like most of the Bill of Rights, at its core, protects from governmental action; in this case, against federal encroachment on state autonomy. Furthermore, the author asserts that these “state statutes which would prevent members of the unorganized militia from supplying themselves with suitable arms would frustrate the will of Congress since an unarmed militia could not effectively function.” *Id.* at 196-97. While the author concedes that unlike the organized militia, no provision exists to arm the unorganized militia, he relies on the “Civilian Marksmanship Program” which provides for instruction at rifle ranges for “able bodied males” as evidence of “Congress’s intent to provide for the arming and disciplining (that is, firearms training) of the militia under its militia clauses power.” *Id.* at 197-98. While this is a novel approach, it is based on the faulty premise that Congress is somehow “organizing” the “unorganized” militia, and to claim that this provision for practice shooting, which in no way offers to arm shooters, is an invocation of Congressional power to organize, arm and discipline the militia, is a bit far-fetched.

124. *See In re Brickey*, 8 Idaho 597, 598-599 (1902); *Nunn v. State*, 1 Ga. 243, 251 (1846). Claims that there are numerous (“twenty-one”, “twenty-two”) state cases which have analyzed “right to keep and bear arms provisions” and have struck down statutes as being violative of it are misleading. *See SENATE SUBCOMM. ON THE CONSTITUTION, COMM. ON THE JUDICIARY*, 97th Cong., 2d Sess., *THE RIGHT TO KEEP AND BEAR ARMS* (Comm. Print 1982); Kates, *supra* note 82, at 244. Most of those cases say nothing about the Second Amendment. They are, instead, only interpretations of their own state constitutions.

Furthermore, many individual rights advocates cite the infamous and now wholly discredited opinion of *Scott v. Sandford*, 60 U.S. 393, 417 (1856) (better known as *Dred Scott*), where Chief Justice Taney

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strates, many cases have taken the opposite view. While the gun lobby has wielded power over legislatures, its challenges to gun control measures in federal courts have consistently failed. Former Chief Justice Warren Burger said: “If I were writing the Bill Of Rights now, there wouldn’t be any such thing as the Second Amendment.... This has been the subject of one of the greatest pieces of fraud—I repeat the word fraud—on the American public, by special interest groups, that I have ever seen in my lifetime.”¹²⁵

Prior to the “incorporation” of the bulk of the Bill Of Rights to the states, three Supreme Court cases tangentially dealt with the Second Amendment. In *United States v. Cruikshank*,¹²⁶ a civil rights case decided in 1875, Chief Justice Waite wrote, in language often quoted by collective rights theorists:

[B]earing arms for a lawful purpose ... is not a right granted by the Constitution. Neither is it any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government.¹²⁷

The Court affirmed the *Cruikshank* decision in *Presser v. Illinois*¹²⁸ stating that the Second Amendment did not apply to the states. Despite its holding, the Court went on in language heralded by individual rights theorists:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.¹²⁹

In *Miller v. Texas*¹³⁰ the Court again stated only that the Second Amendment did not apply to the states but did not further explore this conclusion.

Did Chief Justice Waite’s statement that this is “one of the amendments” indicate a recognition that while some of the amendments apply to the states, this is not one of them? Would the *Presser* Court require an individual to be actively “maintaining the public security” in order to claim the right to bear arms? Why did that Court lay “the constitutional provisions out of view?” The

stated, in a comment that barely rises to the level of dicta, that if slaves were afforded rights, they would among many other things, “be able to keep and carry arms wherever they went.” See Levinson, *supra* note 82, at 651; Kates, *supra* note 82, at 246. The Court in *Dred Scott* did not intend to comment on the Second Amendment, rather, Justice Taney attempted to justify the holding by exaggerating the threat that would be posed by affording slaves various rights. Since the Second Amendment was never even mentioned, it is telling that this case is relied upon so heavily by individual rights proponents.

125. *Perspectives*, NEWSWEEK, Dec. 30, 1991, at 11.

126. *United States v. Cruikshank*, 92 U.S. 542 (1875).

127. *Id.* at 553.

128. *Presser v. Illinois*, 116 U.S. 252, 253 (1886).

129. *Id.* at 265.

130. *Miller v. Texas*, 153 U.S. 535, 538 (1894).

answer to any of these questions would be entirely speculative. In all three cases the Second Amendment challenge was rejected, and it is impossible to know whether the Justices would have incorporated the Amendment after the "incorporation" of other amendments began.¹³¹ The Second Amendment, however, may not have been incorporated for a reason: to do so would have validated the individual rights position in that the amendment would no longer focus on the desire to ensure the state militia's continued existence if the protections were extended to individuals against the state.

The only Supreme Court decision to focus explicitly on the Second Amendment was *United States v. Miller*.¹³² In that case, two men were accused of illegally transporting a weapon from one state to another in violation of the 1934 Firearms Act. In overruling the District Court's opinion that the law violated the Second Amendment, Justice McReynolds, writing for a unanimous Court, stated:

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. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.¹³³

The Court referred to several sources when it defined the militia as "all males physically capable of acting in concert for the common defense. 'A body of citizens enrolled for military discipline.'"¹³⁴ Inexplicably, some individual rights advocates trumpet *Miller* as support for their position.¹³⁵ One could claim that the definition of militia set forth by the Court and its subsequent discussion of the history of the militia demonstrates that the right to bear arms does not belong to the state. It is, however, disingenuous to claim that *Miller* supports anything more than the notion that a well-regulated militia, comprised of individuals, is the focus of the amendment.

In the only two subsequent Supreme Court decisions that cite *Miller* in the Second Amendment context, the individual rights theory was dismissed. In *Konigsberg v. State Bar*,¹³⁶ Justice Harlan eviscerated any absolutist claim that the Second Amendment protects against gun control laws. Rejecting the contention that the First Amendment bars libel, slander, and misrepresentation claims because of its absolutist language, he wrote, "In this connection also

131. The Seventh and Ninth Circuits have held that the refusal to incorporate the Second Amendment to the states in *Presser* and *Cruikshank* remains good law. See *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269-270 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983); *Fresno Rifle & Pistol Club v. Van De Kamp*, No. 91-15466 (9th Cir. May 22, 1992) (LEXIS, Genfed library, USApp file) at *8-10.

132. *United States v. Miller*, 307 U.S. 174 (1939).

133. *Id.* at 178.

134. *Id.* at 179.

135. See, e.g., Heflin, *supra* note 84.

136. *Konigsberg v. State Bar*, 366 U.S. 36, 49-50 n.10 (1960).

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compare the equally unqualified command of the second amendment: 'the right of the people to keep and bear arms shall not be infringed.' And see *United States v. Miller* (cite omitted).¹³⁷

In *United States v. Lewis*,¹³⁸ the Court went even further. Justice Blackmun writing for the Court about a law prohibiting a felon from possessing a firearm stated:

These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See *United States v. Miller*, (cite omitted) (The second amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well-regulated militia.')¹³⁹

Many federal courts of appeal, some of which were also cited in *Lewis*, have used far stronger language in holding that the Second Amendment does not afford an individual the right to bear arms and have cited *Miller* to support their holdings.¹⁴⁰ Not one has ruled to the contrary.

The only other tenable claim that may be made is that *Miller* protects an individual from laws restricting weapons, like assault weapons, that appear to have a "reasonable relationship to the preservation or efficiency of a well-regulated militia." According to one recent article analyzing the Second Amendment in a completely different context, "The [*Miller*] ruling appeared to be stuck to the physical surfaces of the particular gun in the case."¹⁴¹ A case like *Quilici v. Village of Morton Grove*,¹⁴² in which the Seventh Circuit affirmed a local handgun ban, maintaining that "the right to keep and bear handguns is not guaranteed by the second amendment"¹⁴³ because they have no relationship to a militia, says nothing about whether military-type weapons would or should be afforded that protection. One could claim that a military-

137. *Id.* The First Amendment's command that "Congress shall make no law" is also far more absolutist than the opaque language of the Second Amendment.

138. *United States v. Lewis*, 445 U.S. 55 (1980).

139. *Id.* at 65-66 n.8.

140. *United States v. Miller*, 307 U.S. 535, 538 (1894) is cited for every one of the following propositions: *United States v. Nelsen*, 859 F.2d 1318, 1320 (8th Cir. 1988) ("A fundamental right to keep and bear arms ... has not been the law for at least one hundred years.... Later cases have analyzed the second amendment purely in terms of protecting state militias rather than individual rights."); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) ("The courts have consistently held that the second amendment only confers a collective right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation or efficiency of a well-regulated militia.'"); *Eckert v. City of Philadelphia*, 477 F.2d 610 (3d Cir. 1973) ("It must be remembered that the right to keep and bear arms is not a right given by the United States Constitution."); *Cody v. United States*, 460 F.2d 34, 37 (8th Cir. 1972) ("The Second Amendment's guarantee extends only to use or possession which 'has some reasonable relationship to the preservation of a well regulated militia.'"); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) ("Since the Second Amendment right 'to keep and bear Arms' only applies to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm.").

141. See Scarry, *supra* note 121, at 1291.

142. *Quilici v. Village of Morton Grove*, 695 F.2d 261.

143. *Id.* at 270.

type weapon would pass the test. Yet no federal court has ever interpreted *Miller* to apply only to the type of weapon rather than the individual's connection to a well-regulated militia.¹⁴⁴

*United States v. Warin*¹⁴⁵ in the Sixth Circuit and *United States v. Oakes*¹⁴⁶ in the Tenth Circuit both dealt directly with the issue of militia-related weapons. Both were challenges to 26 U.S.C. § 5861(d), requiring registration of all machine guns—weapons that undoubtedly could be used in a militia as “weapons of war.” Both plaintiffs also claimed that they were state militia members by virtue of the fact that they were “able bodied males.”¹⁴⁷ In *Warin*, the court held “that there is no evidence that a submachine gun in the hands of an individual ‘sedentary militia’ member would have any, much less a ‘reasonable relationship to the preservation or efficiency of a well regulated militia.’”¹⁴⁸ In *Oakes*, the court wrote: “To apply the amendment so as to guarantee appellant’s right to keep an unregistered firearm which has not been shown to have any connection to the militia, merely because he is technically a member of the Kansas militia, would be unjustifiable in terms of either logic or policy.”¹⁴⁹ The Supreme Court declined to grant certiorari to hear the appeals.

In *Farmer v. Higgins*,¹⁵⁰ a challenge to the Firearm Owners Protection Act of 1986,¹⁵¹ which prohibits the transfer or possession of machine guns, was mounted in the Eleventh Circuit. At issue was a grandfather clause in the Act, which, overall, was far more draconian than the one challenged in *Oakes* and *Warin*. The court held that the Act prohibited private possession of machine guns not lawfully possessed prior to the enactment of the law. Although the court did not specifically address the Second Amendment, it did so indirectly in declaring say it considered “Farmer’s remaining arguments ... to be without merit.”¹⁵² Here too, the Supreme Court denied certiorari.

Finally, California’s Roberti-Roos Assault Weapon Control Act was

144. At least two commentators have suggested that *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), supports an individual rights position in that the court determined whether a .38 caliber revolver had a reasonable relationship to the preservation of a militia. See Michael T. O’Donnell, *The Second Amendment: A Study of Recent Trends*, 25 U. RICH. L. REV. 501, 504 n.17 (1991); Bernard J. Bordenet, *The Right to Possess Arms: The Intent of the Framers of the Second Amendment*, 21 U. WEST L.A. L. REV. 1, 27 (1990). This analysis only demonstrates that neither commentator read the case closely. The court in unequivocal language stated: “The right to keep and bear arms is not a right conferred upon the people by the federal constitution” *Cases*, 131 F.2d at 921. The court examined whether the appellant, not the weapon, had been “a member of any military organization or that his use of the weapon under the circumstances disclosed was in preparation for a military career.” *Id.* at 923.

145. *United States v. Warin*, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976).

146. *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978).

147. *Warin*, 530 F.2d at 106; *Oakes*, 564 F.2d at 387.

148. *Warin*, 530 F.2d at 107.

149. *Oakes*, 564 F.2d at 386.

150. *Farmer v. Higgins*, 907 F.2d 1041 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 753 (1991).

151. Firearm Owners’ Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449 (1986).

152. *Farmer*, 907 F.2d at 1046.

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challenged in the Eastern District of California on a number of grounds in *Fresno Rifle and Pistol Club v. Van De Kamp*.¹⁵³ The court affirmed the constitutionality of the statute, citing many of the cases discussed above. The court also rejected a privacy challenge, holding that possession of a weapon and one's right to self-defense were not privacy interests.¹⁵⁴ The Ninth Circuit affirmed without addressing the validity of the broad Second Amendment challenge.¹⁵⁵ Rather, citing *Presser v. Illinois* and *United States v. Cruikshank*, the court held that the Second Amendment does not apply to the states and consequently that the Second Amendment does not serve to protect individuals against any such state law.¹⁵⁶

Justice William O. Douglas summarized it well: "A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment," but the Second Amendment was simply "designed to keep alive the militia."¹⁵⁷

IV. IS AN ASSAULT WEAPON BAN THE SOLUTION?

A. *The N.R.A Opposition*

The "powerful lobby" referred to by Justice Douglas is as passionate as it has been powerful. The *New York Times* recently referred to the N.R.A. as "resembl[ing] a kind of religion. Its dogma is the Second Amendment to the Constitution ... there is ... no stronger article of faith among the members of the N.R.A. than the belief that the Second Amendment forbids virtually any restrictions on individual gun ownership."¹⁵⁸ Due to the strong political influence of the N.R.A., efforts to ban assault weapons appear politically dangerous. With its 2.8 million members, the N.R.A. has been referred to as the "most powerful lobby in Washington."¹⁵⁹ Most recently, for instance, the N.R.A. "beat back [the] attempt in Congress last year to ban sales of semiautomatic military-style weapons."¹⁶⁰

In the last few years, however, the N.R.A. has seen some of its power and

153. *Fresno Rifle & Pistol Club v. Van De Kamp*, 746 F. Supp. 1415 (E.D. Cal. 1990).

154. *Id.* at 1419-22.

155. *Fresno Rifle & Pistol Club v. Van De Kamp*, No.91-15466 (9th Cir. May 22, 1992) (LEXIS, Genfed library, USApp file).

156. *Id.* at 8-10

157. *Adams v. Williams*, 407 U.S. 143, 150-51 (1972) (Douglas, J., dissenting).

158. Lewis, *supra* note 7.

159. John Gould, *A Maine Boy's View of Coolin' Off*, CHRISTIAN SCI. MONITOR, July 19, 1991, at 17.

160. Lewis, *supra* note 7.

influence wane.¹⁶¹ Despite N.R.A. opposition, fully automatic weapons were banned¹⁶² and various states and municipalities recently have enacted gun control measures, such as the assault weapon legislation in New Jersey and California and the handgun law in Maryland. Furthermore, the federal Brady Bill, enacting a waiting period for the purchase of handguns, ultimately passed the House and Senate.¹⁶³ The ability of the N.R.A. to defeat any gun control legislation seems, at long last, over.¹⁶⁴

B. Gun Control Studies

In evaluating any effort to ban assault weapons, the most relevant comparison would examine the effects of a national ban on the possession of certain weapons, like the ban on machine guns. A Drug Enforcement Administration (DEA) Domestic Firearms Seizure Report¹⁶⁵ indicates that the machine gun ban had a demonstrable effect. Since the law took effect in 1986, the number of machine guns seized by the DEA decreased every year through 1990. In fact, the total number of machine guns seized decreased 36% from 1987 to 1990 while seizures of other types of firearms increased 4%.¹⁶⁶ This supports the notion that a national ban on assault weapons could reduce the proliferation of those weapons as well.

Most of the available statistics, however, do not demonstrate that local gun control laws reduce crime. The Justice Department funded a report by James Wright and Peter Rossi which concluded "that there is little evidence to show that gun ownership among the population as a whole is, *per se*, an important cause of criminal violence."¹⁶⁷ In many major cities, the crime and murder rates have skyrocketed despite the presence of gun control laws.¹⁶⁸ Most blame the increased drug trade. We can not change overnight the underlying societal factors that cause crime. Consequently, reducing crime should only be a long term goal. We can, however, attempt to reduce the numbers of gun

161. While the power and influence of the N.R.A. is no longer what it once was, the riots in Los Angeles have led to a recent surge in membership requests. See Egan, *supra* note 1.

162. 18 U.S.C.A § 922(o) (West Supp. 1991).

163. See Ifill, *supra* note 56.

164. Police support for many of these laws was certainly a factor in helping to defeat the N.R.A.. Furthermore, the recent riots in Los Angeles may lead more legislators to consider gun control to be a pressing issue. See *supra* note 3.

165. DRUG ENFORCEMENT AGENCY, DOMESTIC FIREARMS SEIZURE REPORT, FY 1990 (1991).

166. *Id.* The DEA statistics did not separate seizures of semiautomatic rifles and shotguns from non-automatics until 1989. Comparisons of semiautomatic handgun seizures between 1987 and 1990 are indeterminate; 1,263 were confiscated in 1987, 1,311 in 1988, 1,387 in 1989 and 1,200 in 1990. Machine gun confiscations consistently decreased: 249 in 1987, 215 in 1988, 206 in 1989, and 159 in 1990. These statistics may be of only limited value, however, since only DEA seizures of weapons were examined and it only covered the period after the law took effect.

167. JAMES D. WRIGHT & PETER H. ROSSI, WEAPONS, CRIME AND VIOLENCE IN AMERICA 13 (1981).

168. See *Pulse, Violent Crimes*, N.Y. TIMES, Jan. 6, 1992, at B1 (citing data from police departments and the U.S. Census Bureau).

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crimes and people murdered by decreasing the availability of assault weapons. Even the N.R.A. concedes that some studies demonstrate that gun control leads to fewer gun crimes, a result it views as “akin to saying that there would be fewer truck accidents if trucks were prohibited from the highways.”¹⁶⁹

In a well-publicized study, researchers at the Universities of Washington, British Columbia, and Tennessee compared the number of assaults and murders in Vancouver and Seattle.¹⁷⁰ They found that the number of assaults in these nearby cities were relatively similar between 1980 and 1986. In Seattle, however, assaults involving handguns were 7.7 times more frequent and the homicide rate five times greater than in Vancouver. Vancouver’s gun control laws only permitted individuals who demonstrated a valid reason—target shooting or collecting—to purchase or possess a firearm.¹⁷¹ In contrast, Seattle had few restrictions for the purchase and possession of firearms. This comparison is particularly significant due to the two cities’ demographic, geographic, economic, and cultural similarities. Most prior comparative studies had been criticized on the ground that differences between the cultures involved in each study skewed the results.

The study’s authors make the modest claim that “restricting access to handguns *may* reduce the rate of homicide in a community (emphasis added).”¹⁷² Their reluctance to wholeheartedly endorse gun control laws may stem from the study’s failure to compare the cities before and after gun control legislation went into effect.¹⁷³ By noting the comparatively similar rates of burglary, robbery, simple assault, and aggravated assault, however, the effect of this defect was minimized. While Seattle’s crime rates were slightly higher, “virtually all of the excess risk of aggravated assault in Seattle was explained by a sevenfold higher rate of assaults involving firearms.... Most of the excess mortality was due to an almost fivefold higher rate of murders with handguns in Seattle.”¹⁷⁴ This excludes the possibility that Seattle’s higher homicide rate could be explained by overall higher levels of criminal activity.

Since 1976, Washington D.C has had one of the most stringent gun control laws in the country.¹⁷⁵ A recent study published in *The New England Journal of Medicine* concluded that Washington’s restrictive law reduced homicides committed with firearms by 25%.¹⁷⁶ The study covered a period of twenty

169. NRA INST. FOR LEGISLATIVE ACTION, GUN LAW FAILURES 2 (1991).

170. John H. Sloan et al., *Handgun Regulations, Crime, Assaults, and Homicide*, 319 NEW ENG. J. MED. 1256 (1988).

171. In Vancouver, self-defense was not considered a valid or legal reason to possess a firearm.

172. Sloan et al., *supra* note 170, at 1256.

173. Nor, of course, could the study take into account the possibility that different national cultures in the United States and Canada may have played a major role in determining the outcome of the study.

174. Sloan et al., *supra* note 170, at 1260.

175. D.C. CODE ANN. § 6.2301 (1991).

176. Colin Loftin et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 NEW ENG. J. MED. 1615 (1991).

years, nine years before the law was enacted and eleven years after, thereby avoiding the pitfalls of the Seattle study. According to the study, while gun-related homicides sharply declined, homicides committed by other means remained about the same from 1976-1987. There were no reductions in firearm homicides in the adjacent areas of Maryland and Virginia where the law was not in effect. This is one of the few statistically significant studies that strongly suggest a cause and effect relationship between a U.S. gun control law and a reduction in gun-related homicides.¹⁷⁷

The direct impact of local gun control laws is difficult to assess. Particularly in small areas such as Washington D.C., surrounded by jurisdictions with differing laws, questions remain as to where weapons are actually purchased. Statistics from jurisdictions that have (unlike Washington) taken only modest steps to limit the availability of assault weapons are of limited relevance in assessing the potential utility of far-reaching federal legislation. Nevertheless, statistics demonstrating the effectiveness of gun control laws, although far from determinative, do lend support to an assault weapon ban. Moreover, even if statistics proving that gun control laws reduce the number of gun crimes did not exist, assault weapons are so uniquely dangerous and carry such a powerful cachet among members of the drug world that it would still make sense to subject them to a national ban.

C. Response to Potential Pitfalls of an Assault Weapon Ban

A national ban on assault weapons, though desperately needed, may lead to problems of its own. Some argue that a ban would create a new business for organized crime and that criminals would continue to purchase the weapons on the black market.¹⁷⁸ While this may be true to some degree, the law could

177. Since the study concluded in 1988, however, the murder rate in Washington D.C. has skyrocketed beyond that of other comparable cities. While comparing one city to another tends to discount many relevant factors, the article concludes:

Since the economic and social conditions in the district are similar to those associated with high rates of homicides in other cities, it is not surprising that the frequency of homicide remained high in the District of Columbia or that in the district, as in many other cities in the late 1980's there were dramatic increases in homicides attributable to the spread of "crack" cocaine. It is reasonable to assume that the restrictions on access to guns in the district continued to exert a preventative effect even as homicide rates were driven up by conflict over drugs and other factors.

Id. at 1620. If the economic and social conditions are similar in other cities then the increase in homicides in those cities should coincide with the rise in Washington D.C. They do not. In 1991, there were over eighty murders per 100,000 people in Washington D.C., more than twice as many as in 1987 when the study ended. New York, which also has a strict gun control law, climbed from 22 to 30 per 100,000 people; Los Angeles from 24 to 29 and Chicago from 23 to 33. *Pulse*, *supra* note 168. The only other major city to see a significant increase was Dallas where the murder rate rose from 30 murders per 100,000 people in 1987 to 50 in 1991. *Id.* These statistics do not necessarily belie the authors' conclusion that the law had a preventative effect—who knows what the rate would have been in the absence of legislation?—but it certainly is not the *coup de grace* that gun control advocates had hoped.

178. James D. Wright, *Second Thoughts About Gun Control*, 91 PUB. INTEREST 23, 30-31 (1988).

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reduce the proliferation of weapons and at least would eliminate varying laws among the states, which has given rise to a thriving interstate gun traffic.¹⁷⁹ Legal purchases of semiautomatic weapons have skyrocketed even as the demand for less powerful guns has waned.¹⁸⁰ Meanwhile, a recent BATF study showed that only 37% of firearms acquired by career criminals were bought or traded for "off the street" or in the "black market."¹⁸¹ Of the career criminals questioned, 34% obtained their weapons from criminal acts or associates, 8% said that they acquired them from relatives,¹⁸² and 13% purchased their weapons at gun shows or from dealers.¹⁸³

Legal purchases would immediately be terminated if the weapons were banned. Preventing easy access to these weapons would also make it less likely that people would have these weapons at all. Consequently, obtaining the weapons from relatives or by theft would become more difficult. The goal of the ban would be to close off these options. If the law leads criminals to the black market, then hopefully enhanced enforcement will lead to the arrest of more of those criminals.¹⁸⁴

In determining the potential success of these laws, a comparison to drug laws is useful. Even critics of the current drug law enforcement efforts would agree that the supply of drugs has been curtailed to some degree by the government's actions.¹⁸⁵ Reducing the number of assault weapons would be an important step towards reducing their destructive effects. With assault weapons, moreover, it is not only the sale but also the possession of these weapons that needs to be vigorously enforced. With drug laws, the government may be hesitant to prosecute for a minor possession because many people perceive the infraction as harmless. But if someone is carrying an assault weapon, particularly in a highly populated area, that person poses an immediate threat to society. Finally, a national assault weapon ban would be as least as effective and enforceable as are drug laws. Enforcement of a national assault weapon ban would likely be easier than drug enforcement because guns are far easier to detect (more difficult to conceal) than drugs.¹⁸⁶ Thus, some of

179. See Richard Lacaye, *Running Guns up the Interstate*, TIME, Feb. 6, 1989, at 24.

180. Erik Eckholm, *Ailing Gun Industry Confronts Outrage over Glut of Violence*, N.Y. TIMES, Mar. 8, 1992, at A30.

181. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PROTECTING AMERICA: THE EFFECTIVENESS OF FEDERAL ARMED CAREER CRIMINAL STATUTES 26 (1991).

182. *Id.*

183. *Id.*

184. It is anomalous that we spend millions of dollars on preventing the proliferation of weapons of war to third world countries and then claim that we can not prevent our own citizens from obtaining them because of the "black market."

185. See TWO YEARS LATER, *supra* note 46. See also James Brooke, *Gains Seen In Fight To Cut Drug Trade*, N.Y. TIMES, Jan. 15, 1992, at A13.

186. There would not even be a need for a new organization to enforce these laws. Rather, consistent with the war on drugs, the Drug Enforcement Agency could become the Drug and Assault Weapon Enforcement Agency and enforce both sets of laws.

the enormous amounts of money now spent fighting drugs should be used to fight assault weapons, either as part of the drug war or in an independent war on weapons.

V. CONCLUSION

Assault weapon legislation should not aim to achieve the far-reaching goal of crime reduction. Rather, it should seek to reduce the number of deaths and injuries resulting from use of more deadly weapons. A national ban on assault weapons would bring numerous benefits. It would give police officers grounds to arrest individuals possessing assault weapons without evidence of other crimes. This could prevent future criminal acts and would allow the police to confiscate the proscribed weapons. The ban would also eliminate the interstate traffic of guns.

More importantly, if the number of assault weapons used in crimes were reduced by forcing criminals to substitute less powerful weapons, the number of casualties might decrease significantly. Criminologist and gun advocate, Gary Kleck, makes clear in an article criticizing gun control, entitled *Policy Lessons From Recent Gun Control Research*, that "rifles and shotguns, depending on caliber or gauge and the ammunition used, can be anywhere from one and one half to ten times as deadly as handguns."¹⁸⁷ While not all semiautomatic weapons are "rifles or shotguns," semiautomatic weapons (particularly those with large magazine capacities) have far more potential to kill than do non-automatic weapons since semiautomatics disperse numerous bullets in a short time span. This is especially true as regards unintended targets. Much of the public outcry for gun control stems from stories of innocent victims hit by stray bullets. This potential for destruction alone makes assault weapons as inappropriate for self-defense as it makes them ideal for drug gangs and other illegal enterprises.

On the heels of record-setting murder rates, studies indicating that assault weapons are a particular danger, evidence that gun control laws may truly work, and an outcry from our nation's police departments and medical professionals, it is difficult to accept the notion that assault weapons must forever remain with us. Assault weapon legislation is not perfect, nor is it "politically safe," but increasing public security and protecting lives should outweigh the reluctance of some politicians to battle the N.R.A. At the very least, these legislators must examine the need for and potential benefits of assault weapon laws.

187. Gary Kleck, *Policy Lessons from Recent Gun Control Research*, 49 *LAW & CONTEMP. PROBS.* 35, 48 (1986).

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A “war” on drugs has been declared with little effort to reduce the weapons of that war. Even the modest “Antidrug Assault Weapons Limitation Act of 1991” would have been a step in the right direction; for if the war on drugs is succeeding at confiscating drugs, as reports indicate,¹⁸⁸ then the “wars” and violence for the remaining drug supply can only be expected to increase. The carnage associated with the drug trade must be eliminated in conjunction with the enforcement of drug laws. Other proposals—increased enforcement, longer sentences, and more prisons—are all “politically safe.” At most, however, they provide only general deterrents. If we hope to preclude the use of assault weapons, we need to make them scarce by banning them.

With legislation banning machine guns already in effect, it is time to take the next step: a ban on many semiautomatic weapons. While determinative statistical proof as to the potential effectiveness of such legislation is difficult to offer, claims that there is no evidence to support the enactment of these laws are unfounded. Furthermore, requiring hunters and the N.R.A. to bear the burden of proof—by demonstrating the need for particular semiautomatic weapons—would force gun advocates to offer convincing statistical evidence that certain semiautomatic weapons are not disturbingly dangerous. It would also shift the entire focus of the debate from groups that oppose such weapons to groups that support them. The time has come, at long last, to do just that.

188. See, e.g., Brooke, *supra* note 185.