

“ASSAULT WEAPON” BANS: UNCONSTITUTIONAL LAWS FOR A MADE-UP CATEGORY OF FIREARMS

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I’m especially excited to talk about whether commonly owned semiautomatic rifles, which happen to have a handful of incidental features built in or attached to them, are protected by the Second Amendment. Spoiler alert: the answer is yes. Ordinary semiautomatic rifles, just like ordinary semiautomatic handguns, are protected by the Second Amendment’s right to keep and bear arms. The U.S. Supreme Court’s legal precedents confirm the same. These constitutional protections do not disappear merely because the anti-gun lobby chooses to label—or perhaps, more accurately, mislabel—these ordinary firearms as “assault weapons.” Indeed, as Justice Thomas astutely recognized, the term “assault weapon” is “a political term, developed by anti-gun publicists.”¹

To make sure we’re all on the same page about what is a supposed “assault weapon,” I’d like to start with a key point: America’s gun grabbers do not define “assault weapons” by how the firearms actually function. The banned so-called “assault weapons” are not the fully automatic rifles used by the

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1. See *Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting) (quoting Bruce H. Kobayashi & Joseph E. Olsen, In Re 101 California Street: *A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of “Assault Weapons,”* STAN. L. & POL’Y REV., Winter 1997, at 41, 43) (internal quotation marks omitted) (“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 many additional firearms as possible on the basis of undefined ‘evil’ appearance” (internal quotation marks omitted)).

military to fight the Taliban in Afghanistan. So-called “assault weapons,” when discussed within America’s gun control debate, constitute nothing more than ordinary semiautomatic rifles; a type of firearm, which civilians have used in the United States for well over a century.²

Semiautomatic firearms are “semiautomatic” because, when you pull the trigger once, the gun fires one bullet and automatically reloads, and that’s it.³ To fire another bullet requires the user to pull the trigger again.⁴ But these ordinary firearms might look different than other firearms because modern day, yet very ordinary, semiautomatic rifles are often painted *black*;⁵ they are not made in the brown wood stock you see on classic American hunting rifles.⁶ This is relevant because it makes modern-style firearms *look like* or *appear to* be fully automatic M16 military rifles, when in reality they are not the same firearm as M16s.

Nevertheless, because of the rifle’s appearance, coupled with certain features that are arbitrarily included in some “assault weapon” ban statutes, an ordinary rifle gets converted *definitionally* into an “assault weapon.”⁷ Some of the features that allegedly convert an ordinary rifle into a prohibited “assault weapon” include muzzle brakes, pistol grips, and adjustable shoulder stocks that enhance the utility of the firearm for self-defense.⁸ These features make it easier for law-abiding Americans to shoot the firearms and shoot them accurately. Certain state legislatures assert that these features, either when added onto,

2. See David B. Kopel, *Defining “Assault Weapons,”* REG. REV. (Nov. 14, 2018), <https://www.theregreview.org/2018/11/14/kopel-defining-assault-weapons/> [https://perma.cc/6T8T-KD9F]. Some semiautomatic pistols and some shotguns are frequently included in the statutory definitions of “assault weapons” but, in terms of the number of firearms in circulation, the overwhelming majority of the banned “assault weapon” firearms are rifles. *Id.*

3. *Semiautomatic*, MERRIAM WEBSTER’S DICTIONARY, <https://www.merriam-webster.com/dictionary/semiautomatic> [https://perma.cc/8XKY-EA37] (last visited Jan. 18, 2019) (“able to fire repeatedly through an automatic reloading process but requiring release and another pressure of the trigger for each successive shot”).

4. *Id.*

5. Technically, AR rifle platforms are not painted black but instead have a black finish applied to them.

6. See Kopel, *supra* note 2 (describing the strategy of targeting guns that “look[] like . . . machine gun[s]” (internal quotation marks omitted)).

7. See *supra* note 2.

8. See Kopel, *supra* note 2.

or made an inherent part of, semiautomatic rifles, make these ordinary firearms “assault weapons.”⁹ These features, when added to or included with a semiautomatic rifle, somehow magically transform ordinary guns into an object that the anti-gunners have successfully banned in six states, plus the District of Columbia.¹⁰

Yet, semiautomatic rifles have been part of the American landscape for over 100 years.¹¹ From the anti-gun lobby’s point of view, the scariest semiautomatic rifle is the AR-15 platform. This rifle platform is what the anti-gun movement and their handmaidens in the urban-based mainstream media like to display on television and in news articles because the rifle can appear scary looking to people unfamiliar with firearms, especially those living in the major media centers of Washington, D.C., New York City, Los Angeles, and Chicago. In reality, the AR-15 is not more powerful than any other centerfire semiautomatic rifle and, in fact, in typical calibers is *less* powerful than the rifles used to hunt deer.

9. *Id.*

10. The six states are California, Connecticut, Maryland, Massachusetts, New Jersey, and New York. CAL. PENAL CODE §§ 30510, 30515, 30605 (West 2012 & Supp. 2020); CONN. GEN. STAT. §§ 53-202a to -202c (2019); 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). The District of Columbia’s ban is at D.C. CODE §§ 7-2501.01(3A)(A), 7-2502.02(a)(6) (2018). Hawaii bans semiautomatic “assault pistols” but the statute does not apply to long guns. HAW. REV. STAT. ANN. § 134-8(a) (LexisNexis 2013). It bears mentioning that some statutes ban firearms by the name of the make and the model, as well as by features. *See, e.g.*, CAL. PENAL CODE § 30510; MD. CODE ANN., PUB. SAFETY § 5-101(r)(2); MD. CODE ANN., CRIM. LAW § 4-301(c).

11. Rifles and pistols with detachable magazines came into wide use toward the end of the nineteenth century. Winchester began making semiautomatic rifles with detachable magazines beginning with the Model 1905. *See* HAROLD F. WILLIAMSON, *WINCHESTER: THE GUN THAT WON THE WEST* 434 (1952); *Historical Timeline 1900–1949, WINCHESTER REPEATING ARMS*, <http://www.winchesterguns.com/news/historical-timeline/historical-timeline-1900-1949.html> [https://perma.cc/Q93D-4DGR] (last visited Mar. 15, 2020). Then-Judge Kavanaugh wrote in a case known as *Heller II*: “The first commercially available semi-automatic rifles, the Winchester Models 1903 and 1905 and the Remington Model 8, entered the market between 1903 and 1906.” *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1287 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (citations omitted). Significantly, he added: “Many of the early semi-automatic rifles were available with pistol grips. These semi-automatic rifles were designed and marketed primarily for use as hunting rifles . . .” *Id.* (citations omitted).

The AR-15 platform was designed in the 1950s.¹² By the 1960s, the rifle was being sold in the U.S. civilian marketplace.¹³ The AR in the name stands for Armalite, and not “assault rifle.”¹⁴ Armalite is the name of the company that first developed the AR-15.¹⁵

So, we’ve had the AR-15 platform itself being bought and sold in the United States for over fifty years. Unfortunately, for those millions of Americans who reside today in the six anti-gun states plus the District of Columbia, these ordinary firearms cannot be possessed, owned, or used by them.¹⁶ An individual caught possessing an AR-15 in one of these few jurisdictions will become a felon and go to prison for a nonviolent, victimless, *malum prohibitum* crime.¹⁷ That’s right. Mere possession of an object that is commonplace and perfectly legal under federal law and in forty-four states will land you in prison, result in the loss of your rights including likely the right to vote, and probably cause you irreparable monetary and reputational damages, as well as your personal liberty. All of this despite the absence of even a single victim. And unfortunately, the federal courts are largely failing to do anything about this travesty.

To date, each court of appeals that has heard a so-called “assault weapon” case has ultimately decided against the citizen and in favor of the government. These legal challenges to “assault weapon” bans have been considered and rejected by the Second Circuit in New York,¹⁸ by the D.C. Circuit,¹⁹ by the Seventh Circuit in Chicago,²⁰ and by the Fourth Circuit in Maryland.²¹

12. *A Brief History Of The AR-15*, NPR (Feb. 28, 2018, 12:07 PM), <https://www.npr.org/2018/02/28/588861820/a-brief-history-of-the-ar-15> [<https://perma.cc/7P5T-S25T>].

13. Glen Zediker, *The AR-15: A Brief History*, NRA SHOOTING SPORTS USA (Oct. 16, 2019), <https://www.ssusa.org/articles/2019/10/16/the-ar-15-a-brief-history/> [<https://perma.cc/Y5CB-FXHQ>].

14. *A Brief History Of The AR-15*, *supra* note 12.

15. *Id.*

16. *See supra* note 10.

17. *Id.*

18. *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 247 (2d Cir. 2015).

19. *Heller II*, 670 F.3d 1244, 1247–48 (D.C. Cir. 2011).

20. *Friedman v. City of Highland Park*, 784 F.3d 406, 407, 412 (7th Cir. 2015).

21. *Kolbe v. Hogan*, 849 F.3d 114, 121 (4th Cir. 2017) (en banc). A suit challenging the California ban was filed in August 2019. *See* Complaint, *Miller v. Becerra*, No. 3:19-cv-01537 (C.D. Cal. Aug. 15, 2019).

So, given this dismal track record in court for an enumerated, fundamental constitutional right, why are we talking today about the U.S. Supreme Court and the rights of individuals to own ordinary firearms with certain features that some political partisans wrongly label "assault weapons"? Well, it's because of Judge Kavanaugh's elevation to the U.S. Supreme Court. You see, Justice Kavanaugh was the author of an approximately fifty-five-page opinion that applied the "text, history, and tradition" constitutional test to the technology of these semi-automatic firearms,²² which were declared by legislative fiat to be "assault weapons" by the Council of the District of Columbia.²³ The name of this case was *Heller II*.

In Justice Kavanaugh's dissent in *Heller II*, he concluded that the Second Amendment protects an individual's right to keep and bear (that is, own, use, possess) these so-called "assault weapons."²⁴ This dissent is particularly significant because the *Heller II* majority opinion, which upheld the banning of these weapons, has become a super-legal precedent followed by other lower, or inferior,²⁵ courts when they uphold other gun bans.²⁶ *Heller II* is the foundational case that subsequent lower courts presiding over legal challenges to anti-gun measures rely on to say: "Sure. The state can ban them." And yet, the dissent to that view was written by now-Justice Kavanaugh.

So, will the Supreme Court address the question of "assault weapon" bans soon? I suspect that they will, and they should. After all, the individual right to self-defense is not only a fundamental *constitutional* right that all of us have—Democrats, Republicans, Independents, Libertarians. It's a human right. And it is also the central component of the Second Amendment, a right that is not given to us by any government. It is not given to us by any politician. It is bestowed upon us by our very existence as humans or, if you will, by God. And the Second

22. *Heller II*, 670 F.3d at 1269–96 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

23. *Id.* at 1271.

24. *Id.* at 1296.

25. Article III of the Constitution provides that, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. Thus, all federal courts of appeals are inferior courts, as a matter of constitutional law.

26. See, e.g., *Kolbe*, 849 F.3d at 139, 121 (citing *Heller II* to say that intermediate scrutiny applies to "assault weapon" ban and upholding ban under that standard).

Amendment doesn't give us that right; it simply recognizes this preexisting human right.

And the U.S. Supreme Court agrees with me. They agreed with me in *District of Columbia v. Heller*,²⁷ which by the way, was reaffirmed by the case of *McDonald v. City of Chicago*²⁸ and then reaffirmed in *Caetano v. Massachusetts*.²⁹ In *Caetano*, which I think applies to the question of so-called "assault weapon" bans, the Supreme Court held that any firearm that is bearable—bearable arms—is protected by the Second Amendment.³⁰ There, the Court dealt with a stun gun,³¹ and I can assure you that the number of people in the United States that own semi-automatic rifles labeled "assault weapons" far outnumber the number of Americans that own stun guns. The U.S. Supreme Court found the Massachusetts Supreme Court applied the wrong test and remanded the case back to Massachusetts requiring a decision on whether stun guns were, in fact, protected weapons, or protected *arms* under the Second Amendment.³² The Massachusetts Supreme Court got the message and struck down the commonwealth's stun gun ban using the common use test,³³ and a year later, the Illinois Supreme Court followed suit and struck down Illinois's stun gun ban.³⁴ Since AR-15s far outnumber stun guns, it follows then that AR-15s should be equally protected by the Second Amendment.

Now, in fairness, the *Heller* Court said there are certain types of weapons that can be banned if they are unusual, and if they are not typically owned by Americans for lawful purposes.³⁵ If they're not in common use by Americans for lawful purposes, the Supreme Court said, certain weapons are presumptively capable of being banned.³⁶ One of the examples they gave is a machine gun—which unlike the semiautomatic gun, which is one pull of the trigger, one bullet fired—will fire bullets for as

27. 554 U.S. 570, 581, 591–92 (2008).

28. 561 U.S. 742, 791 (2010).

29. 136 S. Ct. 1027, 1028 (2016) (per curiam).

30. *Id.* at 1027.

31. *Id.*

32. *Id.* at 1028.

33. *Ramirez v. Commonwealth*, 94 N.E.3d 809, 818–19 (Mass. 2018).

34. *People v. Webb*, 131 N.E.3d 93, 98 (Ill. 2019).

35. *District of Columbia v. Heller*, 554 U.S. 570, 623–25 (2008).

36. *Id.* at 625.

long as the operator is depressing the trigger, until the gun becomes empty of bullets or the operator releases the trigger.³⁷ This is much different than a semiautomatic firearm, and the law recognizes this difference.

So, the question is, "What do these Supreme Court cases mean for so-called 'assault weapon' bans today?" Well, before I answer that question, I want to talk for a couple minutes about what exactly is an "assault weapon." If you take away only one thing from today, please remember this: when you see the words "assault weapon," this is not a factual, denotative definition or term. This is a political propaganda label used by people who want to ban or severely restrict civilian ownership of firearms.

You see, thirty years ago—and this is well known; this is not new information—there was a gentleman by the name of Josh Sugarman, who worked for a group called the Violence Policy Center.³⁸ He recognized that large numbers of the general public did not know much about various types of firearms. Give him great credit, because he saw an opportunity and seized it.³⁹ He encouraged the gun control movement to take advantage of the fact that most people could not tell the difference between an ordinary, semiautomatic rifle, which happens *to look* like an M16 military firearm, and an actual M16 military firearm. He suggested that all of these rifles should be labeled "assault weapons," thereby blending ordinary rifles together with M16s, and ultimately accomplishing more gun control.⁴⁰ 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*⁴¹ that semiautomatic rifles are different from military weapons.⁴² And yet, because they look alike,

37. *Id.* at 624.

38. *About the VPC*, VIOLENCE POL'Y CTR., <http://vpc.org/about-the-vpc/> [<https://perma.cc/V6DY-JFB6>] (last visited Mar. 16, 2020).

39. *Id.*

40. See VIOLENCE POL'Y CTR., KEY POINTS ABOUT ASSAULT WEAPONS 1, 6–11, <http://vpc.org/wp-content/uploads/2018/06/Assault-weapon-primer-2017-VPC.pdf> [<https://perma.cc/MVR5-HQLW>].

41. 511 U.S. 600 (1994).

42. *Id.* at 602–03.

many people conclude that they all essentially fall under the rubric of “assault weapons.”

Just because something looks like something else doesn’t make it that thing, right? It’s common sense. Think about it. Just because something may look like a Rembrandt painting, doesn’t make it an authentic Rembrandt. Go spend some time in Times Square in New York City. There are a lot of people in Times Square who dress in superhero costumes. If we apply the logic of those who want to ban guns, then the fact that these actors *look* like superheroes, would necessarily mean that they have superhero powers like super strength and x-ray vision. But that’s absurd. In no other context would we say that because something looks like something, it is that thing. Otherwise, you could be arrested for possessing a weed that looks like marijuana but is not. That is precisely the type of warped reasoning that the gun grabbers employ in the political debate over “assault weapon” bans.

I previously mentioned some of the features that convert an ordinary gun into an “assault weapon.” Before I discuss some of those features further, it is important to understand how the statutes that ban “assault weapons” actually work.⁴³ To constitute an “assault weapon,” a semiautomatic rifle must be able to accept or use a detachable magazine.⁴⁴ A detachable magazine is simply that piece of metal or plastic that you put your bullets in, and which you then put into the gun.⁴⁵ Plus, the statutes provide, on top of that, in order to qualify as an “assault weapon,” the semiautomatic rifle with a detachable magazine must have one or more features.⁴⁶

What are the features that elevate an ordinary gun into an “assault weapon”? One such feature is a pistol grip. The addition of a pistol grip to a rifle supposedly converts an ordinary

43. Some statutes ban firearms by the name of the make and the model, as well as by features. *See, e.g.*, MD. CODE ANN., PUB. SAFETY § 5-101(r)(2) (LexisNexis 2018 & Supp. 2019); MD. CODE ANN., CRIM. LAW § 4-301(h)(1) (LexisNexis 2012 & Supp. 2019).

44. CAL. PENAL CODE § 30515(a)(1) (West 2012 & Supp. 2020); N.Y. PENAL LAW § 265.00(22)(a) (McKinney 2017 & Supp. 2020).

45. *Clip vs. Magazine: A Lesson in Firearm Terminology*, MINUTEMAN REV. (Jan. 22, 2020), <https://www.minutemanreview.com/clip-vs-magazine-lesson-in-firearm/> [<https://perma.cc/8ZAY-QE49>].

46. *See, e.g.*, CAL. PENAL CODE § 30515(a)(1)(A)–(F); N.Y. PENAL LAW § 265.00(22).

semiautomatic rifle into an “assault weapon.”⁴⁷ This is both practically and constitutionally absurd. Keep this in mind. A pistol grip comes from a pistol; that’s why it is called a pistol grip. In *District of Columbia v. Heller*, the Supreme Court said that pistols and handguns are protected “arms” under the Second Amendment.⁴⁸ So if a manufacturer designs a rifle with a pistol grip, then how does that convert a constitutionally protected rifle into something that is constitutionally unprotected, that is, an ordinary rifle with a pistol grip? It shouldn’t, and I don’t think it does.

A second feature that will make an ordinary rifle an “assault weapon” is a shoulder stock, an adjustable shoulder stock, or a telescoping shoulder stock.⁴⁹ What do these words mean if you’re not already familiar with firearms? Have you ever gone shoe shopping? You may see twelve pairs of the same style and color of shoes, except they are different *sizes*! Sizes. Well, all a shoulder stock does is it shortens or lengthens the rifle so that if you’re a tall, big guy, you can have it one length, and if you’re a short person, you can shorten it.⁵⁰ Every reference to these adjustable stocks is talking about adjusting a rifle to the operator’s size,⁵¹ no different than buying the correct shoe size. How does the addition of such a convenient feature turn an ordinary rifle into an “assault weapon”?

And there are other so-called “scary” features. I love this one. Most of the statutes that ban semiautomatic rifles focus on whether your rifle can accept a bayonet with what’s called a bayonet lug.⁵² A bayonet lug allows you to attach a bayonet on the end of a rifle. The mere presence of the lug itself supposedly converts an ordinary semiautomatic rifle into a menacing “as-

47. See, e.g., CAL. PENAL CODE § 30515(a)(1)(A); N.Y. PENAL LAW § 265.00(22)(a)(ii).

48. *District of Columbia v. Heller*, 554 U.S. 570, 629, 636 (2008).

49. See, e.g., Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, sec. 110102(b), § 921(a)(30)(B)(i), 108 Stat. 1796, 1997-98 (codified as amended in scattered sections of 42 U.S.C.) (expired 2004) (including telescopic shoulder stocks as one of five possible modifications that turn a semiautomatic rifle into an “assault weapon”); CAL. PENAL CODE § 30515(a)(1)(C); N.Y. PENAL LAW § 265.00(22)(a)(i).

50. THE ULTIMATE GUIDE TO U.S. ARMY COMBAT: SKILLS, TACTICS, AND TECHNIQUES 260-61 (Jay McCullough ed., 2012).

51. See, e.g., Mark Overstreet, *Top 10 Reasons You Should Own An AR-15*, FEDERALIST (Dec. 12, 2018), <https://thefederalist.com/2018/12/12/top-10-reasons-ar-15/> [<https://perma.cc/63C6-3QWW>].

52. See, e.g., N.Y. PENAL LAW § 265.00(22)(a)(v).

sault weapon.” Now, I read a lot of news stories every day, and I’m sure you do, too. I don’t know about you, but it’s been a long time since I have read any stories about people getting killed with a bayonet attached to the end of a gun. But that’s just me. Maybe I’m not reading the right papers.

The point is that the features that transform an ordinary firearm into an “assault weapon” are entirely arbitrary. These features, at most, make ordinary rifles more reliable and better for users to shoot accurately and more safely.⁵³ These features improve the safety of the firearm. They don’t reduce the safety of the gun. They make them safer to use for the gun owner and for bystanders. But because of definitional games, the legislators in six states and the District of Columbia have been able to ban these types of firearms.⁵⁴

What is the argument in favor of these gun ban laws? Well, it’s really quite simple. The gun grabbers argue that, “criminals will use these guns to do bad things, so therefore we want to deprive all Americans of their right to have them.”

Let’s think about that logic. Or, as I like to say, let’s think about that illogic for a moment. Our right to keep and bear arms is a natural right recognized by the Second Amendment—this is not a made-up right based on “penumbras” and “emanations,” is it?⁵⁵ It’s actually in the text of the Bill of Rights.⁵⁶ The people’s right to keep and bear arms is found in the Second Amendment of the Bill of Rights, our first freedom.⁵⁷ Yet, there are people out there who say that, because someone, somewhere, may use one of these firearms at some time to engage in criminality, *you and I* must lose our Second Amendment rights to own, use or even possess them.

There’s something perverse about having our fundamental rights shrunk and sacrificed by virtue of the conduct—or pos-

53. Overstreet, *supra* note 51.

54. Julius Wachtel, Opinion, *Want an assault weapons ban that works? Focus on ballistics.*, WASH. POST (Sept. 6, 2019, 11:50 AM), <https://www.washingtonpost.com/opinions/2019/09/06/heres-how-make-an-assault-weapons-ban-that-actually-works/> [https://perma.cc/TJK5-Z89Z].

55. Compare *District of Columbia v. Heller*, 554 U.S. 570, 581, 592 (2008) (stating the right to keep and bear arms is a preexisting right recognized by the Second Amendment) with *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (finding a “right to privacy” in the “emanations” and “penumbras” of the Bill of Rights).

56. U.S. CONST. amend II.

57. *Id.*

sible conduct—of criminals and psychopaths. We should not lose our *fundamental* constitutional rights because of the acts of criminals and people who should be in mental institutions. The Supreme Court agrees with me.

In *Heller*, the Court acknowledged the social dangers associated with firearms, and declared in the concluding paragraph that it understood the arguments about gun control, but there are certain policies that—and I’m quoting the Supreme Court here—are “off the table,” that is, removed from the democratic process because these rights are recognized in the Constitution.⁵⁸ And the banning of firearms protected by the Second Amendment is, and should be, off the table. For people who want more gun restrictions, I have a suggestion for them. Follow the advice of the late Justice Stevens, and try to amend the Constitution using Article V procedures.⁵⁹ Don’t try to subvert the Second Amendment or read it out of the Constitution in other ways.

So, how should courts apply the *Heller* test of common use to “assault weapon” bans? It’s very simple. Today, there are somewhere between five and eight million AR-15s owned by civilians in the United States.⁶⁰ There’s a debate about it, but there is no debate that there are millions of AR-15s owned by millions of Americans.⁶¹ And the number is growing.⁶² When you compare that number to the number of people who engage in other lawful activities like swimming and jogging, you find that the number of AR-15s in civilian hands far exceeds many

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

59. John Paul Stevens, Opinion, *John Paul Stevens: Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), <https://nyti.ms/2p1aPuh> [<https://perma.cc/S4U6-2RB4>].

60. Not Quite All “The Facts” About the AR-15, NRA-ILA (Nov. 8, 2013), <https://www.nra.org/articles/20131108/not-quite-all-the-facts-about-the-ar-15> [<https://perma.cc/QM5D-LZNM>]; John W. Schoen, *Owned by 5 million Americans, AR-15 under renewed fire after Orlando massacre*, CNBC (June 13, 2016, 2:31 PM), <https://www.cnbc.com/2016/06/13/owned-by-5-million-americans-ar-15-under-renewed-fire-after-orlando-massacre.html> [<https://perma.cc/N5CC-VU69>].

61. *Are AR-15 Rifles a Public Safety Threat? Here’s What the Data Say*, FEE (Jan. 11, 2019), <https://fee.org/articles/are-ar-15-rifles-a-public-safety-threat-heres-what-the-data-say/> [<https://perma.cc/399B-E5AA>].

62. Heath Druzin, *From Banned to Beloved: The Rise Of The AR-15*, KERA NEWS (Mar. 13, 2019), <https://www.keranews.org/post/banned-beloved-rise-ar-15> [<https://perma.cc/R9EY-B7QV>]; Ali Watkins, John Ismay & Thomas Gibbons-Neff, *Once Banned, Now Loved and Loathed: How the AR-15 Became ‘America’s Rifle,’* N.Y. TIMES (Mar. 3, 2018), <https://nyti.ms/2F8sMI9> [<https://perma.cc/RPL4-5ZAF>].

of those other common activities in terms of participants. The AR-15 is widely used by millions of Americans for hunting, target competitions, and self-defense.⁶³ Under *Heller's* standard of common use for lawful purposes, the right to possess these firearms is protected under the Constitution.

But then how do we explain why four court of appeals cases have upheld “assault weapon” bans,⁶⁴ essentially ignoring *Heller*? First, we should consider the states from where these gun ban cases arose: New York, Maryland, California, Connecticut, New Jersey, and Illinois.⁶⁵ Politically, these states are all deep blue states; and when you appeal a case to appellate judges in these blue states, it is likely being decided by judges who were blessed for the federal bench by blue-state Senators (even where those local judges may have been appointed by Republican Presidents). Bear in mind that, you don’t see “assault weapon” bans being enacted in the red states of Texas, Georgia, or South Carolina. So, courts in those jurisdictions never get the opportunity to weigh in on the constitutionality of “assault weapon” bans. I think that’s part of the reason why most of the gun ban cases ultimately uphold “assault weapon” bans as constitutional, that is, there is a jurisdictional bias. Gun bans do not get enacted in jurisdictions where these bans would likely be overturned. Although there are cases that have ruled in favor of the Second Amendment, usually these cases have ultimately been overturned *en banc* by a particular circuit. This happened in the Fourth Circuit and in the Ninth Circuit, for example.⁶⁶

Beyond that, courts that uphold these bans engage in an improper balancing of social interests. They essentially embrace the dissent by Justice Breyer in *Heller* that suggests that courts should weigh the good against the bad of guns, shake it all up,

63. *Understanding America's Rifle*, NSSF, <https://www.nssf.org/mstr/> [<https://perma.cc/743C-W8BN>] (last visited Mar. 16, 2020).

64. *Kolbe v. Hogan*, 849 F.3d 114, 121 (4th Cir. 2017) (en banc); *New York 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 II*, 670 F.3d 1244, 1247–48 (D.C. Cir. 2011).

65. N.J. STAT. ANN. §§ 2C:39-1(w), 2C:39-5(f) (West 2016 & Supp. 2019); *Kolbe*, 849 F.3d at 120 (Maryland); *Cuomo*, 804 F.3d at 247 (New York and Connecticut); *Friedman*, 784 F.3d at 407 (Highland Park, Illinois); Complaint, *Miller v. Becerra*, No. 3:19-cv-01537 (C.D. Cal. Aug. 15, 2019).

66. *Kolbe*, 849 F.3d at 121; *Peruta v. San Diego County*, 824 F.3d 919, 942 (9th Cir. 2016) (en banc).

and then rule for the government.⁶⁷ That's really what they do. The courts keep repeating the phrase "assault weapons" over and over in their opinions as if this is some sort of talisman for good constitutional reasoning.⁶⁸ In reality, it's not good legal reasoning. And it is not consistent with the Supreme Court's decision in *Heller*.

I should also mention that Justice Kavanaugh is not alone in his views on the Second Amendment. Other judges agree with Justice Kavanaugh's rationale in *Heller II* that "assault weapon" bans are unconstitutional. That includes a President Clinton appointee, Judge Traxler of the Fourth Circuit, as well as Judge Manion, a well-respected judge in the Seventh Circuit.⁶⁹ So Justice Kavanaugh is not out there by himself, by any means, in terms of where this jurisprudence stands.

I want to address two more points. The first is, many people like to argue that, given the alleged social consequences of widespread gun ownership in the United States, AR-15s and other "assault weapons" should not be protected by the courts because to do so would hurt law enforcement's efforts to thwart criminals and would lead to more murders and crime.⁷⁰ Of course, this is false—there is little, if any, evidence that "assault weapon" bans advance public safety in any way. At any rate, we know there are countless examples of other rights in the Bill of Rights that have, arguably, potentially negative social consequences. For example, the Fourth Amendment.

The Fourth Amendment says you are free from unreasonable searches and seizures, warrantless searches, and the like.⁷¹ There are many times when the police arrest a known violent murderer and rapist—they arrest the bad guy—and yet, be-

67. *District of Columbia v. Heller*, 554 U.S. 570, 681 (2008) (Breyer, J., dissenting); see also Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706–07 (2012) (noting that the federal courts have "effectively embraced the sort of interest-balancing approach" that the Supreme Court "condemned" in *Heller*).

68. *Kolbe*, 849 F.3d 114 (mentioned "assault weapon" over 100 times); *Cuomo*, 804 F.3d 242 (mention "assault weapon" over 50 times).

69. See *Kolbe*, 849 F.3d at 151–52 (Traxler, J., dissenting); *Friedman*, 784 F.3d at 412–13 (Manion, J., dissenting).

70. 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/825Q-SHF4>].

71. U.S. CONST. amend. IV.

cause the cops screwed up the arrest process, that is, how they procured evidence or put their information together, well, guess what happens? The known violent criminal walks free under the exclusionary rule.⁷² That is a social cost because he's not punished, and he's walking the streets where he can commit more rapes and murders. We do not ignore the Bill of Rights and throw the Fourth Amendment out just because some criminal may walk free. That's not how constitutional law works.

And my final point is this: many of the federal courts that uphold "assault weapon" bans and other firearms restrictions say, look, you don't need firearms, Americans. Don't be silly. We, the government, have you covered. We've got the guns. We'll take care of you. You don't need the gun of your choice. You don't need guns at all, for that matter. We've got your back. My response: queue the laugh track. As a matter of political theory, maybe the government has some legal or moral duty to protect us. But as a matter of American law—and you lawyers know this—as a matter of American law, there is no duty on the part of the federal, state, or local governments to protect any of us in any respect⁷³ unless, narrowly, you're in their custody as a prisoner.⁷⁴

Regardless of the law, the reality is that police are not usually around when we encounter a criminal. I make this point in my 2018 book *#Duped*; police are not first responders.⁷⁵ That is a myth. The real first responders in American life are you and me. We are the people who first encounter the criminal. We first encounter the fire. We first encounter the sick person. We first encounter the problem. And we either dial 911, or we address the threat right there. If you don't believe me, consider that 1.2 million Americans every year are murdered, raped, or violently assaulted because the police do *not* arrive in time.⁷⁶

72. Paul H. Rubin, *The Exclusionary Rule's Hidden Costs*, WALL STREET J. (Feb. 28, 2009, 12:01 AM), <https://www.wsj.com/articles/SB123578433303098429> [<https://perma.cc/6C6D-WRY9>].

73. See, e.g., *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 191, 203 (1989).

74. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 833–34 (1994).

75. MARK W. SMITH, *#DUPED: HOW THE ANTI-GUN LOBBY EXPLOITS THE PARKLAND SCHOOL SHOOTING—AND HOW GUN OWNERS CAN FIGHT BACK* 58 (2018).

76. See *2016 Crime Statistics Released*, FBI (Sept. 25, 2017), <https://www.fbi.gov/news/stories/2016-crime-statistics-released> [<https://perma.cc/MQ7T-UZVK>].

This is not because the police are bad. They simply cannot be everywhere at all times.

So, in the end, folks, whether one likes it or not, the reality is that we are our own first responders. I would say that we, thus, have the right to access and own the same protections and fire-power as any law enforcement officer, including the right to the firearms of our choice.

The U.S. Supreme Court should use its authority—remember the Supreme Court is the *one* Supreme Court under the Constitution⁷⁷—to monitor and police the lower courts, that is, the *inferior* federal courts,⁷⁸ that fail to recognize and protect the constitutional right of *all* Americans to keep and bear arms. This protection should extend to those Americans who have been deprived of their fundamental rights in certain states, and the District of Columbia, where the ownership of an ordinary firearm in the form of a semiautomatic rifle, with a few user-friendly features, is outlawed. It is wrong that only those law-abiding Americans residing in forty-four states have the right to these firearms. It is also morally wrong and constitutionally flawed to turn law-abiding Americans into felons because they choose to possess an ordinary semiautomatic rifle while living in or crossing into the wrong state. The U.S. Supreme Court ought to step in and fix it.

[Rebuttal to Jonathan Lowy]: I’ll just make a few quick points. First, Jonathan Lowy eloquently points out that there is a right to life, a right not to be shot, and a right to safety.⁷⁹ That is all generally true. Except the question today is not “do you have that right,” but “how do you effectuate and make that right real in the real world”? I ask this: Do you want to depend upon the government to protect your lives, and the lives of the people you love? Consider Parkland, Florida, where, the guard on duty refused to go into the school building and confront the shooter.⁸⁰ Should we stake our lives on the other security

77. U.S. CONST. art. III, § 1.

78. *Id.*

79. Jonathan E. Lowy, *Comments on Assault Weapons, the Right to Arms, and the Right to Live*, 43 HARV. J.L. & PUB. POL’Y 375, 385 (2020).

80. See Nicholas Bogel-Burroughs, *Why Four Officers Were Fired for Their Response to the Parkland Shooting*, N.Y. TIMES (June 26, 2019), <https://nyti.ms/2LknvDf> [<https://perma.cc/ZH4U-JUDH>] (explaining that Officer Scot Peterson was fired because he did “not really do[] anything” during the shooting (internal quotation marks omitted)); Richard A. Oppel, Jr. & Shreeya Sinha, *What Officials Say Scot*

guards at Parkland who, when the shooting broke out, hid in a closet or jumped on a golf cart and drove away? Do we want our lives to be protected by the eight police officers of the Broward County Sherriff's Department—who set up a perimeter outside the school, never tried to confront the shooter, and didn't go in essentially until the shooter left the school, walked down the street and ordered a sandwich at a local store?⁸¹ Really? I agree we have a right to life. However, the way to effectuate that right is by letting private citizens own firearms.

Second, the majority in *Heller* held that there are certain policy choices that the Bill of Rights takes off the table because they are fundamental, constitutional rights.⁸² One such fundamental, constitutional right is the right to bear arms. One can debate the merits of gun control, but the truth is that the debate that should take place is in the context of amending the Constitution, using Article V procedures to repeal the Second Amendment, like the late Justice Stevens recommended.⁸³ But the gun grabbers do not want to do that. It is too hard, and they do not have the support for it. Instead, they try to subvert the process by enacting gun-grabbing legislation and creating bad precedent in the courts that denies law-abiding Americans their Second Amendment rights.

Third, it is not about mass shooters; it's about mass killers. Did you know that the greatest number of school children killed in a murderous attack was done with a bomb in Bath, Michigan, close to the turn of the century?⁸⁴ Not a gun, but a bomb. That is consistent with the people who used a truck bomb at the Oklahoma City federal building.⁸⁵ Not to mention

Peterson Did Not Do During the Parkland School Shooting, N.Y. TIMES (June 4, 2019), <https://nyti.ms/2jX6a3m> [<https://perma.cc/RS3Y-YQ8X>] (explaining Officer Scot Peterson's failure to act during the Parkland shooting).

81. See Patricia Mazzei, *Slow Police Response and Chaos Contributed to Parkland Massacre, Report Finds*, N.Y. TIMES (Dec. 12, 2018), <https://nyti.ms/2zXPBh2> [<https://perma.cc/B47D-63UJ>].

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

83. See Stevens, *supra* note 59.

84. Lorraine Boissoneault, *The 1927 Bombing That Remains America's Deadliest School Massacre*, SMITHSONIAN MAG. (May 18, 2017), <https://www.smithsonianmag.com/history/1927-bombing-remains-americas-deadliest-school-massacre-180963355/> [<https://perma.cc/SV5B-GPBE>].

85. See *Oklahoma City Bombing*, FBI, <https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing> [<https://perma.cc/S2EH-W5UR>] (last visited Nov. 18, 2019).

the German pilot who killed 150 people by crashing his plane,⁸⁶ the arsonist who killed thirty-two people when he set afire the Upstairs Lounge in New Orleans in 1973,⁸⁷ or the person who killed 87 people at the Happy Land Social Club in 1990 by starting a gasoline fire at the only exit.⁸⁸ There are lots of ways to engage in mass killing without guns. In 2018, the RAND Corporation, which is based in Santa Monica, California,⁸⁹ did a major study on the impact and effect of “assault weapon” bans on public safety. They concluded there was no reliable evidence that these bans positively impacted (reduced) crime rates.⁹⁰ That’s the RAND Corporation in 2018. I think that says enough.

86. Josh Levs, Laura Smith-Spark & Holly Yan, *Germanwings Flight 9525 co-pilot deliberately crashed plane, officials say*, CNN (Mar. 26, 2015, 9:38 PM), <https://www.cnn.com/2015/03/26/europe/france-germanwings-plane-crash-main/index.html> [https://perma.cc/9AC9-DDVT].

87. See Elizabeth Dias, *The Upstairs Lounge Fire: When Dozens of Gay People Were Killed in 1973*, TIME (June 21, 2013), <https://time.com/4365476/orlando-shooting-upstairs-lounge-fire/> [https://perma.cc/YR8J-WJFM] (explaining that, although police believed the fire to be arson, the arsonist was never caught).

88. Sam Roberts, *Julio Gonzalez, Arsonist Who Killed 87 at New York Club in '90, Dies at 61*, N.Y. TIMES (Sept. 14, 2016), <https://nyti.ms/2cOWmEZ> [https://perma.cc/KH8P-CW6N].

89. RAND *Office Locations and Addresses*, RAND CORP., <https://www.rand.org/about/locations.html> [https://perma.cc/5SPQ-DGDJ] (last visited Nov. 18, 2019).

90. See ANDREW R. MORRAL, TERRY L. SCHELL & MARGARET TANKARD, *THE MAGNITUDE AND SOURCES OF DISAGREEMENT AMONG GUN POLICY EXPERTS* 31, 63 (RAND Corp. 2018) (explaining the need for further research because the evidence for or against most major gun policy proposals—including “assault weapon” bans—is inconclusive, contradictory, or nonexistent).