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8.1115, 8.1120 and 8.1125)
72 Cal.Rptr.2d 260
Court of Appeal, Third District, California.

Peter Alan KASLER et al., Plaintiffs and Appellants,
v.
Daniel L. LUNGREN, as Attorney General,
etc., et al. Defendants and Respondents.

No. C017769. March 4,
1998. Review Granted May 20, 1998.

In action challenging constitutionality of the Roberti-Roos Assault Weapons Control Act, the Superior Court, Sacramento County, Super.Ct. No. CV519977, Ronald B. Robie, J., sustained a demurrer, and plaintiffs appealed. The Court of Appeal, Morrison, J., held that: (1) Act's "add-on" procedure effectively required judges to legislate by amending statutory list of banned weapons, in violation of separation of powers provision of State Constitution; (2) "add-on" procedure deprived citizens of notice of the law, in violation of due process; (3) "add-on" provision was unconstitutionally vague; (4) Act's severability clause was sufficient to salvage Act following invalidation of "add-on" provisions; and (5) complaint stated viable claim that Act was underinclusive, in violation of equal protection.

Reversed and remanded.

Sims, J., filed concurring and dissenting opinion.

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Opinion

MORRISON, Associate Justice.

I.

This appeal challenges the Roberti-Roos Assault Weapons Control Act of 1989 (the Act) (Pen.Code, § 12275 et seq., further unspecified section references are to this Code). The trial court sustained a demurrer without ***264** leave to amend except as to one cause of action, regarding a particular model of rifle (the Colt Sporter), which plaintiffs (Kasler) declined to amend. We reverse with directions.

1 This appeal is not about the competing, earnest, views of those who wish to ban guns and those who wish to own and lawfully use them. The parties "have submitted materials concerning the desirability of weapons control, and the effect of weapons control on crime rates. It is well established that the wisdom of legislation is beyond the competence of the court [citation]; that for a court to invalidate legislation based on the usefulness or desirability of the law, the law must be not only unwise but unrelated to any legitimate governmental purpose [citation]. The arguments made in this connection, although of possible interest to the Legislature, are without merit in this court." *(Galvan v. Superior Court of City and County of San Francisco* (1969) 70 Cal.2d 851, 869, 76 Cal.Rptr. 642, 452 P.2d 930.) It is not within our province as judges to determine whether regulating guns in general, or some or all semiautomatic guns in particular, will be "good" or "bad" for California. That is a determination about social policy which the People must make, directly by initiative or through their elected representatives. Our function is to determine whether the complaint competently alleges constitutional flaws in the method chosen by the Legislature to regulate certain guns. We conclude that it does.

The Act consists of a list by make and model of banned guns and a mechanism by which the judiciary is allowed to add guns to the list. This mechanism (the "add-on" provision) violates the separation of powers doctrine and the due process of law. Although this provision seems central to the purpose of the Act, and it seems unlikely that the remainder of the Act would have been passed without it, the Act contains a severability clause which insulates the remaining portions of the Act. However, the remainder of the Act is vulnerable to Kasler's equal protection challenge. The facts alleged in the complaint, if true, establish that the "list" method employed by the Act violates equal protection because it does

not rationally distinguish between owners of regulated and unregulated guns who are identically situated with respect to the harm sought to be alleviated. Because this case arises on demurrer, the case must be remanded for a trial on these allegations in the complaint. Other counts as to which the demurrer was sustained have been abandoned by the failure to defend them on appeal.

II.

To place the Act in perspective, we begin with a brief discussion about the mechanics of guns and gun laws.

A.

Some guns can fire more than once without the need to break open the action, utilizing some device to feed ammunition to the chamber. The simplest family within this class consists of bolt-action, lever-action and pump-action guns which feed cartridges into the chamber as fast as the shooter operates the action. An example would be the classic Winchester rifle. Another family in this class is the "self-loading" gun, which typically uses the recoil or expanding gas of a gunshot to work the action: After a cartridge is fired, the gun reloads itself with the next cartridge in the magazine or belt. There are two kinds of self-loading guns. Machine ("automatic") guns fire until the ammunition is exhausted or the shooter releases the trigger. Semiautomatic guns reload themselves after each shot is fired, but the trigger must be pulled each time the shooter fires.

Some machine guns are "selective fire" guns, meaning that with the flip of a lever the gun can be fired as a machine gun, or limited to firing as a semiautomatic gun. According to the late Edward Ezell, Curator of the National Firearms Collection of the Smithsonian Institution, the first "assault weapon" was the selective fire German *Sturmgewehr* series, introduced in World War II, which was designed to fire a shorter, *less powerful,* cartridge and projectile than existing rifles. (Ezell, *Small* Arms of the World (12th. ed.1983) pp. 16-17, 514-516; Ezell, Small Arms Today (2d ed.1988) p. 457; ****265*** Encyclopdia Britannica (1997 CD-Rom ed.), Technology of War Assault Weapon [articles by Ezell].) The selective fire function, the ability to fire both semi-automatic or full automatic, is a generally accepted feature of an "assault weapon" as far as arms experts are concerned. (E.g., Johnson, Small Arms Identification and Operation Guide-Free World (Defense Intelligence Agency, 4th ed.1976) pp. 127, 137, 200-201; Long, *Assault Pistols, Rifles and Submachine Guns* (1991) pp. 1, 10-15.) Thus, a true "assault weapon" is a type of machine gun. The Act has nothing to do with machine guns.

Semiautomatic guns have been around for over a century. (Encyclopdia Britannica (1997 CD-Rom ed Technology of War: Self-loaders.) They may be pistols, rifles or shotguns. They can have internal ("integral") magazines or detachable magazines, which can come in many sizes. Some semiautomatic guns look like or are patterned after machine guns. For example, the Israeli "Uzi" was designed as a selective fire machine gun. (Small Arms of the World, p. 122, Small Arms Today, pp. 167, 328.) But there is a semiautomatic version for consumption in the United States. Similarly, the "AR-15" (Armalite 15) family of rifles includes the selective-fire "M-16," but also includes semiautomatic rifles, such as the AR-15 Sporter, generically referred to as "AR-15s" to distinguish them from M-16s. (Small Arms of the World, pp. 46-47, 747-748.) But many, if not most, semiautomatic guns have no relationship to automatic guns. Ordinary pistols like the current U.S. issue M9 nine millimeter series and its predecessor, the M1911 .45 caliber series, are semiautomatic and can accept detachable clips, yet neither is patterned after an automatic gun. (Small Arms Today, *supra,* pp. 393-394; Small Arms of the World, *supra,* pp. 739-740.)

However, the term "assault weapon" has entered the political lexicon, now meaning a "military-looking" semiautomatic weapon, which is frequently *assumed* to be the "weapon of choice" of criminals and also *assumed* to be readily convertible into a machine gun. (Kleck, Point Blank: Guns and Violence in America (1991) pp. 67, 70-72; Cal.Atty.Gen., *Assault Weapons: Background Paper* (Feb.1989) pp. 2, 4, 9-10; but see Kopel, *Rational Basis Analysis of 'Assault Weapon' Prohibition* (1994) 20 J. Contemp. L. 381, 392-393, 404-414 [refuting claims]; Tartaro, *The Great Assault Weapon Hoax* (Winter 1995) 20 Dayton L.Rev. 619, 621-636; Bea, *'Assault Weapons': Military-Style Semiautomatic Firearms* (Cong.Res.Serv.(1992) pp. 3-31, 65-73 [discussing lack of conclusive data].))

B.

Early gun control laws were directed at oppressed peoples, such as slaves and freedmen, and the politically powerless, such as immigrants and religious minorities. (Powe, *Guns, Words, and Constitutional Interpretation* (May 1997) 38 Wm. & M. L.Rev. 1311, 1346-1347, 1375-1376; Kleck, *Point Blank,supra,* p. 5; Kates, *Gun Control: Separating Reality from Symbolism* (1994) 20 J. Cont.L. 353, 370-371;

Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment* (1983) 82 Mich. L.Rev. 204, 235-239; see Levinson, *The Embarrassing Second Amendment* (1989) 99 Yale L.J. 637, 656-657 & fn. 95.) California followed this pattern shortly after statehood by criminalizing the gift or sale of any gun to "any Indian." (Stats. 1854, ch. 12, § 1, p. 24; see 1 Ann. Pen.Code, § 398 (1st ed. 1872, Haymond & Burch).) Such laws presume the proscribed class is likely to engage in crime.

Later laws focused on *concealed* weapons (Stats. 1863, ch. 485, § 1, p. 748, repealed 1869-1870, ch. 63, § 1, p. 67), loaded guns in public (§§ 171c, 171d, 12031; accord 2 Edw. III, ch. 3 [1 Stats. at Large 422] [illegal to ride armed in fairs, "in the presence of Justices" and so forth]), or in certain cases carrying an unloaded, unconcealed gun. (E.g., §§ 171b, 12040.)

In addition to enhancing penalties for the use or possession of a gun during a crime (e.g., Stats.1929, ch. 872, § 1, pp.1930-1932; see also e.g., §§ 12021.5, 12022, 12022.5), the Legislature has found certain guns are *more likely* to be used in crime and therefore has sought to control the guns themselves.

***266** The Dangerous Weapons Act (now the Dangerous Weapons Control Law) focuses on guns "capable" of being concealed on the person, and requires dealers to record sales of such guns. (Stats.1917, ch. 145, § 3, p. 221, § 7, pp. 222-224; see § 12073.) The presumption is that guns which can be concealed are more likely to be used in crimes and therefore a record of sales of such guns deters crime or aids in the apprehension of criminals.

Guns are also regulated based on the size of the projectile (Stats. 1895, ch. 202, § 11, p. 258 [shotguns greater than a certain gauge]; § 12301, subd. (a)(1) [guns "greater than 0.60 caliber" deemed "destructive devices"]), the amount of ammunition contained (Stats.1923, ch. 430, § 1, subd. 3, p. 1003 [shotguns holding more than six shells]), or the configuration, such as disguised "cane" guns, and short-barreled shotguns and rifles (§ 12020, subd. (a)).

The entire class of automatic weapons has been severely restricted in California for many years. (Stats.1927, ch. 552, § 1, p. 938; see § 12200 et seq.) In the National Firearms Act of 1934, the federal government also elected to impose restrictions, including taxation and registration, on "destructive" weapons such as machine guns and sawed-off shotguns. (See *United States v. Miller* (1939) 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206; Hardy & Stompoly, *Of Arms and the Law* (1974) 51 Chi-Kent L.Rev. 62, 63-64.) This trend was expanded by a provision of the Omnibus Crime Control and Safe Streets Act of 1968, the Gun Control Act of 1968, which among other things, limited the importation of guns, generally speaking, to those deemed suitable for sporting purposes. (18 U.S.C.A. § 925(d)(3); see *Gun South, Inc. v. Brady* (11th Cir.1989) 877 F.2d 858, 861-862; Report and Recommendation of the ATF Working Group on the Importability of Certain Semiautomatic Rifles (July 6, 1989).) Such determination is made by the Treasury Secretary, upon recommendation of the Bureau of Alcohol, Tobacco and Firearms. (See Thompson, *Form or Substance? Definitional Aspects of Assault Weapon Legislation* (1990) 17 Fla.St.U.L.Rev. 649, 658-666 (Thompson).)

Prior to the Act, statutes rarely named a particular gun, such as a Florida statute regulating possession of "a pistol, Winchester rifle or other repeating rifle[.]" (See *Watson v. Stone* (1941) 148 Fla. 516, 4 So.2d 700, 701.) However, the inclusion of the manufacturer's name was merely illustrative of the category sought to be regulated, namely repeating rifles.

We are unaware of any statute predating the Act which regulates guns based on a list identified by make and model. Some California municipalities passed local "assault weapon" ordinances prior to the Act. Some employed the "list" method. (E.g., former Sacto. City Code, ch. 48, § 48.01.011 et seq., Ord. No. 89-023.) Others defined "assault weapons" by generic description and illustrative list. (E.g., Los Angeles Mun.Code, § 55.05 et seq., Ord. No. 164,388 ["semiautomatic action, center fire rifle or carbine which accepts a detachable magazine with a capacity of twenty rounds or more, including but not limited to the following firearms or their copies ... "]; Davis Mun.Code, § 17-23 et seq., Ord. No. 1508 [similar].) We express no view on the validity of these ordinances.

Some statutes, consisting of a list of guns, were passed *after* the Act, and are similarly structured. An example is the Columbus, Ohio, ordinance struck down in *Springfield Armory, Inc. v. City of Columbus* (6th Cir.1994) 29 F.3d 250 (*Springfield*). Others include a federal statute, the Violent Crime Control and Law Enforcement Act of 1994, and a Denver, Colorado, ordinance largely upheld in *Robertson v. City and County of Denver* (Colo.1994) 874 P.2d 325 [29 A.L.R.5th 837] (*Robertson*), which ban weapons that fit certain objective descriptions, such as any semiautomatic gun with a detachable magazine of a certain size, or with certain features, such as folding stocks, pistol grips, bayonet

mounts, and so forth. (18 U.S.C.A. § 921(A)(30); see Lenett, *Taking a Bite Out of Violent Crime* (1995) 20 Dayton L.Rev. 573, 602-609; but see *Peoples Rights Organization v. City of Columbus* (S.D.Ohio 1996) 925 F.Supp. 1254 [finding much of new Columbus, Ohio, ordinance, following this pattern, to be vague].) Such objective criteria **267* are absent from the California Act, to which we turn.

III.

On January 17, 1989, a mentally disturbed man fired 105 bullets into a Stockton schoolyard. He killed five children and wounded many others. He used a semiautomatic rifle, which physically resembled a Soviet-bloc AK-47, but was not. He then shot himself with a pistol. (See Kempsky, Report to Attorney General: Patrick Edward Purdy and the Cleveland School Killings (Oct.1989) pp. 1-2, App. C, pp. 23-24.) This animated existing but stalled legislative efforts to do *something.* But *what?*

According to materials either attached to the complaint or judicially noticeable, some wanted to ban all semiautomatic weapons. Others wanted to create a commission which would select which weapons to ban and which to allow. (See Sen. Bill No. 292 (1989-1990 Reg. Sess.) as introduced Jan. 26, 1989.) Eventually it was decided to create a list of semiautomatic guns by make and model. One proposal was to list allowable guns and ban the rest. This idea was discarded in favor of creating a list of banned guns.

Ultimately, the Act was passed. It consists broadly of four parts: a list of so-called "assault weapons," a mechanism for adding other guns to the list (apart from legislative amendment), a registration system, and penal provisions.

Kasler insinuates the Act was passed to advance political, not societal, ends. We do not review the motives of individual lawmakers and the collective motives of the Legislature are reflected in the words of statutes and not elsewhere. (*People v. Knowles* (1950) 35 Cal.2d 175, 182, 217 P.2d 1; see *Fletcher v. Peck* (1810) 10 U.S. (6 Cranch) 87, 130, 3 L.Ed. 162, 176.)

The stated intent of the Act is as follows: "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 and injure human beings. It is the intent of the Legislature in enacting this chapter to place restrictions on the use of assault weapons and to establish a registration and permit procedure for their lawful sale and possession. It is not, however, the intent ... to place restrictions on the use of those weapons which are primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities." (§ 12275.5.)

Thus, it is supposed that an "assault weapon" as that term is used by the Legislature, (1) has a high "rate of fire," (2) has a high "capacity for firepower," (3) has little utility "as a legitimate sports or recreational firearm," or such utility "is substantially outweighed by the danger that it can be used to kill and injure human beings," and (4) is not "primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities." (§ 12275.5.)

An uncodified portion of the Act provides: "The Legislature finds and declares that the weapons enumerated in Section 12276 of the Penal Code are particularly dangerous in the hands of criminals and serve no necessary hunting or sporting purpose for honest citizens. It is the intent, therefor, to ban the weapons enumerated in Section 12276 of the Penal Code and any other models which are only variations of these weapons, which are the same weapon but manufactured or sold by another company under a licensing agreement, or which are new models manufactured or sold by any company with just minor modifications or new model numbers in order to circumvent the prohibitions of [the Act.]" (Stats.1989, ch. 19, § 5, pp. 69-70.) There is no reference in the Act to the lawful, defensive use of guns.

Section 12276 (the "list") then "defines" an "assault weapon" as any gun in one of four categories, as follows: Subdivision (a) lists several rifles by manufacturer's name and model designation, except that in two cases the term "series" is used, as in "AK series" and "Colt AR-15 series." (Subd. (e) provides: "The term 'series' includes all other **268* models that are only variations, with minor differences, of those models listed in subdivision (a), regardless of the manufacturer.") Subdivision (b) lists several pistols. Subdivision (c) lists three shotguns. Subdivision (d) states that an "assault weapon" is "Any firearm declared by the court pursuant to Section 12276.5 to be an assault weapon that is specified as an assault weapon in a list promulgated pursuant to Section 12276.5."

Subdivision (f) explains it is the Legislature's intent to ban "the weapons enumerated in this section, the weapons

included in the list promulgated by the Attorney General pursuant to Section 12276.5, and any other models which are only variations of those weapons with minor differences, regardless of the manufacturer. The Legislature has defined assault weapons as the types, series, and models listed in this section because it was the most effective way to identify and restrict a specific class of semiautomatic weapons." It does not appear that the language of this provision specifying "any other models" is self-executing; in other words, those guns must still be "added on."

The add-on procedure in section 12276.5 operates as follows:

First, the Attorney General files a petition in certain superior courts, whereupon the court "shall issue a declaration of temporary suspension of the manufacture, sale, distribution, transportation, or importation into the state, or the giving or lending of a firearm alleged to be an assault weapon within the meaning of Section 12276 because the firearm is either of the following: (1) Another model by the same manufacturer or a copy by another manufacturer of an assault weapon listed in [§ 12276] which is identical to one of the assault weapons listed in those subdivisions except for slight modifications or enhancements including, but not limited to: a folding or retractable stock; adjustable sight; case deflector for left-handed shooters; shorter barrel; wooden, plastic or metal stock; larger magazine size; different caliber provided that the caliber exceeds .22 rimfire; or bayonet mount. The court shall strictly construe this paragraph so that a firearm which is merely similar in appearance but not a prototype or copy cannot be found to be within the meaning of this paragraph. [¶] (2) A firearm first manufactured or sold to the general public in California after June 1, 1989, which has been redesigned, renamed, or renumbered from one of the firearms listed in [§ 12276], or which is manufactured or sold by another company under a licensing agreement to manufacture or sell one of the firearms listed in ... [§ 12276], regardless of the company of production or distribution, or the country of origin." (§ 12276.5, subd. (a).)

Then, "after the Attorney General has completed the notice requirements of subdivisions (c) and (d), the provisions of subdivision (a) of Section 12280 shall apply with respect to those weapons," meaning that criminal penalties for violations of the Act are in effect. (§ 12276.5, subd. (b).)

The notice requirements are as follows: "Upon declaration of temporary suspension, the Attorney General shall immediately notify all police, sheriffs, district attorneys, and those requesting notice pursuant to subdivision (d), shall notify industry and association publications for those who manufacture, sell, or use firearms, and shall publish notice in not less than 10 newspapers of general circulation in geographically diverse sections of the state of the fact that the declaration has been issued." (§ 12276.5, subd. (c).) In turn, section 12276.5, subdivision (d), requires the Attorney General to keep a list of people asking for notice of add-on actions and requires the Attorney General to notify those people, as well as known manufacturers and distributors of such add-on actions.

Subdivision (e) requires the court to set a hearing "on a permanent declaration.... Any manufacturer or California distributor of the weapon which is the subject of the temporary suspension order has the right, within 20 days of notification of the issuance of the order, to intervene in the action," but others, such as weapon owners, "may, in the court's discretion, thereafter join the action as amicus curiae."

The Attorney General must prove the gun "is an assault weapon. If the court finds the weapon to be an assault weapon, it shall issue a declaration that it is an assault weapon under Section 12276. Any party to the matter ***269** may appeal the court's decision. A declaration that the weapon is an assault weapon shall remain in effect during the pendency of the appeal unless ordered otherwise...." (§ 12276.5, subd. (f).)

The Attorney General must prepare a pictorial booklet (§12276.5, Subd.(g)), and "shall promulgate a list that specifies all firearms designated as assault weapons in Section 12276 or declared to be assault weapons pursuant to this section. The Attorney General shall file that list with the Secretary of State for publication in the California Code of Regulations. Any declaration that a specified firearm is an assault weapon shall be implemented by the Attorney General who, within 90 days, shall promulgate an amended list which shall include the specified firearm declared to be an assault weapon. The Attorney General shall file the amended list with the Secretary of State for publication in the California Code of Regulations." (§ 12276.5, subd.(h).)

Owners of banned guns must register them pursuant to a grandfather provision, which requires fingerprinting and payment of a fee; thereafter the gun(s) may be possessed in certain places but cannot be transferred except to a gun dealer or the police, or outside the state. (§ 12285, subd. (b).) Violation of the Act can result in severe punishment. The sale, gift or loan of a gun on the list is a felony punishable by up to eight years' imprisonment. (§ 12280, subd. (a).) There is a lenity provision for people who possessed a banned gun

before the Act (or the gun was added on) but failed timely to register it: Such persons are guilty of but an infraction. (*Id.*, subd. (b).)

IV.

To repeat, under the add-on procedure, the Attorney General must prove "that the weapon which is the subject of the declaration of temporary suspension is an assault weapon. If the court finds the weapon to be an assault weapon, it shall issue a declaration that it is an assault weapon under Section 12276. ... " (§ 12276.5, subd. (f).) This procedure cannot be upheld.

A.

2 "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum." (Cal. Const., art. IV, § 1.) The constitution also vests limited legislative power in the Governor to veto or sign a bill (Cal. Const., art. IV, § 10), and to propose the annual "Governor's Budget," which begins the budget cycle (Cal. Const., art. IV, § 12). But judges are given no constitutional grant of even limited legislative power and thus judges rarely exercise legislative power.

3 4 5 6 7 8 The judiciary has no general power to enact or order the enactment of laws. (*Myers v. English* (1858) 9 Cal. 342, 349; *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 76-77, 222 Cal.Rptr. 750.) "A separation of powers does allow for some incidental overlap of function. [Citation.] But a judicially compelled enactment of legislation is not an incidental overlap; it is the very exercise of legislative power itself." (*City of Sacramento v. California State Legislature* (1986) 187 Cal.App.3d 393, 399, 231 Cal.Rptr. 686.) The judiciary does exercise specific legislative power in two cases. First, the judiciary may order appropriations for self-preservation. (*Millholen v. Riley* (1930) 211 Cal. 29, 33-34, 293 P. 69.) Second, in rare instances the judiciary may rewrite an initiative statute to secure it from attack. (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 47 Cal.Rptr.2d 108, 905 P.2d 1248.) Just as the Legislature cannot reconsider court judgments, the judiciary may not reconsider legislative "judgments," in other words, amend statutes. (*Mandel v. Myers* (1981) 29 Cal.3d 531, 547-549, 174 Cal.Rptr. 841, 629 P.2d 935.) It is the Legislature which defines crimes. (*People v. Knowles, supra*, 35 Cal.2d at p. 181, 217 P.2d 1.) The Legislature cannot bestow legislative power on judges. For example, in ***270** *Epperson v. Jordan* (1938) 12 Cal.2d 61, 82 P.2d 445, the California Supreme Court invalidated statutes which tried to draft members of this court to write titles for initiative measures because "they purport to confer nonjudicial duties on the appellate justices...."

In this case, the "add-on" provisions require a judge, upon petition of the Attorney General, effectively to amend the list. In so doing, the judge must determine whether either of the following is true: The gun is "Another model by the same manufacturer or a copy by another manufacturer of an assault weapon" on the "list," or the gun is a newly manufactured or sold firearm "which has been redesigned, renamed, or renumbered from one of the firearms" on the "list," or "which is manufactured or sold by another company under a licensing agreement to manufacture or sell one of the firearms" on the "list." (§ 12276.5, subd. (a).) The judge's determination of this issue is "a declaration that it is an assault weapon under Section 12276." (*Id.*, subd. (f).) This "declaration" is, in form and purpose, an expansion of the statutory "list."

The Legislature did not intend superior court judges to be mere rubberstamps. But by what reasoning does a judge determine whether a gun is merely "redesigned" from another or has modifications or enhancements which are but "slight?" What is "slight" enough or "redesigned" enough? These unfettered legislative policy choices illustrate why judges should not engage in the activity of amending statutes.

9 It is true, as the Attorney General points out, that in some cases *administrative* agencies may amend lists. For example, as discussed earlier, the Gun Control Act of 1968 empowers the Secretary of the Treasury to decide what is "sporting" weaponry for the purpose of limiting importation. A better analogy is found in the drug arena, where federal administrative agencies have the ability to classify drugs on various schedules, a classification which can result in criminal penalties in some cases. *Touby v. United States* (1991) 500 U.S. 160, 111 S.Ct. 1752, 114 L.Ed.2d 219, upheld a statute allowing the Attorney General of the United States (or his subdelegate, the Drug Enforcement Agency) to add new "designer" drugs to the controlled substances categories by means of an expedited administrative declaration. The United States Supreme Court sustained this delegation of authority to "legislate" against

a separation of powers challenge, because the statute "set forth ... an 'intelligible principle' to constrain the Attorney General's discretion [.]" (500 U.S. at p. 165, 111 S.Ct. at p. 1755, 114 L.Ed.2d at p. 227.)

The Attorney General and amici here see an analogy, because as the chief law enforcement officer of California, the Attorney General has the wherewithal to determine when newly "redesigned" or "renamed" guns appear. In their view the requirement that he obtain the imprimatur of a judge provides *added* protection to gun owners. Amici assert: "The [Act] provides even greater checks than the federal controlled substance law against potential abuse of such authority by requiring automatic judicial review to ensure that the Attorney General has complied with the statutory criteria." But in defending against certain due process claims, amici argue the add-on hearing is quasi-legislative and the Act requires "the Attorney General to demonstrate his compliance with the statutory criteria by a preponderance of the evidence in a trial-type adversary hearing." This inconsistency highlights the defect in the Act: The issue at the "trial" is whether the gun *should be* banned; that is a legislative question.

Under the Act the authority to add guns to the list resides with the judge, not the Attorney General. The judge does not merely review the Attorney General's exercise of discretion. The ensuing judgment is not a judgment validating any decision by the Attorney General, it is a judgment amending the list.

10 We agree with the Attorney General that the separation of powers doctrine does not "prohibit one branch from taking action properly within its sphere that has the *incidental* effect of duplicating a function or procedure delegated to another branch. [Citation.]" (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 117, 145 Cal.Rptr. 674, 577 P.2d 1014, original italics.) But the Act requires a ***271** judge to legislate. That goes too far. The "add-on" provision of the Act, embodied in section 12276.5, is unconstitutional and unenforceable.

B.

11 Kasler also raises several due process claims, some of which are based on the inability of some people to participate in or learn about the "add-on" hearing. There is no general right to participate in or receive notice of pending legislative hearings and we construe the suspension ("add-on") hearing to be such a hearing, albeit for that reason unconstitutional.

12 But there *is* a general right to notice of the law's proscriptions, which must be sufficiently clear to permit a reasonable person to comply and provide the authorities with guidelines to prevent arbitrary enforcement. (*People v. Superior Court (Caswell)* (1988) 46 Cal.3d 381, 389-390, 250 Cal.Rptr. 515, 758 P.2d 1046.)

13 First, the Act deprives citizens of notice of the law because there is a temporal gap between the declaration of suspension and publication of notice thereof. During that period of time the Act treats the gun as an "assault weapon," meaning a person could be a felon for lending it to a fellow hunter. (§ 12280, subd. (a)(1); cf. § 12280, subds. (b), (e) [simple possession is generally not a crime until 90 days after the gun "was specified as an assault weapon"].) But at that moment in time, the new "list" has yet to be published to the world. There is literally no "notice" of the law. Once the court issues a permanent declaration that the firearm is an "assault weapon," the Attorney General must promulgate and forward to the Secretary of State for publication a new list of guns. (§ 12276.5, subd. (h).) The new "list" is effective before it is published. This is intolerable. The Attorney General assures us that a person in such a situation would not be prosecuted, and posits that peace officers could always ask suspects whether or not they knew of the temporary suspension, and suggests that a court reviewing a conviction under these circumstances would construe the statutes as requiring *actual notice* of the suspension. With respect, this pledge of nonprosecution, however earnestly given, does not satisfy a citizen's right to notice of the law. History teaches that "Trust us" is no guarantee of due process.

14 Second, the Act is vague because it defines the weapons which can be added on as those with "slight" modifications and those which have been "redesigned, renamed, or renumbered" from guns on the list. (§ 12276.5, subd. (a)(1), (2).) Reasonable persons can understand renaming and renumbering. But what is a "slight" modification, or a "redesign?" Shortening a barrel would probably be both a "slight" modification and a "redesign." But what if a manufacturer used the same lower receiver, but changed the barrel, grip, magazine and caliber? How is an ordinary person supposed to know that a completely different-looking gun inspired the designer into creating the new gun? How is a reasonable person supposed to know the genealogy of the weapon? (See *Robertson, supra*, 874 P.2d at pp. 334-335 ["we are not persuaded that simply because publications exist which contain the information needed to establish the design history of a pistol, that this saves [part of a Denver,

Colorado, ordinance] from being vague. Whether persons of ordinary intelligence must necessarily guess as to an ordinance's meaning and application does not turn on whether some source exists for determining the proper application of a law"]; *Springfield*, supra, 29 F.3d at pp. 252-253; cf. *Richmond Boro Gun Club Inc. v. City of New York* (2d Cir.1996) 97 F.3d 681, 683-685 [objective ordinance not vague].)

We reject the claim that "assault weapon" owners are always on notice about the potential for an "add-on" because guns are heavily regulated. (See *Staples v. United States* (1994) 511 U.S. 600, 608-615, 114 S.Ct. 1793, 1798-1802, 128 L.Ed.2d 608, 618-622 [rejecting similar claim because of long tradition of lawful gun ownership in this country].)

C.

Severability is a murky subject. Generally speaking, "The problem is twofold: the legislature must have intended that the act be ***272*** separable, and the act must be capable of separation in fact." (2 Sutherland, Statutory Construction (5th ed. 1993) Separability, § 44.03, p. 495, fn. omitted.) We have little trouble with the latter point: Structurally, a list coupled with an enforcement mechanism (registration and penal provisions) would remain, thus the Act is physically or grammatically severable. It is the former requirement, which is usually the second analytical step (*People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 330, 226 Cal.Rptr. 640), which is doubtful. Many cases fail to articulate that requirement because usually the defective part of a law is so clearly unimportant with respect to the statute as a whole that the point is not arguable and the court simply articulates the first step (grammatical severability) and the conclusion. However, "[t]he law enforced after separation must be reasonable in light of the act as originally drafted." (Sutherland, *supra*, § 44.04, p. 502.) "If by sustaining only a part of a statute, the purpose of the act is changed or altered, the entire act is invalid." (*Id.*, § 44.07, p. 518, fn. omitted.)

15 In California the test has been stated in several ways, including: "whether the invalid parts of the statute can be severed from the otherwise valid parts without destroying the statutory scheme, or the utility of the remaining provisions. [*Citations.*]" (*Blumenthal v. Board of Medical Examiners* (1962) 57 Cal.2d 228, 238, 18 Cal.Rptr. 501, 368 P.2d 101.) A casual reading of this case and others like it would suggest that if *any* utility remains in the redacted statute, it is severable. (See also *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 261, 45 Cal.Rptr.2d 207, 902 P.2d 225.) Indeed, one might be tempted so to find, under the often enunciated but rarely examined "principle" that there is a presumption in favor of a finding of severability. But this obscures the proper analysis of the second, "intent" step. If a redacted statute has *no* utility, it is unreasonable to suppose that the Legislature would have passed it, for we presume the Legislature does not engage in idle acts. (*Stafford v. Realty Bond Service Corp.* (1952) 39 Cal.2d 797, 805, 249 P.2d 241; see Civ.Code, § 3532.) Utility is thus a necessary condition to a finding of severability. But it does not suffice.

16 The correct analysis is more complex: "Deletion of the challenged provision would leave a coherent amended statute complete in itself, but the critical inquiry is whether the Legislature would have adopted the entire amendment had it foreseen the partial invalidity thereof? [Citation.]" (*People v. Navarro* (1972) 7 Cal.3d 248, 260, 102 Cal.Rptr. 137, 497 P.2d 481; see *In re Bell* (1942) 19 Cal.2d 488, 497-498, 122 P.2d 22.) While discussing whether an initiative was severable, we said "the provisions to be severed must be so presented to the electorate in the initiative that their significance may be seen and independently evaluated in the light of the assigned purposes of the enactment. The test is whether it can be said *with confidence* that the electorate's attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted them in the absence of the invalid portions." (*People's Advocate, Inc., supra*, 181 Cal.App.3d at pp. 332-333, 226 Cal.Rptr. 640, italics added, approved in *Gerken v. Fair Political Practices Com.* (1993) 6 Cal.4th 707, 714-715, 25 Cal.Rptr.2d 449, 863 P.2d 694, (lead opn. of Lucas, C.J.) and *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821-822, 258 Cal.Rptr. 161, 771 P.2d 1247.) The test is *not* whether it is reasonable to suppose the Legislature would have acted in a certain way. Supposition or speculation does not suffice. We should not presume to state what the Legislature *would have done* unless we can do so "with confidence."

The Sixth Circuit was faced with a similar task when reviewing a law modeled after the Act. The original Columbus, Ohio, ordinance contained a list of weapons, and included "Other models by the same manufacturer with the same action design that have slight modifications or enhancements" of guns on the list. (See *Springfield Armory, Inc. v. City of Columbus* (S.D.Ohio 1992) 805 F.Supp. 489, 491.) After invalidating the "slight" modification provision as vague, the Sixth Circuit declined to leave the list intact: "The legislation does not include a severability ***273*** clause.

We have no way to know whether the local legislature would have enacted the assault weapons ban without the 'slight modifications' provision. [Citations.] Apparently the city council simply copied the ordinance from a California ordinance. Here, the catch-all phrase is the only element that brings any generality to the measure. The provision seems integral to the ordinance since without it manufacturers could circumvent the ban by merely changing the names of the listed weapons. In view of the arbitrary nature of the ordinance and the historical presumption of inseverability in the absence of a severability clause, we conclude that we should not try to save the assault weapon portion of the ordinance but rather that we should leave it to the local legislature to draft another ordinance that does not suffer from the same defects as this one. [Citations.]" (*Springfield, supra,* 29 F.3d at p. 254; cf. *Robertson, supra,* 874 P.2d at p. 335 [severability clause present, minor part of ordinance vague, held: rest of ordinance severable].)

The "presumption of inseverability" mentioned in *Springfield* is, at best, "a weak one." (See Sutherland, *supra,* § 44.09, p. 526.) Nonetheless, the conclusion reached by *Springfield* is sound. Here the object was to regulate those semiautomatic guns which posed the greatest "threat to the health, safety, and security of" Californians (§ 12275.5) and the Legislature *knew* this could not be done with a bare list. Strong objections to this type of law exist. (See Kleck, Targeting Guns: Firearms and Their Control (1997) Search for 'Bad' Guns, pp. 111-112 ["this severely limits the impact of regulation by allowing an ample supply of legally available semiautomatic models to be substituted for the handful of banned models"]; Thompson, *supra,* 17 Fla.St.U.L.Rev. at pp. 667-668 ["While this form of regulation may achieve its goals initially, it will become less and less effective and require constant attention"].) Gun-control supporters have pointed out that creating a list "is problematic. 'If the real difference between an AK-47 [*sic*] and other semi-automatic firearms is only the people who are using the AK-47 this month,' asks law professor Franklin Zimring of the University of California, Berkeley, 'what is to stop them from switching to other semi-automatic weapons?' ... Since a criminal can switch weapons far more easily than a legislature can add weapons to a list, it makes more sense to use some of the BATF [objective] standards to determine which weapons should be subject to the ban." (Abrams, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons* (1992) 10 Yale L. & Pol'y Rev. 488, 498-499, fn. omitted; Lenett, *supra,* 20 Dayton L.Rev. at p. 604 ["for a truly effective ban, it is not enough for Congress just to list the prohibited weapons, no matter how long [the] list"].)

Although it is not given to us to decide that the Legislature would (or should) have heeded these and other objections, had the Legislature known the add-on provisions would not be sustained, it might have chosen to adopt another proposal considered before passage of the Act, such as creating an assault weapon commission, regulating all semiautomatic weapons, or all but a specified list, or doing nothing pending further study. We agree with the Sixth Circuit's conclusion in *Springfield* that stripping from the Act "the only element that brings any generality to the measure" militates strongly against a finding of severability. (29 F.3d at p. 254.) Although a skeletal structure might remain, we are not "confident" that the Legislature would have proceeded in this manner.

17 However, the Act has an uncodified severability clause: "If any provision of this act or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable." (Stats.1989, ch. 19, § 4, p. 69.) The presence or absence of such a clause is but informative, not dispositive, on the question of intent. (1 Cooley's Constitutional Limitations (8th ed. 1927) Declaring Legislative Acts Unconstitutional, p. 368; Sutherland, *supra,* § 44.08, pp. 521-522.) The effect of this clause is to compel severability if the remainder of the Act has "any utility." It provides that we must sustain provisions "which can be given effect" without reference ***274** to the invalid provisions. Here the remaining portions of the Act, although substantially emasculated, "can be given effect." In the circumstances of this case the severability clause is sufficient to salvage the remainder of the Act.

V.

The trial court rejected Kasler's equal protection claims. This was error. Kasler stated a viable claim for relief.

A.

18 We emphasize that we must accept as true the facts stated in the complaint and judicially noticeable, not arguments and conclusions of law. (*Faulkner v. Cal. Toll Bridge Authority* (1953) 40 Cal.2d 317, 329, 253 P.2d 659.)

19 Kasler's complaint alleges the Act is underinclusive because it does not list weapons which have the same or greater rate of fire and capacity for firepower nor weapons identical to weapons on the list.

First, the complaint alleges the Act omits from the list guns which are "functionally indistinguishable" from guns on the list, or "indistinguishable (vis à vis the Act's rationales) [from] the arms listed." For example, the Heckler and Koch PSG-1 sniper rifle (listed) fires the standard NATO 7.62 millimeter cartridge (".308 Winchester") and uses a five-round magazine. However, the Communist-bloc Dragunov SVD sniper rifle (not listed) fires "the Russian 7.62 x 54 high power military cartridge" or "the old military 7.92x57 mm., though it may also be, or have been available in .308 Winchester." Several other examples are stated in the complaint.

Second, the complaint alleges some guns omitted from the list are *identical* to guns on the list. In later pleadings, but not the complaint, this category is referred to as "clones." For example, the Springfield BM-59 is on the list, but the Act omits "the Beretta BM-59 rifle of which the Springfield is an **identical** copy.... The Beretta BM-59 is made by the Beretta company in Italy; the Springfield BM-59 is imported by Springfield from Italy and sold under its own name." (Original emphasis.) Incorporated into the complaint is a memorandum prepared for the Attorney General by the Assistant Director of the Investigation and Enforcement Branch of the Department of Justice, purporting to outline the legislative process resulting in the Act but also relating specific factual allegations. It emphasizes that there are weapons "exactly the same as weapons on the list ... only the company name on the receiver is different." We also observe that the current version of the booklet mandated by section 12276.5 cautions that "the Springfield Armory BM-59 has the specified markings and is an 'assault weapon' pursuant to California law. However, the Springfield Armory M1A, which appears to be almost identical but has different identification markings, is not specified as an 'assault weapon."' (Cal.Atty.Gen., *Assault Weapons Identification Guide* (April 1993) Foreword, p. iv.) At oral argument and in his brief Kasler fleshed out the "clone" category as follows: "If the banned Colt and the 18 unregulated [AR-15] clones are disassembled into a common container, 19 'new' rifles can be reassembled willy-nilly from the jumble of interchangeable, indistinguishable parts. The only parts which are distinguishable ... are the receivers, and that only because they bear the firearm's name."

The complaint pleads "all detachable magazine firearms have the same capacity [for firepower]." For example, "The AR-15 Sporter and Ruger [Mini-14/30 series rifles] come with 5-round magazines, but another manufacturer's 30-round magazine is designed to fit both interchangeably; various manufacturers sell different 30, 60, or more, round magazines for all three." Further, "The one major distinction between most semi-automatic (and other) hunting arms and most of the arms classified by the Act [as assault weapons] is that the latter are much less deadly to human beings. This is because the arms classified in the Act [except a few] are calibered for down-powered current military ammunition or the even less deadly ammunition of pistols. Military ammunition is designed to maximize wounding, not killing, in deference to the Laws of War and to less humane logistical considerations." There is support for this claim in the fact **275* that, generally speaking, international law bans weapons which cause "superfluous injury." (See Parks, Joint Service Combat Shotgun Program (Oct.1997) Army Lawyer 16, 18.)

The complaint pleads the listed guns are not disproportionately used in crime, and although, as stated above, there is academic support for this claim, we do not enter into that debate.

To establish the fallacy of classifying weapons based on their subjective "dangerous" or "ugly" appearance, the complaint pleads that "The arms classified by the Act differ cosmetically from older civilian hunting arms (many of which are also semi-automatic) in being designed and fabricated with modern materials like high-strength plastic. While these modern arms may be less aesthetic, these materiel and design changes result in increased durability, ruggedness and simplicity of design which make these arms superior for hunting, camping, Olympic biathlon competition, and for farmers, ranchers and others desiring arms for pest and predator control." The complaint includes pictures which demonstrate that many guns not on the list are as "military" or "menacing" in appearance as listed guns.

The complaint alleges the *most popular* semi-automatic rifles (Ruger Mini 14, M1 Carbine and M1 Garand) were omitted from the list, notwithstanding their functional equivalence to rifles placed on the list. "The effect of the Act has not been a reduced market in 'assault weapons,' but only to give Ruger a virtual monopoly in the most popular single caliber (.223)." Other guns which cannot be added on because of limitations in the add-on provisions could be built and marketed though they, too, are "functionally identical to" listed guns.

B.

20 21 The equal protection guarantees of our state constitution are contained in three provisions which parallel federal equal protection rights afforded by the Fourteenth Amendment. (See Cal. Const., art. I, § 7, subds. (a) [equal protection] and (b) [privileges and immunities] and art. IV, § 16, subd. (a) [uniformity of laws]; *Steffes v. California Interscholastic Federation* (1986) 176 Cal.App.3d 739, 745-746, & fn. 2, 222 Cal.Rptr. 355.) There being no claim of a so-called "suspect classification" calling for "heightened scrutiny," we apply the rational basis test, whereby "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." (*Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313, 320.) "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike. [Citation.]" (*Nordlinger v. Hahn* (1992) 505 U.S. 1, 9, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1, 12.) In a case considering the three state constitutional provisions the California Supreme Court explained: "None of those constitutional principles is violated if the classification of persons or things affected by the legislation is not arbitrary and is based upon some difference in the classes having a substantial relation to the purpose for which the legislation was designed. [Citations.] A law to be general in its scope need not include all classes of individuals in the state. Nor is a classification void because it does not embrace within it every other class which might be included. [Citations.] Wide discretion is vested in the Legislature in making the classification and every presumption is in favor of the validity of the statute; the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous." (*Sacramento M.U. Dist.* v. *P.G. & E. Co.* (1942) 20 Cal.2d 684, 693, 128 P.2d 529.)

22 23 The tenor of Kasler's complaint is that the facts alleged therein are superior to the facts found by the Legislature. "But States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' [Citations.] [¶] ***276** Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, [citation] they cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable.' [Citation.] Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken." (*Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 464, 101 S.Ct. 715, 723, 66 L.Ed.2d 659, 668-669, fn. omitted.)

24 However, when the Legislature chooses to draw lines, that is, "discriminate" within a given class, the discrimination must be rational in light of the harm to be alleviated. (*Hays v. Wood* (1979) 25 Cal.3d 772, 791, 160 Cal.Rptr. 102, 603 P.2d 19.) More particularly, as stated by Justice Robert Jackson, "A classification is reasonable, however, only if there are differences between the classes and the differences are reasonably related to the purposes of the statute. [Citations.] 'As a matter of principle and in view of my attitude toward the equal protection clause, I do not think differences of treatment under law should be approved on classification because of differences unrelated to the legislative purpose. The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free. This Court has often announced the principle that the differentiation must have an appropriate relation to the object of the legislation or ordinance. [Citations.]' (Mr. Justice Jackson, concurring in *Railway Express Agency v. New York* [1949] 336 U.S. 106, 115, 69 S.Ct. 463, 468, 93 L.Ed. 533.)" (*Werner v. Southern Cal. etc. Newspapers* (1950) 35 Cal.2d 121, 131-132, 216 P.2d 825, quotation approved in *Hays v. Wood*, *supra*, 25 Cal.3d at pp. 786-787, 160 Cal.Rptr. 102, 603 P.2d 19.) Therefore, we must conduct a "'serious and genuine judicial inquiry'" into the correspondence between the classification and the legislative goals. (*Id.* at p. 787, 160 Cal.Rptr. 102, 603 P.2d 19.)

In this case the Legislature has identified two dangers associated with so-called "assault weapons," namely a high rate of fire and a high "capacity for firepower." Kasler pleads that other semi-automatic guns have equal or greater rates of fire and capacity for firepower, yet they were left off the list. Thus, he has pleaded that, with respect to the harm to be alleviated, the Legislature acted irrationally. As expressed with a more familiar example in Kasler's brief, "Drunken driving clearly menaces public safety. Yet it would clearly be irrational to ban drunken driving of a Toyota Corolla, Dodge Caravan, Ford Probe, Mazda Navajo or Chrysler Concorde while allowing it in their respective twins, the Geo Prizm,

Plymouth Voyager, Mazda MX-6, Ford Explorer, Dodge Intrepid and Eagle Vision."

25 26 Arguably, although not included within the express statement of legislative intent behind the Act, in part, the harm herein is one of perception-that so-called "military style" weapons, meaning the "ugly" or "notorious" ones, are bad and the others are good. It is the recurrent theme of the complaint that a classification based on perception of evil is impermissible. We disagree. The Legislature bears the onerous duty of maintaining a system of laws which will protect the citizens of this State from a limitless horizon of evil. Violent criminals do not always act rationally. A robber may choose a semiautomatic Uzi pistol for no other reason than that it looks "uglier" than a functionally identical Smith and Wesson or Sig Sauer police-issue handgun. The rate of fire and capacity for firepower of the two may be the same; indeed, the Uzi may be less accurate, less concealable and more cumbersome in the felon's hands. But he may choose the Uzi nonetheless because it makes him feel powerful and because his victims may fear the Uzi more than an "ordinary" semiautomatic weapon. "Such weapons afford their users a sense of power and, in fact, enhance the dangerousness of such persons." (Yarvis, A Psychological Autopsy, App. A, p. 12, in Kempsky & Binkerd, Report to Attorney General, *supra;* see Cal.Atty.Gen., Assault ***277** Weapons: Background Paper (Feb.1989) pp. 3-4 ["They are glamorized in ways that particularly appeal to young men, who make up the overwhelming majority of criminals. The sense of power conveyed simply by owning one of these weapons is heady"]; Long, Assault Pistols, *supra*, at p. 8 [noting the "Walter Mitty" appeal of semiautomatic versions of machine guns].)

In short, perceptions matter, and the Legislature is free to draw a distinction between otherwise mechanically identical weapons because, in its collective judgment, some were meaner-looking than others, as the complaint pleads: "The 'assault weapons' list seems to have been compiled by selecting from a picture book firearms which, it was felt looked 'bad."'

But liberally construed, Kasler pleads (pictorially and otherwise) that some guns are equally "mean looking" and that others are physically identical. In other words, even assuming that "ugliness" constitutes an unstated but valid "harm" the Legislature sought to alleviate, the Act defies rationality.

As indicated, the term "assault weapon" itself adds nothing to our discussion because a gun only becomes an "assault weapon" by virtue of its inclusion on the assault weapons list, not because of any objective quality that discriminates between "assault weapons" and other semiautomatic guns.

Also unavailing is reference to the *uncodified* statement of intent, which states that the guns on the list "are particularly dangerous in the hands of criminals and serve no necessary hunting or sporting purpose for honest citizens." (Stats.1989, ch. 19, § 5, pp. 69-70.) This facially plausible "finding" cannot insulate the Act if the finding itself is arbitrary and irrational. (See *Professional Engineers v. Department of Transportation* (1997) 15 Cal.4th 543, 569, 63 Cal.Rptr.2d 467, 936 P.2d 473, see also *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 349-350, 66 Cal.Rptr.2d 210, 940 P.2d 797 (lead opn. of George, C.J.).) If the allegations of the complaint are true, the listed guns are no more dangerous in the hands of criminals than the functionally indistinguishable guns, nor than the identical (clone) guns. Nor do they have a greater rate of fire, capacity for firepower, nor pose a greater danger of use "to kill and injure human beings." (§ 12275.5)

We are not the first court to reach such a conclusion. Although the Sixth Circuit invalidated the Columbus ordinance as facially *vague*, one ground of vagueness was *irrationality* because the ordinance "outlaws assault weapons only by outlawing certain brand names without including within the prohibition similar assault weapons of the same type, function or capability. The ordinance does not achieve the stated goal of the local legislature-to get assault weapons off the street. The ordinance purports to ban 'assault weapons' but in fact it bans only an arbitrary and ill-defined subset of these weapons without providing any explanation for its selections. Many assault weapons remain on the market and the consumer is without a reasoned basis for determining which firearms are prohibited. The ordinance permits the sale and possession of weapons which are virtually identical to those listed if they are produced by a manufacturer that is not listed. Thus, the Springfield SAR-48 is banned but equivalent designs sold by Browning Arms Company, Paragon Sales and Armscorp are not. The Springfield BM59 is banned but the equivalent Beretta BM59 and BM62 are not banned. The Colt AR-15 Sporter is banned but not identical weapons sold by Bushmaster, SGW/Olympic Arms, [and others]. The Ruger Mini-14 rifle, which shoots .223 caliber cartridges from a detachable box magazine just like the Colt AR-15 Sporter, is

not prohibited. [Citation.]" (*Springfield, supra*, 29 F.3d at p. 252.)

Further, in *Citizens for a Safer Community v. City of Rochester* (1994) 164 Misc.2d 822, 627 N.Y.S.2d 193, the court (on summary judgment) struck down a portion of a local ordinance which named particular guns: "For example, the Ordinance specifically names the Colt AR-15A2 carbine, AR-15A2 Delta H-Bar, and AR-15A2 H-Bar. It does not list the identical Eagle Arms EA-15, Olympic Arms AR-15 [and others]. It further references the Springfield Armory BM-59 without making reference to the identical Italian made Beretta BM-59. [¶] ... If this ***278** portion of the Ordinance was permitted to stand, two citizens could potentially be treated in a wholly unequal fashion if they possessed identical AR-15's made by different manufacturers. One would be subject to imprisonment, fine and loss of property; and the other would not be breaking the law. Moreover, two manufacturers, each producing identical weapons, would be treated unequally because one would be able to sell his weapons within the City of Rochester and the other would not. [¶].... Therefore, to the extent [the ordinance] names individual weapons, and excludes others that are identical, it is a violation of the equal protection clause [.]" (*Id.* at pp. 837-838, fn. omitted, 627 N.Y.S.2d at pp. 203-204.)

There is a case supporting the Attorney General's position. In *Benjamin v. Bailey* (1995) 234 Conn. 455, 662 A.2d 1226 (after a lower court trial) the Supreme Court of Connecticut *agreed* with our conclusion herein that "the record indicates that the banned weapons [on a similar "list"] cannot meaningfully be differentiated from weapons that are not banned." (*Id.* at p. 472, 662 A.2d at p. 1235.) But the *Benjamin* court rejected the equal protection challenge on two grounds: First that guns were not "persons," an argument not tendered herein and which overlooks the fact that it is the persons who make and own guns who are penalized; and second because "The plaintiffs, ... have offered no evidence whatsoever suggesting that the legislature knew that any of the unproscribed weapons posed as great a threat to the welfare of the residents of this state as do the proscribed weapons. [Citations.]" (*Id.* at p. 479, 662 A.2d at pp. 1238-1239.) The court applied the familiar rule that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. [Citation.]" (*Williamson v. Lee Optical Inc.* (1955) 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563, 573.)

Amici essentially take this approach in defending the Act against the equal protection claim. "According to findings made by the Legislature, the Act restricts *the most immediately identifiable firearms* whose high rate of fire and capacity for firepower substantially outweigh any legitimate sporting or recreational use." (Italics added.) In other words, the Legislature was not required to spend its entire session surveying the weapons industry to come up with a comprehensive list, it was enough to identify a few of the offending guns and let it go at that. Amici (and, at oral argument, the Attorney General) state or imply that any imperfection in the law was a result of ignorance.

But the complaint alleges that the listed guns are no more "immediately identifiable," and that the Legislature was not unaware of the other guns. For example, at a Committee of the Whole hearing of February 13, 1989, the Legislature was informed of the "severe definitional problem" regarding "assault weapons," and the Attorney General appears to concede the Investigation and Enforcement Branch memorandum accurately summarizes the facts, specifically that the Legislature was aware of the existence of the very popular Ruger Mini 14, the M1 and M1 Garand, which are not on the "list," purportedly because they "probably had too large a constituency to ever be worth the risk of including[.]" Nowhere in the hearing was there any effort to segregate the guns ultimately "listed" from other semiautomatic guns, only generic testimony about undefined "assault weapons."

27 The Attorney General properly concedes that "the legislature was also aware that the list of existing Assault Weapons was not exhaustive. Accordingly it provided a procedure for expanding the list to include those existing firearms which are a prototype or copy of the firearms specified on the Assault Weapon list. (§ 12276.5, subd. (a)(1).) Other firearms that function like the specified assault weapons but are primarily designed and intended for legitimate activities were expressly exempted because the legislature found that they did not pose a similar threat to public safety.]]]]]]]]]" We agree that the Legislature was aware that the list was not exhaustive and that it accounted for this problem, or attempted to, via the add-on procedures. Further, since the passage of the Act in 1989 it has been amended several times, most significantly in 1991, when the "list" was substantially rewritten. (Stats.1991, ***279** ch. 954, § 2, p. 4440.) This further evidences the Legislature's knowledge.

To the extent the Attorney General and amici argue the "add-on" provision (apart from its own unconstitutionality) would cure underinclusiveness in the Act we disagree. First, the fact would remain that the Act is underinclusive as presently structured. Second, the add-on provision is limited in scope and cannot be used to add all possible weapons with equal or greater rates of fire and capacity for firepower; it can only be used to add guns which are identical except for "slight" modifications and guns which have been "redesigned, renamed, or renumbered" from guns on the list. (§ 12276.5, subd. (a)(1),(2).) But the complaint pleads there are guns which are functionally equivalent to guns on the list, but are not related to those guns in any way.

DISPOSITION

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion. The stay previously issued is vacated upon finality of this decision. Plaintiffs shall recover costs on appeal.

PUGLIA, P.J., concurs.

SIMS, Associate Justice, concurring and dissenting.

In their multi-count complaint, plaintiffs (including Colt's Manufacturing Company) aim a constitutional attack at the Roberti-Roos Assault Weapons Control Act of 1989 ("the Act"). (Stats.1989, ch. 19, § 3, p. 64 et seq.) In particular, plaintiffs focus on two statutes enacted by the Act: Penal Code section 12276 and Penal Code section 12276.5. [1]

As pertinent, section 12276 sets out a list of assault weapons, identified by brand and model (and sometimes by series) that are subject to restriction by operation of other provisions of the Act. Section 12276.5 sets out procedures whereby additional assault weapons may be added to the list of restricted weapons, ultimately by order of court.

I concur with the majority opinion that the "add-on" provisions of section 12276.5 are facially unconstitutional because they violate the separation of powers doctrine and further violate principles of due process of law.

I also agree with the majority that the invalid provisions of section 12276.5 are severable from the list of weapons set out in section 12276, although I do not share the majority's grudging acceptance of that conclusion. I think it logical that if additional weapons could not be added to those set out in section 12276, the Legislature would naturally want to be able to keep restrictions on what it could, i.e., those weapons listed in section 12276.

I respectfully dissent from the majority's conclusion that plaintiffs have adequately pleaded that section 12276, and particularly the list of assault weapons described therein, violates guarantees of the equal protection of the laws.

Plaintiffs' strongest equal protection claim is founded on the assertion that the Legislature did not include on the section 12276 list certain weapons that are identical to weapons on the list, except for manufacturer.

However, "the Legislature is not bound, in order to adopt a constitutionally valid statute, to extend it to all cases that might possibly be reached [citation], but is free to recognize degrees of harm and make restrictions affecting those classes of cases wherein the need is deemed to be clearest. [Citation.] The Legislature, in dealing with practical exigencies, may be guided by experience and is at liberty to select one phase of a problem for appropriate action without the necessity of including all others that might be affected in the same field of legislation. [Citations.]" (*People v. Banner* (1992) 3 Cal.App.4th 1315, 1322-1323, 5 Cal.Rptr.2d 125.)

"Wide discretion is vested in the Legislature in making the classification and every presumption is in favor of the validity of the statute; the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous." (*Sacramento* ****280*** *M.U. Dist. v. P.G. & E. Co.* (1942) 20 Cal.2d 684, 693, 128 P.2d 529.)

Here, a rational basis exists for the weapons listed in section 12276. That basis is found in an express legislative finding and declaration set out in section 5 of the Act, as follows: "The Legislature finds and declares that the weapons enumerated in Section 12276 of the Penal Code are particularly dangerous in the hands of criminals and serve no necessary hunting or sporting purpose for honest citizens...." (Stats.1989, ch. 19, § 5, pp. 69-70.) In short, one reason the Legislature selected the guns listed in section 12276 is that they are particularly dangerous in the hands of criminals. This is plainly a rational distinction that permits the Legislature to outlaw, as a first step, the most notorious weapons while excluding functionally identical weapons made by other manufacturers that have not achieved celebrity status among criminals.

This finding cannot be defeated merely by alleging that the finding is wrong. Rather, "Where there was evidence before the Legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the Legislature was mistaken." (*Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 464, 101 S.Ct. 715, 723, 66 L.Ed.2d 659, 669, fn. omitted.)

Here, in connection with the enactment of the Act, the Legislature held extensive hearings, including a rare meeting of the Assembly as a Committee of the Whole. In light of the evidence taken by the Legislature, plaintiffs cannot show that the classification undertaken by the Legislature is "palpably arbitrary and beyond rational doubt erroneous." (*Sacramento M.U. Dist. v. P.G. & E. Co., supra*, 20 Cal.2d at p. 693, 128 P.2d 529.)

The trial court properly sustained defendant's demurrer to counts 1, 2, and 3 of the complaint, which allege plaintiffs' equal protection challenge to section 12276.

Plaintiffs have failed to challenge the trial court's ruling sustaining the demurrer as to other counts (6, 7 and 16), and the trial court's ruling is therefore presumed correct.

In count 11, plaintiffs advance an equal protection challenge to the "add on" provisions of section 12276.5. Since we declare these provisions infirm on other grounds, suffice it to say I think this count fails to state a cause of action.

I would affirm the judgment insofar as it sustains defendant's demurrer without leave to amend to counts 1, 2, 3, 6 7, 11 and 16.

I would reverse the judgment insofar as it sustains the demurrer without leave to amend to counts 4, 5, 8, 9, 10, 12, 13, 14 and 15.

Parallel Citations

, 98 Cal. Daily Op. Serv. 1581, 98 Daily Journal D.A.R. 2191

Footnotes

1 Further statutory references are to the Penal Code unless otherwise indicated.

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