

# Reality Check: The “Assault Weapon” Fantasy and Second Amendment Jurisprudence

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## INTRODUCTION: WHEN RIFLES WERE GOOD

From the founding of the Republic until the late twentieth century, rifles and other long guns were not subject to public controversy. At the end of that period, the words “assault weapon” appeared as a derogatory term in efforts to ban semi-automatic rifles. Handguns had previously been the primary target of gun prohibitionists, but the Supreme Court held in *District of Columbia v. Heller*<sup>1</sup> that handguns are commonly possessed by law-abiding persons for

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1. 554 U.S. 570.

lawful persons and are thus protected by the Second Amendment right to keep and bear arms.<sup>2</sup>

In response, the District legalized handguns but banned numerous rifles it characterized as “assault weapons.” In a case that came to be known as *Heller II*,<sup>3</sup> the new prohibition was challenged based on evidence that the banned rifles were commonly possessed and that their features were not dangerous and unusual. Based on contrary allegations in the legislative history about the banned features, however, the U.S. Court of Appeals for the D.C. Circuit upheld the law as not violative of the Second Amendment.<sup>4</sup> The decision has been followed elsewhere. This Article analyzes the above developments and explores the extent to which the decisions are consistent with the constitutional status of Second Amendment rights.

Until the first “assault weapon” ban was passed by California in 1989, rifles had been treated as perhaps the type of arms most protected by the Second Amendment. The second federal Militia Act of 1792 required “every free able-bodied white male citizen” aged 18–45 years old to “provide himself with” a musket or firelock, bayonet, and twenty-four cartridges, or a rifle with twenty balls and a quarter pound of powder.<sup>5</sup> A musket was “a species of fire-arms used in war,”<sup>6</sup> a firelock was a flintlock musket,<sup>7</sup> and a rifle was about the same size as a musket but it had a rifled barrel.<sup>8</sup> While “military style” to use today’s rhetoric, such long guns were commonly possessed.

Beginning in the 1850s, fast-firing lever action rifles were being made with magazines holding 15 to 30 rounds.<sup>9</sup> In 1871, the Tennessee Supreme Court wrote that “the rifle of all descriptions, the shotgun, the musket, and repeater, are such [protected] arms; and that under the Constitution the right to *keep* such arms, can not be *infringed* or *forbidden* by the Legislature.”<sup>10</sup> Semi-automatic rifles, including some with detachable magazines and pistol grips, entered the market around the turn of the century, and were used for hunting.<sup>11</sup> The North Carolina Supreme Court noted in 1921 that, to “the ordinary private citizen,” “the rifle, the musket, the shotgun, and the pistol are about the only arms which he could be expected to ‘bear,’ and his right to do this is that which is guaranteed by the Constitution.”<sup>12</sup>

A New York court noted in 1958 that “a rifle may be possessed in the home or carried openly upon the person on the street without violating any law,” since in

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2. *Id.* at 624–25, 628–29.

3. 670 F.3d 1244.

4. *Id.* at 1260–64.

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

6. 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

7. *Id.*

8. *Id.*

9. HAROLD F. WILLIAMSON, WINCHESTER: THE GUN THAT WON THE WEST 13, 36, 49 (1952).

10. *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 179 (1871).

11. *Heller II*, 670 F.3d 1244, 1287 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (citations omitted).

12. *State v. Kerner*, 107 S.E. 222, 224 (N.C. 1921).

restricting concealed weapons, the legislature “carefully avoided including rifles because of the Federal constitutional provision and the Civil Rights law provision.”<sup>13</sup> And in 1972, the Florida Supreme Court stated that constitutionally-protected arms are those that “are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semi-automatic shotguns, semi-automatic pistols and rifles.”<sup>14</sup>

I. “ASSAULT WEAPON”—THE WORD THAT MEANS ANYTHING YOU WANT  
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Generically, “assault weapon” is a weapon used in an assault.<sup>15</sup> The term “assault rifle,” *Sturmgewehr* as first used in Nazi Germany,<sup>16</sup> became a military term to describe a selective-fire rifle such as the AK-47 that fires both fully automatically and semi-automatically.<sup>17</sup> The M-16 selective-fire service rifle came to be America’s “standard assault rifle.”<sup>18</sup> Federal law defines that as a “machinegun,” *i.e.*, a “weapon which shoots . . . automatically more than one shot, without manual reloading, by a single function of the trigger.”<sup>19</sup>

The production of civilian rifles that fire only in semi-automatic but that have cosmetic outward features that look like military rifles gave gun prohibitionists the idea of calling them “assault weapons” as a propaganda term to promote banning them. As a lobbyist for the Violence Policy Center wrote: “The weapons’ menacing looks, coupled with the public’s confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons.”<sup>20</sup>

Justice Thomas would observe: “Prior to 1989, the term ‘assault weapon’ did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists to expand the category of ‘assault rifles’ so as to allow an attack on as

13. *People v. Raso*, 170 N.Y.S.2d 245, 248–49 (Cnty. Ct. 1958); *see also* *Moore v. Gallup*, 45 N.Y.S.2d 63, 66 (App. Div. 1943) (“[T]he arms to which the Second Amendment refers include weapons of warfare to be used by the militia, such as swords, guns, rifles and muskets . . .”), *aff’d per curiam*, 59 N.E.2d 439 (N.Y. 1944), *amended per curiam* by, 60 N.E.2d 847 (N.Y. 1945); *Hutchinson v. Rosetti*, 205 N.Y.S.2d 526, 529 (Mun. Ct. 1960) (rifle used for defense against a prejudiced mob must be returned based on “the constitutional guarantee of the right of the individual to bear arms. Amendments Art. II.”).

14. *Rinzler v. Carson*, 262 So.2d 661, 666 (Fla. 1972).

15. *See, e.g.*, *Bramlett v. Litscher*, No. 01-C-193-C, 2001 WL 34377271, \*2 (W.D. Wis. June 6, 2001) (“[T]he mop wringer . . . could be used as an assault weapon.”).

16. PETER R. SENICH, *THE GERMAN ASSAULT RIFLE 1935–1945* 79 (1987).

17. *See* HAROLD E. JOHNSON, *DEF. INTELLIGENCE AGENCY, SMALL ARMS IDENTIFICATION & OPERATION GUIDE—EURASIAN COMMUNIST COUNTRIES* 105 (1980) [hereinafter *JOHNSON, SMALL ARMS*] (“Assault rifles are . . . selective-fire weapons . . . Assault rifles . . . are capable of delivering effective full automatic fire . . .”).

18. *See* *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 804 (1988).

19. 26 U.S.C. § 5845(b) (2012).

20. JOSH SUGARMANN, *VIOLENCE POL’Y CTR., ASSAULT WEAPONS AND ACCESSORIES IN AMERICA* 129 (1988).

many additional firearms as possible on the basis of undefined ‘evil’ appearance.”<sup>21</sup> The term “assault weapon” thus became a classic case of “an Alice-in-Wonderland world where words have no meaning.”<sup>22</sup>

America’s first rifle ban—California’s Roberti-Roos Assault Weapons Control Act of 1989<sup>23</sup>—would be upheld on the basis that the Second Amendment does not apply to the states through the Fourteenth Amendment,<sup>24</sup> and that the Second Amendment does not protect individual rights.<sup>25</sup> Bans were extended to a handful of other states and cities.<sup>26</sup>

In 1994, Congress passed a law defining and restricting “semi-automatic assault weapons”—itself an oxymoron—to include a short list of named firearms, such as “Colt AR-15,” as well as certain firearms (mostly semi-automatic rifles with detachable magazines) with two specified generic characteristics, such as a “bayonet mount” and a “pistol grip that protrudes conspicuously beneath the action of the weapon.”<sup>27</sup> It did not restrict possession of such firearms that were lawfully possessed on its effective date. Magazines holding more than ten rounds were similarly restricted but grandfathered.<sup>28</sup> After the law expired ten years later, Congress saw fit not to reenact it.

A few months before Congress passed the law, the Supreme Court decided that, to convict a person of possession of an unregistered machinegun, the government must prove that the person knew that it would fire automatically. The case was *Staples v. United States* (1994), and the defendant thought he had an ordinary semi-automatic AR-15 rifle, which ATF technicians were able to make fire automatically.<sup>29</sup> While the case involved basic *mens rea* issues, the Court made several comments that illuminated how common such rifles are in American society.

The Court described the rifle as follows: “The AR-15 is the civilian version of the military’s M-16 rifle, and is, unless modified, a semi-automatic weapon. The M-16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose, semi-automatic or automatic fire.”<sup>30</sup> “Automatic” fire means that “once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted,” and that is the definition of a “machinegun”; a “semi-automatic,” by contrast, “fires only

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21. *Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting) (quoting Bruce H. Kobayashia & Joseph E. Olson, In re 101 California Street: A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of “Assault Weapons,” 8 STAN. L. & POL’Y REV. 41, 43 (1997)).

22. *Welsh v. United States*, 398 U.S. 333, 354 (1970) (Harlan, J., concurring).

23. CAL. PENAL CODE §§ 30050-31115 (West 2012).

24. *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723 (9th Cir.1992).

25. *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2003).

26. *See, e.g., Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250 (6th Cir. 1994) (holding ban unconstitutionally vague).

27. 18 U.S.C. §§ (a)(30), 922(v) (2002) (repealed 2004).

28. *Id.* §§ 921(a)(31), 922(w).

29. *Staples v. United States*, 511 U.S. 600 (1994).

30. *Id.* at 603.

one shot with each pull of the trigger.”<sup>31</sup>

Acknowledging “a long tradition of widespread lawful gun ownership by private individuals in this country,” *Staples* noted: “Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation . . . . [D]espite their potential for harm, guns generally can be owned in perfect innocence.”<sup>32</sup> Indeed, “[a]utomobiles . . . might also be termed ‘dangerous’ devices.”<sup>33</sup> The Court contrasted ordinary firearms, such as the AR-15 rifle involved in that case, from “machineguns, sawed-off shotguns, and artillery pieces,” adding that “guns falling outside those [latter] categories traditionally have been widely accepted as lawful possessions.”<sup>34</sup>

Since no evidence existed that Mr. Staples knew the rifle would fire more than one shot with a single function of the trigger—which could have been the result of malfunction—the Court remanded the case,<sup>35</sup> and the court of appeals ordered his acquittal.<sup>36</sup> No Second Amendment issue was raised in the case, a topic on which the Court had never expressed much interest. Meanwhile, there were very few prosecutions under the federal “assault weapon” law, reflecting that they were rarely used in crime in the first place. That is likely why Congress chose not to reenact the law when it expired in 2004.

The rarity of criminal misuse of the banned firearms was confirmed in a study by Christopher S. Koper, which noted: “AWs [assault weapons] were used in only a small fraction of gun crimes prior to the ban: about 2% according to most studies and no more than 8%. Most of the AWs used in crime are assault pistols rather than assault rifles.”<sup>37</sup>

The study noted a reduction in gun crime involving assault weapons in selected cities following enactment of the federal law.<sup>38</sup> This could not be attributed to the law—since all preexisting “assault weapons” were grandfathered, the quantity in civilian hands did not decrease. Koper candidly concluded:

Should it be renewed, the ban’s effects on gun violence are likely to be small at best and perhaps too small for reliable measurement. AWs were rarely used in gun crimes even before the ban. LCMs [large capacity magazines] are involved in a more substantial share of gun crimes, but it is not clear how

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31. *Id.* at 602 n.1.

32. *Id.* at 610–11.

33. *Id.* at 614.

34. *Id.* at 612.

35. *Id.* at 620. In upholding his conviction, the Tenth Circuit held that evidence that the rifle malfunctioned when it fired more than one shot by a single function of the trigger, and defendant being unaware of such, did not matter. *United States v. Staples*, 971 F.2d 608, 613–16 (10th Cir. 1992), *rev’d*, 511 U.S. 600 (1994).

36. *United States v. Staples*, 30 F.3d 108, 108 (10th Cir. 1994).

37. CHRISTOPHER S. KOPER ET AL., AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994–2003, at 2 (2004), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf>.

38. *Id.*

often the outcomes of gun attacks depend on the ability of offenders to fire more than ten shots (the current magazine capacity limit) without reloading.<sup>39</sup>

Neither the federal law nor its expiration had any effect on the homicide rate, which had been falling since almost two years before the enactment of the law in September 1994, and has continued to remain low since the law expired in 2004. The Bureau of Justice Statistics has reported: “Firearm-related homicides declined 39%, from 18,253 in 1993 to 11,101 in 2011.”<sup>40</sup> Moreover, while the banned “assault weapons” are mostly rifles, they are used in disproportionately fewer crimes: “About 70% to 80% of firearm homicides and 90% of nonfatal firearm victimizations were committed with a handgun from 1993 to 2011.”<sup>41</sup>

The ban has never been reenacted. A law that banned certain firearms only if made after a certain date and that lasted only ten years of over two centuries of American history, and the legislative and administrative history that promoted it, and which Congress refused to renew, can hardly be cited as supportive of the constitutional validity of similar or more draconian legislation.

## II. TO *HELLER* AND BEYOND

Meanwhile, in the 2001 case of *United States v. Emerson*, the Fifth Circuit decided that “the people” in the Second Amendment means actual people, not an illusive collective, and thus individuals have a right to keep and bear arms.<sup>42</sup> The court found that a Beretta 9mm semi-automatic pistol is protected by the Second Amendment,<sup>43</sup> while upholding the federal prohibition on possession of a firearm by a person subject to a domestic restraining order. The Beretta M9 pistol, used by the U.S. military, has a 15-shot magazine.<sup>44</sup>

By 2007, the D.C. Circuit had invalidated the District of Columbia’s handgun ban in *Parker v. District of Columbia*,<sup>45</sup> which the Supreme Court would affirm in *Heller*. Applying a test of what arms are in common use for lawful purposes, it found that “most handguns (those in common use) fit that description then and now.”<sup>46</sup> *Parker* rejected the suggestion “that only colonial-era firearms (*e.g.*, single-shot pistols) are covered by the Second Amendment,” which instead “protects the possession of the modern-day equivalents of the colonial pistol.”<sup>47</sup>

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39. *Id.* at 3.

40. MICHAEL PLANTY & JENNIFER L. TRUMAN, U.S. DEP’T OF JUST., BUREAU OF JUSTICE STATISTICS, FIREARM VIOLENCE, 1993–2011, at 1 (2013), available at <http://www.bjs.gov/content/pub/pdf/fv9311.pdf>.

41. *Id.*

42. *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

43. *Id.* at 216, 227 n.22, 273.

44. M9, BERETTA, <http://www.beretta.com/en-us/m9/>.

45. *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), *aff’d sub nom.* *District of Columbia v. Heller*, 554 U.S. 570 (2008).

46. *Id.* at 397.

47. *Id.* at 398.

In fact, there are three basic types of such firearms: “The modern handgun—and for that matter the rifle and long-barreled shotgun—is undoubtedly quite improved over its colonial-era predecessor, but it is, after all, a lineal descendant of that founding-era weapon.”<sup>48</sup> Applying a categorical test, *Parker* rejected the argument that protected arms could be selectively banned:

The District contends that since it only bans one type of firearm, “residents still have access to hundreds more,” and thus its prohibition does not implicate the Second Amendment because it does not threaten total disarmament. We think that argument frivolous. It could be similarly contended that all firearms may be banned so long as sabers were permitted. Once it is determined—as we have done—that handguns are “Arms” referred to in the Second Amendment, it is not open to the District to ban them.<sup>49</sup>

The District pressed forward to the Supreme Court, which granted its petition for a writ of certiorari. In briefing in what was now captioned *District of Columbia v. Heller*, the District argued that its handgun ban “do[es] not disarm the District’s citizens, who may still possess operational rifles and shotguns.”<sup>50</sup> It further argued that “the Council acted based on plainly reasonable grounds. It adopted a focused statute that continues to allow private home possession of shotguns and rifles, which some gun rights’ proponents contend are actually the weapons of choice for home defense.”<sup>51</sup> In short, rifles and shotguns are good, handguns are bad. As will be seen in later litigation, the District would argue the opposite—that such rifles may be banned because citizens may possess handguns.

In a 5–4 opinion, the Supreme Court decided that the Second Amendment protects individual rights and that a ban on handguns infringes on the right.<sup>52</sup> The Court’s analysis generally applies to long guns as well as handguns, both of which are “arms.” “The term [‘Arms’] was applied, then [Eighteenth Century] as now, to weapons that were not specifically designed for military use and were not employed in a military capacity.”<sup>53</sup> Further, the technology of protected arms is not frozen in time: “Just as the First Amendment protects modern forms of communications, . . . and the Fourth Amendment applies to modern forms of search, . . . the Second Amendment extends, *prima facie*, to all instruments that

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48. *Id.*

49. *Id.* at 400.

50. Brief for Petitioners at 11, *Heller*, 554 U.S. 570 (No. 07-290).

51. *Id.* at 54.

52. *Heller*, 554 U.S. at 636.

53. *Id.* at 581.

constitute bearable arms, even those that were not in existence at the time of the founding.”<sup>54</sup>

*Heller* looked back to the Court’s 1939 opinion in *United States v. Miller*,<sup>55</sup> which held that judicial notice could not be taken that a short-barreled shotgun “is any part of the ordinary military equipment or that its use could contribute to the common defense,” precluding it from deciding “that the Second Amendment guarantees the right to keep and bear such an instrument.”<sup>56</sup> *Heller* explained:

We think that *Miller*’s “ordinary military equipment” language must be read in tandem with what comes after: “[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.” The traditional militia was formed from a pool of men bringing arms “in common use at the time” for lawful purposes like self-defense . . . . We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.<sup>57</sup>

*Heller* adds that “the sorts of weapons protected were those ‘in common use at the time’”<sup>58</sup> is a “limitation [that] is fairly supported by the historical tradition of prohibiting the *carrying* of ‘dangerous and unusual weapons.’”<sup>59</sup> Under this test, the Court suggested that full automatics like the M-16 machine-gun may be restricted as may “sophisticated arms that are highly unusual in society at large.”<sup>60</sup> Elsewhere, *Heller* referred to certain longstanding restrictions as presumptively valid, but none involve a prohibition on possession of a type of firearm by law-abiding persons.<sup>61</sup>

*Heller* took a categorical approach and, without any consideration of the committee report which sought to justify the handgun ban or various empirical studies, held:

The handgun ban amounts to a prohibition of an entire class of “arms” that is overwhelmingly chosen by American society for that lawful purpose. The

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54. *Id.* at 582.

55. 307 U.S. 174 (1939).

56. *Id.* at 178. *Miller* reinstated an indictment for an unregistered short-barreled shotgun under the National Firearms Act that had been dismissed by the district court on the basis that the Act violated the Second Amendment. *See id.* at 175–77, 183.

57. *Heller*, 554 U.S. at 624–25 (alterations in original) (quoting *Miller*, 307 U.S. at 179).

58. *Id.* at 627 (quoting *Miller*, 307 U.S. at 179).

59. *Id.* at 627 (emphasis added) (citing, *inter alia*, 4 WILLIAM BLACKSTONE, COMMENTARIES \*148–49 (1769) (“The offense of *riding* or *going armed*, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land”); *O’Neill v. State*, 16 Ala. 65, 67 (1849) (“[I]f persons arm themselves with deadly or unusual weapons for the purpose of an affray, and in such manner as to strike terror to the people, they may be guilty of this offence, without coming to actual blows.”)).

60. *Id.* at 627.

61. *See id.* at 626–27.

prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,” would fail constitutional muster.<sup>62</sup>

Again, the test is what arms are chosen by the public for self-defense and other lawful purposes, not what arms the government chooses for the public. Responding to the District’s argument that rifles and shotguns are good, handguns are bad, the Court stated:

It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. It is enough to note . . . that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.<sup>63</sup>

Other reasons could be listed for why many Americans also prefer long guns for self-defense. A rifle or shotgun may also be easy to store; it would be even harder than a handgun to be redirected or wrestled away by an attacker; it has less recoil and may be aimed more accurately than a handgun; many can hold it with one hand while the other dials 911.

*Heller* rejected rational basis analysis,<sup>64</sup> as well as Justice Breyer’s proposed “judge-empowering ‘interest-balancing inquiry’ that ‘asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.’”<sup>65</sup> Relying on such intermediate-scrutiny cases as *Turner Broadcasting System, Inc. v. FCC*,<sup>66</sup> Justice Breyer would have applied a standard under which “the Court normally defers to a legislature’s empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional fact-finding capacity.”<sup>67</sup>

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62. *Id.* at 628–29 (footnote omitted) (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007), *aff’d sub nom. Heller*, 554 U.S. 570).

63. *Id.* at 629.

64. *Id.* at 628 n.27.

65. *Id.* at 634 (quoting *id.* at 689–90 (Breyer, J., dissenting)).

66. 520 U.S. 180 (1997).

67. *Heller*, 554 U.S. at 690 (Breyer, J., dissenting) (citing *Turner*, 520 U.S. at 195–96).

Under that test, Justice Breyer relied first and foremost on the committee report which proposed the handgun ban in 1976 and which was filled with data on the misuse of the type of firearm it sought to justify banning.<sup>68</sup> He also cited empirical studies about the alleged role of handguns in crime, injuries, and death.<sup>69</sup> Contrary empirical studies questioning the effectiveness of the handgun ban and focusing on lawful uses of handguns, in his view, would not suffice to overcome the legislative judgment.<sup>70</sup> Breyer concluded: “There is no cause here to depart from the standard set forth in *Turner*, for the District’s decision represents the kind of empirically based judgment that legislatures, not courts, are best suited to make.”<sup>71</sup>

*Heller* rejected the dissent’s above reliance on the committee report and empirical studies as follows:

After an exhaustive discussion of the arguments for and against gun control, Justice BREYER arrives at his interest-balanced answer: because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban. QED.

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.<sup>72</sup>

In sum, *Heller* held as a categorical matter that handguns are commonly possessed by law-abiding persons for lawful purposes and may not be prohibited. It did not even consider any committee report or empirical study under which to weigh asserted governmental interests outweighed the benefits of recognizing the right. While the subject was handguns, the same approach would be equally applicable to long guns. As will be seen, lower courts would not take the same approach in considering bans on long guns that were pejoratively called “assault weapons.”

### III. THE EMPIRE STRIKES BACK

“After *Heller*, . . . D.C. seemed not to heed the Supreme Court’s message. Instead, D.C. appeared to push the envelope again, with its new ban on semi-automatic rifles and its broad gun registration requirement.”<sup>73</sup> These were

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68. *Id.* at 693.

69. *Id.* at 696–99.

70. *Id.* at 699–703.

71. *Id.* at 705.

72. *Id.* at 634.

73. *Heller II*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

the words of D.C. Circuit Judge Kavanaugh, dissenting from an opinion upholding some of the District of Columbia’s post-*Heller* firearm restrictions. Those restrictions would be challenged in new litigation captioned *Heller v. District of Columbia*. Brought by the same lead plaintiff in the Supreme Court decision, this case came to be called *Heller II*.

As if to get revenge against gun owners for the Supreme Court’s decision, the District’s new law did two things. First, it banned large numbers of firearms, mostly rifles, that it pejoratively called “assault weapons,” and also banned any magazine that will hold over ten rounds. Second, it made registration of any firearm more difficult than ever before. While not the subject of this article, the D.C. Circuit would question the validity of a number of the registration requirements, and would eventually declare four of them—for instance, the provision voiding registrations every three years and requiring re-registration—violative of the Second Amendment.<sup>74</sup>

The District prohibits “assault weapons” by making them non-registerable.<sup>75</sup> The definition begins with “[a]ll of the following specified rifles,” following which are fifty-six named models such as “Colt AR-15 series” and “Armalite AR-180.” After that, fourteen pistol models and four shotgun models are listed, and finally: “All other models within a series that are variations, with minor differences, of those models listed . . . , regardless of the manufacturer.”<sup>76</sup>

“Assault weapon” is further defined as: “A semi-automatic, [*sic*] rifle that has the capacity to accept a detachable magazine and any one of the following:”, following which are generic listings including “(aa) A pistol grip that protrudes conspicuously beneath the action of the weapon; (bb) A thumbhole stock; (cc) A folding or telescoping stock.”<sup>77</sup> It includes pistols that accept detachable magazines outside the pistol grip,<sup>78</sup> excluding pistols designed for Olympic shooting events.<sup>79</sup> No exemption exists for pistols designed for other types of target shooting events, hunting, or self-defense. It also includes shotguns with certain types of stocks and grips, or which accept a detachable magazine.<sup>80</sup>

Finally, the term “assault weapon” is defined to mean anything the Chief of Police says it means: “Any firearm that the Chief may designate as an assault weapon by rule, based on a determination that the firearm would reasonably pose the same or similar danger to the health, safety, and security of the residents of the District as those weapons enumerated in this paragraph.”<sup>81</sup>

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74. See *Heller v. District of Columbia*, 801 F.3d 264 (D.C. Cir. 2015), *reh. denied*, 814 F.3d 480 (D.C. Cir. 2016); see also Stephen P. Halbrook, *The Empire Strikes Back: The District of Columbia’s Post-Heller Firearm Registration System*, 81 TENN. L. REV. 571 (2014).

75. D.C. Code § 7-2501.01(3A)(A) (2013).

76. *Id.* § 7-2501.01(3A)(i)(I)-(VIII).

77. *Id.* § 7-2501.01(3A)(A)(IV).

78. *Id.* § 7-2501.01(3A)(A)(V).

79. *Id.* § 7-2501.01(3A), (B)-(C).

80. *Id.* § 7-2501.01(3A)(A)(VI), (VII).

81. *Id.* § 7-2501.01(3A)(A)(iii).

The District also prohibits possession of any “large capacity ammunition feeding device,” which includes any magazine or other device that “has a capacity of . . . more than 10 rounds of ammunition.”<sup>82</sup>

Violation of the above is punishable by a \$1,000 fine and one year in prison.<sup>83</sup>

The bill that enacted the above was supported by a report of the Committee on Public Safety and the Judiciary.<sup>84</sup> The report dramatically asserted that “assault weapons” are “military-style weapons made for offensive military use. They are designed with military features to allow rapid and accurate spray firing. They are not designed for sport, but to kill people quickly and efficiently.”<sup>85</sup> It failed to cite any instance of any military force in the word that issued semi-automatics instead of selective-fire rifles.

“Assault weapons are preferred by terrorists,” the report continued.<sup>86</sup> Why a terrorist would prefer a firearm that only fires semi-automatically rather than fully automatic was left unexplained.

Mindful that *Heller* held that firearms in common use may not be banned, the report averred that the banned guns “are a minute fraction of the firearms available in the United States, they have never been in common use, they are dangerous and unusual.” No data was cited. Whoever wrote that sentence could not have ever been to a typical shooting range in the United States to see what firearms are in common use and usual.

The committee report failed to suggest what features make the banned firearms so dangerous other than the claim: “Pistol grips help stabilize the weapon during rapid fire and allow the shooter to spray-fire from the hip position.”<sup>87</sup> The ergonomics of this design were not analyzed to justify this proposition. As for spray firing, shotguns shoot multiple balls, but a rifle fires only a single projectile. No suggestion was made as to why anyone would fire from the hip, which would be highly inaccurate, instead of from the shoulder.

The report asserted that “[a]ssault weapons have no legitimate use as self-defense weapons,” but offered no reason why.<sup>88</sup>

The committee report conceded that “semi-automatic pistols are a common and popular weapon,” and “the Committee heard testimony that magazine capacity of up to 20 rounds is not uncommon and ‘reasonable.’”<sup>89</sup> However, “the Committee agrees with the Chief of Police that the 2 or 3 second pause to reload can be of critical benefit to law enforcement, and that magazines

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82. *Id.* § 7-2506.01(b)

83. *Id.* § 7-2507.06.

84. COUNCIL OF D.C., COMM. ON PUB. SAFETY & THE JUDICIARY, REP. ON BILL 17-843, “FIREARMS CONTROL AMENDMENT ACT OF 2008” (2008).

85. *Id.* at 7.

86. *Id.* at 7–8.

87. *Id.* at 7.

88. *Id.* at 7.

89. *Id.* at 9.

holdings over 10 rounds are more about firepower than self-defense.”<sup>90</sup> Left unsaid is that requiring a law-abiding person to pause to reload when under the stress of a violent attack could be fatal. D.C. police officers are issued Glock pistols with magazines holding 15 or 17 rounds for the very purpose of self-defense.<sup>91</sup>

Given all of this rhetoric, it is noteworthy that while the banned rifles were lawful in Virginia, Maryland, and almost all other states, in the District for 2009, of 144 murders, only one was committed with a rifle (of unknown kind), and very few murders were committed with rifles in any State.<sup>92</sup>

#### IV. RETURN OF THE JEDI: THE *HELLER II* RECORD

As noted, the new District law was challenged in *Heller II*. The plaintiffs relied on sworn declarations by expert and lay witnesses in support of summary judgment, while the District so moved based primarily on the above committee report without submitting declarations. Aside from agreeing with plaintiffs on common use, the district court and the majority in the D.C. Circuit ignored plaintiffs’ evidence and rely primarily on the committee report. Thus, an analysis of the plaintiffs’ evidence is warranted here.

It is basic that summary judgment may be granted only if the affidavits or other items in the record show lack of any genuine issue of a material fact.<sup>93</sup> Affidavits must be made on personal knowledge, set out facts that would be admissible, and show that the affiant is competent to testify.<sup>94</sup> This case raises the issue of to what extent may the allegations of a committee report, which may be traced to unsworn allegations by lobbyists without relevant credentials, overcome sworn expert and lay testimony that is not challenged with contrary evidence?

Consider the declaration of Harold E. Johnson, who retired after twenty-one years in the U.S. Marine Corps as a Warrant Officer at the Quantico Ordnance School. An intelligence analyst for the U.S. Army Foreign Science and Technology Center for the next seventeen years, he authored small arms identification guides for the Defense Intelligence Agency and hundreds of classified reports concerning small arms and small arms technology. He served as a consultant to and expert witness for the Firearms Enforcement Branch of the Internal Revenue Service, U.S. Treasury Department, including service on the Firearms

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90. *Id.*

91. See *Frequently Asked Questions About Becoming a Police Officer*, METRO. POLICE DEP’T, <http://mpdc.dc.gov/page/frequently-asked-questions-about-becoming-police-officer> (“MPD issues either the Glock Model 17 or 19 to MPD members assigned to patrol duties.”). The Model 17 magazine holds 17 rounds, and the Model 19 holds 15 rounds. See *Glock 17*, GLOCK, <https://us.glock.com/products/model/g17>; *Glock 19*, GLOCK, <https://us.glock.com/products/model/g19>.

92. See U.S. DEP’T OF JUST., FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2009 Table 20, available at [http://www.fbi.gov/ucr/cius2009/data/table\\_20.html](http://www.fbi.gov/ucr/cius2009/data/table_20.html).

93. See FED. R. CIV. P. 56(c).

94. See FED. R. CIV. P. 56(e)(1); see also *id.* 56(e)(2) (opposing party must set out, through affidavits or other competent evidence, specific facts showing a genuine issue for trial).

Evaluation Panel that set the “sporting purposes” criteria for import of firearms under the Gun Control Act of 1968, and rendered expert advice to Bureau of Alcohol, Tobacco and Firearms (ATF).<sup>95</sup>

Decades before anyone applied the term “assault weapon” to semi-automatic rifles, Johnson wrote in the *Small Arms Identification and Operation Guide—Eurasian Communist Countries*: “Assault rifles are short, compact, selective-fire weapons that fire a cartridge intermediate in power between submachinegun and rifle cartridges. Assault rifles have mild recoil characteristics and, because of this, are capable of delivering effective full automatic fire at ranges up to 300 meters.”<sup>96</sup> “Selective-fire” means that the rifle has the capability to fire both fully automatic, meaning that it continues to fire as long as the trigger is pulled, as well as semi-automatic, meaning that a separate pull of the trigger is required for each shot. Some also fire automatically in bursts, *e.g.*, a three-shot burst with a single pull of the trigger.<sup>97</sup> Noting that firearm models used by the world’s military forces have changed, Johnson stated, “today’s military forces throughout the world continue to utilize selective-fire rifles as their standard service rifles.”<sup>98</sup>

Johnson contrasted civilian arms as follows: “Since they fire only once per trigger pull, semi-automatic rifles are useful, and are widely used throughout the United States, for target shooting, competitions, some forms of hunting, and self-defense.”<sup>99</sup> He stated about the rifles banned by the District:

Semiautomatic rifles, including all of those designated by the D.C. Code as “assault weapons,” are not made or designed for offensive military use. They are not used as service rifles by any military force in the world, nor are they preferred by irregular forces or terrorists. They do not allow rapid and spray firing.<sup>100</sup>

Some of the designated rifles, Johnson continued, “have cosmetic similarities with military rifles,” such as “a pistol grip that protrudes beneath the action, which allows the rifle to be fired accurately from the shoulder. Such pistol grips are *not* designed to allow the shooter to spray-fire from the hip position.”<sup>101</sup>

Mark Westrom, head of the firearm manufacturer ArmaLite, gave evidence about several AR-type rifles. He noted that such rifles have the capacity to accept a detachable magazine and, while standard magazines hold 20 rounds, magazines are also available that hold 5 rounds and 30 rounds. These rifles have a pistol grip typically 3-3/4 to 4 inches in length that protrudes at a rearward angle beneath the action of the rifle. The pistol grip, in conjunction with the

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95. See Joint Appendix at 132, *Heller II*, 670 F.3d 1244 (D.C. Cir. 2011) (No. 10-7036) [hereinafter *Heller II* Joint Appendix] (Declaration of Harold E. Johnson).

96. *Id.* at 133–34 (quoting JOHNSON, *SMALL ARMS*, *supra* note 17, at 51).

97. *Id.* at 133.

98. *Id.* at 134.

99. *Id.* at 135.

100. *Id.* at 134–35.

101. *Id.* at 135.

straight-line stock, allows the rifle to be fired accurately from the shoulder with minimal muzzle-rise. Most such rifles have fixed stocks, but some have a telescoping which allows adjustment to the person’s physique.<sup>102</sup>

According to Westrom, such rifles are commonly possessed for law enforcement, sport (including target shooting, both informally and in formal competitions), and security, including personal protection in the home. Features allowing varied iron and optical sights further reflect their increased use in sport and hunting.<sup>103</sup> They are widely used at the National Matches and other formal target shooting venues.<sup>104</sup> Their accuracy and light recoil make them extremely useful for hunting small and medium-sized game and varmint hunting.<sup>105</sup> They are in wide use for security and personal protection purposes both among police and private owners due to both operational and safety concerns. A carbine or rifle provides better accuracy than a handgun, and the small .223 caliber cartridge tends to break up rather than penetrating multiple walls and objects.<sup>106</sup> Finally, magazines holding more than ten rounds are preferable for self-protection, and are in common use for target shooting, competitions, and other sporting purposes.<sup>107</sup>

Mark Overstreet, a Research Coordinator for the National Rifle Association, conducts research from U.S. government sources on the production and availability of firearms.<sup>108</sup> Overstreet compiled data based on annual manufacturing data published by ATF and on records of the numbers of background checks by the FBI for firearm sales under the National Instant Criminal Background Check System. Overstreet estimated that roughly two million AR-15 type rifles had been manufactured.<sup>109</sup> While numerous rifles and handguns come equipped with magazines holding more than ten rounds, the numbers of such magazines cannot be estimated, other than to say that they number in the multi-millions.<sup>110</sup> Standard magazines for commonly owned semi-automatic pistols hold up to 17 rounds of ammunition. In 2007, about two-thirds of the 1.2 million pistols made and not exported were in calibers typically using magazines that hold over 10 rounds.<sup>111</sup> The Court of Appeals would accept this data as valid in showing that the banned rifles and magazines are in common use.<sup>112</sup>

Plaintiff William Carter applied to register an LMT Defender 2000 .223 caliber semi-automatic rifle, which has a pistol grip that protrudes beneath the

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102. *Id.* at 90 (Affidavit of Mark Westrom).

103. *Id.* at 91.

104. *Id.*

105. *Id.*

106. *Id.* at 91–92.

107. *Id.* at 94.

108. *Id.* at 82 (Declaration of Mark Overstreet).

109. *Id.* at 83.

110. *Id.* at 85–87.

111. *Id.* at 85.

112. *See Heller II*, 670 F.3d 1244, 1261 (D.C. Cir. 2011); *see also id.* at 1287 (Kavanaugh, J., dissenting).

action of the weapon and a telescoping stock, to be used for recreational activity, including at the NRA range. The District denied the application. This type of pistol grip allows the rifle to be accurately shot from the shoulder without excessive muzzle rise. In his Marine Corps training, Carter was instructed to fire the M16 (which has a similar pistol grip) only from the shoulder and was never trained to fire it from the hip.<sup>113</sup> Neither the pistol grip nor the telescoping stock makes the rifle more powerful or dangerous. Numerous persons possess such rifles throughout the United States for target shooting and other lawful purposes.<sup>114</sup>

Consistent with Johnson's and Carter's statements that pistol grips on rifles are designed to be fired from the shoulder and not from the hip, evidence was submitted showing that protruding pistol grips are used on single-shot Olympic air rifles and .22 caliber rifles.<sup>115</sup>

Plaintiff Dick Anthony Heller is a Special Police Officer in the District, which licensed him to carry a pistol. He has provided security for United States judges at the Thurgood Marshall Federal Judicial Center and for various federal officials at other buildings in the District.<sup>116</sup> He attested that many pistols and rifles are sold with magazines that hold more than 10 rounds, and such firearms are in wide use for self-defense, target shooting, and other lawful purposes.<sup>117</sup>

Heller unsuccessfully sought to register a Bushmaster XM-15-E2S .223 caliber rifle for use in the Civilian Marksmanship Program (CMP), in which such rifles are widely used.<sup>118</sup> The CMP is a corporation established by Congress to do the following: "(1) to instruct citizens of the United States in marksmanship; (2) to promote practice and safety in the use of firearms; [and] (3) to conduct competitions in the use of firearms and to award trophies, prizes, badges, and other insignia to competitors."<sup>119</sup>

Congress further declared: "In carrying out the Civilian Marksmanship Program, the corporation shall give priority to activities that benefit firearms safety, training, and competition for youth and that reach as many youth participants as possible."<sup>120</sup>

Plaintiff Absalom F. Jordan, Jr., is a Firearms Instructor certified by the National Rifle Association. He formerly held a Federal Firearms License to engage in the business of dealing in firearms in the District and was agent for

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113. See *Heller II* Joint Appendix, *supra* note 95, at 64–65 (Declaration of William Carter).

114. *Id.* at 65.

115. See *id.* at 47 (Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment).

116. *Id.* at 70–71 (Declaration of Dick Anthony Heller).

117. *Id.* at 71.

118. *Id.* at 70.

119. 36 U.S.C. § 40722 (2012).

120. *Id.* § 40724; see also *Silveira v. Lockyer*, 328 F.3d 567, 587–88 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc) ("[T]he policy Congress has adopted [in 1916] (and re-adopted in 1996) is to provide for a well-regulated militia by putting guns in young people's hands and teaching them how to handle them safely and how to shoot them.").

Glock when the Metropolitan Police Department evaluated and purchased the Glock Model 17 pistol, with magazines that hold 17 rounds. The usefulness of magazines holding more than 10 rounds for lawful defense of self and others is demonstrated by the fact that they are issued to the police.<sup>121</sup> Magazines that have a capacity of more than 10 rounds of ammunition are commonly sold with and are available for numerous makes and models of pistols and rifles. Such magazines are commonly possessed for self-defense, target shooting, hunting, and sporting purposes.<sup>122</sup>

Jordan unsuccessfully applied to register an Armalite AR-180 .223 caliber rifle, which uses a detachable magazine and has a pistol grip that protrudes about 4 inches beneath the action, to be used for personal protection. According to Jordan, rifles of this type are commonly possessed for protection, target shooting, competitions, and sporting purposes.<sup>123</sup>

Consistent with the above, an academic analysis recognized that “assault weapons” and magazines holding more than ten cartridges are “widely owned by private citizens today for legitimate purposes. The growth in popularity of the AR-15 and similar carbines (*i.e.*, compact rifles) for self-defense, hunting, and target shooting has attracted national media attention.”<sup>124</sup>

Other than the data of common use of the banned rifles and magazines submitted by Overstreet, none of the above evidence would figure in the subsequent decisions of the district court or of the D.C. Circuit. The prohibitions would be upheld on the basis of the allegations in the 2008 committee report and certain testimony in support of the bill.

## V. A NON-FUNDAMENTAL, FUNDAMENTAL RIGHT?

While *Heller* invalidated the District’s handgun ban under the categorical common-use test, it characterized the Second Amendment as recognizing a fundamental right: “By the time of the founding, the right to have arms had become fundamental for English subjects. Blackstone, whose works . . . ‘constituted the preeminent authority on English law for the founding generation,’ . . . cited the arms provision of the Bill of Rights as one of the fundamental

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121. *Heller II* Joint Appendix, *supra* note 95, at 55, 57 (Declaration of Absalom F. Jordan, Jr.).

122. *Id.* at 57.

123. *Id.* at 56.

124. Michael P. O’Shea, *The Right to Defensive Arms after* District of Columbia v. Heller, 111 W. VA. L. REV. 349, 388 (2009). O’Shea concluded:

These rifles usually come equipped with standard, detachable magazines holding twenty to thirty rounds . . . . Their modern features . . . may appear startling to those unfamiliar with firearms or the American gun culture. But that cannot change the fact that the arms are indeed “in common use” at this time for a broad range of legitimate purposes . . . . These arms, too, should be deemed constitutionally protected against federal prohibition or restrictions that would cripple their effectiveness.

*Id.* at 389 (footnote omitted).

rights of Englishmen.”<sup>125</sup> Had a standard of scrutiny been necessary, precedent was clear: a right is “fundamental” if it is “explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny.”<sup>126</sup>

In the challenge to the District’s ban on “assault weapons” and magazines, the district court avoided application of strict scrutiny by holding that the right is not fundamental. Repeating the above quotations from *Heller*, the district court wrote: “If the Supreme Court had wanted to declare the Second Amendment right a fundamental right, it would have done so explicitly. The court will not infer such a significant holding based only on the *Heller* majority’s oblique references to the gun ownership rights of eighteenth-century English subjects.”<sup>127</sup>

The district court proceeded to uphold the gun and magazine prohibitions based solely on the allegations of the committee report. It made no reference to plaintiffs’ evidence other than to refer in a single sentence to their arguments that the banned firearms “are not made or designed for offensive military use,” “are not disproportionately used in crime,” and “are commonly used for lawful purposes such as target shooting, hunting and personal protection.”<sup>128</sup> Evidence of these arguments would be disregarded because “the court is compelled to defer to the Council’s findings” that the banned guns and magazines “are not in common use, are not typically possessed by law-abiding citizens for lawful purposes and are ‘dangerous and unusual’ within the meaning of *Heller*.”<sup>129</sup>

The district court added that the prohibitions did not even “implicate the core Second Amendment right” and thus it had no need to decide whether they passed the intermediate scrutiny test, but even if it did, the test would be met because “the Committee Report amply demonstrates that there is at least a substantial fit between that goal [of public safety] and the bans . . . .”<sup>130</sup>

Next came the Supreme Court’s decision in *McDonald v. City of Chicago*,<sup>131</sup> which characterized the right as fundamental too many times to be disregarded. It held that “the right to keep and bear arms is fundamental to *our* scheme of ordered liberty” and is “deeply rooted in this Nation’s history and tradition,” and thus that the Second Amendment is applicable to the states through the

125. *District of Columbia v. Heller*, 554 U.S. 570, 593–94 (2008) (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)).

126. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17, 33 (1973); see also *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“[C]lassifications affecting fundamental rights . . . are given the most exacting scrutiny.”); *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002) (“Under the strict-scrutiny test,” the government has the burden to prove that a restriction “is (1) narrowly tailored, to serve (2) a compelling state interest.”); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982) (explaining that no constitutional right is “less ‘fundamental’ than” others, and “we know of no principled basis on which to create a hierarchy of constitutional values . . .”).

127. *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 187 (D.D.C. 2010), *aff’d in part, vacated in part*, 670 F.3d 1244 (D.C. Cir. 2011).

128. *Id.* at 193–94.

129. *Id.* at 194.

130. *Id.* at 195.

131. 561 U.S. 742 (2010).

Fourteenth Amendment.<sup>132</sup> Tracing the right through periods of American history from the founding through current times, the Court called the right “fundamental” at least ten times.<sup>133</sup>

*McDonald* rejected the view “that the Second Amendment should be singled out for special—and specially unfavorable—treatment,” to be treated as “a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.”<sup>134</sup> It invalidated Chicago’s handgun ban without according Chicago’s legislative findings any deference or even discussion.<sup>135</sup>

In dissent, Justice Breyer objected that the decision would require courts to make all kinds of empirical decisions such as: “What sort of guns are necessary for self-defense? Handguns? Rifles? semi-automatic weapons?”<sup>136</sup> Justice Alito, writing for a plurality of Justices on this point, responded that it “is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise.”<sup>137</sup> *Heller*, Justice Alito noted, rejected Justice Breyer’s “interest-balancing” test and held that “[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”<sup>138</sup>

#### VI. *HELLER II*: HOW THE ALLEGATIONS IN THE COMMITTEE REPORT AND TESTIMONY BY A LOBBYIST OVERCAME THE SUPREME COURT’S COMMON-USE TEST AND THE SWORN DECLARATIONS, EXPERT AND LAY, INTRODUCED AS EVIDENCE

*McDonald* had been decided by the time the challenge to the District’s gun and magazine ban worked its way up to the D.C. Circuit. Since *Heller* had called the right fundamental only twice, the district court ruled that while the ban did not even implicate the Second Amendment, intermediate scrutiny would be appropriate if any test applied. Now, *McDonald* had called the right fundamental ten times. Yet in its 2–1 *Heller II* decision of 2011, the D.C. Circuit would apply an intermediate scrutiny test when it upheld the bans based on the committee report and underlying testimony of a lobbyist.

The majority found no evidence that prohibitions on semi-automatic rifles or large-capacity magazines were longstanding and thereby deserving of a presumption of validity.<sup>139</sup> It further found that the banned rifles met the *Heller* common-use test:

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132. *Id.* at 767.

133. *Id.* at 767–91.

134. *Id.* at 780.

135. *Id.* at 750–51 (quoting CITY COUNCIL OF CITY OF CHI., JOURNAL OF PROCEEDINGS OF THE CITY COUNCIL OF THE CITY OF CHICAGO 10049 (1982)).

136. *Id.* at 923 (Breyer, J., dissenting).

137. *Id.* at 790–91 (plurality opinion).

138. *Id.* at 791 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008)).

139. *Heller II*, 670 F.3d 1244, 1260 (D.C. Cir. 2011).

We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in ‘common use,’ as the plaintiffs contend. Approximately 1.6 million AR–15s alone have been manufactured since 1986, and in 2007 this one popular model accounted for 5.5 percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market.<sup>140</sup>

The banned magazines also met the common-use test:

As for magazines, fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000. There may well be some capacity above which magazines are not in common use but, if so, the record is devoid of evidence as to what that capacity is; in any event, that capacity surely is not ten.<sup>141</sup>

Given that the banned rifles and magazines passed the *Heller* test of being in common use, that should have been the end of the case. Instead, the majority upheld the prohibitions under intermediate scrutiny. According to the majority, intermediate scrutiny asks “whether the Government is promoting an important interest by way of a narrowly tailored means,” in contrast to Justice Breyer’s test—rejected by *Heller*—of whether a law “imposes burdens that, when viewed in light of the statute’s legitimate objectives, are disproportionate.”<sup>142</sup> Instead of a cost-benefit analysis, strict and intermediate scrutiny ask whether a law serves “an important or compelling governmental interest.”<sup>143</sup>

But like Justice Breyer, the majority relied on the *Turner Broadcasting* rule of according “substantial deference to the predictive judgments’ of the legislature,” which must have “drawn reasonable inferences based on substantial evidence.”<sup>144</sup> It rejected dissenting Judge Kavanaugh’s argument that the test should be whether a restriction is “rooted in text, history, and tradition.”<sup>145</sup>

What followed in the opinion is difficult to distinguish from Justice Breyer’s approach. The ban on certain semi-automatic rifles, according to the majority, still allowed “a suitable and commonly used weapon for protection in the home or for hunting, whether a handgun or a non-automatic long gun.” Little evidence was supposedly presented that the banned rifles and magazines were “well-suited to or preferred for the purpose of self-defense or sport.”<sup>146</sup>

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140. *Id.* at 1261.

141. *Id.*

142. *Id.* at 1264.

143. *Id.* at 1265.

144. *Id.* at 1259 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997)); see also *District of Columbia v. Heller*, 554 U.S. 570, 690 (Breyer, J., dissenting) (citing *Turner*, 520 U.S. at 195).

145. *Id.* at 1266.

146. *Id.* at 1262.

Yet the court had just found that the items were in common use, and plaintiffs had submitted expert and lay evidence about their uses for self-defense and sport. Other than self-defense, sport, and hunting, why else would so many Americans be buying such rifles? Every such rifle was first sold at retail by a federally-licensed firearm dealer who conducted a background check under federal law and any state-required background checks.<sup>147</sup>

While the District had introduced no evidence in the district court, the majority relied on non-adjudicatory sources to support the ban. Two ATF sources were cited. As relied on by the Committee on Public Safety, an ATF report asserted that “assault weapons” created “mass produced mayhem.”<sup>148</sup> Such propagandistic rhetoric is unworthy of consideration.<sup>149</sup> Another ATF report concerned whether certain rifles are particularly suitable for sporting purposes, as required for importation.<sup>150</sup>

But the majority relied most particularly on Brady Center lobbyist Brian Siebel, who testified before the Committee that “the military features of semi-automatic assault weapons are designed to enhance their capacity to shoot multiple human targets very rapidly” and “[p]istol grips on assault rifles . . . help stabilize the weapon during rapid fire and allow the shooter to spray-fire from the hip position.”<sup>151</sup> What were Mr. Siebel’s qualifications to make such statements, which were unsworn? Since the pistol grip was virtually the only feature of a rifle that allegedly made it such a dangerous “assault weapon,” this assertion warrants closer analysis.

The declarations in the record by small-arms expert Harold Johnson, rifle manufacturer Mark Westrom, and ex-Marine William Carter established that the pistol grip was designed for accurate fire from the shoulder, not “spray-fire” from the hip. Mr. Siebel’s role as spokesman for the Brady Center and current occupation as a realtor<sup>152</sup> reflect no credentials as a firearms expert. No evidence was presented why a person would want to spray fire from the hip, or that such occurred in any crimes, which would be inherently inaccurate.

The U.S. Army training manual *Rifle Marksmanship* teaches about firing the M4 and M16A2 rifles, which have pistol grips: “Place the weapon’s buttstock into the pocket of the firing shoulder.”<sup>153</sup> It further instructs: “The firing hand

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147. See 18 U.S.C. § 922(t) (2012).

148. *Heller II*, 670 F.3d at 1262 (quoting U.S. DEP’T OF TREAS., BUREAU OF ALCOHOL, TOBACCO, & FIREARMS, ASSAULT WEAPONS PROFILE 19 (1994)).

149. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (“[N]o pronouncement of a Legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act.”).

150. *Heller II*, 670 F.3d at 1263 (citing U.S. DEP’T OF TREAS., BUREAU OF ALCOHOL, TOBACCO, & FIREARMS, STUDY ON THE SPORTING SUITABILITY OF MODIFIED SEMI-AUTOMATIC ASSAULT RIFLES 34–35, 38 (1998)).

151. *Id.* at 1261–62.

152. BRIAN SIEBEL, <http://www.briansiebel.com/>.

153. U.S. DEP’T OF ARMY, RIFLE MARKSMANSHIP, M16-/M4-SERIES WEAPONS 4–18 (2008) [hereinafter RIFLE MARKSMANSHIP], available at [http://armypubs.army.mil/doctrine/DR\\_pubs/dr\\_a/pdf/fm3\\_22x9.pdf](http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm3_22x9.pdf).

grasps the pistol grip so that it fits in the ‘V’ formed by the thumb and forefinger . . . . The remaining three fingers exert a slight rearward pressure to ensure that the buttstock remains in the pocket of the shoulder.”<sup>154</sup> Moreover, “unaimed fire must never be tolerated . . . .”<sup>155</sup> “Keep the cheek on the stock for every shot, align the firing eye with the rear aperture, and focus on the front sightpost.”<sup>156</sup> The manual does *not* teach soldiers to “spray fire from the hip.”

The majority further cited Siebel for the proposition that “assault weapons are preferred by criminals and place law enforcement officers ‘at particular risk . . . because of their high firepower.’”<sup>157</sup> Tellingly, Siebel gave no data or statistics on this alleged preference of criminals—not a surprise, as they mostly prefer handguns—nor did he present any information on the actual use of the banned rifles against law enforcement officers.

The majority also relied on Siebel for the proposition that semi-automatics “fire almost as rapidly as automatics.”<sup>158</sup> Siebel testified that a “30-round magazine” of an UZI “was emptied in slightly less than two seconds on full automatic, while the same magazine was emptied in just five seconds on semi-automatic.”<sup>159</sup> Where did that information come from? Why should it be taken as reliable? For aught it appears, this assertion was pulled out of thin air.

According to the Army training manual *Rifle Marksmanship*, the “Maximum Effective Rate of Fire (rounds per min)” in semi-automatic for the M4 and M16A2 rifles is 45 rounds per minute,<sup>160</sup> not even close to Siebel’s claimed 30 rounds in five seconds. In other words, a semi-automatic could fire *one round per 1-1/3 second*, not *six rounds per second* as claimed.

The above was part of the majority’s attempt to compare automatic with semi-automatic firearms. The Supreme Court suggested in *Heller* that “M-16 rifles and the like” may be banned because they are “dangerous and unusual.”<sup>161</sup> In *Staples*, the Supreme Court had described the “AR-15” as “the civilian version of the military’s M-16 rifle.”<sup>162</sup> That made a world of difference to the Supreme Court, since civilian semi-automatics fire “only one shot with each pull of the trigger,” but a military automatic fires continuously as long as the trigger is pulled.<sup>163</sup> But based on the testimony of Mr. Siebel, the majority in the D.C. Circuit sought to minimize the difference by asserting that semi-automatics “fire almost as rapidly as automatics.”<sup>164</sup>

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154. *Id.*

155. *Id.* at 7–9.

156. *Id.* at 7–19.

157. *Heller II*, 670 F.3d at 1244, 1263 (D.C. Cir. 2011).

158. *Id.*

159. *Id.*

160. *Rifle Marksmanship*, *supra* note 153, at 21.

161. *Heller II*, 670 F.3d at 1263 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)).

162. *Id.* (quoting *Staples v. United States*, 511 U.S. 600, 603 (1994)).

163. *Id.* (quoting *Staples*, 511 U.S. at 602 n.1).

164. *Id.* at 1263.

Other than the pistol grip and semi-automatic features, the majority was silent on the features which supposedly caused the firearms to lose Second Amendment protection. For instance, a telescoping shoulder stock allows a rifle to be adjusted to an individual’s physique, particularly his or her arm length. Like a shoe, a firearm should “fit” the person using it. Even when retracted to the shortest length, such rifles would still have to meet the legal overall length of more than 26 inches.<sup>165</sup> Such rifles are thus no more concealable than any other rifle.

Based on the above, the majority concluded, “the *evidence* demonstrates a ban on assault weapons is likely to promote the Government’s interest in crime control in the densely populated urban area that is the District of Columbia.”<sup>166</sup> “Evidence”? The committee report’s unsupported assertions and Mr. Siebel’s rhetorical allegations could hardly be considered “evidence.” “[E]vidence means the statements of witnesses or documents produced in court for inspection.”<sup>167</sup> The claims would not qualify as admissible expert testimony under the Federal Rules of Evidence, which allows testimony based on “scientific, technical, or other specialized knowledge.”<sup>168</sup> As the Supreme Court noted in *Daubert*: “The adjective ‘scientific’ implies a grounding in the methods and procedures of science. Similarly, the word ‘knowledge’ connotes more than subjective belief or unsupported speculation.”<sup>169</sup>

Plaintiffs submitted the only evidence in the case, and it repudiated the allegations made in the committee report, which were largely based on Mr. Siebel’s testimony at a legislative hearing. Do the unsworn allegations made at a legislative hearing by a lobbyist who has no expert qualifications overcome the actual evidence introduced in a case by sworn witnesses, expert and lay, whose testimony was not challenged? Is it appropriate for a court to uphold a law challenged as unconstitutional based on such unsupported allegations without even mentioning the adverse evidence actually submitted in the case? If so, is that because the normal rules do not apply when Second Amendment rights are concerned?

The panel majority went on to uphold the District’s magazine ban also based on Mr. Siebel’s allegations relied on by the committee. Siebel claimed that “military-style assault weapons”—recall plaintiffs’ uncontradicted evidence that the banned rifles are not used by any military force in the world—are even more dangerous if equipped with magazines that hold more than ten rounds, which “greatly increase[s] the firepower of mass shooters.”<sup>170</sup> The panel mentioned no data or information on the actual facts in mass shootings.

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165. See 26 U.S.C. § 5845(a)(4) (2014); D.C. Code § 7-2501.01(17) (2013).

166. *Heller II*, 670 F.3d at 1263 (emphasis added).

167. *United States v. Pugh*, 99 U.S. 265, 270 (1878).

168. FED. R. EVID. 702.

169. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993).

170. *Heller II*, 670 F.3d at 1263.

The majority added: “The Siebel testimony moreover supports the District’s claim that high-capacity magazines are dangerous in self-defense situations because ‘the tendency is for defenders to keep firing until all bullets have been expended, which poses grave risks to others in the household, passersby, and bystanders.’”<sup>171</sup> How would Mr. Siebel know that? No factual basis was set forth for that allegation.

Based on the above, the majority held that the District had shown “a substantial relationship” between the rifle and magazine bans and “the objectives of protecting police officers and controlling crime.”<sup>172</sup>

Despite its discussion of semi-automatics, the majority did not hold that “possession of semi-automatic handguns is outside the protection of the Second Amendment,” allowing that “a ban on certain semi-automatic pistols” could be unconstitutional, but then adding that it did “not read *Heller* as foreclosing every ban on every possible sub-class of handguns or, for that matter, a ban on a sub-class of rifles.”<sup>173</sup> In other words, even if the Supreme Court in *Heller* held that handguns and long guns as a class may not be banned, some of them may be banned anyway.

The majority ended by picturing the District as not being a total outlier, given that some states ban “assault weapons,” and the bans are not significantly narrower than the District’s ban.<sup>174</sup> However, the few states with such laws defined “assault weapon” more narrowly and grandfathered all such firearms and magazines as were lawfully possessed as of a designated effective date.<sup>175</sup> The District prohibited all of them.

The majority added, “the District’s prohibition is very similar to the nationwide ban on assault weapons that was in effect from 1994 to 2004.”<sup>176</sup> However, the expired federal law defined “assault weapon” to include a *short* list of named firearms as well as certain firearms with *two* specified generic characteristics.<sup>177</sup> The District defines the term to include a *long* list of named firearms as well as certain firearms with *only one* specified generic characteristic. And the federal restriction applied only to firearms and magazines made

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171. *Id.* at 1263–64.

172. *Id.* at 1264.

173. *Id.* at 1268.

174. *Id.* at 1268 n.\*\*.

175. California prohibits “assault weapons,” but exempts registered guns. CAL. PENAL CODE §§ 30600-30675 (West 2012). New Jersey defines “assault firearm” only by name, and allowed those “used for legitimate target-shooting purposes” to be registered. N.J. STAT. ANN. §§ 2C:39-1w, :58-12a, :58-12b (West 2005). At the time *Heller II* was decided, Connecticut and New York defined “assault weapon” to require two generic features, and grandfathered those possessed before 1994. CONN. GEN. STAT. §§ 53-202a(a)(3), -202d, -202m, -202n, -202o (2012); N.Y. PENAL LAW § 265.00(22) (McKinney 2008). In 2013, those two states adopted one-feature tests, but allowed the newly-defined “assault weapons” to be registered. CONN. GEN. STAT. §§ 53-202a(1)(B)-(F), 53-202d(a)(2) (2015); N.Y. PENAL LAW §§ 265.00(22)(b), 400.00(16-a)(a) (McKinney 2008 & Supp. 2015).

176. *Heller II*, 670 F.3d at 1268 n.\*\*.

177. *See* 18 U.S.C. §§ 921(a)(30), 922(v), 922(w) (2002) (repealed 2004).

after the date of enactment, leaving millions of them without restriction.<sup>178</sup>

In his dissenting opinion, Judge Kavanaugh contended that semi-automatic rifles and handguns were not traditionally banned and “are in common use by law-abiding citizens for self-defense in the home, hunting, and other lawful uses,” but that such handguns were used far more in crime than the rifles.<sup>179</sup> Instead of heeding *Heller*, the District pushed the envelope again with its rifle ban.<sup>180</sup>

*Heller* and *McDonald*, the dissent argued, evaluated restrictions “based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.”<sup>181</sup> Applying that categorical test, the Supreme Court “determined that handguns had not traditionally been banned and were in common use—and thus that D.C.’s handgun ban was unconstitutional.”<sup>182</sup> The Court rejected Justice Breyer’s interest-balancing method, which was indistinguishable from intermediate scrutiny.<sup>183</sup> The dissent added: “It is ironic, moreover, that Justice Breyer’s dissent explicitly advocated an approach based on *Turner Broadcasting*; that the *Heller* majority flatly rejected that *Turner Broadcasting*-based approach; and that the majority opinion here nonetheless turns around and relies expressly and repeatedly on *Turner Broadcasting*.”<sup>184</sup>

Even if an analysis based on a level of scrutiny applied, the dissent continued, given that the right to keep and bear arms is an enumerated, fundamental right, it would be strict, not intermediate, scrutiny.<sup>185</sup> “Whether we apply the *Heller* history-and tradition-based approach or strict scrutiny or even intermediate scrutiny, D.C.’s ban on semi-automatic rifles fails to pass constitutional muster.”<sup>186</sup>

Buttressing the majority’s acknowledgment that semi-automatic rifles are in common use, the dissent noted that they accounted for 40 percent of rifles sold in 2010; two million AR-15s, America’s most popular rifle, had been manufactured since 1986.<sup>187</sup> The website of the popular gun seller Cabela’s illustrated how common such rifles are.<sup>188</sup> The dissent cited the declaration of the highly-credentialed firearms expert Harold E. Johnson for the proposition that: “Semi-automatic rifles are commonly used for self-defense in the home, hunting, target shooting, and competitions . . . . And many hunting guns are semi-auto-

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178. *Id.* § 922(v)(2) (assault weapons); *id.* § 922(w)(2) (magazines).

179. *Heller II*, 670 F.3d at 1269–70 (Kavanaugh, J., dissenting).

180. *Id.* at 1271.

181. *Id.* at 1271.

182. *Id.* at 1273.

183. *Id.* at 1276–79.

184. *Id.* at 1280.

185. *Id.* at 1284–85.

186. *Id.* at 1285.

187. *Id.* at 1287 (citing researcher Mark Overstreet).

188. *Id.* (citing <http://www.cabelas.com>).

matic.”<sup>189</sup> The majority had denied that based on the opinions of Brady lobbyist Brian Siebel, who lacked any credentials on the subject.

The dissent took the majority to task for suggesting that “semi-automatic handguns are good enough to meet people’s needs for self-defense and that they shouldn’t need semi-automatic rifles,” which is “like saying books can be banned because people can always read newspapers.”<sup>190</sup> Moreover, if semi-automatic handguns are constitutionally protected—as *Heller* held—it is difficult to understand why semi-automatic rifles are not. Assuming as valid Siebel’s assertion about rate of fire—which meant “that semi-automatics actually fire two-and-a-half times slower than automatics”—the comparison was invalid in that “semi-automatic rifles fire at the same general rate as semi-automatic handguns.”<sup>191</sup>

Referring to rifles that can be used for self-defense in the home as “assault weapons” adds nothing, in that “it is the person, not the gun, who determines whether use of the gun is offensive or defensive,” and in any event handguns are used most often in violent crime.<sup>192</sup>

The dissent would have remanded the issue of the ban on magazines holding more than ten rounds to determine whether such magazines “have traditionally been banned and are not in common use.”<sup>193</sup> The majority, as noted, had conceded that they were in common use, and they were no more traditionally banned than were “assault weapons,” and indeed both were part and parcel of the same recent bans.<sup>194</sup>

## VII. THE AFTERMATH

After the horrible murders at Sandy Hook Elementary School, New York and Connecticut redefined “assault weapon” to include numerous more firearms, mostly semi-automatic rifles, and banned any that were not registered or declared by a specified deadline.<sup>195</sup> *Heller II* would figure prominently in challenges to these and other post-*Heller* enactments.

The New York and Connecticut prohibitions were upheld in *New York State Rifle & Pistol Ass’n, Inc. v. Cuomo* (*NYSRPA*).<sup>196</sup> Noting the production of nearly four million AR-15 rifles alone between 1986 and March 2013, and countless millions of the banned magazines, the court acknowledged that “the assault weapons and large-capacity magazines at issue are ‘in common use’ as

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189. *Id.* at 1287–88.

190. *Id.* at 1289.

191. *Id.* at 1289.

192. *Id.* at 1290.

193. *Id.* at 1296 n.20.

194. *Id.* at 1261.

195. See CONN. GEN. STAT. §§ 53-202a(1)(B)-(F), 53-202d(a)(2) (2015); N.Y. PENAL LAW §§ 265.00(22)(b), 400.00(16-a)(a) (McKinney 2008 & Supp. 2015); see generally Stephen P. Halbrook, *New York’s Not So “SAFE” Act: The Second Amendment In An Alice-in-Wonderland World Where Words Have No Meaning*, 78 ALB. L. REV. 789 (2014/2015).

196. 804 F.3d 242 (2d Cir. 2015).

that term was used in *Heller*.”<sup>197</sup> The court, moreover, “proceed[ed] on the assumption that these laws ban weapons protected by the Second Amendment.”<sup>198</sup> It concluded that the bans “implicate the core of the Second Amendment’s protections by extending into the home,” and “impose a substantial burden on Second Amendment rights and therefore trigger the application of some form of heightened scrutiny.”<sup>199</sup>

But intermediate scrutiny came to the rescue, albeit in a watered-down version that does not require narrow tailoring, under which the bans could be upheld.<sup>200</sup> Despite handguns allegedly “account[ing] for 71 percent to 83 percent of the firearms used in murders” and the holding of *Heller* that handguns cannot be banned,<sup>201</sup> *NYSRPA* asserted that the banned rifles “are disproportionately used in crime, and particularly in criminal mass shootings . . . .”<sup>202</sup> While it gave no data for that proposition, the court relied on the Violence Policy Center for the statistic that “assault weapons” were used in 20% of killings of law enforcement officers from 1998 to 2001<sup>203</sup>—indicating that they were used in disproportionately *fewer* such crimes.

*NYSRPA* devotes exactly one paragraph, with no substantive discussion, about the features that supposedly make “assault weapons” so dangerous and unusual. Features such as the flash suppressor, protruding grip, and barrel shroud, according to plaintiffs, “improve a firearm’s ‘accuracy,’ ‘comfort,’ and ‘utility.’ This circumlocution is, as Chief Judge Skretny observed, a milder way of saying that these features make the weapons more deadly.”<sup>204</sup> But Chief Judge Skretny, who wrote the district court’s opinion, had cited Justice Stevens’ *McDonald* dissent in support of his statement “the very features that increase a weapon’s utility for self-defense also increase its dangerousness to the public at large.”<sup>205</sup> *McDonald* rejected the policy argument against incorporation of the right into the Fourteenth Amendment that “that the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public

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197. *Id.* at 255.

198. *Id.* at 257.

199. *Id.* at 258, 260.

200. *Id.* at 261.

201. *Id.* at 256.

202. *Id.* at 262.

203. *Id.* at 262 & n.15. Given the differing and constantly changing definitions of “assault weapon,” it is unclear how any statistic would be reliable.

204. *Id.* at 262 (footnote omitted).

205. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 990 F. Supp. 2d 349, 368 (W.D.N.Y. 2013) (citing *McDonald v. City of Chicago*, 561 U.S. 742, 891 (2010) (Stevens, J., dissenting)), *aff’d in part, rev’d in part*, 804 F.3d 242 (2d Cir. 2015). Justice Stevens used that argument in support of his belief that “the Court badly misconstrued the Second Amendment” in *Heller* and that it was a mistake to hold “that a city may not ban handguns.” *McDonald*, 561 U.S. at 890 & n.33 (Stevens, J., dissenting).

safety.”<sup>206</sup> “Arms” by their very definition can be lethal, and that is what the Second Amendment guarantees.

Since sights on a firearm make it more “accurate” and hence “more deadly,” could sights be on the list of banned features? If firing in self-defense, is it preferable that an inaccurate firearm be used, exposing an innocent bystander to being shot?

Consider the banned features condemned by the district court. “A muzzle compensator reduces recoil and muzzle movement caused by rapid fire,”<sup>207</sup> but it is obvious that it would do the same in slow fire. Recoil can be painful, and muzzle movement interferes with accuracy. A telescoping stock, which plaintiffs noted “allows the user to adjust the length of the stock, . . . like finding the right size shoe, simply allows the shooter to rest the weapon on his or her shoulder properly and comfortably.”<sup>208</sup> The district court found that to aid “concealability and portability,”<sup>209</sup> without any reference the overall length of the rifle, which could be quite long. As for the pistol grip “increas[ing] comfort and stability,”<sup>210</sup> it also supposedly allows “‘spray firing’ from the hip.”<sup>211</sup>

Through repetition, such myths about the features become reality. *Heller II* asserted them, the district court in the New York challenge repeated them, and the district court in the Connecticut challenge repeated them again.<sup>212</sup> *NYSRPA* could then render a lengthy opinion upholding the bans on commonly-possessed rifles without any substantive discussion of the features that allegedly make them so dangerous and unusual.

To be sure, *NYSRPA* did find two provisions in violation of the Second Amendment. First, it invalidated Connecticut’s ban on the Remington Tactical 7615 pump-action rifle because the state had presented evidence only on semi-automatic firearms, although court left the door over for evidence on pump-actions to be generated.<sup>213</sup> Second, while upholding the ban on magazines holding over ten rounds, it invalidated New York’s ban on loading such magazines with more than seven rounds, for failure “to present evidence that the mere existence of this load limit will convince any would-be malefactors to load magazines capable of holding ten rounds with only the permissible seven.”<sup>214</sup>

206. *McDonald*, 561 U.S. at 782 (plurality opinion); cf., e.g., *Ill. Ass’n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 942 (N.D. Ill. 2014) (“[W]hatever burdens the City hopes to impose on criminal users also falls squarely on law-abiding residents who want to exercise their Second Amendment right.”).

207. *N.Y. State Rifle & Pistol Ass’n*, 990 F. Supp. 2d at 370.

208. *Id.* at 368.

209. *Id.* at 370.

210. *Id.* at 368.

211. *Id.* at 370 (citing *Heller II*, 670 F.3d 1244, 1262–63 (D.C. Cir. 2011) (relying on unsworn testimony of Brady Campaign lobbyist Brian Siebel)).

212. See *Shew v. Malloy*, 994 F. Supp. 2d 234, 243–44, 247–50 (D. Conn. 2014), *aff’d in part, rev’d in part sub nom.* *N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015).

213. *N.Y. State Rifle & Pistol Ass’n*, 804 F.3d at 257 n.73.

214. *Id.* at 264.

Yet the limit on ten-round magazines cannot be expected to get much respect by these same malefactors.

*Heller II* has spawned or influenced similar decisions regarding “assault weapon” and magazine bans in Maryland<sup>215</sup> and in Highland Park, Illinois.<sup>216</sup> Ditto for magazine bans in Colorado<sup>217</sup> and in Sunnyvale, California.<sup>218</sup>

The Supreme Court has not granted certiorari in a Second Amendment case since *McDonald* was decided in 2010. In 2015, Justice Thomas, joined by Justice Scalia, dissented from the denial of certiorari in a challenge to a San Francisco ordinance prohibiting the keeping of a handgun in a residence unless it is either locked or being carried on the person.<sup>219</sup> San Francisco’s law, Justice Thomas wrote, “burdens [citizens’] right to self-defense at the times they are most vulnerable—when they are sleeping, bathing, changing clothes, or otherwise indisposed.”<sup>220</sup> In Justice Thomas’ view, *Heller* did not suggest that only an absolute prohibition would be a “substantial burden” on the right; certiorari should have been granted “to reiterate that courts may not engage in this sort of judicial assessment as to the severity of a burden imposed on core Second Amendment rights.”<sup>221</sup>

Tellingly, Justice Thomas noted that the post-*Heller* courts of appeals “have disagreed about whether and to what extent the tiers-of-scrutiny analysis should apply to burdens on Second Amendment rights.”<sup>222</sup> He then referred to the two opinions in *Heller II*—the majority view of asking whether a law impinges on a Second Amendment right, and if so, applying a level of scrutiny, and the dissenting view of looking at text, history, and tradition, not a balancing test.<sup>223</sup> But, Justice Thomas commented, “[o]ne need not resolve that dispute to know that something was seriously amiss in the decision below.”<sup>224</sup>

Not long after the above denial of certiorari, it was *déjà vu*—the Supreme Court denied certiorari in the challenge to the Highland Park ban mentioned above, and once again Justice Thomas, joined by Justice Scalia, dissented from the denial.<sup>225</sup> The ordinance banned common firearms “which the City branded

215. *Kolbe v. O’Malley*, 42 F. Supp. 3d 768 (D. Md. 2014), *aff’d in part, vacated in part sub nom. Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016), *reh. en banc granted*, 636 F. App’x 880 (4th Cir. 2016) (mem.).

216. *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir.), *cert. denied*, 136 S. Ct. 447 (2015).

217. *Colo. Outfitters Ass’n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1066 (D. Colo. 2014), *vacated and remanded*, 823 F.3d 537 (10th Cir. 2016) (holding that plaintiffs lacked standing).

218. *Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015).

219. *Jackson v. City & Cnty. of S.F.*, 135 S. Ct. 2799, 2799–2802 (2015) (Thomas, J., dissenting from denial of certiorari).

220. *Id.* at 2800.

221. *Id.* at 2802.

222. *Id.* at 2801.

223. *Id.* (comparing *Heller II*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) with *id.* at 1271 (Kavanaugh, J., dissenting)).

224. *Id.*

225. *Friedman v. City of Highland Park*, 136 S. Ct. 447, 447–50 (2015) (Thomas, J., dissenting from the denial of certiorari).

‘Assault Weapons,’” but which are “modern sporting rifles (*e.g.*, AR-style semiautomatic rifles), which many Americans own for lawful purposes like self-defense, hunting, and target shooting.”<sup>226</sup> These characterizations are a departure from the usual pejorative rhetoric.

Justice Thomas noted that *Heller* “excluded from protection only ‘those weapons not typically possessed by law-abiding citizens for lawful purposes.’”<sup>227</sup> The Seventh Circuit erred when it asked whether the banned firearms were common in 1791, when the Second Amendment was adopted; while *Heller* recognized protection for bearable arms generally without regard to whether they existed at the founding.<sup>228</sup> The Seventh Circuit also erred when it asked whether the banned firearms relate to a well-regulated militia, which states and localities would decide.<sup>229</sup> That ignored that the scope of the Second Amendment “is defined not by what the militia needs, but by what private citizens commonly possess,” and that States and localities do not have “the power to decide which firearms people may possess.”<sup>230</sup>

It did not suffice that other alternatives allegedly existed for self-defense. The ban was suspect based on the following: “Roughly five million Americans own AR-style semiautomatic rifles. The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting.”<sup>231</sup> Nor could the ban be upheld “based on conjecture that the public might *feel* safer (while being no safer at all).”<sup>232</sup> Declining to review a decision that flouted *Heller* and *McDonald*, according to Justice Thomas, contrasted with the Court’s summary reversal of decisions that disregarded other constitutional precedents.<sup>233</sup>

So it remains to be seen if and when the Supreme Court may take on the issue of long gun and magazine bans. At a minimum, perhaps something will be seen also as seriously amiss in allowing anything to be said in a committee report and to uphold on that basis, without consideration of actual evidence in the record, a prohibition on exercise of a constitutional right.

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226. *Id.* at 447.

227. *Id.* at 448 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008)).

228. *Id.*

229. *Id.* at 448–49.

230. *Id.* at 449.

231. *Id.* (citation omitted).

232. *Id.*

233. *Id.* at 449–50.