

COMMENTS ON ASSAULT WEAPONS, THE RIGHT TO ARMS, AND THE RIGHT TO LIVE

JONATHAN E. LOWY*

Before delving into the issue of the constitutionality of restrictions on assault weapons, an overview of the state of gun laws in America is warranted. Assault weapons are generally permitted in the United States today.¹ They were banned under federal law between 1994 and 2004, but Congress allowed that ban to lapse.² Now, they are prohibited in several states and are allowed in the others.³

Under current federal law, there are no limits on how many guns one can purchase.⁴ A person can purchase 50, 100, or even

* Chief Counsel and Vice President, Legal, Brady. This Essay is a lightly edited version of Mr. Lowy's remarks at the Federalist Society's event, "The Second Amendment in the New Supreme Court," held on January 15, 2019. The topic of the panel was "Are Semiautomatic Rifles, aka 'Assault Weapons,' Protected by the Second Amendment?"

1. See John J. Phelan IV, *The Assault Weapons Ban—Politics, the Second Amendment, and the Country's Continued Willingness to Sacrifice Innocent Lives for "Freedom,"* 77 ALB. L. REV. 579, 597 (2014) (noting the lack of uniform laws regarding assault weapons and that "only seven states have adopted some kind of an assault weapon ban").

2. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, sec. 110102(a), § 921(v)(1), 108 Stat. 1796, 1997 (codified as amended in scattered sections of 42 U.S.C.) (expired 2004).

3. Only seven states currently have laws banning assault weapons. These include California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, and New York. See CAL. PENAL CODE § 30510, 30515, 30605 (West 2012 & Supp. 2020); CONN. GEN. STAT. §§ 53-202a to -202c (2019); HAW. REV. STAT. ANN. § 134-8(a) (LexisNexis 2013) (only applies to "assault pistols" not long guns); MD. CODE ANN., CRIM. LAW §§ 4-301 to -303 (LexisNexis 2012 & Supp. 2019); MD. CODE ANN., PUB. SAFETY § 5-101 (LexisNexis 2018 & Supp. 2019); MASS. ANN. LAWS ch. 140, §§ 121, 131M (LexisNexis 2016 & Supp. 2019); N.J. STAT. ANN. §§ 2C:39-1(w), 2C:39-5(f) (West 2016 & Supp. 2019); N.Y. PENAL LAW §§ 265.00(22), 265.01 (McKinney 2017 & Supp. 2020).

4. See *Registration*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/gun-owner-responsibilities/registration/> [<https://perma.cc/9LTV-7VPC>] (last visited Mar. 16, 2020) (noting that there is no comprehensive national system of gun registration).

1,000 guns at one time.⁵ There are also no limits on how many guns an individual can possess—theoretically, a person can possess all the guns that could fit into his or her home. Along with the lack of ownership limits under federal law, there are hundreds of models of conventional semiautomatic handguns, hunting rifles, and shotguns that are available under state laws.⁶ The result is that in every state, Americans can buy and possess thousands of semiautomatic handguns, rifles, and shotguns.

To provide some additional context, it is important to note that Congress has given the gun industry special protections under federal law that no other product or industry has been provided. For example, guns are exempt from the Consumer Product Safety Act.⁷ So even if there are safety devices that would save the lives of children and others and are completely feasible—and would not affect the functionality of the gun in any way—the law does not give the federal government the authority to require gun manufacturers to make guns with these safety devices.⁸ But with any other product, the government would require that such safety devices be put in.⁹ This posture is thanks to the National Rifle Association's influence on Congress when the Consumer Product Safety Act was enacted.¹⁰

The gun industry also has special protection from civil liability. Traditionally, a company that negligently provides a product to a criminal can be held civilly liable.¹¹ But some courts have

5. See *Bulk Gun Purchases*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/crime-guns/bulk-gun-purchases/> [<https://perma.cc/3P96-2KUA>] (last visited Mar. 16, 2020).

6. See, e.g., James B. Jacobs & Zoe Fuhr, *The Safe Act: New York's Ban on Assault Weapons & Large Capacity Magazines*, 53 CRIM. L. BULL. 4 (2017) (noting that despite New York's "ban" on assault weapons, residents in the state can still purchase various types of semiautomatic weapons that are not "unusually dangerous").

7. See 15 U.S.C. § 2052 (2018) (containing no references to weapons).

8. See *id.*

9. 15 U.S.C. § 2058 (2018).

10. See James L. Daniels, Comment, *Violating the Inviolable: Firearm Industry Retroactive Exemptions and the Need for a New Test for Overreaching Federal Prohibitions*, 38 J. MARSHALL L. REV. 955, 956–57 (2005).

11. For example, a vendor who furnishes alcohol can be held liable for foreseeable alcohol-related injuries arising out of the intoxication. See *Brannigan v. Raybuck*, 667 P.2d 213, 221 (Ariz. 1983).

held that when a licensed gun dealer negligently supplies guns to criminals, the dealer may not be held liable.¹²

Gun rights activists argue that getting more guns in people's hands leads to less crime.¹³ If this were true, the United States would be a perfect model for it, given that Americans possess such a vast number of guns.¹⁴ Yet the facts prove just the opposite. The gun homicide rate in the United States is twenty-five times higher than in other high-income nations,¹⁵ and Americans are over fifty times more likely to die from a gun than those in the United Kingdom.¹⁶

The crime rate in the United States is actually comparable to, and in some cases lower than, the rate in other high-income nations.¹⁷ Crime, as Professors Franklin Zimring and Gordon Hawkins found years ago, is not the problem behind gun deaths in America.¹⁸ Rather, the problem is that—because of the lax gun laws summarized above—criminals have easy access to guns.¹⁹ One cause of this ease of access is that federal law allows unlicensed people to sell guns without background

12. See *Jefferies v. District of Columbia*, 916 F. Supp. 2d 42, 47 (D.D.C. 2013) (barring tort claims against a weapons manufacturer); *Rosenbeck v. Sportsmen's Outpost, Inc.*, 2013, No. X04CV095032765S, 2011 WL 2479693, at *16, *23 (Conn. Super. Ct. 2011) (barring tort claims against gun dealer); see also Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901–7903 (2018) (prohibiting civil actions against firearm manufacturers or sellers for criminal or unlawful use of firearm products).

13. See JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* (3d ed. 2010).

14. *America's gun culture in charts*, BBC NEWS (Aug. 5, 2019), <https://www.bbc.com/news/world-us-canada-41488081> [<https://perma.cc/25TL-4UQ5>].

15. See *id.* (showing that 73 percent of all homicides in the United States are gun-related compared with 3 percent for England and Wales).

16. See Nurith Aizenman, *Deaths From Gun Violence: How The U.S. Compares With the Rest of the World*, NPR (Nov. 9, 2018, 3:14 PM), <https://www.npr.org/sections/goatsandsoda/2018/11/09/666209430/deaths-from-gun-violence-how-the-u-s-compares-with-the-rest-of-the-world> [<https://perma.cc/SX8V-BLDV>] (showing the rate of violent gun deaths per 100,000 people to be 4.43 for the United States and 0.06 for the United Kingdom).

17. *Total crimes per 1000: Countries Compared*, NATIONMASTER, <https://www.nationmaster.com/country-info/stats/Crime/Total-crimes-per-1000> [<https://perma.cc/S3J9-9ULT>] (last visited Mar. 16, 2020).

18. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* (1997).

19. See Aaron Edward Brown, *The Guns Aren't Illegal. But Sometimes the Owners Are: Understanding Minnesota's private-transfer exception suggests the best path to reducing gun violence*, BENCH & B. MINN., May–June 2019, at 22, 23.

checks. If someone who has been convicted of murder is released from prison, he can visit a gun show, go online, or read the classified ads and find an unlicensed person—an ordinary person who does not have a federal firearms license—and that person can sell the convicted murderer all the guns he wants without a background check, unless in one of the states that require universal background checks.²⁰ Brady is trying to address this problem by advocating for a requirement for background checks for all gun sales.²¹

Even though America's crime rate is similar to those of comparable nations, because criminals and other dangerous people have such easy access to guns, the gun violence rate in the United States is completely out of line with the rest of the world. Every day in America, approximately 310 people are shot and 100 are killed by a gun, including twenty-one children and teens who are shot and four of whom are killed.²² States with the most guns have far higher gun death rates than states with lower amounts of guns.²³ Homes with firearms have a risk of homicide and suicide that is several times higher than in a home without firearms.²⁴ And while guns can be and sometimes are used in self-defense, it is much more likely that guns will be used against family members, visitors, or innocent people, or in suicides, unintentional shootings, or assaults and homicides.²⁵

Most Americans choose not to own firearms,²⁶ even though they have a right to do so under the Second Amendment under

20. 18 U.S.C. §§ 922(a)(5), (d) (2018); 27 C.F.R. 478.30, 478.32(d) (2019).

21. *Expanding Brady Background Checks (H.R. 8 and S. 42)*, BRADY, <https://www.bradyunited.org/legislation/expanding-brady-background-checks-hr-8-and-s-42> [<https://perma.cc/7EHC-EB2W>] (last visited Mar. 17, 2020); see also Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

22. *The Facts That Make Us Act*, BRADY, <https://www.bradyunited.org/key-statistics> [<https://perma.cc/NTU8-2WEM>] (last visited Jan. 18, 2020).

23. See Aaron J. Kivisto et al., *Firearm Ownership and Domestic Versus Nondomestic Homicide in the U.S.*, 57 AM. J. PREVENTIVE MED. 311, 313–17 (2019) (finding firearm ownership increased the rate of domestic but not nondomestic homicide); Michael C. Monuteaux et al., *Firearm Ownership and Violent Crime in the U.S.: An Ecologic Study*, 49 AM. J. PREVENTIVE MED. 207, 210 (2015).

24. *Gun Violence in America*, EVERYTOWN FOR GUN SAFETY (Feb. 20, 2020), <https://everytownresearch.org/gun-violence-america/2/> [<https://perma.cc/HS7V-QFBH>].

25. See *id.*

26. Ruth Igielnik & Anna Brown, *Key takeaways on Americans' views of guns and gun ownership*, PEW RES. CTR. (June 22, 2017), <https://www.pewresearch.org/fact->

the Supreme Court's holding in *District of Columbia v. Heller*.²⁷ However, many of these people are victimized as a result of guns that others choose to own.²⁸

There is also some constitutional significance to the fact that America's lack of gun regulation is not a product of the public will. For example, over ninety-five percent of Americans support background checks for all gun sales.²⁹ That may be the most popular legislative proposal in America.³⁰ I do not know of any legislative proposal for any issue that has the popularity of simply requiring Brady criminal background checks for all gun sales.³¹ Nearly everyone in America supports background checks for all gun sales—except the gun manufacturers, who want to sell more guns, and the politicians and lobbies that support the gun industry.³² That matters because this extreme

tank/2017/06/22/key-takeaways-on-americans-views-of-guns-and-gun-ownership/ [https://perma.cc/L9DA-KUC8] (reporting that 57 percent of Americans live in a household without guns).

27. 554 U.S. 570, 636 (2008).

28. See *Gun Violence in America*, *supra* note 24.

29. See, e.g., Domenico Montanaro, *Americans Largely Support Gun Restrictions To Do Something About Gun Violence*, NPR (Aug. 10, 2019, 7:00 AM), <https://www.npr.org/2019/08/10/749792493/americans-largely-support-gun-restrictions-to-do-something-about-gun-violence> [https://perma.cc/BTD8-BC2Q]; *Universal Background Checks*, GIFFORDS: COURAGE TO FIGHT GUN VIOLENCE, <https://giffords.org/issue/background-checks/> [https://perma.cc/WQ7J-HMYJ] (last visited Jan. 18, 2020). But see *"Universal" Background Checks Aren't as Universally Popular as You've Been Led to Believe*, NRA-ILA (Aug. 13, 2019), <https://www.nra.org/articles/20190813/universal-background-checks-aren-t-as-universally-popular-as-you-ve-been-led-to-believe> [https://perma.cc/6BVS-C9TY] [hereinafter "*Universal" Background Checks*].

30. Compare *Universal Background Checks*, *supra* note 29 (stating that 97 percent of Americans support universal background checks), with Andrew Daniller, *Two-thirds of Americans support marijuana legalization*, PEW RES. CTR. (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/> [https://perma.cc/JS6H-WT88] (stating that 91 percent of Americans support marijuana legalization for medical use).

31. A Brady criminal background check requires a firearm seller to contact the FBI to run a background check. See *Background Check Procedures*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/background-check-procedures/> [https://perma.cc/U4RN-3W6Q] (last visited Mar. 17, 2020). The FBI checks the National Instant Criminal Background Check System (NICS) which "contains information about individuals' criminal and mental health histories and any civil orders entered against them that might affect their eligibility to purchase or possess a gun, such as domestic violence restraining orders." *Id.*

32. See Montanaro, *supra* note 29. But see "*Universal" Background Checks*, *supra* note 29.

expansive view of gun rights is not wildly popular but does have undue influence in Congress.

This Essay is about assault weapons. It is not about whether Americans can or should choose to own firearms if they want to, and it is not about whether Americans can or should choose to stockpile an arsenal of semiautomatic handguns, rifles, and shotguns. They can do so under current federal and state law. The question is whether it is constitutional for states, and perhaps the federal government, to restrict or prohibit the civilian purchase and possession of certain types of semiautomatic weapons which, as Mark Smith just discussed, have certain attributes like rear pistol grips, barrel shrouds, and the ability to accept large-capacity magazines.³³ The question is really whether the Constitution provides an individual right to these design attributes.

Every single court that has considered this issue has rejected the legal position that Mark Smith so eloquently made.³⁴ There are a number of reasons for that. One is that, despite Mark Smith's argument that the features that make an assault weapon an assault weapon are cosmetic,³⁵ that is simply not the case. They are functional aspects of the gun that make it easier to kill large amounts of people in a short amount of time.³⁶ This is not a matter of opinion but is instead demonstrated by the demand for these features in the relevant market, which has spoken on this issue. That relevant market is the market of mass killers.

33. See Mark W. Smith, *Assault Weapon Bans: Unconstitutional Laws for a Made-up Category of Firearms*, 43 HARV. J.L. & PUB. POL'Y 356, 358, 364 (2020).

34. See, e.g., *Wilson v. Cook County*, 937 F.3d 1028, 1029 (7th Cir. 2019) (upholding ban on assault rifles and large-capacity magazines); *Worman v. Healey*, 922 F.3d 26, 30–31, 41 (1st Cir. 2019) (upholding ban on assault rifles and large-capacity magazines); *Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. N.J.*, 910 F.3d 106, 122 (3d Cir. 2018) (upholding ban on large-capacity magazines); *Kolbe v. Hogan*, 849 F.3d 114, 137–38 (4th Cir. 2017) (en banc) (upholding ban on assault weapons); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 269 (2d Cir. 2015) (upholding ban on assault rifles and large-capacity magazines).

35. Smith, *supra* note 33, at 364–66.

36. See, e.g., *Assault Weapons*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/assault-weapons/> [https://perma.cc/XY8-C5DZ] (last visited Jan. 18, 2020); *Large Capacity Magazines*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/large-capacity-magazines/> [https://perma.cc/82WP-2JDS] (last visited Jan. 18, 2020).

Murderers who want to kill as many people in as short an amount of time as possible overwhelmingly choose assault weapons and large-capacity magazines. The mass shooters at the high school in Parkland, Florida,³⁷ the church in Sutherland Springs, Texas,³⁸ the music festival in Las Vegas,³⁹ the terror attack in San Bernardino, California,⁴⁰ the elementary school at Sandy Hook in Newtown, Connecticut,⁴¹ and the movie theater in Aurora, Colorado⁴² all chose AR-15-style assault weapons and large-capacity magazines. That is not because they liked the way they looked—it is because they knew that they were effective in accomplishing their mission, which was to kill as many people as efficiently as possible. And the fact is that they were correct,⁴³ and courts have recognized this.⁴⁴

There are differences between a semiautomatic assault weapon and a fully automatic gun. A fully automatic gun fires rounds so long as the trigger is held and rounds are available,

37. Will Drabold & Alex Fitzpatrick, *The Florida School Shooter Used an AR-15 Rifle. Here's What to Know About the Gun*, TIME (Jan. 15, 2019, 11:38 AM), <https://time.com/5160267/gun-used-florida-school-shooting-ar-15/> [<https://perma.cc/UXH9-447M>].

38. Tom Vanden Brook, *Air Force failed four times to prevent Sutherland Springs church killer from buying guns*, USA TODAY (Dec. 7, 2018, 4:37 PM), <https://www.usatoday.com/story/news/politics/2018/12/07/air-force-failed-four-times-prevent-sutherland-springs-shooter-gun-purchase/2237400002/> [<https://perma.cc/Y2QW-K5RE>].

39. Alex Horton, *The Las Vegas shooter modified a dozen rifles to shoot like automatic weapons*, WASH. POST (Oct. 3, 2017, 10:37 PM), <https://www.washingtonpost.com/news/checkpoint/wp/2017/10/02/video-from-las-vegas-suggests-automatic-gunfire-heres-what-makes-machine-guns-different/> [<https://perma.cc/EG53-P98S>].

40. Chris Keller, *San Bernardino Shooting update: Rifles used in attack were modified to be illegal*, 89.3 KPPC (Dec. 4, 2015), <https://www.scpr.org/news/2015/12/04/56040/san-bernardino-shooting-update-rifles-used-in-atta/> [<https://perma.cc/F4XG-C9BW>].

41. Press Release, Conn. Dep't of Emergency Servs. & Pub. Protect., State Police Identify Weapons Used in Sandy Hook Investigation; Investigation Continues (Jan. 18, 2013), <https://web.archive.org/web/20160517175905/http://www.ct.gov/despp/cwp/view.asp?A=4226&Q=517284> [<https://perma.cc/M2UP-E5RL>].

42. James Dao, *Aurora Gunman's Arsenal: Shotgun, Semiautomatic Rifle and, at the End, a Pistol*, N.Y. TIMES (July 23, 2012), <https://nyti.ms/2k4iTjk> [<https://perma.cc/2BP8-FNYX>].

43. William Cummings & Bart Jansen, *Why the AR-15 keeps appearing at America's deadliest mass shootings*, USA TODAY (Feb. 15, 2018, 6:59 PM), <https://www.usatoday.com/story/news/nation/2018/02/14/ar-15-mass-shootings/339519002/> [<https://perma.cc/DCH4-DGAQ>].

44. See Ryan Sit, *Court Rules Second Amendment Doesn't Protect AR-15, Assault Rifles and Large-Capacity Magazines*, NEWSWEEK (Apr. 6, 2018, 2:10 PM), <https://www.newsweek.com/massachusetts-federal-court-second-amendment-doesnt-protect-ar-15-assault-875779> [<https://perma.cc/BEF2-CSVQ>]; *supra* note 34.

while a semiautomatic gun only fires a single round each time the trigger is pulled.⁴⁵ But the difference between these two capabilities is not great. A shooter can empty a thirty-round magazine in about five seconds with a semiautomatic assault weapon,⁴⁶ while a comparable fully automatic gun can be emptied in two seconds, which is a three-second difference.⁴⁷ Courts have recognized that is not much of a difference.⁴⁸

As discussed above, there was a federal ban on assault weapons from 1994 to 2004,⁴⁹ and the results show that the ban saved lives.⁵⁰ There are people who are alive today who probably would be dead if the United States did not have that ban. The ban resulted in a thirty-seven percent decline in incidences of gun massacres,⁵¹ according to one study.⁵² That is a forty-three percent reduction in people killed in those gun massacres.⁵³ In the decade of the federal ban, there were fifteen gun

45. John Haltiwanger, *A breakdown of gun terminology to help you in discussions on mass shootings and debates over gun control*, BUS. INSIDER (Aug. 12, 2019, 10:06 AM), <https://www.businessinsider.com/terms-to-know-about-guns-when-discussing-mass-shootings-2019-8> [<https://perma.cc/JDY5-UTKH>].

46. *Kolbe v. Hogan*, 849 F.3d 114, 125 (4th Cir. 2017) (en banc) (“The difference between the fully automatic and semiautomatic versions of those firearms is slight. That is, the automatic firing of all the ammunition in a large-capacity thirty-round magazine takes about two seconds, whereas a semiautomatic rifle can empty the same magazine in as little as five seconds.”).

47. *Id.*

48. *See, e.g., id.*

49. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, sec. 110102(a), § 921(v)(1), 108 Stat. 1796, 1997 (codified as amended in scattered sections of 42 U.S.C.) (expired 2004).

50. *See* Christopher Ingraham, *It’s time to bring back the assault weapons ban, gun violence experts say*, WASH. POST (Feb. 15, 2018, 1:23 PM), <https://www.washingtonpost.com/news/wonk/wp/2018/02/15/its-time-to-bring-back-the-assault-weapons-ban-gun-violence-experts-say/> [<https://perma.cc/T4L8-U8LR>]. *But see* CHRISTOPHER S. KOPER, UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994–2003, at 2–3 (2004), <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf> [<https://perma.cc/8JJK-DZTE>] (concluding that the effects of the ban are inconclusive).

51. Classified as six or more people being killed. Ingraham, *supra* note 50.

52. *Id.*

53. *Id.* Another study found that “Mass-shooting fatalities [defined as four or more people shot] were 70% less likely to occur during the federal ban period” Charles DiMaggio et al., *Changes in US mass shooting deaths associated with the 1994–2004 federal assault weapons ban: Analysis of open-source data*, 86 J. TRAUMA & ACUTE CARE SURGERY 11, 12–13 (2019).

massacres that resulted in a total of ninety-six deaths.⁵⁴ The decade after the ban, there were more than two times the number of gun massacres and more than three times the number of people killed in those massacres.⁵⁵ Also consider that over eighty percent of the gun massacres took place in areas where guns are allowed, not the supposedly more susceptible “gun-free” zones.⁵⁶

The constitutional question here is not whether one should support an assault weapon ban. The question is whether legislatures should be allowed to make the judgment that civilians should not be allowed to own the sort of guns that these mass killers have chosen, such as the AR-15. Note, however, that this narrow ban would still allow civilians to amass arsenals of conventional handguns, rifles, and shotguns.

And to be clear, the Supreme Court in *Heller* did not suggest in any way that assault weapons are constitutionally protected. In fact, just the opposite. The majority opinion by Justice Scalia recognized that guns like M16 rifles are not constitutionally protected.⁵⁷ Mark Smith argued that the Supreme Court held in *Staples v. United States*⁵⁸ that the assault weapons available to civilians are totally different from military M16s and other similar guns.⁵⁹ That is not true at all. *Staples* held, “The AR-15 is the civilian version of the military’s M-16 rifle”⁶⁰ The AR-15 and the M16 are very similar, and courts have recognized this.⁶¹

54. Mark Follman, Gavin Aronsen & Deanna Pan, *US Mass Shootings, 1982–2020: Data From Mother Jones’ Investigation*, MOTHER JONES (Feb. 26, 2020, 4:15 PM), <https://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/> [https://perma.cc/E8DJ-NYLT] (using 4 or more deaths as a mass shooting).

55. *Id.*

56. See *Ten Years of Mass Shootings in the United States*, EVERYTOWN FOR GUN SAFETY (Nov. 21, 2019), <https://everytownresearch.org/massshootingsreports/mass-shootings-in-america-2009-2019/> [https://perma.cc/9WCJ-HDTA].

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

58. 511 U.S. 600 (1994).

59. Smith, *supra* note 33, at 363–64 (“The term ‘assault weapons’ was based not on how the guns operated, but on how the guns looked. After all, semiautomatic guns operate much differently than fully automatic machine guns, which is why in 1994 the U.S. Supreme Court ruled in *Staples v. United States* that semiautomatic rifles are different from military weapons. And yet, because they look alike, many people conclude that they all essentially fall under the rubric of ‘assault weapons.’” (footnotes omitted)).

60. *Staples*, 511 U.S. at 603.

61. See, e.g., *id.*

The only major difference is the AR-15 does not enable automatic fire.⁶² But the other attributes are very similar.

And that is why every court that has considered the issue has correctly ruled that bans on civilian possession or purchase of assault weapons can be and should be held as constitutional.⁶³ Judge Wilkinson, a leading conservative jurist who has been on Supreme Court shortlists for Republican presidents, makes this point much better than I could. He wrote this in a concurrence to an en banc decision upholding Maryland's ban on assault weapons and high-capacity magazines:⁶⁴

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 the 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.

....

Providing for the safety of citizens within their borders has long been state government's most basic task. In establishing the "right of law-abiding, responsible citizens to use arms in defense of hearth and home," *Heller* did not abrogate that core responsibility. Indeed, *Heller* stopped far short of the kind of absolute protection of assault weapons that appellants urge on us today.⁶⁵

Let me close by pointing out another key point that I think we should all consider when addressing not just the constitutionality of assault weapon bans, but any Second Amendment issue. That is that the Second Amendment cannot be viewed in a vacuum. Mark Smith referred to the Second Amendment as

62. *See id.* ("The AR-15 . . . is, unless modified, a semiautomatic weapon.").

63. *See, e.g.,* *Kolbe v. Hogan*, 849 F.3d 114, 121 (4th Cir. 2017) (en banc); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 247 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 407 (7th Cir. 2015); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1247–48 (D.C. Cir. 2011).

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

65. *Id.* at 150 (Wilkinson, J., concurring) (citations omitted) (first citing *Boston Beer Co. v. Massachusetts*, 97 U.S. 25, 32 (1877); then quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

our first freedom.⁶⁶ I would disagree with that. Our first freedom is our right to live, our right to safety. A right, if you will, not to be shot. And an extreme expansive version of the Second Amendment infringes on that most fundamental right.

We have a gun violence epidemic in this country, which we should not tolerate.⁶⁷ Mass shootings are a mere part of that, but an important part because today many of us do not feel safe sending our children to high schools or even elementary schools, nor do we feel safe in workplaces, shopping malls, synagogues, churches, and many more places where there have been gun massacres mostly using assault weapons and high-capacity magazines.⁶⁸

There are common sense solutions which most Americans agree on that can reduce gun violence.⁶⁹ These include banning assault weapons and requiring background checks for all gun sales.⁷⁰ We should focus on those solutions, not on extreme readings of the Second Amendment which claim a constitutional right to pistol grips, barrel shrouds, and high-capacity magazines. And we should all work together to try to save lives.

Finally, most of what Mark Smith discussed is whether private citizens should be allowed to own guns.⁷¹ This is the law of the land under *Heller*, which held that law-abiding, responsible citizens have a right to have a gun in the home for self-defense.⁷² And we can argue about whether the *Heller* holding

66. Smith, *supra* note 33, at 366 (“The people’s right to keep and bear arms is found in the Second Amendment of the Bill of Rights, our first freedom.”).

67. *Gun Violence Statistics*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/facts/gun-violence-statistics/> [https://perma.cc/5EEF-6779] (last visited Jan. 18, 2020).

68. *See, e.g.*, STEPHEN WU, 2013 HAMILTON COLLEGE YOUTH POLL: ATTITUDES TOWARDS GUN CONTROL AND SCHOOL VIOLENCE 1 (2013), <https://www.hamilton.edu/documents/HamiltonReportGunControlandSchoolViolence.pdf> [https://perma.cc/P2W6-6TSS] (asked about “the possibility of a mass shooting in their school or community . . . nearly 60% [of high school students] [we]re either somewhat concerned, fairly concerned or very concerned”).

69. *See* Frank Newport, Opinion, *Analyzing Surveys on Banning Assault Weapons*, GALLUP NEWS (Nov. 14, 2019), <https://news.gallup.com/opinion/polling-matters/268340/analyzing-surveys-banning-assault-weapons.aspx> [https://perma.cc/7Q78-M78N] (“[O]ur summary conclusion is that a clear majority of about six in 10 Americans currently support . . . a ban [on assault weapons].”).

70. *Id.*

71. Smith, *supra* note 33, at 372.

72. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

should be expanded in some ways. None of that, however, addresses Mark Smith's argument for a right to pistol grips, barrel shrouds, high-capacity magazines, and assault weapons, which is what the question at hand is about. It really is a red herring to discuss whether there should be a right to guns in some way. That is an interesting topic worth debating, but that is not what is up for debate here.