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Style, Substance, and the Right to Keep and Bear Assault Weapons

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ABSTRACT

Assault weapons have long been a subject of intense controversy. The debate has intensified in recent years after a series of mass shootings in which perpetrators used AR-15 rifles or other military-style weapons, such as the shootings in Newtown, Aurora, San Bernardino, Orlando, Las Vegas, Sutherland Springs, and Parkland. While the federal assault weapon ban has expired, some state legislatures have enacted bans. Critics complain that these laws irrationally condemn certain types of firearms simply because they have a military appearance. Gun control advocates argue that these laws are not just about superficial appearances and that the banned weapons are more dangerous than other firearms. This Article contends that even if the controversy over assault weapons ultimately stems from concerns about the look or style of certain firearms, those are not irrelevant considerations. If the military style of assault weapons increases their appeal to disturbed individuals committing the most horrific crimes, and if the intimidating look of these weapons increases the public's perception of the risk of mass shootings, those are legitimate concerns that legislators and judges may take into account.

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INTRODUCTION

In early 2016, a satirical news website reported that President Barack Obama had found an ingenious way to resolve America's problems with guns.[1] A new law would require all firearms to be a bright shade of pink. "Not only will all newly produced guns be forced to be sold only in pink, but registered guns will also have to be sent in to a special gun control bureau where they will be painted the mandatory shade of pink."[2] According to the satirical story, the National Rifle Association planned to challenge the new law as a violation of constitutional rights, but President Obama insisted that "the [C]onstitution does not state that Americans have the right [to] choose the color of their gun."[3]

The story was a joke, of course; a joke based on the idea that firearms would lose their macho appeal for many gun enthusiasts if they were a color that made them look less manly and intimidating.[4] While the notion of actually enacting a pink gun law is outlandish, it is not silly to consider what impact the aesthetic or stylistic characteristics of firearms have on

1. David Marrs, *America Solves Gun Control Problem by Making All Guns Pink*, DAILY SQUAT (Feb. 1, 2016), https://perma.cc/9M53-HVZD.

2. *Id.*

3. *Id.* This was not the first time someone suggested that all guns should be pink. *See, e.g.*, XemaSab, *Maybe All Guns Should Be Pink*, DEMOCRATIC UNDERGROUND (May 2, 2013, 10:05 PM), https://perma.cc/LL53-KK33. I also recall being a judge for a gun control essay contest about fifteen years ago, and one of the entries was a tongue-in-cheek call for requiring all guns to be pink.

4. Pink guns, marketed to women, are a small-but-growing segment of the firearms market. *See* Adam Weinstein, *Take a Stand for Women: Ban Pink Guns*, TASK & PURPOSE (Mar. 8, 2017), https://perma.cc/SGJ4-94PZ (criticizing the marketing of pink firearms for reinforcing social gender norms).

how they are used and perceived, as well as how they should be treated by law. Does it matter what a gun looks like? Is the style or appearance of a gun ever a legitimate consideration in determining what legal regulations or restrictions should be imposed on it? Does the Second Amendment give people a right to have guns that look a certain way?

These questions are particularly acute for assault weapons, a category of firearms that has been a subject of intense cultural, political, and legal controversy over the past several decades. Critics of assault weapon bans complain that these laws irrationally draw distinctions among firearms based on cosmetic features, prohibiting guns that have a frighteningly militaristic appearance but not other guns that function the same but look less alarming.[5] Gun control advocates have responded by arguing that these laws are not just about appearances and that the banned weapons do in fact have substantive characteristics that make them more dangerous or more likely to be misused than other firearms.[6]

In this Article, I will take an unconventional approach to this debate and argue that even if the controversy over assault weapons ultimately does boil down to concerns about how certain guns look, those concerns are not meaningless. Appearances matter, at least in some ways and in some contexts. If the military style of assault weapons emboldens some disturbed individuals and increases the likelihood that they will commit crimes, especially the sort of public mass shootings that have horrified the nation time and time again in recent years, that is a legitimate and reasonable concern. If the widespread presence of these guns and the increasingly common practice of carrying them openly in public settings causes real and significant distress for a lot of people, that is a phenomenon worthy of at least some consideration in thinking about how these weapons should be treated by legislators and by courts. Appearances are not everything, but they also are not nothing.

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5. *See, e.g.*, Stephen P. Halbrook, *Reality Check: The "Assault Weapon" Fantasy and Second Amendment Jurisprudence*, 14 GEO. J.L. & PUB. POL'Y 47, 49 (2016) (arguing that "assault weapons" is a propaganda term used to promote bans on firearms "that have cosmetic outward features that look like military rifles"); James B. Jacobs, *Why Ban "Assault Weapons"?*, 37 CARDOZO L. REV. 681, 687 (2015) (arguing that banning guns that look like military weapons is "like asking how many features make an automobile look too futuristic or too much like a race car for private citizens to own").

6. *See, e.g.*, BRIAN J. SIEBEL, BRADY CTR. TO PREVENT GUN VIOLENCE, ASSAULT WEAPONS: "MASS PRODUCED MAYHEM" 1 (2008) ("Far from being simply 'cosmetic,' these features all contribute to the unique function of any assault weapon to deliver extraordinary firepower. They are uniquely military features, with no sporting purpose whatsoever."); VIOLENCE POLICY CTR., BULLET HOSES: SEMIAUTOMATIC ASSAULT WEAPONS—WHAT ARE THEY? WHAT'S SO BAD ABOUT THEM? (2003).

Part I of this Article provides some basic information about different types of firearms and what constitutes an assault weapon. Part II discusses legal restrictions that have been put on assault weapons by legislatures, including the now-expired federal assault weapon ban and the assault weapon bans that remain in effect in some states. Part III looks at how courts have dealt with the issue, particularly the string of decisions by federal appellate courts in recent years that have upheld state or local assault weapon bans. Part IV considers whether the military look of assault weapons has any relevance to legislative or judicial decision-making about them, and it challenges the notion that the intimidating appearance of these weapons should be a wholly irrelevant consideration.

I. ASSAULT WEAPONS

The debate over assault weapons often degenerates into sparring over terminology. Some gun rights proponents contend that there is really no such thing as an "assault weapon" because the term is a political buzzword invented by gun control advocates.[7] Others say that gun manufacturers and dealers invented the term in an effort to hype their products and boost sales.[8] While it may be impossible to come to a consensus on the proper way to talk about the issue, it is helpful to begin with a basic understanding of some distinctions among different types of firearms and their characteristics.

A. Types of Firearms

Handguns and long guns are two categories of firearms.[9] Handguns (such as pistols and revolvers) are designed to be fired with one hand,[10] while long guns (such as rifles and shotguns) are relatively longer and require the use of both hands.[11]

Firearms can be categorized in other ways, such as by the type of action that the firearm utilizes. The action is the mechanism within the

7. *See* Halbrook, *supra* note 5; Peter Ferrara, Opinion, *'Assault Weapon' Is Just a PR Stunt Meant to Fool the Gullible*, FORBES (Dec. 28, 2012, 9:23 AM), https://perma.cc/5FTR-G8S4.

8. PHILLIP PETERSON, GUN DIGEST, BUYER'S GUIDE TO ASSAULT WEAPONS 11 (Dan Shideler ed., 2008).

9. Allen Rostron, *High-Powered Controversy: Gun Control, Terrorism, and the Fight over .50 Caliber Rifles*, 73 U. CIN. L. REV. 1415, 1419 (2005).

10. 18 U.S.C. § 921(a)(29)(A) (2012) (defining handgun as "a firearm which has a short stock and is designed to be held and fired by the use of a single hand").

11. *Id.* § 921(a)(5), (7) (defining rifles and shotguns as firearms meant to be fired from the shoulder).

firearm that handles the ammunition.[12] In some firearms, the action requires some manual force supplied by the shooter. For example, the user of a bolt action rifle must manipulate a small lever to eject an empty cartridge from the rifle's firing chamber and put the next round of ammunition in position to be fired.[13]

Other firearms are self-loading.[14] This simply means they do not rely on manual force supplied by the shooter to dispose of an empty cartridge and to prepare the next cartridge to be fired. Instead, self-loading firearms use the explosive force created by each round, as it is fired, to eject the spent cartridge and move the next round into the gun's firing chamber. Self-loading firearms were first developed in the late 1800s, and they entered into widespread use in the early 1900s.[15] By eliminating the need for the shooter to do anything other than pull the trigger, self-loading firearms could achieve significantly faster rates of fire than what was possible with previous types of firearms.[16]

1. Automatic Firearms

This new technology was soon put to use on the battlefields of World War I.[17] Commonly referred to as machine guns, the self-loading firearms used in the war were capable of firing several hundred rounds per minute.[18] Early on, these machine guns were large, heavy weapons. They were not easily transportable, and each gun required a crew of several soldiers to operate it. By the end of the war, the development of lighter and somewhat more portable machine guns was well underway.[19]

The machine guns used in the war were automatic weapons, meaning they were capable of firing more than one bullet per pull of the trigger.[20] Once the trigger is pulled, a fully automatic weapon will continue firing

12. *See* Rostron, *supra* note 9, at 1419–20.

13. *Id.* at 1420.

14. *Id.*

15. *See* JIM SUPICA, GUNS 21–24 (2005).

16. For example, when Hiram Maxim built his first fully automatic firearm, he found it could fire over 600 rounds per minute. Adrienne LaFrance, *People Thought Machine Guns Might Prevent Wars*, ATLANTIC (Jan. 26, 2016), https://perma.cc/AAH2-QQJX.

17. For a detailed account of the machine guns used in World War I, see Tom Laemlein, *"Grim Reapers": The Machine Guns of World War I*, AM. RIFLEMAN (Oct. 20, 2017), https://perma.cc/Z4C6-RJ42.

18. *Id.*

19. *Id.*

20. *See* 26 U.S.C. § 5845(b) (2012) (defining "machinegun"); *see also* Rostron, *supra* note 9, at 1420.

rapidly until either the shooter releases the trigger or the gun runs out of ammunition.[21]

After the war, automatic rifles that were smaller and lighter, like the Thompson submachine gun,[22] soon became available, and they became popular with civilians as well as soldiers.[23] With the rise of organized crime during the Prohibition era, automatic rifles became notorious weapons for gangsters.[24] Congress eventually cracked down, passing the National Firearms Act of 1934 (NFA).[25] While that law did not ban any weapons, it created a new regime of special legal restrictions for all firearms capable of automatic fire.[26]

Those restrictions remain in effect today. Any person who wants to legally obtain an automatic weapon must pay a $200 transfer tax and go through an application process that includes being investigated and approved by the FBI.[27] The federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) maintains a "registry of information about the ownership of every NFA weapon."[28]

Automatic weapons thus have been subject to special restrictions under federal law since the 1930s. In 1986, Congress took the additional step of prohibiting the introduction of new automatic weapons into the civilian market.[29] Automatic weapons manufactured and registered under the NFA prior to May 19, 1986, remain legal, and ownership of them can be transferred to another person (provided the transferee complies with the NFA's requirements and restrictions), but automatic weapons produced on

21. Rostron, *supra* note 9, at 1420 n.13.

22. Retired U.S. Army Brigadier General John Thompson designed a small automatic rifle "that will fire 50 to 100 rounds, so light that [a soldier] can drag it with him as he crawls on his belly from trench to trench, and wipe out a whole company single-handed." Matthew Moss, *The Tale of the Tommy Gun*, POPULAR MECHANICS (Feb. 27, 2017), https://perma.cc/2D75-DAXQ.

23. *See* SUPICA, *supra* note 15, at 25–30.

24. *Prohibition-Era Gang Violence Spurred Congress to Pass First Gun Law*, NAT'L PUB. RADIO (June 30, 2016, 4:25 PM), https://perma.cc/S9S6-7HQC.

25. National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (codified at 26 U.S.C. §§ 5801–5872 (2012)); *see* Rostron, *supra* note 9, at 1428.

26. Rostron, *supra* note 9, at 1430–34. In addition to automatic firearms, the NFA restrictions apply to silencers, destructive devices such as bombs and grenades, and certain types of weapons such as rifles and shotguns with short barrels. *See* 26 U.S.C. § 5845(a)–(f).

27. Rostron, *supra* note 9, at 1430.

28. *Id.* at 1432.

29. *See* Firearm Owners' Protection Act, Pub. L. No. 99-308, sec. 102, § 9, 100 Stat. 449, 452–53 (1986) (codified at 18 U.S.C. § 922(o) (2012)).

or after that date can be legally acquired only by the military and law enforcement agencies.[30]

As a result of the 1986 law, there are a limited number of automatic firearms that can be lawfully possessed by civilians in the United States, and that number does not increase over time. A recent release of data by the ATF indicates that there are about 176,000 guns in the pool of registered "pre 86" automatic weapons.[31] Given the limited number available, these firearms have become relatively expensive and much sought after by gun enthusiasts and collectors.[32]

2. *Semi-Automatic Firearms*

While automatic weapons are relatively rare, semi-automatic firearms are very common.[33] Semi-automatic weapons are self-loading, so they automatically load themselves with another round of ammunition after each shot is fired.[34] But, unlike an automatic weapon that can fire multiple rounds with one trigger pull, a semi-automatic weapon fires only one bullet "each time the shooter pulls the trigger."[35] Millions of new semi-automatic pistols and rifles are sold in the United States every year,[36] and they are not subject to the special legal restrictions that apply to automatic weapons under the NFA.[37]

B. *Assault Weapons*

The controversy over "assault weapons" essentially arises because gun manufacturers make firearms for the civilian market that imitate military

30. *See* Rostron, *supra* note 9, at 1434.

31. Letter from Stephanie M. Boucher, Disclosure Div. Chief, Bureau of Alcohol, Tobacco, Firearms & Explosives, to Jeffrey E. Folloder, Exec. Dir., Nat'l Firearms Act Trade & Collectors Ass'n (Feb. 24, 2016), https://perma.cc/8RGC-KVTF.

32. Philip Wegmann, Opinion, *It's Still Legal to Own a Machine Gun (It's Also Extremely Difficult and Especially Expensive)*, WASH. EXAMINER (Oct. 2, 2017, 3:53 PM), https://perma.cc/2UWH-9XLP.

33. *Semi-Automatic Firearms and the "Assault Weapon" Issue Overview*, NAT'L RIFLE ASS'N-INST. FOR LEGISLATIVE ACTION (Feb. 15, 2013), https://perma.cc/KMH9-W5XR ("Semi-automatics account for about 20 percent of the 300 million privately-owned firearms in the United States and the percentage is quickly rising, because semi-automatics now account for about 50 percent of all new firearms bought annually.").

34. *See* Rostron, *supra* note 9, at 1420.

35. *Id.*

36. *Semi-Automatic Firearms and the "Assault Weapon" Issue Overview*, *supra* note 33 ("Americans bought about five million new semi-automatics in 2012.").

37. *See* Rostron, *supra* note 9, at 1430.

weaponry. Assault weapons are firearms, principally rifles, that are semi-automatic versions of the automatic weapons used by military forces.[38]

The use of the term "assault" in connection with these weapons seems to trace back to the Sturmgewehr 44, a rifle developed by Germany during World War II.[39] The Sturmgewehr, translated as "storm rifle" or "assault rifle," could be set to fire in semi-automatic or fully automatic mode.[40] It combined the best features of an infantry rifle (which has a long range and high accuracy) and a submachine gun (which is compact, lightweight, and fires a relatively low-powered cartridge, so it is easier to control during automatic fire).[41]

After World War II, other nations developed similar weapons for their militaries. The Soviet Union produced the AK-47 rifle, and the United States adopted the M-16 rifle.[42] Both proved to be effective for military use and became the basic weapons of modern combat.[43] Manufacturers eventually began to produce and market versions of these military weapons that could fire only semi-automatically.[44] These firearms, such as the AR-15 rifle, which is a semi-automatic version of the M-16, became popular for uses beyond military contexts.[45] The semi-automatic civilian versions of military rifles are what has become known as assault weapons.[46]

II. LEGISLATION

Over the past several decades, laws that ban assault weapons have been enacted at the federal level and in several states.[47] The definition of

38. H.R. REP. NO. 103-489, at 17 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 1820, 1825 (explaining that an ATF working group during the George H.W. Bush administration chose the term "assault weapons" to refer to semi-automatic versions of fully automatic military assault rifles).

39. *See* Aaron Smith, *The Nazis' Assault Rifle Now Made in America*, CNNMONEY (June 29, 2016, 11:57 AM), https://perma.cc/F9RS-2GRV.

40. *Id.*

41. *Id.*; SUPICA, *supra* note 15, at 26.

42. SUPICA, *supra* note 15, at 28.

43. *Id.* at 30.

44. *Id.*

45. *Id.*

46. *See supra* note 38.

47. *Semi-Automatic Firearms and the "Assault Weapon" Issue Overview*, *supra* note 33; *e.g.*, Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, 108 Stat. 1996 (codified in scattered sections of 18 U.S.C.) (repealed 2004); CAL. PENAL CODE §§ 30500–31115 (West 2012); CONN. GEN. STAT. ANN. §§ 53-202a, -202b (West 2012); D.C. CODE §§ 7-2501.01(3)(A), -2502.02(a)(6) (2001 & Supp. 2017); HAW. REV. STAT. §§ 134-1 to -4(e) (2011); MD. CODE ANN., CRIM. LAW §§ 4-301 to -304, -306

an assault weapon has varied under these laws, but they generally employ the same basic two-part approach to identifying the firearms to which they apply. The laws list certain specific firearms, by brand and model name, and then provide a test, based on a weapon's parts or features, for determining which other firearms will also be considered assault weapons.[48] This approach, using a specific list and a features test, strikes a balance between clarity and flexibility. The list provides some degree of certainty about which firearms are covered, while the features test enables the law to be applied to new models introduced after the law's enactment and prevents the statute from being evaded by merely giving a new name to one of the listed weapons.

California pioneered this approach. A shooting at an elementary school in 1989 prompted it to become the first state to enact an assault weapon ban.[49] A young drifter, wearing military combat fatigues and a flak jacket, used a semi-automatic AK-47 type rifle to fire more than 100 rounds at children on a playground.[50] Five children died, and thirty others were wounded.[51] Public officials and law enforcement leaders throughout the state called for a ban on military-style firearms.[52] Within a few months, California's legislature passed the Roberti-Roos Assault Weapons Control Act.[53] The law applied to a list of weapons identified by name, including all rifles in the AK and AR-15 series.[54] In addition, it covered other firearms with certain specified features. For example, it covered any semi-automatic centerfire rifle with a detachable ammunition magazine and any one of six other features: (1) a pistol grip protruding conspicuously beneath the action of the weapon, (2) a thumbhole stock, (3) a folding or telescoping stock, (4) a grenade or flare launcher, (5) a flash suppressor, or (6) a forward pistol grip.[55] The law prohibited the sale of these weapons in California,[56] and it also prohibited possession of them.[57] It did, however,

(LexisNexis 2012 & Supp. 2017); MASS. GEN. LAWS ch. 140, §§ 121, 131(m) (2014); N.J. STAT. ANN. §§ 2C:39-1(w), :39-5(f) (West 2016); N.Y. PENAL LAW §§ 265.00(22), .02(7), .10 (McKinney 2017).

48. *See infra* notes 49–52, 61–64 and accompanying text.

49. Jacobs, *supra* note 5, at 687–88.

50. *Stockton's Open Wounds*, NEWSDAY, Mar. 5, 1989, at 15.

51. *Id.*

52. *See* Carl Ingram, *Normal Political Patterns Melt in Heat of Gun Control Conflict*, L.A. TIMES, Mar. 27, 1989, at 3.

53. Roberti-Roos Assault Weapons Control Act of 1989, 1989 Cal. Stat. 64 (codified at CAL. PENAL CODE §§ 30500–31115 (West 2012)).

54. The current version of the list is at CAL. PENAL CODE § 30510.

55. *Id.* § 30515.

56. *Id.* § 30600.

57. *Id.* § 30605.

include a "grandfathering" exception that allowed those already possessing assault weapons to keep them, provided they complied with registration requirements.[58] New Jersey enacted similar legislation in 1990, and Connecticut followed suit in 1993.[59]

Similar legislation soon followed at the national level.[60] The federal assault weapon ban, enacted in 1994, was bitterly controversial.[61] Even with Democrats holding majorities in both houses of Congress, President Bill Clinton had to press hard to pull together the votes needed to pass it. He put the provision in a major crime bill that included measures favored by many conservatives, such as expanding the federal death penalty, hiring more police officers, and building more prisons.[62] At every event relating to the bill, Clinton surrounded himself with dozens of police officers.[63] Portraying the assault weapon ban as a way to protect police endangered by too much firepower in criminal hands, Clinton managed to eke out enough votes to pass it.[64]

The law covered a list of weapons identified by name, including AK or Kalashnikov type rifles and the Colt AR-15.[65] In addition to the firearms on that list, it also covered firearms deemed to be assault weapons based on their features.[66] For example, a semi-automatic rifle was covered if it had the "ability to accept a detachable" ammunition magazine and possessed any two of the following five features: "(i) a folding or telescoping stock; (ii) a pistol grip that protrudes conspicuously beneath the action of the

58. *Id.* §§ 30900–30965.

59. *Semi-Automatic Firearms and the "Assault Weapon" Issue Overview*, *supra* note 33. For example, the New Jersey statute covers a list of several dozen firearms identified by name, plus any other firearm "substantially identical" to any of the listed firearms. N.J. STAT. ANN. §§ 2C:39-1(w)(1)–(2) (West 2016). It also covers semi-automatic shotguns that have a pistol grip, a folding stock, or a magazine capacity of more than six rounds. *Id.* § 2C:39-1(w)(3).

60. Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, 108 Stat. 1996 (codified in scattered sections of 18 U.S.C.) (repealed 2004).

61. *Id.* For a sense of the bitter division over the issue, see Ronald Brownstein, *No Cease-Fire in Fight over Gun Ban: Narrow House Victory Not End as NRA Promises Retaliation*, CHI. SUN-TIMES, May 8, 1994, at 25. President Clinton's push for the assault weapon ban put him at odds with congressional leaders even within his own party. *See* Russell Riley, *Bill Clinton's Costly Assault Weapons Ban*, ATLANTIC (June 25, 2016), https://perma.cc/2YAG-X75F.

62. *See* David Corn, *What the Fight over Clinton's 1994 Assault Weapons Ban Can Teach Obama*, MOTHER JONES (Dec. 21, 2012, 11:01 AM), https://perma.cc/LFJ3-54KU.

63. *Id.*

64. *Id.*

65. Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. § 921(a)(30)(A) (2003) (repealed 2004).

66. *Id.* § 921(a)(30)(B).

weapon; (iii) a bayonet mount; (iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; [or] (v) a grenade launcher."[67] The federal statute, applying only to firearms with two or more of the specified features, thus did not go as far as California's stricter one-feature test. The federal law also contained a list of approximately 650 firearms that would be exempt from the ban, even if they otherwise fell within the law's definition of an assault weapon.[68] The exemption list comprised guns that were primarily used for hunting, target practice, and shooting sports.[69]

While the federal law prohibited the manufacture and sale of the banned weapons, it contained a grandfather clause protecting weapons already sold and lawfully possessed before the date of the statute's enactment.[70] As a result, sales of assault weapons surged in the months before the bill passed, as gun owners stocked up on firearms that would no longer be available after implementation of the ban.[71]

The effect of the federal assault weapon ban was limited in another important respect. As a compromise to help ensure that it would pass, the measure came with an expiration date.[72] A sunset clause in the bill provided that the assault weapon ban would remain in effect for only ten years unless Congress opted to renew it.[73] As the expiration of the ban approached in 2004, President George W. Bush declared that he would sign a renewal bill, but it was an empty gesture because it was clear that Congress would not vote to renew the ban.[74] In September 2004, the ten-year clock ran out, and the federal ban evaporated.[75]

Violent crime in the United States decreased significantly while the federal assault weapon ban was in effect, but analysts reached different conclusions about whether the law contributed to that decrease.[76] Even the

67. *Id.*

68. *Id.* §§ 922(v)(2)–(3); *id.* app. a; *see also* VIVIAN S. CHU, CONG. RESEARCH SERV., R42957, FEDERAL ASSAULT WEAPONS BAN: LEGAL ISSUES 5 (2013).

69. CHU, *supra* note 68.

70. 18 U.S.C. § 922(v)(2).

71. Corn, *supra* note 62.

72. *See* 18 U.S.C. § 921.

73. *Id.*

74. *See* Wayne Slater, *Kerry Lays into Bush as Assault-Weapons Ban Expires*, DALL. MORNING NEWS, Sept. 14, 2004, at 7A (describing accusations that President George W. Bush had a secret deal with the NRA to announce support for renewal of the assault weapon ban but not urge Congress to act).

75. Rostron, *supra* note 9, at 1435.

76. *Compare Ban on Assault Weapons Didn't Reduce Violence*, WASH. TIMES (Aug. 16, 2004), https://perma.cc/J7QP-TG69 (claiming National Institute of Justice study found that assault weapons are rarely used in crimes and the federal assault weapon ban had no

law's supporters acknowledged that it was an imperfect measure,[77] particularly because of what some dubbed "the 'copycat' problem."[78] Manufacturers were able to evade the ban by renaming firearms and making minor modifications to their designs, such as removing a bayonet mount, that put them outside the law's definition of an assault weapon.[79] For example, one manufacturer began selling an AR-15 type rifle that was modified slightly to avoid the ban and then renamed it the PCR, short for "Politically Correct Rifle."[80]

Since the demise of the federal assault weapon ban in 2004, pushes to enact a new ban have been made in Congress from time to time, but each has fallen short.[81] For example, in April 2013, a bill that would have created a new federal assault weapon ban was defeated in the United States Senate by a vote of 40 to 60.[82] In the absence of federal action on the issue, states maintain the option to implement their own policies. Seven states (California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, and New York) currently have assault weapon bans in effect.[83]

III. CASES

The debate over assault weapon bans has been waged in courts as well as in legislative arenas. They have been challenged on an array of constitutional grounds, and for the most part they have withstood these legal attacks.

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discernible impact on rates of gun violence), *with* BRADY CTR. TO PREVENT GUN VIOLENCE, ON TARGET: THE IMPACT OF THE 1994 FEDERAL ASSAULT WEAPON ACT 2 (2004), https://perma.cc/8PG2-B2MZ (claiming that the federal assault weapon ban significantly reduced the number of assault weapons used in crimes).

77. Corn, *supra* note 62 (quoting a former Department of Justice official from the Clinton administration as saying, "It was better to get what we got than nothing").

78. BRADY CTR. TO PREVENT GUN VIOLENCE, *supra* note 76, at 4–5.

79. *Id.*

80. *Id.* at 5.

81. Bills that would reinstitute a federal assault weapon ban have been introduced repeatedly. *E.g.*, Assault Weapons Ban of 2017, S. 2095, 115th Cong. (2017); Assault Weapons Ban of 2015, H.R. 4269, 114th Cong. (2015); Assault Weapons Ban of 2013, S. 150, 113th Cong. (2013); Assault Weapons Ban and Law Enforcement Protection Act of 2007, H.R. 1022, 110th Cong. (2007); Assault Weapons Ban and Law Enforcement Protection Act of 2005, H.R. 1312, 109th Cong. (2005).

82. Jonathan Weisman, *Gun Control Drive Blocked in Senate; Obama, in Defeat, Sees "Shameful Day,"* N.Y. TIMES, Apr. 18, 2013, at A1.

83. *Supreme Court Leaves State Assault Weapons Bans in Place*, BALT. SUN (June 20, 2016, 4:35 PM), https://perma.cc/U7JQ-HPRM.

A. Before Heller

Prior to the Supreme Court's decision in *District of Columbia v. Heller* in 2008,[84] the Second Amendment right to keep and bear arms did not seem to be a potent basis for challenging assault weapon laws.[85] Lower courts consistently interpreted the Second Amendment as narrowly applying only to the organized, public activities of state militia forces like the National Guard, and not to individual, private uses of guns.[86]

As a result, critics of assault weapon bans challenged them on a variety of other legal grounds. For example, after California became the first state to ban assault weapons, gun rights advocates claimed the statute violated separation of powers and due process rights.[87] Challenges brought against the federal assault weapon ban included claims that it was unconstitutionally vague,[88] it was an impermissible Bill of Attainder,[89] and it exceeded Congress's authority under the Commerce Clause.[90]

The core argument, however, was that the assault weapon bans violated equal protection rights by arbitrarily and unjustifiably prohibiting certain firearms that are ultimately no more dangerous than many other firearms that were not banned.[91] In short, the challengers claimed that it was irrational to ban a firearm merely for having a military look or style.

Courts generally rejected these challenges; their reasoning essentially boiled down to judicial deference to legislative decisions.[92] The Supreme

84. District of Columbia v. Heller, 554 U.S. 570 (2008).

85. U.S. CONST. amend. II.

86. *E.g.*, Silveira v. Lockyer, 312 F.3d 1052, 1075 (9th Cir. 2002); Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999); United States v. Wright, 117 F.3d 1265, 1273–74 (11th Cir. 1997); United States v. Rybar, 103 F.3d 273, 286 (3d Cir. 1996); Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995); United States v. Hale, 978 F.2d 1016, 1019–20 (8th Cir. 1992); United States v. Toner, 728 F.2d 115, 128 (2d Cir. 1984); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976); Cases v. United States, 131 F.2d 916, 921–23 (1st Cir. 1942). The lone exception, prior to *Heller*, was *United States v. Emerson*, 270 F.3d 203, 264–65 (5th Cir. 2001), which found that the Second Amendment protects an individual's right to keep and bear arms for purposes unrelated to militia service.

87. *See* Kasler v. Lockyer, 2 P.3d 581, 584 (Cal. 2000).

88. *E.g.*, United States v. Starr, 945 F. Supp. 257, 259 (M.D. Ga. 1996), *aff'd sub nom.* United States v. McCranie, 144 F.3d 56, 56 (11th Cir. 1998) (unpublished table decision).

89. *E.g.*, Navegar, Inc. v. United States, 192 F.3d 1050, 1066–68 (D.C. Cir. 1999).

90. *E.g.*, *id.* at 1052; CHU, *supra* note 68, at 7–9.

91. *Kasler*, 2 P.3d at 584–92; CHU, *supra* note 68, at 9–11.

92. While the federal and state bans were upheld, local ordinances adopted by an Ohio city were struck down because they defined assault weapons in ways that were too vague. *See* Peoples Rights Org. v. City of Columbus, 152 F.3d 522, 538 (6th Cir. 1998); Springfield Armory, Inc. v. City of Columbus, 29 F.3d 250, 254 (6th Cir. 1994).

Court of California, for example, acknowledged that the definition of assault weapons under the state's law might be roughly and imperfectly drawn, but the court was not inclined to override the legislature's choices about how to "make California a safer place, even if only marginally and incrementally."[93] Likewise, courts found that the federal assault weapon ban rationally served legitimate government interests.[94] Congress tried to draw a line between firearms relatively more likely to be used for criminal purposes while exempting those relatively less likely to be used that way.[95] "[W]hile perhaps not flawless in its execution," the law was not utterly irrational.[96]

B. After Heller

In 2008, the legal landscape changed significantly with the Supreme Court's decision in *District of Columbia v. Heller*.[97] The Supreme Court held that the Second Amendment protects a broad range of individual, private uses of guns, not just the activities of organized militia forces.[98] The decision led to waves of constitutional challenges to a wide range of gun laws, including assault weapon bans.[99]

In the decade since *Heller*, federal appellate courts have decided four cases about the Second Amendment and assault weapons. These cases will be discussed in detail in the remainder of this Part. All four cases have reached the same conclusion: assault weapon bans are constitutional. The D.C. Circuit upheld the District of Columbia's ban in 2011,[100] the Second Circuit upheld New York and Connecticut laws in 2015,[101] the Seventh Circuit upheld a local ordinance (enacted by the City of Highland Park, Illinois) in 2015,[102] and the Fourth Circuit upheld Maryland's ban in 2017.[103] The results have been unanimously in one direction, and the courts' reasoning has been fairly consistent across all of the cases, with one significant exception. While reaching the same result as the other courts,

93. *Kasler*, 2 P.3d at 592.

94. Olympic Arms v. Buckles, 301 F.3d 384, 389–90 (6th Cir. 2002).

95. *Id.*

96. *Id.* at 390.

97. District of Columbia v. Heller, 554 U.S. 570 (2008).

98. *Id.* at 577–625.

99. *See* Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 725–56 (2012) (discussing the various litigation that followed the *Heller* decision).

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

101. N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242 (2d Cir. 2015).

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

103. Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017).

the Fourth Circuit was the lone court to decide that the Second Amendment does not even apply to assault weapons.[104]

1. The Scope of the Right to Keep and Bear Arms

At the outset of their analysis, courts have struggled with a threshold question of whether assault weapons are even within the scope of the Second Amendment's protection. The Supreme Court's decision in *Heller* construed the Second Amendment as applying only to weapons "typically possessed by law-abiding citizens for lawful purposes."[105] In other words, a firearm must be "in common use" among civilians for lawful purposes to receive any constitutional protection.[106] The Supreme Court added that this limitation is consistent with the historical tradition of prohibiting possession of "dangerous and unusual weapons."[107]

The Supreme Court did not hesitate to find that handguns are a type of weapon commonly used by American civilians for lawful purposes, as they "are the most popular weapon chosen by Americans for self-defense in the home."[108] In contrast, the Court implied that a military weapon like an M-16 rifle would not qualify for Second Amendment protection.[109] The Court's decision suggested it would be "startling" to think that the federal laws imposing strict regulations on machine guns might violate the Second Amendment.[110] At oral argument, Justice Scalia was even more explicit in stating his belief that even though there are more than 100,000 automatic weapons lawfully possessed by American civilians, these weapons are nevertheless "quite unusual" and therefore not protected by the Second Amendment.[111]

Putting these limits on the types of weapons covered by the Second Amendment was a clever way for the Supreme Court to avoid opening the door to claims that people have a constitutional right to military weaponry like Stinger missiles and bazookas. It enabled the Supreme Court to say that the Second Amendment broadly protects private possession and use of guns "while avoiding the scary and politically unpalatable prospect that it

104. *See infra* notes 120–27 and accompanying text.
105. District of Columbia v. Heller, 554 U.S. 570, 625 (2008).
106. *Id.* at 624 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).
107. *Id.* at 627 (citations omitted).
108. *Id.* at 629.
109. *Id.* at 627.
110. *Id.* at 624.
111. Transcript of Oral Argument at 22, *Heller*, 554 U.S. 570 (No. 07-290).

gives private individuals a right to arm themselves" with the most potent sorts of military weaponry.[112]

At the same time, limiting the Second Amendment's reach in these ways also raised a host of difficult questions that the Supreme Court did not answer.[113] In particular, the Supreme Court gave no clear guidelines or standards for determining what it means for a weapon to be in common use.[114] No one knows how many guns, or how many people using the guns, is enough to qualify as common or typical. For example, if a particular type of gun is lawfully used by one million Americans, is that sufficiently common because one million is a large number, or is it insufficient because one million is a very small fraction of the total number of guns and people in America?[115]

On top of that uncertainty about what they are supposed to be deciding, courts lack clear information about how many people have assault weapons. The challengers in several of the assault weapon ban cases relied on data about the number of AR-15 rifles sold each year since 1986.[116] For a thorough analysis of the lawful use of assault weapons, one obviously would need information about more than just recent sales of that one type of rifle. In a later case, the challengers attempted to present a more comprehensive count of assault weapons, estimating that there were at least eight million AR-15 and AK-47 type semi-automatic rifles in private hands nationwide by 2013.[117]

Even with more precise data about the number of assault weapons and the total number of firearms in America, courts would face a difficult task in deciding whether assault weapon use is sufficiently common to merit constitutional protection. The Supreme Court thought handguns are common enough to be protected by the Second Amendment but automatic

112. Allen Rostron, *Protecting Gun Rights and Improving Gun Control After* District of Columbia v. Heller, 13 LEWIS & CLARK L. REV. 383, 390 (2009).

113. *See* Kolbe v. Hogan, 849 F.3d 114, 135–36 (4th Cir. 2017) (listing questions about the scope of the Second Amendment raised by *Heller*).

114. Friedman v. City of Highland Park, 784 F.3d 406, 409 (7th Cir. 2015) (stating that the Court did not identify "what line separates 'common' from 'uncommon' ownership").

115. At the oral argument in *Heller*, Justice Scalia suggested that the relevant measure might be the percentage of Americans who use the gun, as he pointed out that 100,000 machine guns was a small number relative to the population of the United States. Transcript of Oral Argument, *supra* note 111.

116. *See* N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 255 (2d Cir. 2015); *see also* Heller v. District of Columbia, 670 F.3d 1244, 1261 (D.C. Cir. 2011).

117. *See Kolbe*, 849 F.3d at 128; Brief for Plaintiffs-Appellants at 8, *Kolbe*, 849 F.3d 114 (No. 14-1945); *see also Friedman*, 784 F.3d at 409 (citing evidence in the record showing "that perhaps 9% of the nation's firearms owners have assault weapons").

weapons are not.[118] Those guideposts leave an enormous amount of gray area. Semi-automatic assault weapons fall somewhere in that debatable zone, as they are certainly less common than handguns but more common than machine guns. Most courts have therefore essentially given challengers the benefit of the doubt and assumed that assault weapons are sufficiently common to merit Second Amendment protection.[119]

As noted above, the Fourth Circuit boldly departed from that consensus and held that the Second Amendment does not apply to assault weapons.[120] It based that ruling on a bit of text in the *Heller* majority opinion that had not previously received much attention.[121] Justice Scalia remarked in his opinion that a government could ban "M-16 rifles and the like" while explaining that the Second Amendment does not guarantee a right to possess military weapons.[122] M-16s are automatic weapons, so one might interpret this narrowly to mean the government can ban M-16 rifles and other machine guns.

Instead, the Fourth Circuit concluded that "and the like" simply refers to firearms that have qualities and characteristics similar to those of M-16 rifles and other military weapons.[123] For example, an AR-15 rifle is obviously very much like an M-16 rifle in all ways except one—the AR-15 is the semi-automatic version of the automatic M-16. In other respects, the weapons essentially share the same design, appearance, and features.[124] Semi-automatic fire versus automatic fire is, of course, a substantial distinction, but the Fourth Circuit was not convinced that it should prevent courts from finding that one weapon is "like" the other.[125] A skilled shooter, the court found, can achieve rates of fire with a semi-automatic firearm that nearly match those of an automatic weapon.[126] In the Fourth Circuit's view, the Supreme Court in *Heller* was not trying to draw a bright line between semi-automatic and automatic weapons; instead, the Court made clear that military weaponry is not protected by the Second

118. *See supra* notes 108–11 and accompanying text.

119. *See N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 255; *Heller*, 670 F.3d at 1261; *cf. Friedman*, 784 F.3d at 408–09 (suggesting that Second Amendment analysis should not turn on how common a weapon is at the time of the litigation).

120. *Kolbe*, 849 F.3d at 137.

121. *Id.* at 136–37.

122. District of Columbia v. Heller, 554 U.S. 570, 627 (2007).

123. *Kolbe*, 849 F.3d at 136–37.

124. *Id.* at 136.

125. *Id.*

126. *Id.*

Amendment and can be banned regardless of whether the mode of fire is semi-automatic or automatic.[127]

The Fourth Circuit thus concluded that the Second Amendment does not apply to assault weapons, and the court characterized this as an easy call based on *Heller*'s plain language.[128] While it is a clever and intriguing argument, it is by no means the only plausible reading of *Heller*. Given that Justice Scalia clearly wanted to head off any claims that his opinion gives people a constitutional right to use machine guns,[129] his opinion's reference to "M-16 rifles and the like"[130] may have been just an imprecise way of talking about automatic weapons. But the uncertainty just underscores once again the extent to which *Heller* left a muddle of ambiguity and important questions unresolved.

2. *Intermediate Scrutiny*

Moving beyond the threshold question of what type of firearms the Second Amendment covers, the ultimate question in every case is how strong the right to keep and bear arms should be. Even the Fourth Circuit, after making its categorical assertion that the Second Amendment does not apply to assault weapons, went on to analyze what should happen assuming that assault weapons are not entirely outside the scope of the right.[131] In this Section, I will look at the intermediate scrutiny standard that the courts have selected and examine how they have applied it to assault weapon bans. The courts' decisions have essentially boiled down to two key propositions: judges should be deferential to legislative determinations about guns, and no great injustice occurs if people cannot have assault weapons because they can simply use other guns.

a. Selecting a Standard

In *Heller*, the Supreme Court declined to specify what level of scrutiny should apply in Second Amendment cases, saying only that it must be something more demanding than mere rational basis scrutiny.[132] Since

127. *Id.* at 136–37.

128. *Id.* at 136 (describing the issue as a "relatively easy inquiry" with an answer that is "plainly" in the government's favor).

129. *See supra* notes 105, 114 and accompanying text.

130. District of Columbia v. Heller, 554 U.S. 570, 627 (2007).

131. *See Kolbe*, 849 F.3d at 138.

132. *Heller*, 554 U.S. at 628–29. "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Id.* at 628 n.27.

Heller, the lower courts thus have wrestled with the issue of what level of scrutiny to apply, and most have opted for intermediate scrutiny.[133] The assault weapon cases are no exception, with intermediate scrutiny being used by the federal appellate courts in every one of these cases decided so far.[134]

Intermediate scrutiny generally requires courts to decide if the government's action is "substantially related to an important governmental objective"[135] or "reasonably adapted to a substantial governmental interest."[136] Determining that intermediate scrutiny should apply leaves courts a tremendous amount of discretion and flexibility in deciding cases because intermediate scrutiny can mean many different things.[137] It is more of an array or spectrum of possible approaches than a single test or standard.[138] Applying intermediate scrutiny in the assault weapon cases, a court might require substantial, detailed proof demonstrating that an assault weapon statute will reduce gun violence. Or a court instead might merely require the government to articulate a plausible theory as to how an assault weapon ban might have beneficial effects.

If courts applied a highly demanding form of intermediate scrutiny, requiring concrete, detailed proof that a gun law will have a specified effect, then virtually every gun law might fail the test. It is difficult to conclusively prove what effect any legal measure will have on a phenomenon as complex as crime. This is true for pro-gun legislation as well as gun control measures. For example, despite an enormous amount of study, no consensus exists on whether legislatures can reduce crime by

133. Allen Rostron, *The Continuing Battle over the Second Amendment*, 78 ALB. L. REV. 819, 824–25 (2014).

134. *Kolbe*, 849 F.3d at 138; N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 257–61 (2d Cir. 2015); Heller v. District of Columbia, 670 F.3d 1244, 1261–62 (D.C. Cir. 2011). In the Seventh Circuit case, *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015), Judge Easterbrook sidestepped the question of what level of scrutiny should apply, but he noted that other circuits have applied intermediate scrutiny to assault weapon bans. *Id.* The approach he used can fairly be described as an intermediate scrutiny approach. *See id.* If anything, it may be less demanding than the version of intermediate scrutiny applied by the other circuits. *Id.* at 410–11 (holding that gun laws should be upheld if they leave people with adequate means to exercise the right of self-defense); Rostron, *supra* note 99, at 744–47 (describing the exceptionally lenient version of intermediate scrutiny used by Judge Easterbrook in a prior Second Amendment case).

135. *Heller*, 670 F.3d at 1258 (quoting Clark v. Jeter, 486 U.S. 456, 461 (1988)).

136. *Kolbe*, 849 F.3d at 139 (quoting United States v. Masciandaro, 638 F.3d 548, 471 (4th Cir. 2011)).

137. Rostron, *supra* note 99, 746–47.

138. *Id.*

passing laws that make it easier for people to carry concealed guns.[139] And the same difficulty in reaching firm conclusions about complex, politically tinged issues can be found in a host of other settings, from disagreements about the likely economic effects of tax cuts[140] to uncertainties about whether climate change is increasing the frequency or intensity of hurricanes.[141] Complex problems rarely have incontrovertible solutions.

In the assault weapon cases, courts have avoided these difficulties by employing a relatively mild form of intermediate scrutiny. They emphasize that an assault weapon ban does not impose a substantial burden on anyone's rights because a person unable to have a banned assault weapon can simply use any one of the many types of firearms that are legal.[142] As the D.C. Circuit reasoned, this is akin to giving governments room to regulate speech in ways that impose modest burdens because they leave open ample alternative channels for communication.[143]

To some extent, this is a matter of gun rights advocates' own arguments coming back to haunt them. In *Heller*, the Supreme Court found that the District of Columbia's handgun ban violated the Second Amendment because it prohibited "an entire class of 'arms'" frequently used for lawful self-defense.[144] Gun rights advocates would like to say that assault weapon bans similarly outlaw a significant, popular category of

139. COMM. TO IMPROVE RESEARCH INFO. & DATA ON FIREARMS, NAT'L ACAD. OF SCIS., FIREARMS AND VIOLENCE: A CRITICAL REVIEW 2 (Charles F. Wellford et. al. eds., 2005) (finding "no credible evidence that the passage of right-to-carry laws decreases or increases violent crime" and concluding that "the data available on these questions are too weak to support unambiguous conclusions or strong policy statements").

140. *See, e.g.*, Patricia Cohen, *Who Would Win Under the Plan? Economists Face Off*, N.Y. TIMES, Dec. 2, 2017, at A11.

141. *See, e.g.*, *Global Warming and Hurricanes*, GEOPHYSICAL FLUID DYNAMICS LAB., (Jan. 24, 2018), https://perma.cc/YW36-GN37 (finding it is premature to conclude that global warming resulting from greenhouse gas emissions has "had a detectable impact on Atlantic hurricane or global tropical cyclone activity" (emphasis omitted)).

142. *See* Kolbe v. Hogan, 849 F.3d 114, 138 (4th Cir. 2017) (stating that the challenged law "bans only certain military-style weapons and detachable magazines, leaving citizens free to protect themselves with a plethora of other firearms and ammunition"); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 260 (2d Cir. 2015) ("[C]itizens may continue to arm themselves with non-semiautomatic weapons *or* with any semiautomatic gun that does not contain any of the enumerated military-style features."); Friedman v. City of Highland Park, 784 F.3d 406, 410–11 (7th Cir. 2015) ("If criminals can find substitutes for banned assault weapons, then so can law-abiding homeowners."); Heller v. District of Columbia, 670 F.3d 1244, 1262 (D.C. Cir. 2011) ("[T]he prohibition of semi-automatic rifles and large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves.").

143. *See Heller*, 670 F.3d at 1262.

144. District of Columbia v. Heller, 554 U.S. 570, 628 (2008).

firearms. But at the same time, gun rights advocates insist that "assault weapons" is actually not a real category or class of firearms at all, but just a term invented for political purposes to demonize an arbitrary set of firearms with certain superficial, aesthetic similarities.[145] They cannot have it both ways. If "assault weapons" is not a meaningful category of firearms, then obviously laws banning them do not deprive people of access to any meaningful category of firearms.

b. Application of the Standard

Turning to the application of the intermediate scrutiny standard, courts indicate that the government must show that the assault weapon bans have some substantial relationship to the goal of protecting police officers and the public from gun violence.[146] In each case, the courts have found evidence sufficient to satisfy this requirement.[147] In doing so, they have essentially accepted the government's evidence at face value. In other words, they treat the evidence as establishing what the evidence purports to show, and they have not seemed interested in trying to assess the strength, credibility, or persuasiveness of the evidence.

For example, several of the courts relied on an academic study, led by criminologist Christopher Koper, that examined the effects of the 1994 federal assault weapon ban.[148] The study is a detailed, careful, and impressive piece of work. Given its complexity and seemingly fair-minded approach, the study contains plenty of grist for arguments coming from both the gun rights and gun control perspectives. And indeed, fact checkers claim both sides of the gun debate have cherry-picked select portions of the study and used them out of context.[149]

In the assault weapon cases, courts have accurately cited the Koper study for several assertions that favor the governments' positions and support the courts' decisions to uphold the assault weapon laws.[150] For

145. *See supra* note 7 and accompanying text.

146. *Kolbe*, 849 F.3d at 139; *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 261; *Heller*, 670 F.3d at 1262.

147. *Kolbe*, 849 F.3d at 140–41; *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 262–63; *Friedman*, 784 F.3d at 412; *Heller*, 670 F.3d at 1262–63.

148. CHRISTOPHER S. KOPER ET AL., AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994–2003 (2004), *cited in N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 263 n.122, *Friedman*, 784 F.3d at 411, and *Heller*, 670 F.3d at 1263.

149. *See* Robert Farley, *Did the 1994 Assault Weapons Ban Work?*, FACTCHECK.ORG (Feb. 1, 2013), https://perma.cc/852W-8TYX.

150. *E.g.*, *Friedman*, 784 F.3d at 411 (citing Koper study as showing that assault weapon bans "reduce the share of gun crimes involving assault weapons"); *Heller*, 670 F.3d at 1263

instance, the study found that criminal use of assault weapons declined during the period when the federal assault weapon ban was in effect.[151] That is a helpful and significant fact. But the court opinions in the assault weapon cases do not mention other findings in the Koper study that are arguably equally important to a complete picture. In particular, the Koper study found that while the federal assault weapon ban led to a decrease in crimes with assault weapons, that benefit was offset by increased criminal use of non-banned firearms.[152] As a result, the study found that it could not "clearly credit the ban with any of the nation's recent drop in gun violence."[153] Koper believes that while there was little or no evidence that the federal ban caused a decrease in gun crime during the ten years it was in effect, the ban could have produced at least some small reduction in shootings if the ban had remained in effect for a longer period of time.[154] While assault weapon bans "would certainly not be a panacea for gun crime," Koper feels they "may help to prevent further spread of particularly dangerous weaponry and eventually bring small reductions in some of the most serious and costly gun crimes."[155] The courts upholding assault weapon bans against constitutional attacks therefore certainly are not wrong to cite Koper's study, but it is fair to say they have relied on it in ways that do not delve deeply into its complexity. The courts have not appreciated that the study could easily be spun to support either side of the gun policy debate.

Likewise, courts have relied on data indicating that assault weapons tend to be overrepresented among the firearms traced by law enforcement.[156] For example, assault weapons accounted for over eight percent of guns traced in 1993, even though assault weapons constitute only about one percent of all the firearms in the United States.[157] The Second Circuit relied on this fact as part of the evidence for its conclusion

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(citing Koper study as showing that criminal use of assault weapons decreased after the federal assault weapon ban was enacted).

151. KOPER, *supra* note 148, at 51, *cited in Heller*, 670 F.3d at 1263.

152. KOPER, *supra* note 148, at 96.

153. *Id.*

154. *See* Farley, *supra* note 149.

155. *Id.*

156. *E.g.*, N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 262 (2d Cir. 2015) (citing Brief for the State Defendants as Appellees and as Cross-Appellants at 49, *id.* (No. 14-0036(L)); *see* H.R. REP. NO. 103-489, at 13 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 1820, 1821; *see also* Allen Rostron, *Beyond Market Share Liability: A Theory of Proportional Share Liability for Nonfungible Products*, 52 UCLA L. REV. 151, 191 (2004) (explaining how firearm traces are conducted).

157. H.R. REP. NO. 103-489, at 13 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 1820, 1821.

that assault weapons "are disproportionately used in crime."[158] The disproportionate representation of assault weapons in the trace data is strong evidence that assault weapons are more likely to be associated with criminal activity than most other firearms.[159] But some researchers are very skeptical of the notion that trace data has any value in studying criminal use of guns.[160] One critic colorfully "compared analyzing trace data to practicing phrenology or examining the entrails of sacrificial animals to forecast the future."[161] Courts have wisely avoided being dragged into a swamp of technical arguments about the merits of trace data use, and instead they have simply acknowledged that the trace data provides evidence on which a government might reasonably choose to rely.

In applying their mild version of intermediate scrutiny, the courts have tended to say little about the particular military-style features, such as folding stocks and flash suppressors, listed in assault weapon legislation. They have asserted that the danger posed by some of the features, such as a firearm's compatibility with the use of a grenade launcher or silencer, are "manifest and incontrovertible."[162]

Other features, such as folding stocks, pistol grips, and barrel shrouds, are not dangerous in and of themselves, but courts suggest that their combined effect is to make assault weapons particularly well-suited for being used in a spray-firing mode.[163] In other words, they make it easier for the shooter to hold the gun at hip level and fire as quickly as possible in the general direction of the shooter's targets, rather than raising the gun to shoulder level and methodically taking more precise aim. That supports the view that the assault weapon laws are a plausible way to pursue the government's interest in reducing the dangers of gun violence, but it is not something that is conclusively proven or explored in great detail in the decisions.

In assessing the effects of various firearm features, the courts at times could be more careful about distinguishing the role of each particular feature. For example, the Second Circuit's decision asserted that features

158. *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 262.

159. *See* Rostron, *supra* note 156, at 190–96 (arguing that trace data should be used in tort cases as a way to estimate the relative likelihood of different types of guns being used in crimes).

160. *Id.* at 193–95.

161. *Id.* at 193 (citing David B. Kopel, *Clueless: The Misuse of BATF Firearms Tracing Data*, 1999 L. REV. MICH. ST. U. DET. C.L. 171, 185 (1999)).

162. *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 262.

163. *See e.g.*, Kolbe v. Hogan, 849 F.3d 114, 125 (4th Cir. 2017); Friedman v. City of Highland Park, 784 F.3d 406, 409 (7th Cir. 2015); Heller v. District of Columbia, 670 F.3d 1244, 1262–63 (D.C. Cir. 2011).

like flash suppressors, protruding grips, and barrel shrouds cause assault weapons to be more lethal, resulting in "more wounds, more serious, in more victims," per shooting incident.[164] The evidence underlying that assertion is a 1994 congressional report, which discussed the enhanced lethality of assault weapons equipped with large-capacity magazines.[165] The increased danger resulting from use of large-capacity magazines is obvious: a firearm with greater ammunition capacity can be used to shoot more bullets at more people. But that is true whether or not the firearm is an assault weapon and has features like a flash suppressor, a pistol grip, or a barrel shroud.

To be sure, a strong case can be made for banning assault weapons, but the issue is obviously complicated and highly debatable, with respectable arguments to be made on both sides. Faced with that situation, courts ruling on the validity of assault weapon legislation have assumed their job is simply to determine whether the government has a plausible theory and substantial evidence about how the legislation might have important positive effects, not to weigh the government's evidence against the challenger's evidence and decide which is stronger.

c. Judicial Restraint

One might say that the courts are setting a rather low bar for the government to overcome. The assault weapon bans will be upheld as long as governments have a plausible contention that the bans enhance public safety, even if the challengers present equal or even greater evidence to the contrary.

The courts' approach, however, has the admirable virtue of giving considerable deference to legislative decision-making. Every one of the decisions has emphasized this point, stressing that courts should exercise restraint and leave to legislators the task of assessing and weighing the complex, conflicting information about assault weapons and the hotly contested policy issues surrounding them.[166] The cautious form of

164. *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 262.

165. H.R. REP. NO. 103-489, at 19 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 1820, 1827.

166. *See N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 261, 263 (stating that the court must show substantial deference to the legislature's weighing of evidence and policy judgments about assault weapons); *Friedman*, 784 F.3d at 412 ("The best way to evaluate the relation among assault weapons, crime, and self-defense is through the political process and scholarly debate."); *Heller*, 670 F.3d at 1269 (Appendix: Regarding the Dissent) (stating that it is not the court's job to decide whether assault weapons should be banned and instead judges have the narrower task of merely determining whether the government has presented the sort of evidence sufficient to survive intermediate scrutiny).

intermediate scrutiny employed by the courts in the assault weapon cases ensures that legislatures maintain their proper central role in making policy with respect to firearms.

Judge J. Harvie Wilkinson's concurrence in the Fourth Circuit case made the case for judicial restraint in the most affecting terms:

> Disenfranchising the American people on this life and death subject would be the gravest and most serious of steps. It is their community, not ours. It is their safety, not ours. It is their lives, not ours. To say in the wake of so many mass shootings in so many localities across this country that the people themselves are now to be rendered newly powerless, that all they can do is stand by and watch as federal courts design their destiny—this would deliver a body blow to democracy as we have known it since the very founding of this nation.[167]

Judge Wilkinson astutely noted that *Heller* was "a cautiously written opinion," not meant to sweep away legislative authority over firearms, and "had it been written more ambitiously, it is not clear that it could have garnered the critical five votes."[168]

Indeed, the highly deferential approach taken in the assault weapon cases is arguably just what the Supreme Court prescribed in *Heller*. The Supreme Court majority in *Heller* went out of its way to emphasize that the Second Amendment does not provide an absolute right and that many types of firearm regulations are permissible.[169] Moreover, the majority's opinion in *Heller* emphatically warned against allowing Second Amendment analysis to turn into "a judge-empowering 'interest-balancing inquiry'" that requires courts to assess the policy merits of challenged legislation.[170] In other words, Justice Scalia did not want courts to wade into social science and public policy debates and make constitutional decisions based on whether they thought the expert witnesses, empirical studies, or other evidence presented by a government proved that a particular gun law was a good idea with a positive impact on public safety. In *Heller*, this meant striking down the District of Columbia's handgun ban because the ban significantly infringed on the right to use guns in defense against crime, and the ban could not be saved by the District's policy arguments about

167. *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring).

168. *Id.* at 150–51.

169. *See* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008) (clarifying that "nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms").

170. *Id.* at 634 (quoting *id.* at 689 (Breyer, J., dissenting)).

how the ban had vital positive effects.[171] The Supreme Court thus made clear that its task in Second Amendment cases is not to evaluate the public policy merits of gun laws.

The lower courts have done a similar maneuver in the assault weapon cases, but in the opposite direction. They have found that the bans do not significantly infringe on the right to keep and bear arms because people prohibited from having a banned assault weapon can simply use guns that are not banned.[172] They have upheld the bans, despite the challengers' policy arguments about how the bans are misguided and ineffectual, because those arguments should be directed at legislatures rather than courts.[173] The judges in these cases thus have heeded Justice Scalia's admonition to refrain from balancing interests and weighing public policy arguments, although perhaps not with results he would have applauded.

Judicial restraint is ultimately at the heart of the appellate court decisions about assault weapon bans. As Judge Easterbrook explained in the Seventh Circuit case, "The central role of representative democracy is no less part of the Constitution than is the Second Amendment: when there is no definitive constitutional rule, matters are left to the legislative process."[174] The courts have respected this principle by applying intermediate scrutiny to the assault weapon bans in a way that reserves to legislatures the task of making policy decisions about the wisdom and effectiveness of such laws.

IV. THE SIGNIFICANCE OF APPEARANCES

The debate over assault weapons will continue in the courts as well as in legislatures. The arguments often essentially boil down to a question of whether assault weapons are materially different and more dangerous than other semi-automatic firearms not classified as assault weapons. Gun enthusiasts insist that the differences between assault weapons and other firearms are purely cosmetic.[175] They contend that it is absurd to ban certain weapons merely because they have a military look that may be more frightening or intimidating to some people.[176] A gun's appearance,

171. *Id.* at 634–35.

172. *See supra* note 142 and accompanying text.

173. *See supra* note 166 and accompanying text.

174. Friedman v. City of Highland Park, 784 F.3d 406, 412 (7th Cir. 2015) (citing McCulloch v. Maryland, 17 U.S. 316, 407 (1819)).

175. *See supra* notes 5–7 and accompanying text.

176. *See supra* notes 5–7 and accompanying text.

according to gun proponents, is a superficial consideration that should have no impact on its legal status or treatment.[177]

Gun control advocates generally respond by arguing that their concerns about assault weapons are not based merely on appearances.[178] They contend that the features listed in statutory definitions of assault weapons are meaningful.[179] It is fairly obvious how the ability to mount a grenade launcher or bayonet on a firearm could have an effect that is not purely cosmetic. While pistol grips, forward grips, barrel shrouds, thumbhole stocks, and muzzle brakes do not change the basic functioning of a firearm, they can make it easier to maintain control of the weapon during sustained, rapid firing of a large number of rounds.[180] Folding or telescopic stocks can make a rifle shorter and easier to conceal.[181] Flash suppressors reduce the extent to which a shooter's vision will be impaired by muzzle flash at night but also can help conceal a shooter's location.[182] These features are not on military firearms just because they look nice. They can enhance the effectiveness of a firearm, whether it is being used by a soldier, a police officer, a criminal, or a law-abiding citizen.

Setting aside the debate about substantive differences between assault weapons and other firearms, there can be no doubt that appearances also play a significant role in the issue. For many people who have strong negative feelings about assault weapons, their attitudes are undoubtedly not based on extensive study of crime data or on impassive evaluations of the utility of thumbhole stocks or protruding grips. Many people have a strongly negative visceral reaction to firearms that look like weapons of war. The immediate, gut-level reaction to a glimpse of a more traditional rifle may be warm thoughts and images, such as a father and son hunting, that would be suitable for a Norman Rockwell painting. Assault weapons, on the other hand, may have much darker associations. Personally, the first thing that flashes into my mind when I see an AR-15 type rifle is the Vietnam War; Osama bin Laden is in the first image that comes to mind at the sight of an AK-47 type rifle. While this is the most anecdotal sort of

177. *See supra* notes 5–7 and accompanying text.

178. *See* SIEBEL, *supra* note 6 (noting that "[f]ar from being simply 'cosmetic,' these features all contribute to the unique function of any assault weapon to deliver extraordinary firepower").

179. *See* EDUC. FUND TO STOP GUN VIOLENCE, KILLING MACHINES: THE CASE FOR BANNING ASSAULT WEAPONS 8–10 (2003); Terence Cullen, *Assault Weapons Have Sinister Accessories Beyond Bump Stocks*, N.Y. DAILY NEWS (Oct. 5, 2017, 12:37 PM), https://perma.cc/CSG9-TX83.

180. *See* EDUC. FUND TO STOP GUN VIOLENCE, *supra* note 179.

181. *Id.* at 3.

182. *Id.* at 6.

evidence, it seems obvious that various types of firearms have different emotional connotations because of the way they look. If so, is the appearance of a firearm nevertheless a superficial consideration with no proper role in legislative or judicial decision-making about the regulation of firearms?

While regulating firearms based solely on how they look would be a highly questionable approach, the appearance of firearms is by no means an entirely irrelevant consideration. In short, looks matter. In a wide range of contexts, aesthetics affect what people feel, think, and do. For example, students learn more from educational materials that are aesthetically pleasing.[183] The visual appeal of a website is the top factor driving judgments of the website's credibility.[184] If a product has a visually appealing design, consumers will perceive it as being easier to use than a product that is substantively identical but does not look as nice.[185] Moreover, that perception will become reality because a product that people perceive to be more usable will in fact be a more useable product for them.[186] Airport screenings and other security measures that do not increase security in any real sense may nevertheless have beneficial effects if they reassure the public, minimize irrationally exaggerated fears, and even deter potential terrorists by creating a credible illusion of enhanced security.[187] If human beings were coldly rational calculators, superficial appearances might be dismissed as irrelevant. But cognition is invariably intertwined with emotion.

In the court opinions about assault weapon bans, only Judge Easterbrook touched on the emotional and psychological aspects of the issue in a significant way.[188] He noted that if assault weapon bans do nothing else, they may at least enhance public perceptions of safety.[189] People tend to overestimate the likelihood of horrific events like mass

183. *See, e.g.*, Jan L. Plass et al., *Emotional Design in Multimedia Learning: Effects of Shape and Color on Affect and Learning*, 29 LEARNING & INSTRUCTION 128, 128–40 (2014).

184. *See* B.J. Fogg et al., *How Do Users Evaluate the Credibility of Web Sites? A Study with over 2,500 Participants*, *in* PROCEEDINGS OF THE 2003 CONFERENCE ON DESIGNING FOR USER EXPERIENCES 1, 5 (2003).

185. *See* Masaaki Kurosu & Kaori Kashimura, *Apparent Usability vs. Inherent Usability: Experimental Analysis on the Determinants of the Apparent Usability*, *in* HUMAN FACTORS IN COMPUTING SYSTEMS: CHI '95 CONFERENCE COMPANION 292, 293 (Irvin R. Katz et al. eds., 1995).

186. *See id.*

187. *See* Peter Glaskowsky, *Bruce Schneier's New View on Security Theater*, CNET (Apr. 10, 2008, 8:45 AM), https://perma.cc/VK4N-SYP5; Bruce Schneier, *In Praise of Security Theater*, WIRED (Jan. 25, 2007, 12:00 PM), https://perma.cc/G29M-NLVR.

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

189. *Id.*

shootings.[190] Judge Easterbrook candidly observed that if an assault weapon ban "reduces the perceived risk from a mass shooting, and makes the public feel safer as a result, that's a substantial benefit."[191]

While the military look of assault weapons may alarm many people, the weapon's menacing appearance may appeal to the worst instincts and urges of some others. Nearly two decades ago, I was among the lawyers for the plaintiffs in the case of *Merrill v. Navegar, Inc.*[192] The case arose from a shooting rampage at an office in San Francisco.[193] The shooter had three firearms, two of which were TEC-9 semi-automatic pistols.[194] California's assault weapon law banned the sale of these weapons, but the shooter went to the neighboring state of Nevada to obtain them.[195] In seeking to establish that the manufacturer of these guns could be held liable for negligently marketing a weapon with special appeal to criminals, one of the major challenges was proving causation. Even assuming the manufacturer acted negligently, did it make a difference? In other words, the issue was whether the shooter would have used other firearms and the tragic results would have been the same even if TEC-9s and other assault weapons did not exist.

One of the plaintiffs' arguments on this point was based on the expert testimony of J. Reid Meloy, a forensic psychologist.[196] He characterized the shooter as the sort of purposeful and emotionless predator who would meticulously plan his attack and who would have violent fantasies fueled by the military style of his weaponry.[197] In Meloy's view, the TEC-9's fearsome appearance was not merely cosmetic or a coincidence.[198] The weapon's look, and the ways in which it was marketed to appeal to those fantasizing about extreme violence, may well have emboldened the shooter to undertake a mass shooting spree he otherwise might not have attempted.[199]

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190. *Id.*

191. *Id.*

192. Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146 (Cal. Ct. App. 1999), *rev'd*, 28 P.3d 116 (Cal. 2001).

193. *Id.* at 152.

194. *Id.* at 153–54. To be precise, they were TEC-DC9s, but TEC-DC9s and TEC-9s are materially indistinguishable, so I will refer to them here as TEC-9s because that is the more familiar term for them. *Id.* at 152 n.3.

195. *Id.* at 152–53.

196. *Id.* at 158.

197. *Id.*

198. *Id.*

199. *Id.*

This is the sort of argument that is difficult to prove conclusively for any one particular incident but that has some undeniable overall truth. There certainly have been horrific mass shootings that did not involve assault weapons.[200] But it is hard to believe it is a mere coincidence that AR-15 rifles and other military-style assault weapons have been used in so many of the worst mass shootings in recent years—the Newtown school shooting and Aurora movie theater shooting in 2012, the San Bernadino holiday party shooting in 2015, the Orlando nightclub shooting in 2016, the Las Vegas concert shooting and Sutherland Springs church shooting in 2017, and the Parkland high school shooting in 2018.[201] People who carry out these sorts of mass assaults seem inclined to use firearms patterned after military weapons, whether the reasons for doing so are psychological or practical.

The possibility that criminals may be influenced by the look of assault weapons has not been a major topic in legislative debates. Proponents of assault weapon bans understandably might worry about acknowledging that their concerns are based in any way on the appearance of the weapons rather than their functional capabilities. No one wants to be accused of ignorantly trying to ban a gun merely because it looks scary.

But legislators have not entirely ignored the issue of whether assault weapons may be problematic in part because of how they look. In 1994, when the federal assault weapon ban was working its way through Congress, a House subcommittee conducted a hearing and issued a report on the proposed legislation.[202] The report discussed the military features, such as folding stocks and pistol grips, that distinguish assault weapons from other firearms.[203] It noted that gun enthusiasts "often dismiss these combat-designed features as merely 'cosmetic.'"[204] But witnesses at the subcommittee hearing testified "that, even if these characteristics were merely 'cosmetic' in effect, it is precisely those cosmetics that contribute to their usefulness as tools of intimidation by criminals."[205]

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200. For example, the shooter who killed thirty-two people at Virginia Tech in 2007 used two conventional semi-automatic pistols, although he utilized some large-capacity ammunition magazines. *See* VIOLENCE POLICY CTR., BACKGROUNDER ON PISTOLS USED IN VIRGINIA TECH SHOOTING 2 (2007).

201. Christopher Ingraham, *Assault Rifles Are Becoming Mass Shooters' Weapon of Choice*, WASH. POST: WONKBLOG (June 12, 2016), https://perma.cc/4EUE-Q7PC; M.L. Nestel, *How Assault Rifles Have Played a Prominent Role in US Mass Shootings*, ABC NEWS (Nov. 7, 2017, 9:19 AM), https://perma.cc/5KN8-C3YM.

202. H.R. REP. NO. 103-489 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 1820.

203. *Id.* at 18, 1994 U.S.C.C.A.N. at 1826.

204. *Id.*

205. *Id.*

Henry Cisneros, the Secretary of the Department of Housing and Urban Development, testified that part of the problem with assault weapons is that "[t]hey are intimidating in appearance."[206] Senator Charles Schumer followed up on the point later, asking Cisneros if "the look" of the weapons is important for intimidation purposes.[207] Cisneros said "[a]bsolutely" and described how criminal gang members in Chicago housing projects rely on the look of their assault weapons to intimidate security guards and project residents.[208]

John Magaw, the director of the Bureau of Alcohol, Tobacco, and Firearms, echoed that idea, saying, "These weapons were intentionally designed to mirror military weapons and are used to intimidate their victims."[209]

Likewise, John Pitta, executive vice president of the Federal Law Enforcement Officers Association, testified that while the impact of assault weapons could be measured statistically in some respects, he was not familiar with any statistics that could quantify the extent to which assault weapons served the purpose of intimidation.[210]

Opponents of the federal assault weapon legislation effectively conceded that there was some merit to the notion that assault weapons are more intimidating than other firearms. One of the witnesses presented by the legislators opposed to the legislation was Phillip Murphy, from Tucson, Arizona, who testified about using his AR-15 rifle to guard his parents' home after a burglary, as he was afraid the perpetrators would return to rob the home again.[211] He explained why that firearm's appearance was an important consideration, saying that he "brought a weapon so intimidating that I might preclude any aggressive action taken against me by its appearance alone."[212] The menacing appearance of an assault weapon thus becomes a force for good when the gun is in the right hands.

This is a dilemma at the heart of any attempt to ban or restrict particular types of firearms. Guns can be used to do good things or bad

206. *Public Safety and Recreational Firearms Use Protection Act: Hearing on H.R. 3527 Before the Subcomm. on Crime & Criminal Justice of the H. Comm. on the Judiciary*, 103d Cong. 88 (1994) (statement of Henry Cisneros, Secretary, Department of Housing and Urban Development).

207. *Id.* at 107.

208. *Id.*

209. *Id.* at 97 (statement of John W. Magaw, Director, Bureau of Alcohol, Tobacco, and Firearms, U.S. Department of the Treasury).

210. *Id.* at 175 (statement of John Pitta, Executive Vice President, Federal Law Enforcement Officers Association).

211. *Id.* at 145–46 (statement of Phillip W. Murphy).

212. *Id.* at 146.

things, and anything that makes a gun a better instrument for criminal use may make it a better tool for some legitimate uses, as well. A gun that is well-designed for firing a large number of rounds as quickly as possible may be ideal for a disturbed individual who wants to kill strangers in a crowded public place, but one can at least imagine a scenario where the same qualities of the firearm will come in handy for a heroic person using the gun to defend against a large number of attackers. And just as there are many responsible, law-abiding people who like firearms that look like military weapons, there are people with evil intentions who are drawn to them, as well.

What to do about this is the difficult question. We entrust legislators with the task of determining, within constitutional boundaries, whether there are regulatory measures that can reduce the risks posed by firearms without unduly interfering with their legitimate uses. In doing that calculus, it is not absurd for legislators to take into account how the military appearance of firearms affects perceptions of them and for courts to do the same in deciding whether to uphold laws that restrict access to these weapons. Aesthetics are certainly not everything, but they also are not nothing.

CONCLUSION

Assault weapons certainly generate passionate feelings on all sides of the gun debate. I have found this in conversations with people who favor stricter gun control and people who strongly believe any restrictions on firearms are a serious threat to freedom. I have also found it in talking with people who generally favor gun rights but would make an exception for assault weapons.

Over the past twenty years, I've talked about gun issues at many different sorts of events. Often, I have been approached afterward by audience members who will graciously thank me for speaking but respectfully explain that they disagree with much of what I said. In about a dozen of these conversations, I have heard some version of this line: "I think people should have a right to have guns, but I don't know why anyone should be able to have an assault weapon."

My sense is that people say this sort of thing because they want to make it clear that they realize the issues are difficult and they do not approach them in an entirely one-sided way. They are being nice and seeking to show that we share some common ground even though they largely disagree with me. But what is striking to me is that when people who generally favor gun rights try to think of some point on which they might agree with a gun control speaker, assault weapons are the subject that

consistently comes to their minds. For example, I have never had anyone say, "I believe in gun rights, but I don't know why we can't expand background checks to cover private sales" or, "I believe in gun rights, but it seems reasonable to have a waiting period for firearm purchases." There is something about assault weapons and the feelings they engender that resonates even with some people who otherwise are not sympathetic to the gun control perspective.

Yet, even those who favor a ban or special restrictions on assault weapons must concede that drafting statutes that draw clear, durable lines between assault weapons and other firearms is a challenge. Rigid definitions can be easily circumvented by slight changes to gun designs, and more flexible definitions will be condemned as too vague and uncertain. It is also difficult to measure how effective these laws are. And surveys of public opinion indicate that support for these laws has declined substantially, even in an era when there have been so many high-profile shootings involving assault weapons.[213]

For all of these reasons, pushing for the enactment of laws banning assault weapons would not be my focus if I were crafting strategy for gun control efforts. I would focus on measures to expand and strengthen the background check system.[214] Trying to keep guns out of the hands of those with serious criminal records or significant mental problems should be an objective on which everyone can agree. Beyond that, putting restrictions on specific items that can be defined with relative ease, like large-capacity magazines[215] and bump stocks or other mechanisms that increase firing rates,[216] might be a better goal than seeking to ban a more amorphous category of items like assault weapons.

To the extent that assault weapon bans have already been enacted in some states and may be enacted by additional states in the future, there should be no room for doubt that these laws are constitutional. Courts have consistently and properly held that Second Amendment rights are not absolute and that substantial deference must be given to legislative

213. *See* Art Swift, *In U.S., Support for Assault Weapons Ban at Record Low*, GALLUP NEWS (Oct. 26, 2016), https://perma.cc/AF38-GHCH.

214. Allen Rostron, *Cease Fire: A "Win-Win" Strategy on Gun Policy for the Obama Administration*, 3 HARV. L. & POL'Y REV. 347, 360–61 (2009); Allen Rostron, *Incrementalism, Comprehensive Rationality, and the Future of Gun Control*, 67 MD. L. REV. 511, 565 (2008).

215. Richard Aborn, Opinion, *A Commonsense Gun Restriction*, NEWSDAY (June 1, 2014, 5:07 PM), https://perma.cc/GR8F-D9G9 (calling on Congress to reinstate the federal ban on large-capacity ammunition magazines).

216. Larry Buchanan et al., *What Is a Bump Stock and How Does It Work?*, N.Y. TIMES (Feb. 20, 2018), https://nyti.ms/2yInaRa.

determinations about how to reduce risks of firearm misuse without unduly infringing on legitimate use. In evaluating Second Amendment challenges to assault weapon bans, courts should respect legislative determinations that the military appearance of assault weapons may enhance their potential for causing harm. And if the differences between assault weapons and other firearms really are purely cosmetic, as gun rights enthusiasts insist, then there will be no great harm in banning them because people can simply use other weapons that work just as well. If that means some people will be unable to use firearms with the aesthetic style that they prefer, so be it. The Constitution guarantees a right to keep and bear arms, not a right to keep and bear weapons that have a certain look.