

## *Heller* and “Assault Weapons”\*

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**Wallace:** In our discussion time, I have three or four questions here. First, assault weapons bans are typically upheld because judges think assault weapons are exceptionally more dangerous than other firearms. The question I have is, To what extent is the accurate knowledge of how semiautomatic assault weapons operate—to what extent is that an essential prerequisite to proper constitutional decision-making on assault weapons bans? In other words, if the courts are wrong about how assault weapons operate, are their legal conclusions about the constitutionality of such bans less credible?

A second question is, What is the proper test for determining whether possession of a particular type of firearm is constitutionally protected? Is it a categorical test? Is it an interest-balancing test? We heard those terms talked about in the earlier panels today. Should the constitutionality of an assault weapons ban be analyzed with an interest-balancing approach or a categorical approach?

And then, finally, how relevant is the existence of alternative weapons choices to the constitutionality of assault weapons bans?

So those are some questions that I have for the panel. If we don't get to those in the presentation, we can come back to them in our discussion. We're going to start with Professor Rostron, then Mr. Kopel, then Mr.

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\* Panelists made edits to this transcript. Visit [www.campbelllawreview.com](http://www.campbelllawreview.com) to view the full video of *Campbell Law Review's* 2018 symposium: *Heller* After Ten Years.

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Lowy, in that order. We appreciate you being here today with us and helping enlighten us on this great topic.

**Rostron:** Thank you to the law review here, and the faculty, and the students for the invitation, the opportunity to be here. It's been really interesting to listen to it throughout the day. Obviously, it makes me think about a lot of things. It intersects with a lot of things that I was thinking about talking about on this subject. For example, something that Professor Blocher said on the last panel really resonates with me—I think these are hard issues, I really think they are. I tend to think controversial issues are controversial for a reason. If they were easy and just sort of really one-sided, it wouldn't be something that we'd be having an event to discuss, and we wouldn't be talking about these issues for years and years, as people have said. This debate's been going on.

The issue of assault weapons is hard right off the bat, even with just the terminology. What is an assault weapon? People disagree about whether that's even a thing that exists. Is there such thing as an assault weapon, or is that improper terminology? Where did the term come from? Some people suggest that the term is, on the one hand, propaganda that's been invented by gun control groups for their political purposes. Other times I've seen people suggest—and even people on the gun rights side of thing—I've seen them suggest, "No, it's actually invented by manufacturers and dealers as a way to sort of hype their products and sell them." So, in any event, the term does go back a ways. And the basic idea, I think, of assault weapons—we could agree—is we're talking about, as Professor Wallace said, these are semi-automatic versions of military firearms.

So after World War II, for example, the Soviet Union and its allies essentially adopted the AK-type rifle as their standard military firearm, and the United States eventually adopted the M-16 rifle. And these have the capacity, at least, for automatic fire. But manufacturers eventually developed versions of them for the civilian market that were just semi-automatic, meaning they can't fire automatically. They're not machine guns. They don't fire more than one round with a pull of the trigger, but they just fire one round per trigger pull.

But nevertheless, otherwise, they're similar to the military weapons. They are meant to imitate the features and the style of the military weapons. So for example, the AR-15 is a semi-automatic version of an M-16 rifle which would be used by the military. So that's essentially what we're talking about.

I'll give a little background here since I'm the first speaker. Some of what I say may be pretty elementary for those of you who know a lot about

these issues. Other people, it may be new to you, so maybe it's helpful to lay that foundation as we get going. But, I think the assault weapon issue really started to become significant in the late 1980s.

In particular, there was a shooting in California. There was a shooting at an elementary school in Stockton, California. A young man used an AK-type rifle, semi-automatic version, I should say, to shoot at children on a playground, and killed some of them. And obviously, it was a tragic thing that got a lot of attention. And so in particular, people in California started calling for the enactment of legislation to ban these and other types of weapons that have this military style or features. And so within a couple of months, California enacted a statute, the Roberti-Roos Assault Weapons Control Act, which prohibited certain weapons. And as Professor Wallace said, a few other states soon followed. I think New Jersey and Connecticut were a couple of the early ones in the early '90s.

And all of these laws sort of have a similar structure. Usually, there's sort of two parts to it. One is just a list. They'll make a list of weapons that they'll identify by name, and they'll say, you know, the AR-15 or the Bushmaster, or XM-15, or the—whatever it may be—the AK series. Sometimes it's difficult to list them because they'll be different variations and that sort of thing. But in any event, there is some attempt to list weapons by name.

And then there's an attempt to provide a more general definition based on the features of the weapon. So the California law, for example, was pretty typical—and the other laws are patterned after it—that it said, for example, in terms of rifles at least, that a semi-automatic centerfire rifle with a detachable magazine would be an assault weapon if it had any one of six features that were listed. They were a pistol grip protruding conspicuously beneath the action of the weapon, a thumbhole stock, a folding or telescoping stock, a grenade or flare launcher, a flash suppressor, or a forward pistol grip. So you'll get different variations of those features in different laws, and it may require only one of the features, or it may require two for it to be an assault weapon. But that's the basic idea of how the definitions work.

In 1994, Congress passed a federal assault weapon law. So this time, obviously, at the national level. And rightly or wrongly—it was very controversial before it was enacted, and even afterward—and rightly or wrongly, it's seen as having played a big role in the Republican Party being successful in the 1994 elections and the Democrats losing control of Congress. So there's a political implication to it.

The Federal Assault Weapons Ban had a couple of features that made it problematic even, I think, for its supporters. One is that it didn't apply until it took effect, obviously; until it was enacted and took effect. And it

didn't apply retroactively. It didn't mean that people had to turn in, essentially, weapons that were already possessed. Assault weapons that were already possessed were grandfathered, and possession of them would continue to remain legal.

And so, among other things, that caused a surge of the sales of these weapons in the period leading up to the law's enactment. People, maybe for investment reasons, or maybe just for concern that they then wouldn't be able to get these weapons, sort of stockpiled these weapons before the ban took effect.

A second feature of it was that the law was undermined, to some extent at least, by the fact that once you define exactly what an assault weapon is, in these very precise terms, then people can produce a weapon that is close to the banned weapons, but not quite. So if there's a certain feature—the ability to mount a bayonet, or something—if that's what made a firearm fit within the definition of assault weapon, then the manufacturer could make essentially the same gun but remove that feature.

And now, you can get around the assault weapon definition, in other words. And depending on your perspective, I guess that could be either sort of an unfortunate and sort of shady sort of evasion of the spirit and intent of the statute, or it could be, on the other hand, just an example of compliance. They pass a law, and they say that this is prohibited, and so you comply with the statute, and you make something else that's not covered by the law.

A third feature of the federal law was that it essentially came with an expiration date. For political reasons, there was a compromise, and they put in a sunset clause that said that the law would cease to be in effect after ten years. It could be renewed by Congress, but at the point when it came up for renewal, Congress chose not to renew it, and so the federal law went off the books and disappeared.

And there have been bills proposed in every Congress, pretty much since then, that would reinstate the Federal Assault Weapon Ban or some version of it, but they haven't been enacted. So it remains essentially a state-by-state issue. And at this point, I believe, if the count is correct, that there are seven states that have an assault weapon ban in effect. They're states that you might sort of expect, that have stricter gun laws. Out in the west, there's Hawaii and California, and then over in the east, there's Massachusetts, and Connecticut, New York, and New Jersey, and Maryland, if I'm remembering all of them. So to some extent, it's a legislative issue; it's a state-by-state thing. Some states have these laws, and some don't.

And then, in addition, it becomes a court issue as well because challenges or lawsuits are brought to challenge these laws, so it winds up in

the courts. The legal landscape for these sorts of challenges, obviously, was impacted greatly in 2008 by the *Heller* decision that everybody has been talking about today.<sup>1</sup> And so there have been a number of decisions made about the validity of these assault weapons laws. Four, in particular, by the federal appellate courts. The D.C. Circuit ruled on the validity of the District of Columbia’s law.<sup>2</sup> The Second Circuit, I think, was next. They were talking about New York’s and Connecticut’s laws.<sup>3</sup> The Seventh Circuit ruled on, actually, a local law.<sup>4</sup> The City of Highland Park, Illinois, had an assault weapon ban.<sup>5</sup> And then most recently, the Fourth Circuit ruled on Maryland’s statute.<sup>6</sup>

And in each case, the result was the same; the assault weapons bans were upheld. For the most part, I would say, the reasoning was also very consistent with one major exception. The Fourth Circuit was the only one of the courts that found that the Second Amendment doesn’t even really apply to assault weapons; that they’re not the kind of weapon that would be covered. But other than that, the courts had pretty consistent reasoning. And it’s reasoning that you’ve heard a lot about today through all of these panels, that they apply this two-part analysis, for the most part, and the second step of it is a type of intermediate scrutiny.

And as you’ve heard, intermediate scrutiny can mean a lot of different things. It’s not sort of a unitary test that only has one meaning. You could define intermediate scrutiny or apply it in ways, I think, that will be very demanding, and probably no gun law could survive it, or you could apply it in a very mild sort of way that pretty much everything would survive. And in some sense, I think all the level of scrutiny stuff is kind of a distraction, or I get the sense that judges, they know how they’re going to decide a case, and maybe they’re going to uphold a law. And if they want to do so, they’ll use the legal language of intermediate scrutiny to explain why they’re going to uphold it. And if they’re not—if they want to strike it down, they’ll do so.

At the heart of it, underneath the legal talk about different levels of scrutiny, and the tests, and that sort of thing, I see two basic propositions. One of them I think you’ve heard a lot about already today. One of them is basically the idea of being highly deferential to legislative determinations about how to regulate guns. There’s just a ton of that in those decisions. And then second, and specific to the assault weapon issue, I think the

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

2. *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

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

4. *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011).

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

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

courts are moved, to a large extent, by the idea that, look, it's not a huge burden or infringement on anybody's right to keep and bear arms, because if you can't use an assault weapon, you can use some other firearm.

So I was going to use a quotation to illustrate the deferential attitude of the courts, and it was exactly the one that Jon Lowy read to you earlier, in the last panel. So we thought exactly alike on that—from J. Harvie Wilkinson of the Fourth Circuit, his concurrence in the assault weapon case. As he really sort of eloquently said, "Look, this is really serious business, and don't want to—we as judges do not want to decide this. We want to leave this to the democratic process."

But I think you see that deference not just in the words, but also in what the courts do, and again, you've heard a little bit of this in the earlier panels today. I think it's fair to say that the courts in these opinions more or less take the government's evidence at face value. In other words, they don't look at it say, "Well, hmm. Am I really persuaded by it? What would be the pros and cons of it?" Or, "I'm going to assess the credibility of it." They more or less look and say, "Is it plausible? Does the government—are they presenting a plausible, on its face—a reasonable government could think that that's a reason to do this?"

For example, a lot of decisions cite a study that was done—led by a criminologist, Christopher Koper. But, it looked at what the effect of the Federal Assault Weapons Ban was on crime. And to me, it seemed like an attempt to do that in as neutral a way as you can. It had a lot in it that I think the gun control side would want to cite and point to, and there was a lot in it that the other side, the gun rights side of things, would want to tout, as well. So it seemed to be a somewhat balanced attempt to assess these issues. And the governments will cite it. And I will say, the courts don't then delve into the complexity of exactly what conclusions this study reached or didn't reach, or the fine details of it. They more or less accept that you could rely on it to enact this sort of law.

Another example is trace data. You know, guns are sometimes recovered in crime and then traced by law enforcement, and some people find that sort of data to be a useful way to try to study the prevalence of different kinds of weapons used in crime, and you could say that assault weapons are overrepresented based on that. There are others who are very skeptical of the use of that data.

So just very skeptical, and pointing out, it's complex stuff, using this kind of data. But again, courts don't want to get dragged into the social science, empirical merits of whether using the trace data, how representative is it, or how biased of a sample it may be, or whatever. They tend to just say, "Well, the government could rely on this, and it's not an unreasonable thing to do."

So there is very strong impulse to defer to the legislatures. And then, as I said, I think it's joined by this idea that the infringement on the right isn't that severe. Applying this kind of weak, intermediate scrutiny might seem like the right to keep and bear arms is insufficiently protected. But at least in this case, I think judges say, "Look, you could use another gun." That argument was sort of attempted by the District of Columbia in the *Heller* case itself. They said, "Well, if you can't use a handgun, if they're banned, you could always use a rifle or a shotgun." And the Supreme Court said, "Well, those are two pretty different categories of weapons. There are reasons you might prefer the handgun, so we're not going to buy that reasoning."

But in these opinions, I think the lower courts seem to be essentially saying, "So you can't use an assault rifle, yeah, you know." And to some extent, I will say, I think this is some of the argument of the proponents of assault weapons, the legality of assault weapons—to some extent it's their own arguments coming back to hurt them on this issue. They're sort of hoisted on their own petard because often they will want to make the argument, "Assault weapons are really no different. They're not any more effective as a weapon, the functioning. They're semi-automatic. The functioning is the same, so there's really nothing special about them. Really nothing—no reason particularly why they do what a firearm does better than a non-assault weapon, or a weapon with a different style would."

And courts sort of turn that around them and say, "Well, if they're nothing special, then I guess there's no huge harm if they were to be prohibited." So they're sort of boxed in in a way that I would imagine, is frustrating; that if they are to sort of acknowledge that assault weapons are more effective as a weapon in some way, then that can be used against them to say, "Well, then the government has a basis for prohibiting them because criminals might want to use them." And if they say, "Well, they're not really any different," then the notion is, "Well, then it doesn't really hurt your rights not to have them."

So thinking about this issue and looking to write something for the symposium for this collection that we've done, I was trying to think of something new to say. And I thought about something that has come up a few times here today, which is the role that the appearance of the weapons—just sort of the look of the weapons has in this. And I really do think that the military appearance of these firearms is a big part of the controversy about them. It drives people's feelings about them to a large extent.

Again, one of the main arguments in all the literature about this, by people who are supportive of the right to have assault weapons, will be that

these guns are being demonized or singled out for prohibition just because of the way that they look. It's just a superficial cosmetic thing. And they'll come up with good analogies, I think, they'll say, "Oh, what if we just—what if we did that with cars? What if we said, 'Oh, that car, you know, it doesn't really go faster, but it looks like it could. It looks very—it looks like a sports car. It looks like a race car or something.'" And we'd say, "Oh, that should be irrelevant to the regulation of a motor vehicle, and it should be irrelevant that a gun has a certain sort of style or a certain look to it."

And for the most part, at least, I think people on the gun control side of things respond and say, "No, no, no. It is not merely superficial. It is not just about the looks. It's about certain features which have substantive, material relevance. It's fairly obvious why some of the most military features—if you have a grenade launcher or a bayonet on a firearm, I guess it's easy to see why that has some use."

The things like folding or telescopic stocks, you could say, "Well, that makes the rifle potentially smaller and perhaps easier to conceal." And a lot of the other features I mentioned—the grips, and the barrel shrouds, and the muzzle breaks, and the thumbhole stocks—half of the argument would be that it makes them, these weapons, relatively easier to control while firing—rapidly firing a large number of rounds of ammunition. And so whether it's in a military setting, or if it was a criminal use of the gun, that it has some relevance to the functioning of the gun.

And I would suggest that there's truth in that. I think that after all, the reasons why the military designs firearms in a certain way, they don't do it just for the looks of it. I think there are substantive reasons why the Army, or the Marines, or whatever—it's not just for show. So it's not purely cosmetic. But I do, again, I come back to that I think that the appearance of the weapons plays a big role in the way people think about them and react to them.

And I know, I'll just say, just for myself—I know this is extremely anecdotal, but I try to think about what is in the base of my mind, what is the first—it's like a—what do you call it? Like a mind association, or whatever? If somebody says a word and you're supposed to quickly, without thinking, say something back. And I sort of think about that with different kinds of firearms. If the AR-15—which, again, looks like the M-16 rifle—if I see an image of that, the first thing that comes to my mind, for some reason, is the Vietnam War. That's the first thing that comes to my mind, so when I see an AK-type rifle, I would say the first thing that comes to my mind is the video of Osama Bin Laden using such a rifle, shooting out in the desert somewhere.



And on the other hand, what I would think of as sort of the more traditional, older, classic sporting and hunting rifle, the first thing that comes to my mind is hunting. And I picture a father and a son in—like in some kind of Norman Rockwell painting; and they're out there, in a bygone era; and they're enjoying being outdoors and deer hunting; or whatever it may be. So some of these images are—and I think I'm not the only one who—in the world who has these different associations. Some of them are sort of darker than others.

And again, very anecdotal, but it seems obvious to me that there's something at work in the debate over these guns. And I would not contend that they, therefore, should be regulated solely on the basis of the way they look and the way they make people feel. But I don't think it's totally irrelevant either. I don't think it's totally irrelevant or absurd for that to be a consideration.

And I tried to think of some examples of situations where aesthetics, or appearances, or looks do matter; and how they do affect how we think, and feel, and do things. And so I came up with a few examples I'll throw at you. If you have any others, you're welcome to share them with me. And maybe they'll be in the article, and you'll be rewarded with acknowledgment in the little footnote or whatever at the beginning, which is not worth much. But for example, I found studies that show that the aesthetic merits of educational materials make a difference in how much students learn from them. If the colors are nicer, and the way it's laid out and stuff. The substance is the same. The substance of the information is the same, but you learn more if it's aesthetically pleasing.

Studies have suggested that the number one factor that influences whether you think that the information on a website is credible or not is the visual presentation of it. And again, it shouldn't really matter. It should depend on who wrote it and the substance of what it says. But we give a lot of weight to the visual aesthetics of it.

There's a sort of a famous study about product design from Japan. It had to do with the layout of buttons on an ATM machine. They found that even when, again, substantively, they really are the same—if one of them is a more visually appealing layout of the buttons, people will perceive it to be easier to use, even if it's really not. And then that perception becomes the reality. Because if you believe that something's easier to use, then for you, it actually will be, because you sort of convince yourself that it's so.

And another example that came to mind—and this one, maybe people could argue the merits of this. But there's been a lot of talk about what is the value of the airport security, and that sort of thing, that we go through since 9/11 and that sort of thing. And you'll see some people characterize it as a sort of security theater; that it doesn't actually enhance security, and

it's just meant to make people feel better. But there are some in that area, who study that area, who have started to say, that's actually a significant value that we shouldn't dismiss too easily. To the extent that you reassure the public, you minimize and prevent them from having irrationally exaggerated fears about the risk of terrorism. And maybe, to some extent, you deter potential terrorists simply because you've given a credible—even if it's an illusion—a credible illusion of security, and it deters the people from attempting to do something they otherwise would do.

There is only one place I've found in the court opinions where they've really talked about this, and it's been mentioned a few times. Alan Gura mentioned it last night, and it's been mentioned here today, as well. It's this passage by Frank Easterbrook of the Seventh Circuit, where he essentially did come out and say one of the benefits of the assault weapon ban could be in essentially making people feel safer. It makes the public feel safer, it reduces the perceived risk of a mass shooting, and that would be a substantial benefit. And you know, I understand I'm going out on a limb a little bit here to sort of suggest that that's a valid sort of thing. It's easy to dismiss it and say, "It's just people's feelings. It's not a real thing." But I would contend that it is. I would contend that the way people act and feel about things—that there is some truth in it, and that it is of some significance.

Going back to the legislative history of the Federal Assault Weapons Ban, I did find a few places where it was mentioned that people—law enforcement, heads of law enforcement agencies, and some other government officials—talked about how assault weapons—part of the issues with them is the way they look; that they're intimidating, and that criminals—criminal gangs, and that sort of thing—they know it, and they prefer those weapons because they're more intimidating.

And there was actually, in there—I found it interesting—that one of the witnesses for the other side said essentially the same thing. He was a witness put on by the Republicans on the House subcommittee, and he was a guy from Arizona. He talked about how he had defended his parent's home after a burglary. He was afraid the burglars were going to come back and rob the place again, so he defended the home with an AR-15 rifle. And part of his testimony was that he specifically chose that weapon because of how intimidating it is. He wanted something where if they saw him they would absolutely not even think about challenging him, or using a weapon of their own, because his weapon, an AR-15, would be so intimidating.

I was also reminded of a case that Dennis Henigan worked on, and I worked on it as well, back twenty years ago. It was a case about a guy who

shot in a law firm in San Francisco. It was called *Merrill v. Navegar*.<sup>7</sup> And he used couple weapons. Two of them were TEC-9s that were banned in California but available elsewhere. And part of the issue was, did it make any difference? It was a negligence lawsuit claiming that the manufacturer was negligent in the way they marketed and designed the weapon. One of the issues was causation. Did it even make any difference? Maybe he would have just used some other weapon no matter how they marketed the TEC-9s.

And I was struck by part of the evidence there. One of the expert witnesses was a forensic psychologist who studied the thinking of people who undertake these kinds of killings. And he said, "Look, they don't choose their weapons randomly. They're very methodical about it. They want to be very sure that they're able to accomplish what they're setting out to do, and so they're fueled by these violent fantasies. And even just an aesthetic thing like the appearance of the weapon can embolden them to attempt something that they wouldn't otherwise have taken."

So, it's the sort of thing—it's very hard to prove. It's one of these things where you may feel like it is true, but it would be very hard to prove. It is somewhat anecdotal. But I can't help but feel the pattern of events suggests there's something to it. There are these shootings in recent years. Certainly, they don't all involve assault weapons, but there are the ones that do: Newtown, Aurora, San Bernardino, Orlando, Las Vegas, Sutherland Springs. There are these audacious sorts of mass shootings that suggest maybe there are people who are inclined to use this type of firearm when they're going to do that sort of thing. Whether the reasons are practical and substantive, or psychological, they prefer a military-style weapon.

So the question then is what to do about it, and I think it's a hard issue. If I was running gun control policy or something, or I was setting the agenda, I don't think I would put banning assault weapons at the top of the list. I think I'd work on the background check system. And if I was going to work on a ban for anything, I think I would maybe think about large-capacity magazines before assault weapons. But some states have decided to do it, and I think courts are properly deferring to their decision-making. And among many other factors there, I don't think it's totally irrelevant or absurd for them to consider the military appearance of the weapons.

Whenever I hear people say, "Oh, it's just cosmetic," the line that always comes to my mind is—I want to say, "Yeah, but you know, cosmetics is like a billion-dollar industry." So, it's not everything. Cosmetics aren't everything, but I don't think it's nothing either. Thanks.

[APPLAUSE]

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7. *Merrill v. Navegar, Inc.*, 28 P.3d 116 (2001).

**Kopel:** Well, thank you, and I'd say Professor Rostron has given a very good introduction and fair-minded overview of the topic. I'd like to follow up on what he ended with, which is the issue of appearances. Back in the olden days, handgun prohibition was the original objective of gun control groups, as they started out in the 1970s, and then weren't getting that far on the topic. Josh Sugarmann, a strategist for one of them—he now runs his own group called the Violence Policy Center—wrote an influential memo. This was not some secret thing; it was shared publicly. You can find it on the internet now. There was no attempt to keep it secret.

He wrote a strategy memo which said in effect, "The press is getting bored with handgun bans. We've done our best. We've gotten a certain amount, but we need to come up with something new." And so he said, "Let's do assault weapons." He wrote in the memo that the semi-automatic "weapon's menacing looks, coupled with the public's confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons."

And of course, he was exactly right about that. When the issue became a big national topic in the late 1980s, public opinion polls were about three- or four-to-one in favor of prohibition. Over the last three decades, further public education has affected approximately a third of the population. So now you ask this ban question, and it's more about a 50/50 split on the topic. So roughly 25 to 30% of the population has been educated that these guns are not machine guns; that they were in fact invented in 1885. They're nothing newfangled.

But obviously, the role of public education is incomplete. When Dennis Henigan and I, for example, were arguing about controls on handguns in the 1990s, one of the things we never argued about was, What are handguns? Lots of states have laws, North Carolina included, that treat handguns differently from long guns. You can find little variations from state to state, but we all kind of know basically what a handgun is, and there's only disagreement maybe at the margins. Well, what if the gun has a 13-inch barrel? Or something like that. Handguns are a discrete class that is well understood. Handguns are also, understandably, sometimes targeted for more stringent regulation because they, after all, constitute about one-third of the gun supply, and yet are used in about two-thirds of gun crimes.

The "assault weapon" issue, however, is very different. First of all, it's because nobody ever has a consistent long-term definition of what an "assault weapon" is. What it is in practice, in statute, is the largest category of arms ban that can be gotten through any given legislature at any given

time. And that varies tremendously. The original New Jersey assault weapon ban outlawed some BB guns; that got thrown out on federal preemption grounds because Senator Bob Dole had a federal BB preemption statute. It got enacted in the 1980s.

As Professor Rostron said, after the Stockton, California murders, the bills came out of Congress. Howard Metzenbaum, the leading gun control senator of his day, from Ohio, had a bill that would outlaw things like the Colt 1911 pistol—the seven-shot pistol that was invented in 1911, and still in widespread use today, and an excellent gun. But not what people think of when you put a picture of some guy with a gun that looks like an AK-47, and you say, “We want to ban these,” and it turns out “Well, besides those, we’re also going after the Colt 1911.”

Representative Pete Stark introduced a bill that would outlaw every gun that was based on a military and a police design, which is just about all of them. The synergy between military, police, and citizen guns has always been extremely strong in the United States, and you will be hard-pressed to find many guns, in any gun owner’s closet or gun safe, that don’t have military or police design in their roots. As a state senator, Barack Obama voted for an “assault weapon” bill—which did not pass—that among other things, would have outlawed some double-barreled shotguns. So there is never any stable definition. It’s always, “How much can we ban?”

Connecticut banned “assault weapons” in 1991, I believe, and then they enacted a new ban in 2013. California has gone through multiple iterations of what it calls an “assault weapon.” The bait and switch is always sold as, “Oh, this is just a ban on 19 types of guns or very few types of guns. It’s only on these eccentric things that regular gun owners don’t even need to worry about.” Now, California is moving to the level of outlawing—the next proposal—to outlaw all semi-automatic long guns that take a detachable magazine.

So these days, one of the common definitions is what’s called the “features test,” as Professor Rostron talked about. So, you can’t say, “Well, we just want to ban all semi-automatics,” which some countries do. Sudan, for example, that wonderful exemplar of civil liberties and human rights, outlaws citizen possession of all semi-automatics, other than the guns they give to their Janjaweed militias so they can kill the Darfuris. But they’re technically outlawed for citizens in Sudan, and in some other countries.

Short of saying we’re going to outlaw all semi-automatics, how are you going to distinguish what gets banned from what doesn’t, other than list the makes and models? But if one attempts to list things in a generic way, all semi-automatics, internally, function at about the same rate of fire.

You can find differences of tenths of a second from one gun to another, but they're all pretty much the same.

So the focus is on things that do not have anything to do with the gun's rate of fire, or—its firepower—that is, how fast does the bullet travel, how much does the bullet weigh, things like that. These things, which are the most important things in a gun's lethality, don't count. So you can have guns that are exactly identical in their lethality in terms of the power of the bullet and the rate of fire, and one's an "assault weapon," and one is not. So we're now down to saying—it used to be that two features were bad, now it's having one feature.

One feature that's bad (makes a gun banned) is having an adjustable stock. Well, not everybody is the same height. A person who is 5'3" would have a better fit on the gun if she could shorten the stock, and the other person who's 6'7" would have a better fit of the gun if that person could lengthen the stock. That is supposedly an "assault weapon." That's supposedly, according to the Fourth Circuit, something that is efficiently designed for "mass carnage."

Then you have other things, like, Does it have threads on the muzzle, the front of the gun, for which a silencer—as it's called under federal law—a sound suppressor can be attached? Well, those devices happen to be lawful in thirty-seven states and under federal law. It's a very strict licensing system. It takes months to get the permission from the Bureau of Alcohol, Tobacco, and Firearms, but there are many lawful sound moderators that exist, and they reduce hearing damage. They take a gun from about 160 decibels down to about 140, which is still pretty loud and not silent like in the movies, but it makes progress in reducing hearing damage.

When they're used in hunting as is lawful in every state where silencers, as they're called, are lawful, it annoys the neighbors less. It certainly doesn't make a gun silent. The threads allow the attachment of a silencer. And more important, I think—or more commonly, at least—they also allow the attachment of what's called a "muzzle brake," which means it keeps the muzzle more stable. When a gun fires, there's kind of a sine wave that travels through the barrel of a gun and makes it vibrate. The muzzle brake stabilizes that, which makes the gun more accurate.

Likewise, having an additional grip on the gun. So instead of holding the gun, say, a rifle, on the wooden fore-end, like that, you have a grip, which makes it more stable. If we're going to have a society that has guns in it, it seems sensible that we would want lawful gun users to use their guns accurately; more accurately rather than less accurately. All these things add accuracy, stability, better function. The Second Circuit in its case upholding the New York ban says, "Well, this shows that these guns

are just more effective at killing. And so that's exactly why we can ban them." Well, their argument is if a gun's accurate, that makes it worse. So by the Second Circuit theory, the less accurate a gun is, I guess the more it's protected, and that is bass-ackwards in terms of common sense and public safety.

In the *Kolbe* case, I represented the National Sheriffs' Association in an amicus brief filed before the U.S. Supreme Court asking that the cert. petition be granted. As the sheriffs pointed out, these features on the guns—the type that are banned in Maryland—are why they are chosen by law enforcement; why a gun like the AR-15 is, almost certainly, the most common gun that you will find in the patrol car of a sheriff's deputy around the country.

And things that Maryland bans, like a magazine over ten rounds, if you look on the hips of your deputies around the country, you will find a great many of them have semi-automatic handguns, often 9mm caliber, with a magazine—a standard manufacturer-supplied magazine—between eleven and twenty rounds. Now, it's said that these guns, by the Fourth Circuit, are efficient instruments of mass carnage, suitable for warfare and not for civilian life. Well, sheriffs and deputies are peace officers. Peace officers do not wage war. The officer you see carrying a gun is not carrying it so he can kill a lot of people quickly, as is claimed in a defamatory way against people who choose these arms for lawful protection. The only reason sheriffs carry these guns is for lawful protection of self and others. They don't carry them for hunting or collecting or anything else. They are purely for defensive purposes.

Every ban, of course, includes law enforcement exemptions, which is kind of odd that you believe what the ban says; that these guns are military weapons that are just designed to kill a lot of people at once. I don't think killing people a lot at once is a good idea just because the government does it with government employees. And of course, that's not how sheriffs are trained. They're trained to minimize the use of deadly force, not to try to kill a lot of people quickly.

When you put out this pernicious myth, that law enforcement is carrying instruments of mass carnage for rapid mass killing, that aggravates the current atmosphere of hostility to law enforcement. Of course, every law enforcement use of force, especially deadly force, should be rigorously investigated. And some of those have been proven to be criminal. As Professor Reynolds talked about last night, some things that should have been prosecuted or led to convictions have not, and that is absolutely a serious problem, sometimes caused by under training, sometimes caused by poor hiring. But the vast majority of law enforcement officers, when they use deadly force, do so lawfully and justifiably according to the law. Not

merely, "Well, you can't convict him beyond a reasonable doubt." They do so properly.

We have a lot of incidents where sometimes those lawful, proper, justifiable uses get distorted for various reasons, and that distortion gets replayed in the media, and by the time the truth comes out the media has lost interest and moved on. One of the consequences of that has been an increase in ambush attacks on law enforcement officers over the past two years. Laws, like Maryland's, and the rhetoric behind them, aggravate the problem because they tell you that law enforcement officers are essentially like an occupying army; they're carrying military equipment designed for killing people quickly, the opposite of the truth.

It is quite true that—whether you ban guns that have magazines of ten rounds, or fifteen, or whatever—few defensive gun uses involve more than ten or fifteen shots fired. That is absolutely true. It's true for citizens, and it's just as true for law enforcement. It's also true that the vast majority of law enforcement, in their entire careers of thirty or forty years, will never fire a single defensive shot. So if that's true, how come all police officers and sheriff's deputies carry these guns? I mean, not every single one carries a magazine of eleven or more, but the vast majority do.

Why do they choose to carry these guns when they know it's extremely unlikely they're going to fire more than ten shots? And indeed, it's pretty unlikely that they're going to ever fire any shot ever? Well, for the same reason that everybody should own fire extinguishers. You have things available for emergency use that you hope you'll never need, but if you do, it can be a matter of life or death.

The reason that citizens have always looked to law enforcement as good models for the type of arms to possess is because law enforcement arms are selected with care to be good arms for keeping the peace, for civil defense, defense of civil society. In the nineteenth century, they copied law enforcement officers in the 1870s with a Colt Revolver, or the Winchester Model 1866, an eighteen-round gun that was one of the most popular in the country at the time. They were right to do so because those guns are carefully selected for this crucial use.

One reason that magazines over ten are preferred commonly in law enforcement, and the National Sheriffs' Association believes that every law-abiding citizen should be able to make the choice to own one, is reserve capacity. As officers are taught, if you're attacked by one guy, "Well, if you see one attacking you, well, there could be two. If you see two, then there's three." Because violent confrontations are inherently unpredictable—they're initiated by the criminal at the time and the place the criminal chooses, not the victim—the victim will typically only have one gun and one magazine, for self-defense available.



If you have an adequate reserve—the seventeen rounds in a Glock 17 or the sixteen rounds in a Smith & Wesson, or the twenty rounds in a Springfield—then knowing there's the possibility of more attackers, of unpredictable developments, you will fire more shots in defense, obviously. Even police officers only hit their targets in defensive shootings—which are usually quite short distances—about 20 to 40% of shots; the vast majority are not—unlike in the movies—immediately disabling to the attacker and sending the guy flying through a plate glass window. To the contrary, it often takes several or more shots to disable the attacker. So if you've only got ten and you've got multiple attackers, you may be out of luck. But if you have the more standard capacity, then you have a better chance of being able to resist or deter.

When you enact imposed limits on magazine capacity below the standard size, below the standard magazines that are typically sold by reputable manufacturers with their guns, then you are risk-shifting because you are making the defender fire fewer shots. When the defender fires fewer shots, the odds are greater that the attacker will succeed in carrying out what the attacker is trying to do, which is injure the victim. It is risk shifting from victims to perpetrators in the view of the National Sheriffs' Association brief.

In addition, another reason for having standard magazines is what's called "suppression fire." Sometimes, in a situation, you may not be thinking that you're going to be able to deliver that fight-stopping hit to the attacker, but you may be keeping the attacker pinned down, so that the attacker can't attack other people, and is busy keeping away from your "suppression fire," as it's called. And there's no doubt that if you have a better ammunition reserve, your chance of being able to shoot effective suppression fire is going to be more effective.

Now, of course, it's true police officers are trained better, and go through background checks before they're being hired. If you say, "Well, it's only because they have such a high skill level that they're capable of using guns like an AR-15, or a magazine with thirteen rounds in it," well, I'm a little skeptical of that. But at least that is an alternative argument. If we were going to say you have to have extra training, extra background checks, things like that, that would be a whole different issue than prohibition and confiscation as is now taking place, but for a preliminary injunction currently in place, in California.

I think you have to face the dichotomy. It's either you think cops and the guns they carry are the same as the Brazilian police or the Mexican Army, which does a lot of law enforcement. You either think of police being like an army of occupation, ruling from above; in which case, why shouldn't they be carrying machine guns, as they do in France, where street

cops carry machine guns, and Brazil, where they carry real machine guns quite a lot.

Or you think of them in the American sense of peace officers, as being of the community, not above it, and the rule is policing by consent. If you do the latter, then the fact that every ban includes a law enforcement exception is a tacit acknowledgment that these arms are quite often, for many people, the best, safest, most reliable, superior arms for keeping the peace and defending innocent life in a civil society. Thank you.

[APPLAUSE]

**Lowy:** Thank you. I mean, first, to frame the debate, the only issue here is whether states or the federal government are permitted under the Constitution to restrict or prohibit assault weapons or high capacity magazines in the hands of civilians, not law enforcement. And personally, I've represented dozens of law enforcement officers, many of their widows, where they have been killed, and I certainly don't view them as occupying forces or anything at all like that. There's no one I respect more, because they have to face gunfire, often of assault weapons that are in the wrong hands, and they put their lives on the line. And they are highly trained, and they have a very different job than any of us, including those of us who choose to carry concealed weapons to defend themselves.

So that's the issue. And by the way, law enforcement led the fight for an assault weapon ban and a high capacity magazine ban, and law enforcement continues to support assault weapon bans and high capacity magazine bans, notwithstanding David's brief and that organization's position in that case. And that record is consistent going over decades because law enforcement knows best how these weapons are used. And I want to try to go back to the prism that I suggested in the previous panel; to look at this issue, through the prism of people, rights, and laws.

First, people. The market has pretty much spoken on assault weapons and high capacity magazines. Because we've seen mass shooter, after mass shooter, after mass shooter, where they could choose what weapons they want to use in order to kill as many people as possible in a short amount of time. And time after time, they have chosen assault weapons and/or high capacity magazines: Sandy Hook; the Aurora, Colorado movie theater; San Bernardino; Orlando; Las Vegas; Virginia Tech; Fort Hood; Binghamton, New York; Tucson; and many, many more. If I listed them all, I would be finished long after five o'clock.

So that isn't to say that people who choose to own or use high capacity magazines or assault weapons are mass murderers, or of evil intent or anything like that. That is not to say that there are many people who may buy those weapons for target practice, for example. But there's the

reality of how these weapons have been used. And there have been studies that show that because the mass killers chose and used high capacity magazine and/or an assault weapon, they were able to wound and kill more people than they otherwise would.

There's a study that found, reviewing mass shootings, that assault weapons enabled 135% more people shot, 57% more people killed. And to be clear, what that means—that means that there are children, first graders in the Sandy Hook Elementary School, who were killed, and if the shooter did not have access to a military-style assault weapon or a high capacity magazine, some of those children would have come home to their parents, and they didn't. So that's an important fact, and I think it's a fact that legislatures, if they choose, can base an assault weapon ban and/or a high capacity magazine ban.

By the way, studies of the Federal Assault Weapons Ban showed that it had an effect on the use of those weapons in crime, as did the ban on high capacity magazines. When the federal ban lapsed, there was a spike in the use of those weapons and high capacity magazines in crime.

On the other side, in the Fourth Circuit case in *Kolbe*, for example, the court found that there were no incidents in the record of self-defense using an assault weapon. And there were no incidents of self-defense where it was necessary to fire more than ten rounds; that is, where a high capacity magazine was needed for self-defense. So, again, the legislatures that have chosen to ban these weapons are considering these facts. It's certainly more than reasonable for them to reach the conclusion that these weapons can be restricted or prohibited.

Next, let's talk briefly about rights, and be clear about what this right is when people are claiming that their Second Amendment rights are being infringed because of an assault weapon ban or a high capacity magazine ban. Well, the argument is that someone who is allowed, under law, to amass, in this country, an arsenal, an unlimited number of firearms—there is no limit on how many firearms a civilian can own in this country. I'm not saying there should be, or there shouldn't be, but it's just a fact.

So, someone who amasses 100, 500, 1000—name your number—of semi-automatic firearms—there are countless semi-automatic handguns that are permitted in states with the most stringent assault weapon bans, and also countless shotguns and rifles. So the argument is that someone who can, under the law, amass this unlimited arsenal—including all the semi-automatic handguns—except those covered by the assault weapons ban—many, many models, rifles, shotguns—that person is claiming, "My Second Amendment rights are being infringed upon because I am not allowed to purchase the gun that the Sandy Hook shooter used." Or, "I'm not allowed

to buy a 30-round magazine, or maybe the 100-round magazine that the Aurora-movie-theater shooter used.” That is the argument.

So, I think, for good reason, every single court that has looked at this issue of whether there actually is a Second Amendment right that’s infringed upon by an assault weapon ban or a high capacity magazine, every single court’s rejected it. And I think it’s a very simple case. And the grounds are different in some of these cases, but I think it’s difficult to make that argument, that your Second Amendment rights are being infringed upon given the legal landscape of federal gun laws in America and every state, even those with the most stringent gun laws.

And finally, when considering people and rights, you, of course, have to consider people’s right to live, as I said in the last panel. And clearly, if you go to a movie in Colorado, go to an elementary school in Connecticut, go to see your congresswoman in Arizona, you have a right to live. And it is being infringed upon, not just by any weapon, but by these weapons that are enabling greater bloodshed and greater deaths.

And, just finally, I assume there’s going to be some discussion of the common use test, which has been talked about in the courts; about whether assault weapons are protected, constitutionally protected, because they are in “common use.” And the courts—one of the courts—I think it may be the Fourth Circuit in *Kolbe*—or it may have been the Seventh Circuit in *Highland Park*—that rejected this pretty soundly. And I think it really doesn’t make much sense because the argument is that, essentially, if the gun industry can get ahead of the legislature, which isn’t very difficult—they don’t move too quickly—and on guns, it can often take them twenty, thirty years to pass a law—but if the gun industry can flood the market with a product, therefore it becomes in common use, and therefore it’s constitutionally protected.

You could imagine creating an extremely dangerous firearm, very similar to a machine gun—and maybe it’s a gun that’s hard to come up with a legitimate civilian need for it, but very easy to come up with a use for terrorists and mass killers—but if you were able to get enough of them out in the market, then legislatures are powerless to do anything about it, even if it turns out they are used to great effect for mass killing. And that is, I’ve always thought, a very bizarre argument, and I think there’s a good reason it has not been accepted by the courts. Thank you.