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## Reconsidering a Federal Assault Weapons Ban in the Wake of the Aurora, Oak Creek, and Portland Shootings: Is it Constitutional in the Post-Heller Era?

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**RECONSIDERING A FEDERAL ASSAULT WEAPONS BAN IN THE WAKE OF THE AURORA, OAK CREEK, AND PORTLAND SHOOTINGS: IS IT CONSTITUTIONAL IN THE POST-HELLER ERA?**

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BRIAN ROTH\*

I. INTRODUCTION

James Huberty drove to a McDonald’s restaurant “after announcing casually to his wife, ‘I’m going to hunt humans.’” Stepping into the restaurant with a 9-millimeter Browning automatic pistol in his belt and a 12-gauge shotgun and a 9-millimeter UZI semiautomatic rifle slung over his shoulders, Huberty called out, “‘Everybody on the floor.’ About 45 patrons were present. As they scrambled to comply, Huberty marched around the restaurant calmly spraying gunfire . . . .

Maria Diaz ran out the side door in panic when the shooting started, then remembered that her two-year-old son was still inside. She crept back to a window and saw him sitting obediently in a booth. She motioned him toward the door, nudged it open, and the boy toddled to safety.”

Not everyone was so fortunate.

After SWAT sharpshooters finally killed Huberty, “police and hospital workers moved in on the gruesome scene. A mother and father lay sprawled across their baby, apparently in an attempt to shield it. All three were dead.”

The carnage was clearly far worse than it would have been had Huberty not been armed with semiautomatic weapons. He fired hundreds of rounds. “The gunfire was so heavy that police at first assumed that more than one gunman was inside. A fire truck took six shots before reversing direction and backing off. One fire fighter was grazed by a bullet that tore through the truck and then landed softly on his head.”

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In all, of the 45 patrons in the restaurant, Huberty killed 21 and wounded 15 others.<sup>1</sup>

Unfortunately, this is just one of many instances where the use of assault weapons has resulted in catastrophic tragedy.<sup>2</sup> The shootings in Aurora, Colorado,<sup>3</sup> Oak Creek, Wisconsin,<sup>4</sup> and Portland, Oregon<sup>5</sup> are some of the most recent incidents involving assault weapons.

On July 20, 2012, a gunman—James Eagan Holmes—entered a movie theater in Aurora, Colorado and opened fire.<sup>6</sup> He first launched gas grenades and then began calmly and methodically shooting.<sup>7</sup> One of the individuals present described the scene: “He was sitting there like target practice. He was trying to shoot as many people as he could.”<sup>8</sup> As another person observed: “There was gunfire, there were babies, there were kids, there was blood everywhere.”<sup>9</sup> The gunman killed twelve and wounded fifty-eight.<sup>10</sup> Authorities speculated that the carnage would have been worse, but for the fact that the gunman’s assault weapon jammed.<sup>11</sup>

On August 5, 2012, Wade Michael Page killed six and wounded four at a Sikh temple in Oak Creek, Wisconsin.<sup>12</sup> Page was allegedly motivated by a

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1. Kasler v. Lockyer, 2 P.3d 581, 587 (Cal. 2000) (citations omitted).

2. See, e.g., *Assault Weapons Policy Summary*, L. CENTER TO PREVENT GUN VIOLENCE (May 21, 2012), <http://smartgunlaws.org/assault-weapons-policy-summary/>. Assault weapons have been the weapon of choice in many high-profile incidents, including the “1993 office shooting[s] at . . . 101 California Street . . . in San Francisco, [California],” the “1999 Columbine High School massacre in [Columbine,] Colorado,” and the 2007 Westroads Mall shooting in Omaha, Nebraska. *Id.*

3. Jennifer Brown, *Midnight Massacre: Aurora Theater Shooting “Our Hearts are Broken,”* DENVER POST, July 21, 2012, at A1.

4. *Police Identify Army Veteran as Wisconsin Temple Shooting Gunman*, CNN U.S. (Aug. 7, 2012, 7:50 AM), [http://www.cnn.com/2012/08/06/us/wisconsin-temple-shooting/index.html?hpt=hp\\_t1](http://www.cnn.com/2012/08/06/us/wisconsin-temple-shooting/index.html?hpt=hp_t1).

5. John Bacon, *Oregon Mall Shooter, Victims Identified*, USA TODAY (Dec. 12, 2012, 6:51 PM), <http://www.usatoday.com/story/news/nation/2012/12/11/oregon-mall-shooting/1762473/>.

6. See Brown, *supra* note 3.

7. *Id.*

8. *Id.*

9. Ed Pilkington & Matt Williams, *Colorado Theater Shooting: 12 Shot Dead During The Dark Knight Rises Screening*, THEGUARDIAN (July 20, 2012, 10:20 AM), <http://www.guardian.co.uk/world/2012/jul/20/colorado-theater-shooting-dark-knight>.

10. Brown, *supra* note 3.

11. David A. Fahrenthold et al., *A Day of Tears and Twists in Colorado*, WASH. POST, July 23, 2012, at A1.

12. *Police Identify Army Veteran as Wisconsin Temple Shooting Gunman*, *supra* note 4; see also Todd Richmond, *Wade Michael Page, Sikh Temple Shooter, Acted Alone, FBI Says*, HUFF POST (Nov. 20, 2012, 6:01 PM), <http://www.huffingtonpost.com/2012/11/20/wade->

fervent commitment to white supremacy causes.<sup>13</sup> The deceased victims ranged in age from thirty-nine to eighty-four years old.<sup>14</sup> Page was armed with a lawfully-purchased “Springfield Armory XDM 9-[millimeter] semiautomatic pistol.”<sup>15</sup>

On December 11, 2012, Jacob Tyler Roberts entered a mall near Portland, Oregon with an AR-15 semiautomatic assault rifle.<sup>16</sup> On a busy holiday shopping day, Roberts killed two people and seriously injured a third person before turning the gun on himself.<sup>17</sup> Clackamas County Sheriff, Craig Roberts, said “the death toll would have been higher had the shooter’s assault rifle not jammed and law enforcement not responded within minutes of the first shot.”<sup>18</sup>

The incidents in Aurora, Oak Creek, and Portland have undoubtedly invigorated the gun control debate.<sup>19</sup> This article argues that although the deci-

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michael-page-acted-alone\_n\_2168229.html (reporting that the FBI concluded Page acted alone).

13. Miranda Leitsinger, *Experts: Alleged Temple Gunman Wade Michael Page Led Neo-Nazi Band, Had Deep Extremist Ties*, NBCNEWS.COM (Aug. 6, 2012, 2:48 PM), [http://usnews.nbcnews.com/\\_news/2012/08/06/13147115-experts-alleged-temple-gunman-wade-michael-page-led-neo-nazi-band-had-deep-extremist-ties](http://usnews.nbcnews.com/_news/2012/08/06/13147115-experts-alleged-temple-gunman-wade-michael-page-led-neo-nazi-band-had-deep-extremist-ties).

14. Erica Goode & Serge F. Kovaleski, *A Killer Who Fed and Was Fueled by Hate*, N.Y. TIMES, Aug. 7, 2012, at A1.

15. *Temple Shooter Bought Gun at Suburban Shop*, CHANNEL3000.COM (Aug. 7, 2012, 3:18 PM), <http://www.channel3000.com/news/Temple-shooter-bought-gun-at-suburban-shop/-/1648/16004660/-/eqy0rf/-/index.html> (reporting that Page lawfully purchased the semiautomatic weapon on July 28, and Page retrieved the firearm on July 30 after clearing a required background check); *see also* Molly Hennessy-Fiske & Kim Murphy, *Sikh Temple Shooting: Gun Shop Owner Says Wade Page Seemed Normal*, L.A. TIMES (Aug. 8, 2012, 4:30 AM), <http://www.latimes.com/news/nation/nationnow/la-na-nn-sikh-shooting-guns-20120807,0,7536671.story>.

16. Bacon, *supra* note 5.

17. Rachel La Corte & Steven Dubois, *Oregon Mall Shooting: Gunman Opens Fire at Clackamas Town Center Mall in Portland, Kills 2, Self*, HUFF POST (Dec. 12, 2012, 8:34 PM), [http://www.huffingtonpost.com/2012/12/12/oregon-mall-shooting\\_n\\_2285243.html](http://www.huffingtonpost.com/2012/12/12/oregon-mall-shooting_n_2285243.html).

18. Bacon, *supra* note 5; *see also* Teresa Carson, *Deadly Oregon Mall Shooting Appeared to Be Lone, Random Rampage*, REUTERS (Dec. 12, 2012, 6:08 PM), <http://www.reuters.com/article/2012/12/12/us-usa-shooting-oregon-idUSBRE8BB01720121212> (stating that “carnage from the shooting likely was limited by the fact the gun jammed”); Kirk Johnson & Serge F. Kovaleski, *Series of Turning Points Kept Mall Toll Lower than Feared*, N.Y. TIMES, Dec. 13, 2012, at A20 (reporting that although the gunman’s assault rifle jammed, he was able to fire approximately sixty rounds); *Police ID Suspect in Oregon Mall Shooting, Say Gun Jammed Possibly Preventing More Deaths*, FOXNEWS.COM (Dec. 12, 2012), <http://www.foxnews.com/us/2012/12/12/gun-jammed-in-oregon-mall-shooting-as-authorities-id-suspect/?test=latestnews> (opining that the jamming likely prevented additional deaths).

19. *See* Jennifer Brown & Colleen O’Connor, *Past Shooting Victims Unite in Urging Action*, DENVER POST, Dec. 15, 2012, at A1; *see also* Rick Jervis & John McAuliff, *Colo.*

sion of the Supreme Court of the United States in *District of Columbia v. Heller* (*Heller I*)<sup>20</sup> marks a high point in individual rights under the Second Amendment, assault weapons bans nevertheless fall outside of the Second Amendment's scope.<sup>21</sup> Further, this article proposes that Congress should promptly enact a law proscribing the manufacture, sale, and possession of assault weapons due to their propensity to inflict catastrophic violence.<sup>22</sup>

Part II of this article briefly explores the history of the Second Amendment, including the various modes of its interpretation and the major Supreme Court cases in this area.<sup>23</sup> This section also concisely defines assault weapons and discusses the prevalence of assault weapons bans throughout the United States.<sup>24</sup>

Part III analyzes how lower courts have dealt with challenges to their jurisdictions' assault weapons bans after *Heller I* was decided.<sup>25</sup>

Part IV argues that some of these lower court decisions were correctly decided, and that *Heller I*'s holding does not bestow a constitutional right to keep and bear assault weapons for any purpose.<sup>26</sup> This section also proposes a bill, drafted by the Law Center to Prevent Gun Violence, on which Congress should vote to criminalize the manufacture, sale, and possession of assault weapons.<sup>27</sup>

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*Rampage Adds Fuel to Gun-Control Debate*, USA TODAY (July 24, 2012), <http://www.usatoday.com/news/nation/story/2012-07-24/aurora-gun-control-debate/56465980/1>. Surprisingly, however, Americans' views on gun control laws remain relatively unchanged. THE PEW RESEARCH CTR., VIEWS ON GUNLAWS UNCHANGED AFTER AURORA SHOOTING 1-2 (2012), available at <http://www.people-press.org/2012/07/30/views-on-gun-laws-unchanged-after-aurora-shooting/> (stating that "[t]he issue remains a highly partisan one: Republicans prioritize gun rights by a 71% to 26% margin, while Democrats prioritize gun control by a 72% to 21% margin").

20. 554 U.S. 570 (2008).

21. See discussion *infra* Part IV.A.

22. See discussion *infra* Part IV.C.

23. See discussion *infra* Part II.A-B; see also U.S. CONST. amend. II.

24. See discussion *infra* Part II.C.

25. See discussion *infra* Part III; see also *Heller I*, 554 U.S. at 577.

26. See discussion *infra* Part IV.A-B; see also *Heller I*, 554 U.S. at 625 (citing *United States v. Miller*, 307 U.S. 174, 178 (1939)).

27. See discussion *infra* Part IV.C.

## II. BACKGROUND

### A. *The Second Amendment and Its Modes of Interpretation*

The Second Amendment to the United States Constitution states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>28</sup>

The meaning of these twenty-seven words has been the source of marked contention.<sup>29</sup> Broadly speaking, there are two primary theories of interpretation: A collective people’s right and an individual’s right.<sup>30</sup> Individual’s right theorists believe that the Second Amendment right should not be interpreted differently from other constitutional provisions, which confer individual rights.<sup>31</sup> Collective people’s right supporters contend that the founders’ concern regarding the Second Amendment primarily revolved around “the allocation of military power,” and as a result, the right conferred is a collective people’s right.<sup>32</sup> “Each side of the debate claims that its view is in accord with the” framers’ intent.<sup>33</sup> Each side also maintains that its interpretation is in line with the original and plain meanings.<sup>34</sup> To be sure,

28. U.S. CONST. amend. II.

29. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 26 (3d ed. 2006) (referring to the Second Amendment as a source of “heated debate among scholars” and laymen alike).

30. *See id.*; *see also* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 793–94, 794 n.2, 810 (1998); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 613 (2000).

31. Volokh, *supra* note 30, at 794, 810 (stating that the First, Fourth, and Ninth Amendments use the phrase “the right of the people” and there is general agreement that those amendments confer individual rights; similarly, the Second Amendment confers such a right); *see also* U.S. CONST. amend. II.

32. *See* Yassky, *supra* note 30, at 598–99, 620–21 n.130 (stating that “the Second Amendment speaks only of ‘the people’ in their collective capacity as militiamen”); *see also* U.S. CONST. amend. II.

33. CHERMERINSKY, *supra* note 29, at 27. *Compare* *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002) (holding that the Second Amendment protects only a collective people’s right to keep and bear arms), *abrogated in part by* *District of Columbia v. Heller*, 554 U.S. 570 (2008), *with* *United States v. Emerson*, 270 F.3d 203, 264 (5th Cir. 2001) (holding that the Second Amendment protects an individual’s right to keep and bear arms).

34. *See* PATRICK J. CHARLES, *THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT* 16–17 (2009) (stating that individual right theorists maintain that “‘people’ is primarily [used] in the Bill of Rights when referring to the individual,” and consequently the Second Amendment protects individuals. Collective right theorists, on the other hand, contend “that because the militia was composed of a [group] of people . . . the ‘right to keep and bear arms’ can only be exercised by the collective people when . . . servi[ng] [in] the militia.”); *see also* STEPHEN P. HALBROOK, *THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* 325 (2008) (examining the early

these modes of interpretation do not produce any satisfying answer to the question of which right the Second Amendment confers. The case law, then, must be analyzed to address this issue.

## B. *Major Supreme Court Decisions Pertaining to the Second Amendment*

### 1. *United States v. Cruikshank*: The Second Amendment's Inapplicability to the States

*United States v. Cruikshank*<sup>35</sup> was the first Supreme Court case that directly addressed the Second Amendment.<sup>36</sup> In that case—which centered on the Colfax massacre in Louisiana—the defendants were charged with violating a federal statute prohibiting individuals from conspiring to deprive other individuals of their constitutionally-protected rights.<sup>37</sup> A Second Amendment issue arose—not because the defendants confiscated the black citizens' firearms or prevented them from joining the state militia—but because the defendants prevented the black citizens from voting and thereby restricted them from bearing arms.<sup>38</sup>

In addressing the plaintiffs' Second Amendment claim, the Court agreed with the plaintiffs that the Second Amendment declares that the right to keep and bear arms shall not be infringed.<sup>39</sup> The Court clarified, however, that this right “means no more than that it shall not be infringed by Congress,” and as a result, the Second Amendment is not a restraint on state governments or private individuals.<sup>40</sup>

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dictionary definition of “‘people,’” which includes “‘persons in general’” and “‘the commonalty [sic], as distinct from men of rank,’” and subsequently determining that “‘the people’” refers to individuals); H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* 168–211 (2002) (analyzing briefly the scholarly contributions of Sanford Levinson, Carl Bogus, William Van Alstyne, Akhil Reed Amar, and David Yassky, and determining that these learned authors support disparate views).

35. 92 U.S. 542 (1875), *abrogated by* McDonald v. City of Chi., 130 S. Ct. 3020 (2010).

36. CHARLES, *supra* note 34, at 64 (stating that this case marked the first time that the Supreme Court gave “the Second Amendment any significant attention”); *see also* U.S. CONST. amend. II.

37. *Cruikshank*, 92 U.S. at 548; JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 22–23 (2011) (describing the sociopolitical and legal circumstances surrounding the Colfax massacre).

38. CHARLES, *supra* note 34, at 64 (stating that the Second Amendment became an issue in addition to the right to peacefully assemble and the right to enjoy life and liberty); *see Cruikshank*, 92 U.S. at 548; *see also* U.S. CONST. amend. II.

39. *Cruikshank*, 92 U.S. at 553; *see also* U.S. CONST. amend. II.

40. *Cruikshank*, 92 U.S. at 553 (stating further that “[t]his is one of the amendments that has no other effect than to restrict the powers of the national government”); *see also* U.S.

## 2. *Presser v. Illinois*: A Narrow Second Amendment

Just eleven years after *Cruikshank* came *Presser v. Illinois*,<sup>41</sup> in which the plaintiff contested an Illinois law that made it unlawful for citizens to assemble and form a militia bearing arms without the express consent of the governor.<sup>42</sup> The plaintiff argued, *inter alia*, that the law violated the Second Amendment.<sup>43</sup>

The Court reaffirmed its core holding in *Cruikshank* and confirmed that the Second Amendment prohibits “only . . . the power[s] of Congress and the National [G]overnment.”<sup>44</sup> The Second Amendment did not protect the plaintiff’s purported right to keep and bear arms because neither Congress nor the National Government enacted the law at issue and the state government did not eliminate its militia.<sup>45</sup> The Court further explained that although states cannot enact laws that eviscerate the militia force, any law short of that would not be invalidated by the Second Amendment.<sup>46</sup>

## 3. *United States v. Miller*: The “Well-Regulated Militia” Requirement

*United States v. Miller*<sup>47</sup> was perhaps the most important Supreme Court decision pertaining to the Second Amendment prior to 2008.<sup>48</sup> In that case, the defendants were indicted for possessing a shotgun with “a barrel less than [eighteen] inches” in violation of a federal statute.<sup>49</sup> The trial court quashed the indictment, holding that the law violated the defendants’ Second Amendment right to keep and bear arms.<sup>50</sup>

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CONST. amend. II; STEVENS, *supra* note 37, at 23 (stating that this “unfortunate decision paved the way for continued racial violence and the enactment of state laws throughout the South that deprived blacks of full citizenship for decades”).

41. 116 U.S. 252 (1886); *see generally Cruikshank*, 92 U.S. 542.

42. *Presser*, 116 U.S. at 262.

43. *Id.* at 264.

44. *Id.* at 265; *see also Cruikshank*, 92 U.S. at 553.

45. *Presser*, 116 U.S. at 264–65.

46. *Id.* at 265.

47. 307 U.S. 174 (1939).

48. With that said, however, *Miller* has also been heavily criticized by commentators due to its brevity and relatively simplistic analysis. *See, e.g.*, BRIAN DOHERTY, GUN CONTROL ON TRIAL: INSIDE THE SUPREME COURT BATTLE OVER THE SECOND AMENDMENT 15 (2008) (“*Miller* is an unusual case on which to rest an entire edifice of constitutional interpretation.”); *see UVILLER & MERKEL, supra* note 34, at 18–19 (characterizing *Miller* as “problematic from the standpoint of Second Amendment doctrine” because people arguing from each side of the aisle repeatedly “read the same language from the *Miller* opinion as confirming” its view).

49. *Miller*, 307 U.S. at 175.

50. *Id.* at 177.

Hearing the case on direct appeal, the Supreme Court reversed the trial court's ruling, and issued the following, now famous, statement:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.<sup>51</sup>

For many decades, *Miller* was understood to stand for the proposition that the Second Amendment conferred a right only in connection with militia service.<sup>52</sup> That is to say that *Miller* turned on whether the *weapon* at issue was connected to the militia; it did not hinge on whether the *individual* was connected to the militia.<sup>53</sup>

### C. *How Do Assault Weapons Fit Into All of This?*

Assault weapons may be thought of as semiautomatic firearms that require an individual trigger pull to discharge each bullet.<sup>54</sup> After one bullet is discharged, "the cartridge automatically reloads in preparation for the next shot."<sup>55</sup> Fully automatic firearms, in contrast, discharge bullets so long as the trigger is being pulled.<sup>56</sup>

In 1994, Congress passed a ten-year ban on assault weapons.<sup>57</sup> The ban reached its sunset in 2004.<sup>58</sup> The law "ban[ned] the manufacture, sale, and

51. *Id.* at 178 (citing *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840)). Interestingly, the Court did not quickly conclude that the defendants were not members of a militia; to the contrary, it declared that all males are capable of constituting the militia, but, nevertheless, a sawed-off shotgun has no relation to any militia. See DOHERTY, *supra* note 48, at 17.

52. *Id.*; see UVILLER & MERKEL, *supra* note 34, at 18–19.

53. See UVILLER & MERKEL, *supra* note 34, at 18–19; see also *Miller*, 307 U.S. at 179.

54. Daniel Abrams, Comment, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL'Y REV. 488, 491 (1992).

55. *Id.*; see also *Assault Weapons Policy Summary*, *supra* note 2 (stating that these weapons allow for "rapid and accurate spray firing").

56. See Abrams, *supra* note 54, at 491–92 (analogizing fully automatic weapons with machine guns).

57. *Assault Weapon Ban Expires*, CBSNEWS (Feb. 11, 2009, 7:52 PM), <http://www.cbsnews.com/stories/2004/09/13/politics/main642984.shtml>; David Johnston & Steven A. Holmes, *Clinton Signs Crime Bill into Law*, PITTSBURGH POST-GAZETTE, Sept. 14, 1994, at A8.

58. See *Assault Weapon Ban Expires*, *supra* note 57.

possession of 19 [specific] assault weapons.”<sup>59</sup> The regulations promulgated under the assault weapons ban contained many definitions.<sup>60</sup>

First, the regulations listed the nineteen specific weapons by make and model number.<sup>61</sup> Second, the regulations included in its definition *semiautomatic rifles* that can accept detachable magazines and have at least two of the following: “(1) A folding or telescoping stock, (2) [a] pistol grip that protrudes conspicuously beneath the action of the weapon, (3) [a] bayonet mount, (4) [a] flash suppressor or threaded barrel designed to accommodate a flash suppressor, and (5) [a] grenade launcher.”<sup>62</sup> Third, the regulations included in its definition *semiautomatic pistols* that can accept a detachable magazine and have at least two of the following:

- (1) An ammunition magazine that attaches to the pistol outside of the pistol grip, (2) [a] threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer, (3) [a] shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the nontrigger hand without being burned, (4) [a] manufactured weight of 50 ounces or more when the pistol is unloaded, and (5) [a] semiautomatic version of an automatic firearm.<sup>63</sup>

Fourth, the regulations included in its definition *semiautomatic shotguns* that have at least two of the following: “(1) A folding or telescoping stock, (2) [a] pistol grip that protrudes conspicuously beneath the action of the weapon, (3) [a] fixed magazine capacity in excess of [five] rounds, and (4) [a]n ability to accept a detachable magazine.”<sup>64</sup>

These definitions are helpful when attempting to grasp the precise notion of an assault weapon.<sup>65</sup> For a simpler definition, it may be useful to consider three factors in determining whether a particular firearm is an assault weapon: (1) Military appearance, (2) likelihood and ease of transformation into a fully automatic weapon, and (3) cartridge size.<sup>66</sup>

Aside from the Federal Assault Weapons Ban of 1994, numerous state and municipal jurisdictions have implemented similar assault weapons bans

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59. Johnston & Holmes, *supra* note 57.

60. See 27 C.F.R. § 178.11 (2002).

61. *Id.* § 178.11, at 1139.

62. *Id.* § 178.11, at 1139–40.

63. *Id.* § 178.11, at 1140.

64. *Id.*

65. See 27 C.F.R. § 178.11.

66. Abrams, *supra* note 54, at 492 (stating that these are the factors that the Bureau of Alcohol, Tobacco, and Firearms use in identifying weapons as assault weapons).

to thwart the dangerous propensity of these firearms.<sup>67</sup> Prior to the Supreme Court's decision in *Heller I*, there was little doubt that assault weapons bans were constitutional and not in violation of the Second Amendment. The question emerges then, whether *Heller I* changed the constitutional landscape of assault weapons bans.<sup>68</sup>

#### D. *Heller I: Shaking the Second Amendment Terrain*

In *Heller I*, the Supreme Court addressed the Second Amendment head-on for the first time in nearly seven decades when it was called to decide whether a District of Columbia ban on handguns in the home is constitutional.<sup>69</sup> The District of Columbia criminalized the possession of an unregistered handgun, and handgun registration was prohibited, thereby effectuating a handgun ban.<sup>70</sup>

The Court first thoroughly examined the meaning of the Second Amendment, and in particular, its linguistic components.<sup>71</sup> Justice Scalia, writing for the Court that was split on ideological lines, analyzed the Second Amendment's operative clause—"right of the people to keep and bear

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67. See, e.g., *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002) (upholding California's assault weapons ban), *abrogated in part by* *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 525–26, 539 (6th Cir. 1998) (citing *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250, 252 (6th Cir. 1994)) (examining Columbus's assault weapons ban); *Richmond Boro Gun Club, Inc. v. City of N.Y.*, 97 F.3d 681, 683, 689 (2d Cir. 1996) (upholding New York City's assault weapons ban); *Coal. of N.J. Sportsmen, Inc. v. Whitman*, 44 F. Supp. 2d 666, 669, 693 (D.N.J. 1999) (upholding New Jersey's assault weapons ban); *Robertson v. City & Cnty. of Denver*, 874 P.2d 325, 335–36 (Colo. 1994) (en banc) (upholding Denver's assault weapons ban); *Benjamin v. Bailey*, 662 A.2d 1226, 1228, 1242 (Conn. 1995) (upholding Connecticut's assault weapons ban); *City of Cincinnati v. Baskin*, 859 N.E.2d 514, 519 (Ohio 2006) (upholding Cincinnati's assault weapons ban); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 166, 173, 175 (Ohio 1993) (upholding Cleveland's assault weapons ban). Of course, those cases were all decided before *Heller I*. See *Heller I*, 554 U.S. 570, 635 (2008).

68. See *Heller I*, 554 U.S. at 635.

69. *Id.* at 573; DOHERTY, *supra* note 48, at 15. As a background note, the idea to challenge the District of Columbia's handgun ban was very well thought out and methodical. See DOHERTY, *supra* note 48, at 23 (crediting Robert Levy, a renowned libertarian, as the organizer and financier of the effort).

70. *Heller I*, 554 U.S. at 574–75. For the pertinent statutory provisions, please see sections 7-2501.01(10), (12), 7-2502.01, 7-2502.02, 7-2551.01, and 7-2551.02 of the District of Columbia Code.

71. *Heller I*, 554 U.S. at 579–99; see also U.S. CONST. amend. II.

[a]rms”—and its prefatory clause—“[a] well regulated Militia, being necessary to the security of a free State.”<sup>72</sup>

With regard to the operative clause, the Court determined that “the people” could refer to only the individual, especially in light of the Fourth and Ninth Amendments’ use of “the people.”<sup>73</sup> The Court also discovered that “[n]owhere else in the Constitution does a ‘right’ attributed to ‘the people’ refer to anything other than an individual right.”<sup>74</sup> The Court further stated that “the most natural reading of ‘keep [and bear] Arms’ . . . is to ‘have [and carry] weapons.’”<sup>75</sup> This right applied to militiamen and ordinary citizens alike.<sup>76</sup>

With respect to the prefatory clause, the Court concluded that this language merely “announces the purpose for which the right was codified: [T]o prevent elimination of the militia.”<sup>77</sup> Nothing in the prefatory clause indicates that the *sole* reason that the right to keep and bear arms exists was to maintain the militia.<sup>78</sup>

After concluding this analysis, the Court then compared the Second Amendment to analogous state constitutional provisions enacted at the time of the Constitution’s ratification.<sup>79</sup> Specifically, the Court referenced the constitutional provisions that confer the right to bear arms in Pennsylvania, Vermont, North Carolina, and Massachusetts: “defence of themselves,” “defence of the State,” and “the common defence,” respectively.<sup>80</sup> The Court determined that the only logical conclusion was that these state constitutions “secured an individual[’s] right to [keep and] bear arms for [self-defense],” and consequently that was the original understanding of the federal constitutional provision at the time.<sup>81</sup>

The Court turned next to the historical interpretation of the Second Amendment, including its own case law, from the amendment’s ratification up to the present case.<sup>82</sup> The Court analyzed the post-ratification commen-

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72. *Heller I*, 554 U.S. at 577, 579–98 (citations omitted); see also HALBROOK, *supra* note 34, at 337 (stating that the founders intended the Constitution to be readable by any citizen, and that an “exhaustive textual analysis of the Second Amendment” became necessary only in the last half-century).

73. *Heller I*, 554 U.S. at 579 (quoting U.S. CONST. amend. IV, IX).

74. *Id.* at 580.

75. *Id.* at 582 (quoting U.S. CONST. amend. II).

76. *Id.* at 583.

77. *Id.* at 599.

78. *Heller I*, 554 U.S. at 599.

79. *Id.* at 600–03.

80. *Id.* at 601.

81. *Id.* at 602–03.

82. *Id.* at 605–26.

tary of St. George Tucker, William Rawle, and Joseph Story.<sup>83</sup> It then considered relevant pre-Civil War case law,<sup>84</sup> including *Houston v. Moore*,<sup>85</sup> *Nunn v. State*,<sup>86</sup> *State v. Chandler*,<sup>87</sup> and *Aymette v. State*.<sup>88</sup> After that, the Court examined the post-Civil War commentators and legislation.<sup>89</sup> The Court also analyzed its own precedents in *Cruikshank*, *Presser*, and *Miller*.<sup>90</sup>

After an extensive and exhaustive evaluation, the Court concluded that the “Second Amendment confers an individual right to keep and bear arms,” and it rejected the argument that the amendment applies only in connection with militia service.<sup>91</sup> As a result, the District of Columbia handgun ban was unconstitutional, because “the inherent right of self-defense has been central to the Second Amendment right.”<sup>92</sup> The Court determined that the District of Columbia law prohibited an entire class of weapons that are most popular among American citizens for self-defense, and this ban extended to an individual’s home where the need for self-defense is paramount.<sup>93</sup> The District of Columbia handgun ban therefore failed to pass constitutional muster under any standard of scrutiny.<sup>94</sup>

#### E. McDonald v. City of Chicago: *The Incorporation of the Second Amendment to the States*

In *McDonald v. City of Chicago*,<sup>95</sup> just two years after *Heller I*, the Court evaluated Chicago and Oak Park laws that effectively amounted to handgun bans.<sup>96</sup> The Court was faced with the important task of determining

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83. *Heller I*, 554 U.S. at 606–10.

84. *Id.* at 610–14.

85. 18 U.S. (5 Wheat.) 1 (1820).

86. 1 Ga. 243 (1846).

87. 5 La. Ann. 489 (1850).

88. 21 Tenn. (2 Hum.) 154 (1840).

89. *Heller I*, 554 U.S. at 614–19.

90. *Id.* at 619–25; *see also* *United States v. Cruikshank*, 92 U.S. 542, 553 (1875), *abrogated by* *McDonald v. City of Chi.*, 130 S. Ct. 3020 (2010); *Presser v. Illinois*, 116 U.S. 252, 264–65 (1886); *United States v. Miller*, 307 U.S. 174, 178, 182 (1939).

91. *Heller I*, 554 U.S. at 622.

92. *Id.* at 628.

93. *Id.* at 628–29.

94. *Id.*

95. 130 S. Ct. 3020 (2010).

96. *Id.* at 3026. The Chicago “ordinance [stated] that ‘[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm.’” *Id.* (second alteration in original). In a separate provision, the Chicago Municipal Code prohibited most handgun registration, thereby “effectively banning handgun possession” within Chicago city limits. *Id.* Oak Park had a law that was similar to that of Chicago. *Id.* That law made it “‘unlawful for any person to possess . . . any firearm,’ a term that include[d]

whether the Second Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment.<sup>97</sup> The Court noted that the majority of the Bill of Rights guarantees have been incorporated.<sup>98</sup> Indeed, only a few of these guarantees have not been incorporated.<sup>99</sup>

The Court determined that neither *Cruikshank* nor *Presser* precluded it from considering whether the Second Amendment is applicable to the

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‘pistols, revolvers, guns and small arms . . . commonly known as handguns.’” *McDonald*, 130 S. Ct. at 3026.

97. *Id.* at 3028, 3031. *Heller I* did not decide this issue because at issue in that case was a District of Columbia handgun ban—as opposed to a state handgun ban—and therefore the Court did not determine whether the Second Amendment is applicable to the states. *Heller I*, 554 U.S. at 573.

98. *McDonald*, 130 S. Ct. at 3034; *see also* *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (recognizing the incorporation of the Eighth Amendment right against excessive bail); *Benton v. Maryland*, 395 U.S. 784, 787 (1969) (incorporating the Double Jeopardy Clause of the Fifth Amendment); *Duncan v. Louisiana*, 391 U.S. 145, 157–58 (1968) (incorporating the Sixth Amendment right to trial by jury in criminal cases); *Washington v. Texas*, 388 U.S. 14, 17–19 (1967) (incorporating the Sixth Amendment right to compulsory process); *Klopper v. North Carolina*, 386 U.S. 213, 222 (1967) (incorporating the Sixth Amendment right to a speedy trial); *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (incorporating the Sixth Amendment right to confront an adverse witness); *Aguilar v. Texas*, 378 U.S. 108, 110 (1964) (incorporating the Fourth Amendment warrant requirement), *overruled on other grounds by* *Illinois v. Gates*, 462 U.S. 213 (1983); *Malloy v. Hogan*, 378 U.S. 1, 3 (1964) (incorporating the Fifth Amendment right against self-incrimination), *abrogated on other grounds by* *Arizona v. Fulminante*, 499 U.S. 279 (1991); *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (incorporating the Sixth Amendment right to assistance of counsel), *abrogated by* *Scott v. Illinois*, 440 U.S. 367 (1979); *Robinson v. California*, 370 U.S. 660, 667 (1962) (incorporating the Eighth Amendment right against cruel and unusual punishment); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (incorporating the Fourth Amendment exclusionary rule); *Wolf v. Colorado*, 338 U.S. 25, 33 (1949) (incorporating the Fourth Amendment right against unreasonable searches and seizures), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961); *In re Oliver*, 333 U.S. 257, 273, 278 (1948) (incorporating the Sixth Amendment right to a public trial); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (incorporating the Establishment Clause of the First Amendment); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause of the First Amendment); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (incorporating the First Amendment right to freely assemble); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931) (incorporating the First Amendment right of the press); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the First Amendment right to freely speak); *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 233 (1897) (incorporating the Just Compensation Clause of the Fifth Amendment).

99. *McDonald*, 130 S. Ct. at 3034, 3035 & n.13. The Bill of Rights guarantees that have not been fully incorporated are “the Third Amendment [right] against [the] quartering of soldiers,” the Fifth Amendment right to indictment by a grand jury, “the Seventh Amendment right to a [trial by jury] in civil cases, and . . . the Eighth Amendment[] prohibition [against] excessive fines.” *Id.* at 3035 n.13.

states.<sup>100</sup> The Court reasoned that neither of those cases affected the present case because the “selective incorporation” under the Due Process Clause had yet to begin at the time of those decisions.<sup>101</sup> In considering whether the right to keep and bear arms is “deeply rooted in this Nation’s history and tradition,” the Court pointed directly to *Heller I* itself for guidance.<sup>102</sup>

As expressed in *Heller I*, the right to self-defense is at the core of the Second Amendment.<sup>103</sup> The *McDonald* Court echoed this sentiment and reasoned that, in the absence of *stare decisis* considerations, the Second Amendment is a fundamentally protected right, and it applies to state governments with equal force as the federal government.<sup>104</sup> Thus, the Court held “that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right [as defined] in *Heller I*.”<sup>105</sup>

This begs the question, then, how does the Supreme Court’s Second Amendment jurisprudence affect state and local governments in promoting assault weapons bans? Has anything changed since *Heller I* and *McDonald* were decided? For the following reasons, I argue that assault weapons bans remain constitutional.

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100. *Id.* at 3031 (citing *Heller I*, 554 U.S. at 620 n.23); see also *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875), *abrogated by McDonald v. City of Chi.*, 130 S. Ct. 3020 (2010).

101. *McDonald*, 130 S. Ct. at 3031; see also DOHERTY, *supra* note 48, at 15 (noting that the conclusions in *Cruikshank* and *Presser* are outdated in light of the Supreme Court’s recent trend in selectively incorporating the Bill of Rights).

102. *McDonald*, 130 S. Ct. at 3036 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (citing *Heller I*, 554 U.S. at 628–29).

103. *Heller I*, 554 U.S. at 628 (categorizing the right to self-defense as “inherent” and “central to the Second Amendment right”).

104. *McDonald*, 130 S. Ct. at 3050 (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 & n.14 (1968)).

105. *Id.*; see also *Heller I*, 554 U.S. at 628–29. The Court was not dissuaded by the governments’ argument that there are strong, “controversial public safety implications” at stake. *McDonald*, 130 S. Ct. at 3045. The majority simply pointed to other Bill of Rights guarantees that have been incorporated to the states despite the possibility of negative public safety implications. *Id.*; see, e.g., *Hudson v. Michigan*, 547 U.S. 586, 591–92 (2006) (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)) (reflecting on the immense social costs of the Fourth Amendment exclusionary rule); *Barker v. Wingo*, 407 U.S. 514, 522 (1972) (recognizing the possibility of extremely harsh consequences resulting from the Sixth Amendment right to a speedy trial).

### III. ANALYSIS

Since the Supreme Court's watershed decision in *Heller I*, lower courts have been increasingly faced with interpreting the Court's exact holding.<sup>106</sup> One of the more difficult areas of interpretation, it seems, has been *Heller I*'s applicability to assault weapons bans.<sup>107</sup> This section analyzes *Heller I*'s progeny in the lower courts with respect to assault weapons bans.

#### A. Determining the Applicable Standard of Review

First, it is useful to examine some of the levels of scrutiny that have been applied in Second Amendment cases. Interestingly, the Supreme Court has never articulated the precise level of scrutiny implicated by the Second Amendment right.<sup>108</sup> As a result, lower courts have struggled to settle on the proper standard.<sup>109</sup>

A minority of courts have applied strict scrutiny in purported accordance with the majority opinion in *Heller I*, which states that the right to keep and bear arms is "pre-existing," analogizes the right to keep and bear arms to other fundamental rights, and asserts "that the right to have arms was 'fundamental for English subjects' at the time of the founding."<sup>110</sup> Strict scrutiny requires that a law "be narrowly tailored to serve a compelling governmental interest."<sup>111</sup> Strict scrutiny is not deferential toward government policy.<sup>112</sup>

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106. *E.g.*, *Heller v. District of Columbia (Heller III)*, 670 F.3d 1244, 1252–53, 1256, 1264–67 (D.C. Cir. 2011); *People v. James*, 94 Cal. Rptr. 3d 576, 578–79, 584–86 (Ct. App. 2009), *cert. denied*, 130 S. Ct. 1517 (2010); *Wilson v. Cnty. of Cook (Wilson II)*, 968 N.E.2d 641, 655–56 (Ill. 2012).

107. *See, e.g.*, *James*, 94 Cal. Rptr. 3d at 578–80, 585.

108. *Heller v. District of Columbia (Heller II)*, 698 F. Supp. 2d 179, 184 (D.D.C. 2010), *aff'd in part, vacated in part*, 670 F.3d 1244 (D.C. Cir. 2011).

109. *See id.* at 184–88 (analyzing the variety of approaches applied by lower courts in the wake of *Heller I*).

110. *Id.* at 185 (quoting *Heller I*, 554 U.S. at 592–93); *see also* *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1231–32 (D. Utah 2009) (citing *Heller I*, 554 U.S. at 593–94) (applying strict scrutiny because *Heller I* defined the Second Amendment as "fundamental," and made strong comparisons between the Second Amendment right and other fundamental rights that were reviewed under strict scrutiny).

111. *Abrams v. Johnson*, 521 U.S. 74, 91 (1997).

112. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1267, 1269 (2007) (stating that the strict scrutiny standard is often said to be "'strict in theory, but fatal in fact'"). *But see* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (quoting *Fulilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (flatly rejecting that strict scrutiny is "'strict in theory, but fatal in fact,'" and strongly criticizing the phrase)).

Some courts have applied the “undue burden” test, which was first articulated in the abortion realm.<sup>113</sup> The “undue burden” test treats a law as constitutional so long as it does not place “a substantial obstacle in the path” of the person attempting to engage in constitutionally permissible conduct.<sup>114</sup>

The majority of courts, however, have concluded that Second Amendment laws are subject to intermediate scrutiny.<sup>115</sup> As a result, this Article argues through an intermediate scrutiny lens. Intermediate scrutiny requires that a law “be substantially related to an important governmental” interest.<sup>116</sup>

### B. *People v. James*

*People v. James*<sup>117</sup> was one of the first and most influential cases to address assault weapons bans following the Supreme Court’s decision in *Heller I*. There, the appellate court reviewed the defendant’s conviction for unlawful possession of an assault weapon pursuant to the California Penal Code.<sup>118</sup> The defendant argued that his conviction was contrary to his Second Amendment right to bear arms.<sup>119</sup>

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113. *Heller II*, 698 F. Supp. 2d at 185 (citing *Nordyke v. King*, 644 F.3d 776, 786 (9th Cir.), *vacated, reh’g granted*, 664 F.3d 774 (9th Cir. 2011), *cert. denied*, 81 U.S.L.W. 3364 (2013)); see *People v. Flores*, 86 Cal. Rptr. 3d 804, 809 & n.5 (Ct. App. 2008) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992)) (analogizing the Second Amendment right to the abortion right, and holding that a gun restriction will receive heightened scrutiny only where it poses an “undue burden” on an individual’s right to keep and bear arms, just as with restrictions on the abortion right).

114. *Casey*, 505 U.S. at 877.

115. *Heller III*, 670 F.3d 1244, 1262 (D.C. Cir. 2011) (concluding that the intermediate scrutiny standard is appropriate because assault weapons bans “do not impose a substantial burden upon [the Second Amendment] right,” and for that same reason, strict scrutiny is not the proper standard of review); see *United States v. Marzarella*, 595 F. Supp. 2d 596, 604 (W.D. Pa. 2009) (opining that intermediate scrutiny is proper in Second Amendment cases, and that just because the Supreme Court deemed the Second Amendment a “fundamental right,” does not necessarily mean that it is subject to strict scrutiny review because “[t]he Court has never purported to apply strict scrutiny in every provision of the Bill of Rights”), *cert. denied*, 131 S. Ct. 958 (2011); Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 229 (2006) (noting that other rights are considered “far more fundamental” than the Second Amendment right to keep and bear arms).

116. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

117. 94 Cal. Rptr. 3d 576 (Ct. App. 2009), *cert. denied*, 130 S. Ct. 1517 (2010).

118. *Id.* at 577. For the pertinent statutory provisions, please see CAL. PENAL CODE §§ 12275–90 (West 2009) (repealed 2010).

119. *James*, 94 Cal. Rptr. 3d at 577.

In rejecting the defendant's argument, the Court of Appeal of California determined that possession of an assault weapon does not fall within the scope of the Second Amendment as defined in *Heller I*.<sup>120</sup>

The court first pointed to the legislative intent behind the assault weapons ban.<sup>121</sup> It found that the legislature was attempting to cure the gigantic threat that assault weapons pose to society.<sup>122</sup> The legislature proscribed particular firearms based on their "high rate of fire and capacity for fire-power that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings."<sup>123</sup>

With the legislative intent as a backdrop, the court found that *Heller I* did not confer a right to possess any type of weapon.<sup>124</sup> Although *Heller I* does indeed stand for the proposition that an individual may possess a handgun in his home for self-defense, nothing in the Supreme Court's opinion suggests that this protection extends to atypical weapons,<sup>125</sup> the assault weapons classified by the California legislature were "weapons of war."<sup>126</sup> In concluding, the California court found that the assault weapons ban was constitutional and noted that the firearms at issue were "at least as dangerous and unusual" as the weapon at issue in *Miller*.<sup>127</sup>

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120. *Id.*

121. *Id.* at 580–81; *see also* CAL. PENAL CODE §§ 12275–90.

122. *James*, 94 Cal. Rptr. 3d at 580–81 (quoting *Kasler v. Lockyer*, 2 P.3d 581, 586 (Cal. 2000)) (describing the widespread use of assault weapons as a "crisis"); *see also* CAL. PENAL CODE §§ 12275–90.

123. *James*, 94 Cal. Rptr. 3d at 580 (quoting CAL. PENAL CODE §§ 12275–90). The legislature commented that it was merely attempting to protect "the health, safety, and security" of California citizens, and it was not interested in legalizing firearms intended for "legitimate sports or recreational activities." *Id.* at 580–81 (quoting CAL. PENAL CODE §§ 12275–90).

124. *Id.* at 585 (quoting *Heller I*, 554 U.S. 570, 626 (2008)).

125. *See Heller I*, 554 U.S. at 626, 635.

126. *James*, 94 Cal. Rptr. 3d at 586.

127. *Id.* (discussing *United States v. Miller*, 307 U.S. 174, 175 (1939)). This is an interesting conclusion by the California court, because although *Heller I* certainly did not overrule *Miller*, it did not speak very favorably of the opinion. *See Heller I*, 554 U.S. at 623 (chiding Justice Stevens, who wrote the dissenting opinion, for placing too much reliance on *Miller*, because "the case did not even purport to be a thorough examination of the Second Amendment," and for that reason it is especially incorrect "to read *Miller* for more than what it said"). Even with that aside, the court in *James* repeatedly mentions that it is examining the Second Amendment right "as defined in *Heller I*," but then, rather abruptly, reverts back to *Miller* in the end. *James*, 94 Cal. Rptr. 3d at 586.

### C. Heller III

One of the more comprehensive decisions to come down regarding *Heller I*'s effect on assault weapons bans is *Heller v. District of Columbia (Heller III)*.<sup>128</sup> Following the Supreme Court's 2008 decision in *Heller I*, the District of Columbia enacted firearm regulations that it seemingly thought were constitutional.<sup>129</sup> The plaintiffs challenged specific provisions of the District of Columbia's gun laws, including the registration requirement and assault weapons prohibition.<sup>130</sup>

In evaluating the plaintiff's constitutional challenge against assault weapons and large-capacity magazines, the court engaged in a two-part analysis.<sup>131</sup> The court first noted that the record was devoid of any evidence indicating that assault weapons bans are longstanding and thus entitled to a presumption of legal validity.<sup>132</sup>

The first part of the court's analysis sought to answer the question of whether "the prohibitions impinge upon the Second Amendment right?"<sup>133</sup> Surprisingly, the court stated that assault weapons are in "common use," as described in the majority opinion in *Heller I*.<sup>134</sup> The court noted that although that may be true, assault weapons—even if commonly used—are not necessarily used for self-defense.<sup>135</sup> As a result, assault weapons bans likely do not impinge upon the Second Amendment right.<sup>136</sup> The court did not definitively answer the question, though, because it maintained that intermedi-

128. 670 F.3d 1244 (D.C. Cir. 2011).

129. *Id.* at 1247.

130. *Id.* The particular law was the Firearms Registration Amendment Act of 2008, which amended the Firearms Control Regulations Act of 1975. *Id.*; see also D.C. CODE §§ 7-2502.01(a), .02(a)(6) (2012), *invalidated by* District of Columbia v. Heller, 554 U.S. 570 (2008); *Id.* §§ 7-2502.03(a), (b), (d), (e), .04(c), .07a(a), (c), (d); *Id.* § 7-2506.01(b), *invalidated in part by* Herrington v. United States, 6 A.3d 1237 (D.C. Cir. 2010).

131. *Heller III*, 670 F.3d at 1260–64.

132. *Id.* at 1260–61.

133. *Id.*

134. *Id.* at 1261 (predicating this determination on the fact that "[a]pproximately 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"); *Heller I*, 554 U.S. 570, 627 (2008). The court also considered the fact that "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." *Heller III*, 670 F.3d at 1261.

135. *Heller III*, 670 F.3d at 1261.

136. *Id.* at 1262.

ate scrutiny was the appropriate standard of review, and the assault weapons ban at issue did pass constitutional muster under this standard.<sup>137</sup>

The second part of the court's analysis focused on whether the assault weapons ban survived intermediate scrutiny.<sup>138</sup> The court issued a reminder that it is the government that carries the burden of proof under intermediate scrutiny.<sup>139</sup> Consequently, the District of Columbia was responsible for demonstrating that its assault weapons ban bears a substantial relationship to its important government interest in crime control and prevention.<sup>140</sup>

The District of Columbia had no difficulty showing that assault weapons are dangerous.<sup>141</sup> It pointed to a series of empirical studies supporting the government's contention that assault weapons are especially likely to result in danger for law enforcement personnel because of their "high firepower."<sup>142</sup> The government seemingly placed heavy reliance on studies evaluating the federal assault weapons ban from 1994 to 2004.<sup>143</sup>

These studies suggest that assault weapons were "most commonly used in crime before the [federal assault weapons] ban," as opposed to other purposes, such as for hunting or in self-defense.<sup>144</sup> Moreover, one study found that assault weapons—like the ones at issue in *Heller III*—"account for a larger share of guns used in mass murders and murders of police, crimes for

137. *Id.* at 1261–62.

138. *Id.* at 1261–64. In determining that intermediate scrutiny was appropriate, the court noted that the plaintiffs proffered no evidence supporting the assertion that assault weapons are encompassed within the core Second Amendment right, which would have heightened the level of scrutiny. *Id.* at 1262–63. The court provided an example of how the plaintiffs could have done this by pointing to several statistical conclusions from empirical studies. *Heller III*, 670 F.3d at 1262 (citing DEP'T OF THE TREASURY, STUDY ON THE SPORTING SUITABILITY OF MODIFIED SEMIAUTOMATIC ASSAULT RIFLES 38 (1998), available at <http://www.atf.gov/firearms/industry/april-1998-sporting-suitability-of-modified-semiautomatic-assault-rifles.pdf>; Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 185 (1995)). These statistics suggest that handguns are overwhelmingly used in self-defense, and that assault weapons are "not generally recognized as particularly suitable for or readily adaptable to sporting purposes." *Id.* (quoting DEP'T OF THE TREASURY, *supra*, at 38).

139. *Id.*

140. *Id.*

141. *See Id.* at 1262–64.

142. *Heller III*, 670 F.3d at 1263 (quoting BRADY CTR. TO PREVENT GUN VIOLENCE, ASSAULT WEAPONS "MASS PRODUCED MAYHEM" 3 (2008)).

143. *See id.* (basing support for its conclusion on two empirical studies).

144. *Id.* at 1263 (quoting CHRISTOPHER S. KOPER WITH DANIEL J. WOODS & JEFFREY A. ROTH, AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994–2003, at 11 (2004), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf>).

which weapons with greater firepower would seem particularly useful.”<sup>145</sup> The same study concluded that crime decreased after the federal assault weapons ban was enacted, and for that reason, the District of Columbia argued that assault weapons bans significantly further its governmental interest in crime control and prevention.<sup>146</sup>

The D.C. Circuit found validity in the government’s argument and agreed that its assault weapons ban “promote[d] the [g]overnment’s interest in crime control in the densely populated urban area that is the District of Columbia.”<sup>147</sup> The court concluded by determining that the District of Columbia “carried its burden of showing [that its law bears] a substantial relationship” to the important government interest in crime control and prevention.<sup>148</sup> Therefore, the court held that the plaintiffs’ Second Amendment rights were not violated, and hence the government’s assault weapons ban was constitutional.<sup>149</sup>

In a lengthy dissenting opinion, Judge Kavanaugh maintained that the District of Columbia’s assault weapons ban was unconstitutional.<sup>150</sup> In support of his position, he noted that “[t]he vast majority of handguns today are semi-automatic,” and thus no line can be easily drawn between handguns and assault weapons bans in accordance with a close and correct reading of *Heller I*.<sup>151</sup> In sum, according to Judge Kavanaugh, there is simply no constitutional distinction that can be logically drawn between the handgun ban at issue in *Heller I* and the assault weapons ban at issue in *Heller III*.<sup>152</sup> Judge Kavanaugh’s dissenting opinion may prove to be instrumental in subsequent cases that may ultimately reach the Supreme Court.

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145. *Id.* (quoting KOPER WITH WOODS & ROTH, *supra* note 144, at 87).

146. *Id.* (citing KOPER WITH WOODS & ROTH, *supra* note 144, at 51).

147. *Heller III*, 670 F.3d at 1263.

148. *Id.* at 1264.

149. *Id.*

150. *Id.* at 1269 (Kavanaugh, J., dissenting). Judge Kavanaugh is generally viewed as a very conservative jurist. Charlie Savage, *Appeals Courts Pushed to Right by Bush Choices*, N.Y. TIMES, Oct. 29, 2008, at A1. “[H]e was Assistant to the President and Staff Secretary to President [George W.] Bush.” Brett M. Kavanaugh, U.S. CTS. OF APPEALS D.C. CIRCUIT, <http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+BMK> (last visited Feb. 24, 2013). He was also a law clerk for Justice Kennedy. *Id.* It may be safe to assume that Judge Kavanaugh’s dissenting opinion adequately represents at least one traditionally conservative perspective on the constitutionality of assault weapons bans. See *Heller III*, 670 F.3d at 1269–70.

151. *Heller III*, 670 F.3d at 1286.

152. *Id.* at 1289 (stating that “[t]he fundamental flaw in the majority opinion is that it cannot persuasively explain why semi-automatic handguns are constitutionally protected (as *Heller I*) held) but semi-automatic rifles are not.”).

D. *Wilson v. County of Cook* (Wilson II)

In 1993, Cook County, Illinois enacted an ordinance that banned specific firearms defined as assault weapons.<sup>153</sup> The Cook County Board of Commissioners determined that these particular weapons needed to be outlawed due to their uniquely dangerous attributes.<sup>154</sup> Recently, a group of plaintiffs decided to challenge the ordinance's constitutionality.<sup>155</sup> "The trial court dismissed [the] plaintiffs' first amended complaint," determining that the ordinance did not violate the right to keep and bear arms under either the United States Constitution or the Illinois Constitution.<sup>156</sup> In what became a particularly interesting procedural history, the plaintiffs first appealed following the Supreme Court's decision in *Heller I*.<sup>157</sup> The appellate court found in favor of Cook County, as it interpreted *Heller I* to extend only to federal laws.<sup>158</sup> Immediately thereafter, the plaintiffs filed a petition for leave to appeal to the Supreme Court of Illinois; however during the time when the petition was pending, *McDonald* was decided.<sup>159</sup> The Supreme Court of Illinois directed the appellate court to vacate its prior holding and reconsider its ruling in light of *McDonald*.<sup>160</sup>

The plaintiffs' argument was that they possessed a Second Amendment right—as interpreted in *Heller I* and applied to the states in *McDonald*—to keep and bear arms, including the purported "assault weapons" prohibited by the ordinance.<sup>161</sup> The plaintiffs further contended that many of the proscribed firearms were actually commonly owned, and as such, they were well within the scope of *Heller I*.<sup>162</sup> The appellate court affirmed the trial court's ruling once again, holding "that the [S]econd [A]mendment right does not extend to assault weapons and that the [o]rdinance is substantially related to

153. *Wilson II*, 968 N.E.2d 641, 645 (Ill. 2012).

154. *See id.* Among the commissioners' findings were:

1,000 of the 4,500 trauma cases handled by [the] Cook County Hospital that year were due to gunshot wounds; there were more federally licensed gun dealers in Cook County than gas stations; an estimated 1 in 20 high school students had carried a gun in the prior month; and assault weapons [were] 20 times more likely to be used in the commission of a crime than other kinds of weapons.

*Wilson v. Cook Cnty.* (*Wilson I*), 943 N.E.2d 768, 771 (Ill. App. Ct.), *review granted*, 949 N.E.2d 1104 (Ill. 2011), *and aff'd in part, rev'd in part*, 968 N.E.2d 641 (Ill. 2012).

155. *Wilson II*, 968 N.E.2d at 646.

156. *Wilson I*, 943 N.E.2d at 770.

157. *See Wilson II*, 968 N.E.2d at 647.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 646–47.

162. *Wilson II*, 968 N.E.2d at 656.

an important government[al] interest.”<sup>163</sup> The plaintiffs appealed to the Supreme Court of Illinois.<sup>164</sup>

In reversing the trial court with regard to the plaintiffs’ Second Amendment claim, the Supreme Court of Illinois held that the plaintiffs sufficiently pleaded a cause of action for a constitutional violation.<sup>165</sup> The court reasoned that, given the procedural posture of the case, it could not evaluate the nexus between the assault weapons ban and the interest sought to be protected.<sup>166</sup> The court was not willing to determine that “no set of facts [could] be proved that would entitle plaintiffs to relief on” their Second Amendment claim.<sup>167</sup> The court further stated:

Plaintiffs seek to present evidence to support their allegation that this particular Ordinance encompasses a myriad of weapons that are typically possessed by law-abiding citizens for lawful purposes and fall outside the scope of the dangers sought to be protected under the Ordinance. Without a national uniform definition of assault weapons from which to judge these weapons, it cannot be ascertained at this stage of the proceedings whether these arms with these particular attributes as defined in this Ordinance are well suited for self-defense or sport or would be outweighed completely by the collateral damage resulting from their use, making them “dangerous and unusual” as articulated in *Heller I*. This question requires us to engage in an empirical inquiry beyond the scope of the record and beyond the scope of judicial notice about the nature of the weapons that are banned under this Ordinance and the dangers of these particular weapons.<sup>168</sup>

In essence, the court refused to interpret *McDonald* and *Heller I* as categorically permitting the proscription of assault weapons and it opted not to follow *James* and *Heller v. District of Columbia (Heller II)*<sup>169</sup> on that score.<sup>170</sup>

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163. *Id.* at 647 (citing *Wilson I*, 943 N.E.2d 768, 780–81 (Ill. App. Ct.), *review granted*, 949 N.E.2d 1104 (Ill. 2011), and *aff’d in part, rev’d in part*, 968 N.E.2d 641 (Ill. 2012)).

164. *Id.*

165. *Id.* at 657.

166. *Id.*

167. *Wilson II*, 968 N.E.2d at 657.

168. *Id.* at 656.

169. 698 F. Supp. 2d 179 (D.D.C. 2010), *aff’d in part, vacated in part*, 670 F.3d 1244 (D.C. Cir. 2011).

170. *Wilson II*, 968 N.E.2d at 656–57.

## IV. PROPOSAL

I propose that *Heller II* and *James* were indeed correctly decided, and that assault weapons bans are constitutional, consistent with *Heller I*'s core holding.

A. *Assault Weapons Bans Do Not Implicate the Core Second Amendment Right, and Consequently These Bans Need Not Survive Intermediate Scrutiny*

The Supreme Court's holding in *Heller I* was very narrow: "In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."<sup>171</sup> Self-defense is undoubtedly at the core of the Second Amendment right.<sup>172</sup> Moreover, the Court's decision expressly encompasses handguns in the home.<sup>173</sup> Assault weapons, as previously articulated, are neither generally used in self-defense nor are they handguns, and for those two reasons, assault weapons fall outside of the scope of *Heller I*.<sup>174</sup>

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171. *Heller I*, 554 U.S. 570, 635 (2008).

172. *Id.* at 628, 632 (stating that "the inherent right of self-defense has been central to the Second Amendment right" and that the historical underpinnings of this right support this conclusion).

173. *Id.* at 635. *But see* Moore v. Madigan, No. 12-1788, 2012 WL 6156062, at \*9 (7th Cir. Dec. 11, 2012) (holding that Illinois's ban on ready-to-use guns in public is unconstitutional). In *Moore*, the Seventh Circuit was charged with interpreting the holdings of *McDonald* and *Heller I*. *Id.* at \*3, \*9. Judge Posner, writing for the majority, stated:

To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller [I]* and *McDonald*.

A gun is a potential danger to more people if carried in public than just kept in the home.

....

A blanket prohibition on carrying gun [sic] in public prevents a person from defending himself anywhere except inside his home; and so substantial a curtailment of the right of armed self-defense requires a greater showing of justification than merely that the public *might* benefit on balance from such a curtailment, though there is no proof it would.

....

The Supreme Court has decided that the [Second A]mendment confers a right to bear arms for self-defense, which is as important outside the home as inside. The theoretical and empirical evidence (which overall is inconclusive) is consistent with concluding that a right to carry firearms in public may promote self-defense.

*Id.* at \*3-4, \*7, \*9.

174. *See Heller III*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (expressing uncertainty as to "whether [assault] weapons are commonly used . . . for self-defense" purposes). *Heller III* also reflects on testimony put on by the government that supports the claim that, even if assault weapons are sometimes used in self-defense, "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." *Id.* at 1263-64. That is to say that there are other extrinsic re-

Furthermore, the Supreme Court's opinion in *Heller I* conceded that the Second Amendment is not so robust that it evades all limitation.<sup>175</sup> Indeed, the Court explicitly recognized that the "longstanding prohibitions" on certain types of weapons are not necessarily altered by its opinion in *Heller I*.<sup>176</sup> Although *Heller I* lists only a few examples of longstanding prohibitions on the right to keep and bear arms, there is nothing in the opinion that suggests that this is an exclusive or exhaustive list.<sup>177</sup> Thus, it can be convincingly said that our Nation's longstanding prohibition on assault weapons need not be disturbed.<sup>178</sup>

Additional support for this proposition can be found later in the opinion.<sup>179</sup> The Court cited *Miller* favorably and mentioned that that decision protected only weapons "'in common use at the time.'"<sup>180</sup> The Court interpreted this as a prohibition against the possession of "'dangerous and unusual weapons.'"<sup>181</sup> Numerous authoritative studies support the contention that assault weapons are "'dangerous and unusual'" weapons, and for that reason, they are unprotected by the Second Amendment.<sup>182</sup> Certainly, if assault weapons were not considered "dangerous and unusual," one would have a troublesome time imagining which weapons would qualify as such.

For these reasons, it appears evident that assault weapons bans do not implicate the core Second Amendment right.<sup>183</sup> Consequently, these bans

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percussions that must be considered in concluding that assault weapons are used in self-defense.

175. *Heller I*, 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited.")

176. *Id.* at 626–27 & n.26 (providing examples of classic firearm prohibitions, such as "possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms").

177. *Id.*

178. *See id.* Assault weapons are admittedly a relatively recent development. Nevertheless—as aforementioned—governments have sought to control and ban assault weapons since their inception. *See supra* text accompanying note 67.

179. *See Heller I*, 554 U.S. at 627.

180. *Id.* (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

181. *Id.*

182. *See Heller III*, 670 F.3d 1244, 1262–64 (D.C. Cir. 2011) (quoting *Heller I*, 554 U.S. at 627) (discussing several studies that describe assault weapons as tools that facilitate "'mass produced mayhem'" and "'are designed to enhance their capacity to shoot multiple human targets very rapidly'"). In a society that values the sanctity of life, these weapons certainly can be thought of as "'dangerous and unusual.'" *Id.* at 1263 (quoting *Heller I*, 554 U.S. at 627).

183. *Id.* at 1264.

need not be subjected to intermediate scrutiny and are therefore constitutionally consistent with *Heller I*.<sup>184</sup>

*B. Even Assuming, Arguendo, that Assault Weapons Bans Do Implicate the Core Second Amendment Right, These Bans Nevertheless Pass Constitutional Muster Under Intermediate Scrutiny*

Even assuming, *arguendo*, that assault weapons bans do implicate the core Second Amendment right—that is, assault weapons are found to be used in self-defense—these bans withstand the intermediate scrutiny analysis.<sup>185</sup>

1. Governments Have an Important Governmental Interest in Banning Assault Weapons

Governments have an important governmental interest in banning assault weapons, because these bans aid in crime control and prevention, and in that sense, they enhance safety.<sup>186</sup> The Law Center to Prevent Gun Violence concluded that assault weapons are unique firearms in that they are not used for “sport,” as are many other lawful firearms.<sup>187</sup> To the contrary, assault weapons are strongly conducive to accurate and efficient spray firing.<sup>188</sup> In other words, these firearms make it easier to kill.<sup>189</sup> And, not only that, these guns make it easier to kill a larger number of individuals than more traditional classes of firearms.<sup>190</sup> The Law Center to Prevent Gun Violence found that assault weapons have been increasingly used against law enforcement agents; in particular, because assault weapons have proliferated within drug and gang communities.<sup>191</sup>

Courts have long recognized governments’ interest in preserving and enhancing public safety.<sup>192</sup> In one heavily cited Supreme Court decision, Justice John Marshall Harlan said:

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184. *Id.* app. at 1266.

185. *See id.* at 1263–64.

186. *See Heller III*, 670 F.3d at 1263 (stating that “[i]n short, the evidence demonstrates a ban on assault weapons is likely to promote the Government’s interest in crime control”).

187. *Assault Weapons Policy Summary*, *supra* note 2; *see also* *People v. James*, 94 Cal. Rptr. 3d 576, 580–81 (Ct. App. 2009), *cert. denied*, 130 S. Ct. 1517 (2010).

188. *Assault Weapons Policy Summary*, *supra* note 2.

189. *See id.*

190. *Id.*

191. *Id.*; *see also* *Robertson v. City & Cnty. of Denver*, 874 P.2d 325, 333 (Colo. 1994) (en banc) (explaining that assault weapons are easily concealed and therefore are likely to be used to accomplish criminal objectives).

192. *See, e.g., Quilici v. Vill. of Morton Grove*, 695 F.2d 261, 263, 268–69 (7th Cir. 1982) (upholding a gun control ordinance that was expressly directed at preserving safety); *Benja-*

There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that “persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned.”<sup>193</sup>

This passage truly illuminates the rationale for why safety is an important governmental interest: Safety, in certain circumstances, can actually promote the curtailment of certain rights. In that sense, then, it can hardly be argued that safety is anything other than an important governmental interest if it has stood to restrict other fundamental rights. Perhaps it is axiomatic to state that a democratic society values the safety of all of its citizens, and, without which, it would fail to operate effectively—or maybe even cease to operate at all.

## 2. Assault Weapons Bans Bear a Substantial Relationship to Governments’ Important Governmental Interest

Assault weapons bans, like the ones in *Heller III*, *James*, and *Wilson v. County of Cook (Wilson II)*,<sup>194</sup> bear a substantial relationship to the governments’ important interests in crime control and prevention.<sup>195</sup> The bans are

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min v. Bailey, 662 A.2d 1226, 1233 (Conn. 1995) (arguing that states have traditionally been able “to protect the health, safety and morals of the citizenry”); *State v. Comeau*, 448 N.W.2d 595, 597 (Neb. 1989) (quoting *Louis Finocchiaro, Inc. v. Neb. Liquor Control Comm’n*, 351 N.W.2d 701, 703 (Neb. 1984)) (asserting that the public safety and welfare are undoubtedly sound reasons to regulate the right to keep and bear arms).

193. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) (quoting *Mo., Kan. & Tex. Ry. Co. v. Haber*, 169 U.S. 613, 629 (1898); *R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877); *Thorpe v. Rutland & Burlington R.R. Co.*, 27 Vt. 140, 150 (1855)).

194. 968 N.E.2d 641 (Ill. 2012).

195. See *Heller III*, 670 F.3d 1244, 1264 (D.C. Cir. 2011); *People v. James*, 94 Cal. Rptr. 3d 576, 586 (Ct. App. 2009), cert. denied, 130 S. Ct. 1517 (2010); *Wilson II*, 968 N.E.2d at 647 (citing *Wilson I*, 943 N.E.2d 768, 780–81 (Ill. App. Ct.), review granted, 949 N.E.2d 1104 (Ill. 2011), and aff’d in part, rev’d in part, 968 N.E.2d 641 (Ill. 2012)).

incredibly specific and tightly worded to fit this objective, as the legislation at issue in these cases list specific brands and models that are proscribed.<sup>196</sup> In these cases, the government proscribed particular assault weapons based on legislative findings that these weapons pose a direct and uncontroverted threat to society at large.<sup>197</sup> While it is true that legislative bodies are not entirely insulated from judicial review, legislatures must be afforded “substantial deference” so long as their conclusions have been based on substantial evidence.<sup>198</sup>

Furthermore, the assault weapons bans at issue in *Heller III*, *James*, and *Wilson v. Cook County (Wilson I)*,<sup>199</sup> do not criminalize the category of firearms that is “overwhelmingly chosen by American society”—non-semiautomatic handguns.<sup>200</sup> Those bans target only weapons that are narrowly defined as “assault weapons” in an effort to promote the important governmental interest in public safety and crime control and prevention.<sup>201</sup> Most other types of firearms remain available for lawful use.<sup>202</sup> Thus, it cannot be credibly argued that similar assault weapons bans are not a substantial fit to further the government’s important governmental interest.

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196. See *Heller III*, 670 F.3d at 1248–49; *James*, 94 Cal. Rptr. 3d at 579–80 nn.5–6; *Wilson II*, 968 N.E.2d at 648–49.

197. See *Heller III*, 670 F.3d at 1261 (citing reports on the District of Columbia legislation that found that “assault weapons ‘have no legitimate use as self-defense weapons, and would in fact increase the danger to law-abiding users and innocent bystanders if kept in the home or used in self-defense situations’”); *James*, 94 Cal. Rptr. 3d at 580 (recognizing the legislative intent behind the assault weapons ban at issue: “‘The Legislature hereby finds and declares that the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of this state. The Legislature has restricted the assault weapons specified in Section 12276 based upon finding that each firearm has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill human beings’”); *Wilson II*, 968 N.E.2d at 656 (stating that the ordinance at issue set forth numerous findings indicating that “‘there is no legitimate sporting purpose for the military style assault weapons now being used on our streets,’ and that ‘assault weapons are twenty times more likely to be used in the commission of a crime than other kinds of weapons’”).

198. See *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 665–66 (1994).

199. 943 N.E.2d 768 (Ill. App. Ct.), review granted, 949 N.E.2d 1104 (Ill. 2011), and *aff’d in part, rev’d in part*, 968 N.E.2d 641 (Ill. 2012).

200. *Heller I*, 554 U.S. 570, 628 (2008) (stating that handguns constitute the most popular class of firearms for self-defense purposes); *Heller III*, 670 F.3d at 1261–62; *James*, 94 Cal. Rptr. 3d at 577, 579 n.5; *Wilson I*, 943 N.E.2d at 781.

201. See *Heller III*, 670 F.3d at 1249, 1262–63; *James*, 94 Cal. Rptr. 3d at 580; *Wilson I*, 943 N.E.2d at 771.

202. See *James*, 94 Cal. Rptr. 3d at 580–81.

C. *There Is Strong Public Support in Favor of Banning Assault Weapons, and Therefore Congress Should Enact Legislation Criminalizing the Manufacture, Sale, and Possession of Assault Weapons*

Recent polls strongly suggest that the general public is in favor of restricting the “manufacture, sale, and possession of . . . assault [weapons].”<sup>203</sup> One poll reveals that approximately 62% of Americans are in favor of “ban[ning] the sale of semi-automatic assault weapons, [with a limited] except[ion] for use by the military or police.”<sup>204</sup> Another nationwide poll suggests that 57% of Americans are in favor of banning the “manufacture, sale, and possession of [some] semi-automatic [weapons], such as . . . AK-47[s].”<sup>205</sup> Shockingly, “a majority of gun-owning households [support a nationwide] ban on assault weapons, although by [an admittedly] smaller margin.”<sup>206</sup>

Also, in the aftermath of the expiration of the federal assault weapons ban in 2004, polls indicated that 61% of Americans were dissatisfied with its expiration, whereas only 12% were satisfied with its expiration.<sup>207</sup> Additionally, polls at the time suggest that Democrats, Republicans, and Independents alike favored extending the federal assault weapons ban, thereby indicating the support of assault weapons bans across the political spectrum.<sup>208</sup> In other words, the issue seemingly transcends traditional political cleavages.

Due to strong public support, Congress should once again enact legislation criminalizing the manufacture, sale, and possession of assault weapons.<sup>209</sup> The following is a proposed law drafted by the Law Center to Prevent

203. ORC INT’L, CNN/ORC POLL 3 (Aug. 2012), available at <http://i2.cdn.turner.com/cnn/2012/images/08/09/rel7a.pdf>; see, e.g., Frank James, *Little Election-Year Incentive for Obama or Romney to Join Gun Debate*, NPR (July 23, 2012, 5:40 PM), <http://www.npr.org/blogs/itsallpolitics/2012/07/23/157230177/little-election-year-incentive-for-obama-or-romney-to-join-gun-debate> (reporting a recent Time poll from June 2011).

204. *Guns* (p. 2), POLLINGREPORT.COM, <http://www.pollingreport.com/guns2.htm> (last visited Feb. 24, 2013).

205. ORC INT’L, *supra* note 203, at 3.

206. CBS NEWS & NY TIMES, POLL: THE ECONOMY, THE BUDGET DEFICIT AND GUN CONTROL (2011), available at [http://www.cbsnews.com/htdocs/pdf/Jan11\\_Econ.pdf?tag=contentMain;contentBody](http://www.cbsnews.com/htdocs/pdf/Jan11_Econ.pdf?tag=contentMain;contentBody). This poll also suggests that there has been an increase in overall public support for a nationwide assault weapons ban since 2009. *Id.*

207. *Guns* (p. 2), *supra* note 204 (referencing a poll conducted by NBC News and the Wall Street Journal in September 2004).

208. *Id.* (referencing a poll conducted by the Harris Poll in September 2004).

209. See *id.* Indeed, some lawmakers, such as Senator Diane Feinstein (D-CA), have reportedly taken steps to reintroduce a federal assault weapons ban. Ryan Keller, *Senator*

Gun Violence (formerly the Legal Community Against Violence), modified for adoption by Congress.<sup>210</sup> The law encompasses ideas from the 1994 federal assault weapons ban and has many commonalities with the assault weapons bans at issue in *Heller III*, *James*, and *Wilson II*<sup>211</sup>:

### 1. Findings

....

*Whereas* assault weapons are semi-automatic firearms designed with military features to allow rapid and accurate spray firing for the quick and efficient killing of humans;

*Whereas* assault weapons have been the weapon of choice in many mass shootings of innocent civilians;

*Whereas* assault weapon shootings are responsible for a significant percentage of the deaths of law enforcement officers killed in the line of duty;

*Whereas* approximately [two] million assault weapons are already in circulation in the United States;

*Whereas* the wide availability of assault weapons is a serious risk to public health and safety;

*Whereas* most citizens—including most gun owners—support assault weapons bans and believe that assault weapons should not be available for civilian use;

*Therefore*, the [United States Congress] hereby adopts the following:

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*Feinstein Looking to Introduce New Assault Weapons Ban*, EXAMINER.COM (Nov. 8, 2012), <http://www.examiner.com/article/senator-feinstein-looking-to-introduce-new-assault-weapons-ban>.

210. See LEGAL CMTY. AGAINST VIOLENCE, BANNING ASSAULT WEAPONS—A LEGAL PRIMER FOR STATE AND LOCAL ACTION 58 (2004), available at [http://smartgunlaws.org/wp-content/uploads/2012/05/Banning\\_Assault\\_Weapons\\_A\\_Legal\\_Primer\\_8.05\\_entire.pdf](http://smartgunlaws.org/wp-content/uploads/2012/05/Banning_Assault_Weapons_A_Legal_Primer_8.05_entire.pdf).

211. See *id.*; see also 18 U.S.C. § 922 (1994); *Heller III*, 670 F.3d 1244, 1249 (D.C. Cir. 2011); *People v. James*, 94 Cal. Rptr. 3d 576, 578–80 (Ct. App. 2009), *cert. denied*, 130 S. Ct. 1517 (2010); *Wilson II*, 968 N.E.2d 641, 648–49 (Ill. 2012).

## 2. Definitions

- (a) “Assault weapon” means any:
- (1) Semi-automatic or pump-action rifle that has the capacity to accept a detachable magazine and has one or more of the following:
    - (i) A pistol grip;
    - (ii) Any feature capable of functioning as a protruding grip that can be held by the non-trigger hand;
    - (iii) A folding, telescoping, or thumbhole stock;
    - (iv) A shroud attached to the barrel, or that partially or completely encircles the barrel, allowing the bearer to hold the firearm with the non-trigger hand without being burned, but excluding a slide that encloses the barrel; or
    - (v) A muzzle brake or muzzle compensator.
  - (2) Semi-automatic pistol, or any semi-automatic, centerfire rifle with a fixed magazine, that has the capacity to accept more than [ten] rounds of ammunition;
  - (3) Semi-automatic pistol that has the capacity to accept a detachable magazine and has one or more of the following:
    - (i) Any feature capable of functioning as a protruding grip that can be held by the non-trigger hand;
    - (ii) A folding, telescoping, or thumbhole stock;
    - (iii) A shroud attached to the barrel, or that partially or completely encircles the barrel, allowing the bearer to hold the firearm with the non-trigger hand without being burned, but excluding a slide that encloses the barrel;
    - (iv) A muzzle brake or muzzle compensator; or
    - (v) The capacity to accept a detachable magazine at any location outside of the pistol grip;

- (4) Semi-automatic shotgun that has one or more of the following
  - (i) A pistol grip;
  - (ii) Any feature capable of functioning as a protruding grip that can be held by the non-trigger hand;
  - (iii) A folding, telescoping, or thumbhole stock;
  - (iv) A fixed magazine capacity in excess of 5 rounds; or
  - (v) An ability to accept a detachable magazine;
- (5) Shotgun with a revolving cylinder;
- (6) Conversion kit, part, or combination of parts, from which an assault weapon can be assembled if those parts are in the possession or under the control of the same person[s].
- (b) “Assault weapon” does not include any firearm that has been made permanently inoperable.
- ....
- (c) “Detachable magazine” means any ammunition feeding device, the function of which is to deliver one or more ammunition cartridges into the firing chamber, which can be removed from the firearm without the use of any tool, including a bullet or ammunition cartridge.
- (d) “Large capacity magazine” means any ammunition feeding device with the capacity to accept more than [ten] rounds, but shall not be construed to include any of the following:
  - (1) A feeding device that has been permanently altered so that it cannot accommodate more than [ten] rounds.
  - (2) A [twenty-two] caliber tube ammunition feeding device.
  - (3) A tubular magazine that is contained in a lever-action firearm.
- (e) “Muzzle brake” means a device attached to the muzzle of a weapon that utilizes escaping gas to reduce recoil.

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(f) “Muzzle compensator” means a device attached to the muzzle of a weapon that utilizes escaping gas to control muzzle movement.

### 3. Prohibitions

(a) No person, corporation or other entity in the [United States] may manufacture, import, possess, purchase, sell, or transfer any assault weapon or large capacity magazine.

(b) Subsection (a) shall not apply to:

(1) Any government officer, agent, or employee, member of the armed forces of the United States, or peace officer, to the extent that such person is otherwise authorized to acquire or possess an assault weapon and/or large capacity magazine, and does so while acting within the scope of his or her duties; or

(2) The manufacture, sale, or transfer of an assault weapon or large capacity ammunition feeding device by a firearms manufacturer or dealer that is properly licensed under federal, state, and local laws to any branch of the armed forces of the United States, or to a law enforcement agency in [the United States] for use by that agency or its employees for law enforcement purposes.

....

(c) Any person who, prior to the effective date of this law, was legally in possession of an assault weapon or large capacity magazine shall have [ninety] days from such effective date to do any of the following without being subject to prosecution:

(1) Remove the assault weapon or large capacity magazine from the [United States];

(2) Render the assault weapon permanently inoperable; or

(3) Surrender the assault weapon or large capacity magazine to the appropriate law enforcement agency for destruction.<sup>212</sup>

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212. LEGAL CMTY. AGAINST VIOLENCE, *supra* note 210, at 59–61. Appendix G is part of a report, *Banning Assault Weapons—A Legal Primer for State and Local Action*, which is a publication of the Legal Community Against Violence (now known as the Law Center to Prevent Gun Violence). *Id.* at 57; *About Us*, L. CENTER TO PREVENT GUN VIOLENCE,

## V. CONCLUSION

Although *Heller I* is widely viewed as a pro-guns-rights case, assault weapons bans remain constitutional under the Second Amendment.<sup>213</sup> The Second Amendment is subject to limitations and regulations similar to other fundamental rights, and nothing in *Heller I* suggests anything to the contrary.<sup>214</sup> *Heller I*'s narrow holding does not confer a right to keep and bear assault weapons, and consequently assault weapons bans are constitutionally permissible.<sup>215</sup> Congress should promptly enact legislation criminalizing the manufacture, sale, and possession of assault weapons consistent with prevailing public opinion, such as the law suggested by the Law Center to Prevent Gun Violence. This measure can only aid in subsequent prevention of catastrophic violence, like that which occurred in Aurora, Colorado, Oak Creek, Wisconsin, and Portland, Oregon.

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<http://smartgunlaws.org/about-gun-laws> (last visited Feb. 24, 2013). The model law is modified for adoption by the United States Congress. See LEGAL CMTY. AGAINST VIOLENCE, *supra* note 210, at v, 15. Intentionally absent is a “penalty” or “punishment” section, as this article merely opines that assault weapons manufacture, sale, and possession should be subject to criminal liability and chooses to abstain from addressing the broader policy question of criminal punishment.

213. See *Heller I*, 554 U.S. 570, 635 (2000); *Heller III*, 670 F.3d at 1263–64; see also *supra* Part IV.A–B.

214. *Heller I*, 554 U.S. at 626.

215. See *id.* at 627, 635; *Heller III*, 670 F.3d at 1261.