FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN; RICHARD LEWIS; PATRICK LOVETTE; DAVID MARGUGLIO; CHRISTOPHER WADDELL; CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC., a California corporation, *Plaintiffs-Appellees,* v. ROB BONTA, in his official capacity as Attorney General of the State of California, *Defendant-Appellant.*	No. 19-55376 D.C. No. 3:17-cv-01017-BEN-JLB OPINION

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Argued and Submitted En Banc June 22, 2021
Pasadena, California

Filed November 30, 2021

Before: Sidney R. Thomas, Chief Judge, and Susan P. Graber, Richard A. Paez, Marsha S. Berzon, Sandra S. Ikuta, Mary H. Murguia, Paul J. Watford, Andrew D. Hurwitz, Ryan D. Nelson, Patrick J. Bumatay and Lawrence VanDyke, Circuit Judges.

Opinion by Judge Graber;
Concurrence by Judge Graber;
Concurrence by Judge Berzon;
Concurrence by Judge Hurwitz;
Dissent by Judge Bumatay;
Dissent by Judge VanDyke

SUMMARY*

Second Amendment

The en banc court reversed the district court's summary judgment and remanded for entry of judgment in favor of Defendant Rob Bonta, Attorney General for the State of California, in an action raising a facial challenge to California Penal Code section 32310, which prohibits, with certain exceptions, possession of large-capacity magazines, defined as those that can hold more than ten rounds of ammunition.

California law allows owners of large-capacity magazines to modify them to accept ten rounds or fewer. Owners also may sell their magazines to firearm dealers or remove them from the state. And the law provides several exceptions to the ban on large-capacity magazines, including possession by active or retired law enforcement officers, security guards for armored vehicles, and holders of special weapons permits.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Plaintiffs, who include persons who previously acquired large-capacity magazines lawfully, bring a facial challenge to California Penal Code section 32310. They argue that the statute violates the Second Amendment, the Takings Clause, and the Due Process Clause.

The court applied a two-step framework to review the Second Amendment challenge, asking first whether the challenged law affects conduct protected by the Second Amendment, and if so, what level of scrutiny to apply. The court noted that ten sister circuits have adopted a substantially similar two-step test. The court assumed, without deciding, that California's law implicates the Second Amendment, and joining its sister circuits, determined that intermediate scrutiny applied because the ban imposed only a minimal burden on the core Second Amendment right to keep and bear arms. Applying intermediate scrutiny, the court held that section 32310 was a reasonable fit for the important government interest of reducing gun violence. The statute outlaws no weapon, but only limits the size of the magazine that may be used with firearms, and the record demonstrates (a) that the limitation interferes only minimally with the core right of self-defense, as there is no evidence that anyone ever has been unable to defend his or her home and family due to the lack of a large-capacity magazine; and (b) that the limitation saves lives. The court noted that in the past half-century, large-capacity magazines have been used in about three-quarters of gun massacres with 10 or more deaths and in 100 percent of gun massacres with 20 or more deaths, and more than twice as many people have been killed or injured in mass shootings that involved a large-capacity magazine as compared with mass shootings that involved a smaller-capacity magazine. Accordingly, the ban on legal possession of large-capacity

magazines reasonably supported California's effort to reduce the devastating damage wrought by mass shootings.

The court held that section 32310 does not, on its face, effect a taking. The government acquires nothing by virtue of the limitation on the capacity of magazines, and because owners may modify or sell their nonconforming magazines, the law does not deprive owners of all economic use. Plaintiffs' due process claim essentially restated the takings claim, and it failed for the same reasons.

Concurring, Judge Graber stated that as the majority opinion explains, *District of Columbia v. Heller*, 554 U.S. 570 (2008), does not provide a clear framework for deciding whether a statute does or does not violate the Second Amendment. But by repeatedly drawing an analogy to the First Amendment's Free Speech Clause, *Heller* strongly suggests that intermediate scrutiny can apply to the Second Amendment, too. Accordingly, reasonable restrictions on the time, place, or manner of exercising the Second Amendment right to keep and bear arms are permissible if they leave open ample alternative means of exercising that right, the central component of which is individual self-defense. Applying those principles here, intermediate scrutiny was the appropriate standard for assessing California's ban on large-capacity magazines. Other circuits have recognized, and Judge Graber agreed, that a ban on large-capacity magazines leaves open ample alternative means of self-defense.

Concurring, Judge Berzon, joined by Judges Thomas, Paez, Murguia, Watford and Hurwitz, wrote separately to respond to Judge Bumatay's dissent, which advocated a "text, history, and tradition" approach to Second Amendment legal claims. In connection with her response, Judge Berzon offered a brief theoretical and historical

defense of the two-step, tiered scrutiny approach used by eleven of the federal courts of appeals in Second Amendment cases. Judge Berzon hoped to demonstrate that the notion that judges can avoid so-called subjectivity more successfully under the "text, history, and tradition" approach than under the two-step, tiered scrutiny analysis was a simplistic illusion. Rather than representing a "much less subjective" framework for decisionmaking in Second Amendment cases involving discrete arms regulations, the "text, history, and tradition" test obscures the myriad indeterminate choices that will arise in most such cases. The tiered scrutiny approach, in contrast, serves to guide and constrain a court's analysis in Second Amendment disputes regarding discrete arms regulations, as it has done for numerous other constitutional provisions. Additionally, the notion that text, history, and, especially, "tradition" are objectively ascertainable disregards what linguists, historians, and anthropologists have long recognized: language can be indeterminate, especially as time passes; ascertaining what happened in the past is contingent and variable, because both the data available and the means of structuring and analyzing that data vary over time; and "tradition" is a term with little stable meaning, both as to the time period it takes for a "tradition" to become established and as to the individuals or communities whose habits and behaviors are said to establish a "tradition."

Concurring, Judge Hurwitz wrote that he was reluctantly compelled to respond to the dissent of Judge VanDyke. Judge Hurwitz stated that judges can respectfully disagree on whether the measures California has adopted violate the Second Amendment. But an attack on the personal motives of the members of this court who reach the same result in this case as every other Circuit to address this issue neither

advances the court's discourse nor gives intellectual support to the legal positions argued by Judge VanDyke.

Dissenting, Judge Bumatay, joined by Judges Ikuta and R. Nelson, stated that the tiers-of-scrutiny approach utilized by the majority functions as nothing more than a black box used by judges to uphold favored laws and strike down disfavored ones. While the court can acknowledge that California asserts a public safety interest, it cannot bend the law to acquiesce to a policy that contravenes the clear decision made by the American people when they ratified the Second Amendment. Judge Bumatay believes that this court should have dispensed with the interest-balancing approach and hewed to what the Supreme Court told the courts to do in the watershed case, *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), which provided clear guidance to lower courts on the proper analytical framework for adjudicating the scope of the Second Amendment right. That approach requires an extensive analysis of the text, tradition, and history of the Second Amendment, rather than the tiers-of-scrutiny approach used by the majority. Under that approach, the outcome is clear. Firearms and magazines capable of firing more than ten rounds have existed since before the Founding of the nation. They enjoyed widespread use throughout the nineteenth and twentieth centuries. They number in the millions in the country today. With no longstanding prohibitions against them, large-capacity magazines are thus entitled to the Second Amendment's protection.

Dissenting, Judge VanDyke largely agreed with Judge Bumatay's dissent. Judge VanDyke stated that the majority of this court distrusts gun owners and thinks the Second Amendment is a vestigial organ of their living constitution. Those views drive this Circuit's caselaw ignoring the

original meaning of the Second Amendment and fully exploiting the discretion inherent in the Supreme Court's cases to make certain that no government regulation ever fails the court's laughably "heightened" Second Amendment scrutiny. This case is the latest demonstration that the Circuit's current test is too elastic to impose any discipline on judges who fundamentally disagree with the need to keep and bear arms. Judge VanDyke consequently suggest two less manipulable tests the Supreme Court should impose on lower courts for analyzing government regulations burdening Second Amendment rights. First, the Supreme Court should elevate and clarify *Heller*'s "common use" language and explain that when a firearm product or usage that a state seeks to ban is currently prevalent throughout our nation (like the magazines California has banned here), then strict scrutiny applies. Second, the Court should direct lower courts like this one to compare one state's firearm regulation to what other states do (here a majority of states allow what California bans), and when most other states don't similarly regulate, again, apply strict scrutiny.

COUNSEL

Samuel P. Siegel (argued) and Helen H. Hong, Deputy Solicitors General; John D. Echeverria, Deputy Attorney General; Mark R. Beckington and Heather Hoesterey, Supervising Deputy Attorneys General; Thomas S. Patterson, Senior Assistant Attorney General; Michael J. Mongan, Solicitor General; Rob Bonta, Attorney General; Office of the Attorney General, Sacramento, California; for Defendant-Appellant.

Erin E. Murphy (argued), Paul D. Clement, Kasdin M. Mitchell, and William K. Lane III, Kirkland & Ellis LLP, Washington, D.C.; C.D. Michel, Anna M. Barvir, and Sean A. Brady, Michel & Associates P.C., Long Beach, California; for Plaintiffs-Appellees.

Jonathan E. Lowy and T. Tanya Schardt, Brady, Washington, D.C.; Rafael Reyneri, Scott D. Danzis, Thomas C. Villalon, and Nora Conneely, Covington & Burling LLP, Washington, D.C.; for Amicus Curiae Brady.

Scott A. Edelman, Gibson Dunn & Crutcher LLP, Los Angeles, California; Vivek R. Gopalan, Matthew C. Reagan, and Zhen He Tan, Gibson Dunn & Crutcher LLP, San Francisco, California; Kathryn M. Cherry, Gibson Dunn & Crutcher LLP, Dallas, Texas; Hannah Shearer and Hannah Friedman, Giffords Law Center to Prevent Gun Violence, San Francisco, California; J. Adam Skaggs, Giffords Law Center to Prevent Gun Violence, New York, New York; for Amici Curiae Giffords Law Center to Prevent Gun Violence and March for Our Lives Action Fund.

Antonio J. Perez-Marques and Antonio M. Haynes, David Polk & Wardwell LLP, New York, New York; Eric

Tirschwell, Mark Anthony Frassetto, Janet Carter, and William J. Taylor Jr., Everytown Law, New York, New York; for Amicus Curiae Everytown for Gun Safety.

Christa Y. Nicols, Brady, Washington, D.C., for Amicus Curiae Team ENOUGH.

Jonathan K. Baum, Katten Muchin Rosenman LLP, Chicago, Illinois; Mark T. Ciani, Katten Muchin Rosenman LLP, New York, New York; for Amici Curiae California Chapter of the American College of Emergency Physicians, American Academy of Pediatrics California, and California Academy of Family Physicians.

Karl A. Racine, Attorney General; Loren L. Alikhan, Solicitor General; Caroline S. Van Zile, Principal Deputy Solicitor General; Carl J. Schifferle, Deputy Solicitor General; Sonya L. Lebsack, Assistant Attorney General; Office of the Solicitor General, Washington, D.C.; William Tong, Attorney General, Hartford, Connecticut; Kathleen Jennings, Attorney General, Wilmington, Delaware; Clare E. Connors, Attorney General, Honolulu, Hawaii; Kwame Raoul, Attorney General, Chicago, Illinois; Brian E. Frosh, Attorney General, Baltimore, Maryland; Maura Healey, Attorney General, Boston, Massachusetts; Dana Nessel, Attorney General, Lansing, Michigan; Keith Ellison, Attorney General, St. Paul, Minnesota; Gurbir S. Grewal, Attorney General, Trenton, New Jersey; Hector Balderas, Attorney General, Santa Fe, New Mexico; Letitia James, Attorney General, New York, New York; Ellen F. Rosenblum, Attorney General, Salem, Oregon; Josh Shapiro, Attorney General, Harrisburg, Pennsylvania; Peter F. Neronha, Attorney General, Providence, Rhode Island; Thomas J. Donovan Jr., Attorney General, Montpelier, Vermont; Mark R. Herring, Attorney General, Richmond,

Virginia; Robert W. Ferguson, Attorney General, Olympia, Washington; for Amici Curiae District of Columbia, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington.

Michael N. Feuer, City Attorney; Kathleen Kenealy, Chief Assistant City Attorney; Scott Marcus, Senior Assistant City Attorney; Danielle L. Goldstein, James P. Clark, and Blithe Smith Bock, Deputy City Attorneys; Office of the City Attorney, Los Angeles, California; Dennis J. Herrera, City Attorney; Aileen McGrath, Co-Chief of Appellate Litigation; Office of the City Attorney, San Francisco, California; Barbara J. Parker, City Attorney, Office of the City Attorney, Oakland, California; Mara W. Elliott, City Attorney; Jonathan I. Lapin, Chief Deputy City Attorney; Office of the City Attorney, San Diego, California; Yibin Shen, City Attorney; Michael Roush, Chief Assistant City Attorney; Montague Hung, Deputy City Attorney; Office of the City Attorney, Alameda, California; Scott H. Howard, City Attorney, Pasadena, California; George S. Cardona, Interim City Attorney, Santa Monica, California; John A. Nagel, City Attorney; Rebecca L. Moon, Senior Assistant City Attorney; Office of the City Attorney, Sunnyvale, California; Michael Jenkins, City Attorney, Best Best & Krieger LLP, Manhattan Beach, California; for Amici Curiae City of Los Angeles, City and County of San Francisco, City of San Diego, City of Oakland, City of West Hollywood and Mayor Lindsey P. Horvath, City of Alameda, City of Calabasas, City of Santa Monica, and City of Sunnyvale.

James E. Hough, Jamie A. Levitt, and Cesar A. Francia, Morrison & Foerster LLP, New York, New York; Daniel A.

Goldschmidt, Morrison & Foerster LLP, Chiyoda-ku, Tokyo, Japan; James R. Sigel, Morrison & Foerster LLP, San Francisco, California; Samuel B. Goldstein, Morrison & Foerster LLP, Washington, D.C.; for Amici Curiae Pride Fund to End Gun Violence, Equality California, and Gays Against Guns.

Stephen P. Halbrook, Fairfax, Virginia; Nezida S. Davis, Bakari Law LLC, Decatur, Georgia; for Amici Curiae National African American Gun Association Inc. and Pink Pistols.

Jeremiah L. Morgan, Robert J. Olson, William J. Olson, and Herbert W. Titus, William J. Olson P.C., Vienna, Virginia; Joseph W. Miller, Joseph Miller Law Offices LLC, Fairbanks, Alaska; Steven C. Bailey and Gary G. Kreep, Ramona, California; for Amici Curiae Gun Owners of America, Inc.; Gun Owners Foundation; Gun Owners of California; California Constitutional Rights Foundation; Virginia Citizens Defense League; Montana Shooting Sports Association; Oregon Firearms Federation; Tennessee Firearms Association; Conservation Legal Defense and Education Fund; Policy Analysis Center; Heller Foundation; and Restoring Liberty Action Committee.

John Parker Sweeney, James W. Porter III, Marc A. Nardone, and Candice L. Rucker, Bradley Arant Boult Cummings, Washington, D.C., for Amicus Curiae National Rifle Association of America Inc.

Dan M. Peterson, Dan M. Peterson PLLC, Fairfax, Virginia, for Amici Curiae National Association of Chiefs of Police, Western States Sheriffs' Association, California Reserve Peace Officers Association, San Francisco Veteran Police Officers Association, International Law Enforcement

Educators and Trainers Association, Law Enforcement Legal Defense Fund, California State Sheriffs' Association, New Mexico Sheriffs' Association, Association of New Jersey Rifle & Pistol Clubs Inc., Bridgeville Rifle & Pistol Club, Connecticut Citizens Defense League, Delaware State Sportsmen's Association, Gun Owners' Action League Massachusetts, Gun Owners of California, Maryland State Rifle & Pistol Association, New York State Rifle & Pistol Association, Vermont Federation of Sportsmen's Clubs, Vermont State Rifle & Pistol Association, and Virginia Shooting Sports Association.

Joseph G.S. Greenlee, Firearms Policy Coalition, Sacramento, California; George M. Lee, Seiler Epstein LLP, San Francisco, California; for Amici Curiae William Wiese, Jeremiah Morris, Lance Cowley, Sherman Macaston, Clifford Flores, L.Q. Dang, Frank Federau, Alan Normandy, Todd Nielsen, California Gun Rights Foundation, Firearms Policy Coalition, Firearms Policy Foundation, Armed Equality, San Diego County Gun Owners, Orange County Gun Owners, Riverside County Gun Owners, California County Gun Owners, and Second Amendment Foundation.

Donald E. J. Kilmer Jr., Law Offices of Donald Kilmer APC, San Jose, California, for Amicus Curiae Madison Society Foundation Inc.

John Cutonilli, Garrett Park, Maryland, pro se Amicus Curiae.

Patrick S. Loi and Anthony P. Schoenberg, Farella Braun & Martel LLP, San Francisco, California, for Amicus Curaie Americans Against Gun Violence.

Marek Suchenek Ph.D., Long Beach, California, pro se Amicus Curiae.

Mark Brnovich, Attorney General; Joseph A. Kanefield, Chief Deputy & Chief of Staff; Brunn W. Roysden III, Solicitor General; Michael S. Catlett, Deputy Solicitor General; Office of the Attorney General, Phoenix, Arizona; Jeff Landry, Attorney General; Elizabeth B. Murrill, Solicitor General; Josiah Kollmeyer, Assistant Solicitor General; Department of Justice, Baton Rouge, Louisiana; Steve Marshall, Attorney General, State of Alabama; Treg Taylor, Attorney General, State of Alaska; Leslie Rutledge, Attorney General, State of Arkansas; Christopher M. Carr, Attorney General, State of Georgia; Lawrence G. Wasden, Attorney General, State of Idaho; Theodore E. Rokita, Attorney General, State of Indiana; Derek Schmidt, Attorney General, State of Kansas; Daniel Cameron, Attorney General, Commonwealth of Kentucky; Lynn Fitch, Attorney General, State of Mississippi; Eric S. Schmitt, Attorney General, State of Missouri; Austin Knudsen, Attorney General, State of Montana; Douglas J. Peterson, Attorney General, State of Nebraska; Dave Yost, Attorney General, State of Ohio; Mike Hunter, Attorney General, State of Oklahoma; Alan Wilson, Attorney General, State of South Carolina; Jason R. Ravnsborg, Attorney General, State of South Dakota; Ken Paxton, Attorney General, State of Texas; Sean D. Reyes, Attorney General, State of Utah; Patrick Morrissey, Attorney General, State of West Virginia; Bridget Hill, Attorney General, State of Wyoming; for Amici Curiae States of Arizona, Louisiana, Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Kansas, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, Wyoming, and Commonwealth of Kentucky.

Craig A. Livingston and Crystal L. Van Der Putten, Livingston Law Firm P.C., Walnut Creek, California; Lawrence G. Keane and Benjamin F. Erwin, National Shooting Sports Foundation Inc., Newtown, Connecticut; for Amicus Curiae National Shooting Sports Foundation Inc.

OPINION

GRABER, Circuit Judge:

In response to mass shootings throughout the nation and in California, the California legislature enacted Senate Bill 1446, and California voters adopted Proposition 63. Those laws amended California Penal Code section 32310 to prohibit possession of large-capacity magazines, defined as those that can hold more than ten rounds of ammunition. California law allows owners of large-capacity magazines to modify them to accept ten rounds or fewer. Owners also may sell their magazines to firearm dealers or remove them from the state. And the law provides several exceptions to the ban on large-capacity magazines, including possession by active or retired law enforcement officers, security guards for armored vehicles, and holders of special weapons permits.

Plaintiffs, who include persons who previously acquired large-capacity magazines lawfully, bring a facial challenge to California Penal Code section 32310. They argue that the statute violates the Second Amendment, the Takings Clause, and the Due Process Clause. We disagree.

Reviewing de novo the district court's grant of summary judgment to Plaintiffs, *Salisbury v. City of Santa Monica*, 998 F.3d 852, 857 (9th Cir. 2021), we hold: (1) Under the Second Amendment, intermediate scrutiny applies, and section 32310 is a reasonable fit for the important government interest of reducing gun violence. The statute outlaws no weapon, but only limits the size of the magazine that may be used with firearms, and the record demonstrates (a) that the limitation interferes only minimally with the core right of self-defense, as there is no evidence that anyone ever has been unable to defend his or her home and family due to

the lack of a large-capacity magazine; and (b) that the limitation saves lives. About three-quarters of mass shooters possess their weapons and large-capacity magazines lawfully. In the past half-century, large-capacity magazines have been used in about three-quarters of gun massacres with 10 or more deaths and in 100 percent of gun massacres with 20 or more deaths, and more than twice as many people have been killed or injured in mass shootings that involved a large-capacity magazine as compared with mass shootings that involved a smaller-capacity magazine. Accordingly, the ban on legal possession of large-capacity magazines reasonably supports California's effort to reduce the devastating damage wrought by mass shootings. (2) Section 32310 does not, on its face, effect a taking. The government acquires nothing by virtue of the limitation on the capacity of magazines, and because owners may modify or sell their nonconforming magazines, the law does not deprive owners of all economic use. (3) Plaintiffs' due process claim essentially restates the takings claim, and it fails for the same reasons. Accordingly, we reverse the judgment of the district court and remand for entry of judgment in favor of Defendant Rob Bonta, Attorney General for the State of California.

FACTUAL AND PROCEDURAL HISTORY

A. *Large-Capacity Magazines*

A magazine is an "ammunition feeding device" for a firearm. Cal. Penal Code § 16890. On its own, a magazine is practically harmless and poses no threat to life or limb. But when filled with bullets and attached to a firearm, its deadliness is equally obvious. A magazine enables a shooter to fire repeatedly—a number of times up to the ammunition capacity of the magazine—without reloading. Once a magazine is empty, the shooter may continue to fire only

after pausing to change magazines or to reload the original magazine. The time it takes to change magazines ranges from about two to ten seconds, depending on the skill of the shooter and the surrounding circumstances. *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J. ("ANJRPC")*, 910 F.3d 106, 113 (3d Cir. 2018).

California and many other jurisdictions define a "large-capacity magazine" as a magazine capable of holding more than ten rounds of ammunition. *E.g.*, Cal. Penal Code § 16740; 18 U.S.C. § 921(a)(31)(A) (1994); Conn. Gen. Stat. § 53-202w(a)(1); D.C. Code § 7-2506.01(b); N.J. Stat. Ann. § 2C:39-1(y). Large-capacity magazines thus allow a shooter to fire more than ten rounds without any pause in shooting.

Most, but not all, firearms use magazines. For those firearms that accept magazines, manufacturers often include large-capacity magazines as a standard part of a purchase of a firearm. "Most pistols are manufactured with magazines holding ten to seventeen rounds, and many popular rifles are manufactured with magazines holding twenty or thirty rounds." *Kolbe v. Hogan*, 849 F.3d 114, 129 (4th Cir. 2017) (en banc). Although data on magazine ownership are imprecise, some experts estimate that approximately half of all privately owned magazines in the United States have a capacity greater than ten rounds. *Id.*

As we will discuss in detail below, Defendant introduced evidence that mass shootings often involve large-capacity magazines, to devastating effect. Shooters who use large-capacity magazines cause significantly more deaths and injuries than those shooters who are equipped with magazines of smaller capacity. Intended victims and law enforcement officers use brief pauses in shooting to flee or to fight back. Because shooters who are equipped with

large-capacity magazines may fire many bullets without pause, shooters are able to—and do—inflict far more damage using those magazines than they otherwise could.

B. *California's Ban*

In 1994, Congress banned the possession or transfer of large-capacity magazines. Pub. L. 103-322, § 110103, Sept. 13, 1994, 108 Stat. 1796, 1998–2000 (formerly codified at 18 U.S.C. § 922(w)). The federal ban exempted those magazines that were legally possessed before the date of enactment. *Id.* The law expired ten years later, in 2004. *Id.* § 110105(2).

California began regulating large-capacity magazines in 2000, prohibiting their manufacture, importation, or sale in the state. Cal. Penal Code § 12020(a)(2) (2000). After the expiration of the federal ban, California strengthened its law in 2010 and again in 2013 by, among other things, prohibiting the purchase or receipt of large-capacity magazines. Cal. Penal Code § 32310(a) (2013). But possession of large-capacity magazines remained legal, and law enforcement officers reported to the California legislature that, as a result, enforcement of the existing laws was "very difficult."

In 2016, the California legislature enacted Senate Bill 1446, which barred possession of large-capacity magazines as of July 1, 2017, and imposed a fine for failing to comply. 2016 Cal. Stat. ch. 58, § 1. Later in 2016, voters in California approved Proposition 63, also known as the Safety for All Act of 2016, which subsumed Senate Bill 1446 and added provisions that imposed a possible criminal penalty of imprisonment for up to a year for unlawful possession of large-capacity magazines after July 1, 2017. Cal. Penal Code § 32310(c). Proposition 63

declared that large-capacity magazines "significantly increase a shooter's ability to kill a lot of people in a short amount of time." Prop. 63 § 2(11). "No one except trained law enforcement should be able to possess these dangerous ammunition magazines," and the present law's lack of a ban on possession constituted a "loophole." *Id.* § 2(12). The law's stated purpose is "[t]o make it illegal in California to possess the kinds of military-style ammunition magazines that enable mass killings like those at Sandy Hook Elementary School; a movie theater in Aurora, Colorado; Columbine High School; and an office building at 101 California Street in San Francisco, California." *Id.* § 3(8).

California law defines a "large-capacity magazine" as

> any ammunition feeding device with the capacity to accept more than 10 rounds, but shall not be construed to include any of the following:
>
> (a) A feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds.
>
> (b) A .22 caliber tube ammunition feeding device.
>
> (c) A tubular magazine that is contained in a lever-action firearm.

Cal. Penal Code § 16740. The ban on possession of large-capacity magazines exempts persons who are active or retired law enforcement officers, security guards for armored vehicles, and holders of special weapons permits for limited

purposes; the law also allows the manufacture of magazines for government use and the use of magazines as props in film production. *Id.* §§ 32400–55. Finally:

> Any person who may not lawfully possess a large-capacity magazine commencing July 1, 2017 shall, prior to July 1, 2017:
>
> (1) Remove the large-capacity magazine from the state;
>
> (2) Sell the large-capacity magazine to a licensed firearms dealer; or
>
> (3) Surrender the large-capacity magazine to a law enforcement agency for destruction.

Id. § 32310(d).

California is not alone in banning the possession of large-capacity magazines after the federal prohibition expired in 2004. The District of Columbia and eight other states have imposed significant restrictions on large-capacity magazines. Colo. Rev. Stat. §§ 18-12-301, 302; Conn. Gen. Stat. § 53-202w; D.C. Code § 7-2506.01(b); Haw. Rev. Stat. § 134-8(c); Mass. Gen. Laws Ann. ch. 140, §§ 121, 131(a), 131M; Md. Code Ann., Crim. Law § 4-305(b); N.J. Stat. Ann. §§ 2C:39-1(y), 39-3(j), 39-9(h); N.Y. Penal Law §§ 265.00, 265.36; 13 Vt. Stat. Ann. § 4021. Municipalities, too, have banned the possession of large-capacity magazines. *E.g.*, Highland Park, Ill. City Code § 136.005; Sunnyvale, Cal. Mun. Code § 9.44.050 (enacted before the statewide ban).

C. *Procedural History*

Plaintiffs brought this action in 2017, arguing that California's prohibition on the possession of large-capacity magazines violates the Second Amendment, the Fifth Amendment's Takings Clause, and the Fourteenth Amendment's Due Process Clause. Plaintiffs own, or represent those who own, large-capacity magazines, and they do not want to comply with California's requirement that they modify the magazines to accept ten or fewer rounds, remove the magazines from the state, sell them to a licensed firearms dealer, or allow state authorities to destroy them.

Shortly before July 1, 2017, the district court preliminarily enjoined the state from enforcing the law, holding that Plaintiffs were likely to succeed on their claims under the Second Amendment and the Takings Clause. *Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017). On appeal to this court, a two-judge majority affirmed the preliminary injunction, concluding that the district court did not abuse its discretion in holding that Plaintiffs had shown a likelihood of success on their claims. *Duncan v. Becerra*, 742 F. App'x 218, 221–22 (9th Cir. 2018) (unpublished); *see also id.* at 220 ("We do not determine the ultimate merits, but rather determine only whether the district court correctly distilled the applicable rules of law and exercised permissible discretion in applying those rules to the facts at hand." (internal quotation marks omitted)). Judge Wallace dissented. *Id.* at 223–26. He acknowledged the deferential standard of review on appeal from a preliminary injunction but he "d[id] not consider it a close call to conclude the district court abused its discretion in finding Plaintiffs were likely to succeed on the merits of their constitutional challenges." *Id.* at 226 (Wallace, J., dissenting). Judge

Wallace reasoned that "California's evidence—which included statistical studies, expert testimony, and surveys of mass shootings showing that the use of [large-capacity magazines] increases the lethality of gun violence—was more than sufficient to satisfy intermediate scrutiny." *Id.* at 223. And he further concluded that the California law did not violate the Takings Clause, because there is no physical taking and no evidence that alteration or sale of large-capacity magazines would be economically infeasible. *Id.* at 225.

In 2019, the district court granted summary judgment to Plaintiffs on the Second Amendment and takings claims and permanently enjoined Defendant from enforcing the law. *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019). On appeal, a divided panel affirmed the district court's grant of summary judgment as to the Second Amendment claim. *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020). Chief District Judge Lynn dissented; she would have rejected Plaintiffs' Second Amendment claim. *Id.* at 1169–76.

The panel majority's opinion conflicted with decisions by all six circuit courts to have considered—and rejected—Second Amendment challenges to similar laws. *Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019), *cert. denied*, 141 S. Ct. 109 (2020); *ANJRPC*, 910 F.3d 106; *Kolbe*, 849 F.3d 114; *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo ("NYSRPA")*, 804 F.3d 242 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) ("*Heller II*"). We granted rehearing en banc and, pursuant to our ordinary practice, vacated the panel's opinion. *Duncan v. Becerra*, 988 F.3d 1209 (9th Cir. 2021) (order); Ninth Cir. Rules 35-1 to 35-3, Adv. Comm. Note 3.

DISCUSSION

We address (A) the Second Amendment claim and (B) the takings claim.[1]

A. *Second Amendment Claim*

The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Second Amendment "protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010). The Second Amendment "is fully applicable to the States." *Id.* at 750.

In *District of Columbia v. Heller*, 554 U.S. 570, 574, 628 (2008), the Supreme Court struck down, as inconsistent with the Second Amendment right to keep and bear arms, the District of Columbia's laws that "generally prohibit[ed] the possession of handguns" and "totally ban[ned] handgun possession in the home." The Court declined to define the applicable framework for addressing Second Amendment claims, holding that the handgun ban failed "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Id.* at 628.

"Following *Heller* and *McDonald*, we have created a two-step framework to review Second Amendment challenges." *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir.

[1] In a footnote, Plaintiffs state that summary judgment was proper in their favor on the due process claim "[f]or all the same reasons" that apply to the takings claim. Because we reject the takings claim, we reject the due process claim.

2021) (en banc), *petition for cert. filed*, (U.S. May 11, 2021) (No. 20-1639). We first ask "if the challenged law affects conduct that is protected by the Second Amendment." *Id.* If not, then the law is constitutional, and our analysis ends. *Id.* If, on the other hand, the law implicates the Second Amendment, we next choose and apply an appropriate level of scrutiny. *Id.* at 784. Ten of our sister circuits have adopted a substantially similar two-step test. *Gould v. Morgan*, 907 F.3d 659, 668–69 (1st Cir. 2018), *cert. denied*, 141 S. Ct. 108 (2020); *NYSRPA*, 804 F.3d at 254; *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs*, 788 F.3d 1318, 1322 (11th Cir. 2015); *see Young*, 992 F.3d at 783 (listing cases from the Third, Fourth, Fifth, Sixth, Seventh, Tenth and D.C. Circuits that apply a similar two-step framework).

Judge Bumatay's dissent would jettison the two-step framework adopted by us and our sister circuits, in favor of a "text, history, and tradition" test. Dissent by J. Bumatay at 108. Plaintiffs have not sought this test, despite having filed supplemental briefs after we granted rehearing en banc, and Defendant has not had a chance to respond. The dissent nevertheless asks us to disrupt a decade of caselaw and to create a circuit split with ten of our sister circuits, not because of any recent development in the law, but because of the dissent's preferred reading of the same Supreme Court cases that we have applied many times. We reject the dissent's invitation. Our test is fully consistent with every other circuit court's approach and, for the reasons that follow, we agree with those decisions that have thoroughly and persuasively rejected the dissent's alternative approach to Second Amendment claims. *E.g.*, *NYSRPA*, 804 F.3d at 257 n.74; *Heller II*, 670 F.3d at 1264–67.

Our two-step inquiry faithfully adheres to the Supreme Court's guidance in *Heller* and *McDonald*. The Court looked extensively to history, text, and tradition in discussing the scope of the Second Amendment right. Accordingly, history, text, and tradition greatly inform step one of the analysis, where we ask whether the challenged law implicates the Second Amendment. *See, e.g.*, *Young*, 992 F.3d at 784–826 (undertaking a detailed historical review); *Teixeira v. County of Alameda*, 873 F.3d 670, 682–87 (9th Cir. 2017) (en banc) (reviewing historical materials at length). Those sources also inform step two, where we choose strict scrutiny, intermediate scrutiny, or no scrutiny at all (as in *Heller*) by examining the effect of the law on the core of the Second Amendment right as traditionally understood. *E.g.*, *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013).

But we do not read the Supreme Court's cases as foreclosing the application of heightened scrutiny as the final step of the analysis. The Court expressly held that rational basis review is never appropriate. *Heller*, 554 U.S. at 628 n.27. Had the Court intended to foreclose the other forms of traditional review, it could have so held. Instead, and to the contrary, the Court referred specifically to "the standards of scrutiny that we have applied to enumerated constitutional rights" and held that application of heightened scrutiny is unnecessary when the law at issue "would fail constitutional muster" under any standard of scrutiny. *Id.* at 628–29.

The Court clearly rejected Justice Breyer's "judge-empowering 'interest balancing inquiry'" that, rather than corresponding to any of "the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis)," asked instead "'whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's

salutary effects upon other important governmental interests.'" *Id.* at 634 (citing *id.* at 689–90 (Breyer, J., dissenting)). But the standards that we apply—strict and intermediate scrutiny—plainly are the traditional tests and are not the interest-balancing test proposed by Justice Breyer. In *Heller*, the Court emphasized that the Second Amendment, "[l]ike the First, . . . is the very *product* of an interest balancing by the people." *Id.* at 635. The Court regularly assesses First Amendment challenges using intermediate and strict scrutiny, depending on the nature of the law and the context of the challenge. *E.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017); *Reed v. Town of Gilbert*, 576 U.S. 155, 163–65 (2015). We see no reason why those same standards do not apply to Second Amendment challenges as well. Unless and until the Supreme Court tells us and the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits that, for a decade or more, we all have fundamentally misunderstood the basic framework for assessing Second Amendment challenges, we reaffirm our two-step approach.

Here, Plaintiffs bring a facial Second Amendment challenge to California's ban on large-capacity magazines. Accordingly, Plaintiffs "must show that no set of circumstances exists under which the [statute] would be valid." *Young*, 992 F.3d at 779 (alteration in original) (internal quotation marks omitted). Our review is "limited to the text of the statute itself," and Plaintiffs' (and amici's) individual circumstances do not factor into our analysis. *Id.*

We are guided by the decisions of six of our sister circuits, all of which upheld laws banning or restricting large-capacity magazines as consistent with the Second Amendment. *Worman*, 922 F.3d 26; *ANJRPC*, 910 F.3d 106; *Kolbe*, 849 F.3d 114; *NYSRPA*, 804 F.3d 242;

Friedman, 784 F.3d 406; *Heller II*, 670 F.3d 1244; *see Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) (affirming the denial of a preliminary injunction in a case in which the plaintiffs challenged a municipal ban on large-capacity magazines). Most of those decisions applied the same general two-step approach that guides us and reached the same conclusions that we reach. In particular, they assumed without deciding, at step one, that the law implicated the Second Amendment; and held, at step two, that intermediate scrutiny applied and that the ban or restrictions survived that form of review. *Worman*, 922 F.3d at 33–40; *ANJRPC*, 910 F.3d at 116–24; *NYSRPA*, 804 F.3d at 254–64; *Heller II*, 670 F.3d at 1260–64; *see Fyock*, 779 F.3d at 996–1001 (following that same general approach in the context of an appeal from a preliminary injunction).[2]

1. *Step One: Whether the Challenged Law Implicates the Second Amendment*

At step one, we ask whether the challenged law affects conduct that the Second Amendment protects. *Young*,

[2] Sitting en banc, the Fourth Circuit reached two alternative holdings in upholding Maryland's ban on large-capacity magazines. It first held, at step one, that bans on large-capacity magazines do *not* implicate the Second Amendment. *Kolbe*, 849 F.3d at 135–37. The court next held, in the alternative and in accord with the four decisions cited in the text that, assuming any scrutiny was warranted, intermediate scrutiny applied and that the ban withstood such scrutiny. *Id.* at 138–41.

For its part, the Seventh Circuit declined to apply that court's ordinary two-step inquiry, holding instead that a municipal ban on large-capacity magazines was constitutional because those magazines were not common at the time of ratification, and the ordinance leaves residents "ample means to exercise the inherent right of self-defense that the Second Amendment protects." *Friedman*, 784 F.3d at 411 (internal quotation marks omitted).

992 F.3d at 783. Defendant argues that California's ban withstands scrutiny at this step for two reasons. First, Defendant asks us to follow the lead of the Fourth Circuit and hold that large-capacity magazines lack Second Amendment protection because they are similar to "'M-16 rifles and the like,' i.e., 'weapons that are most useful in military service.'" *Kolbe*, 849 F.3d at 142 (quoting *Heller*, 554 U.S. at 627). Second, Defendant argues that longstanding regulations have governed magazine capacity such that California's ban on large-capacity magazines survives scrutiny at this initial step of the analysis. *See Young*, 992 F.3d at 783 (holding that, if longstanding, accepted regulations have governed the subject of the challenged law, then the Second Amendment is not implicated).

Both arguments appear to have significant merit. As we describe below, large-capacity magazines have limited lawful, civilian benefits, whereas they provide significant benefits in a military setting. Accordingly, the magazines likely are "most useful in military service," at least in an ordinary understanding of that phrase. *Kolbe*, 849 F.3d at 135–37.

Moreover, Congress and some states have imposed firing-capacity restrictions for nearly a century. In 1932, Congress banned, in the District of Columbia, "any firearm which shoots automatically or semiautomatically more than twelve shots without reloading." Around the same time, several states, including California, enacted bans on firearms that could fire automatically or semi-automatically more than 10, 12, 16, or 18 bullets. 1933 Cal. Stat. 1170, § 3. The state bans were later repealed, but the District of Columbia's ban appears to have remained in place in some form continuously since 1932. We also take note of the more

recent bans, first imposed by Congress in 1994 and later imposed by nine states and some municipalities after the federal ban expired in 2004. *Cf. United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012) (holding, nine years ago, that machine guns are "unusual" because they had been banned since 1986, a total of 26 years). In addition, governments long have imposed magazine capacity limits on hunters. *See, e.g.*, 50 C.F.R. § 20.21(b) (prohibiting the hunting of most migratory game birds "[w]ith a shotgun of any description capable of holding more than three shells, unless it is plugged with a one-piece filler, incapable of removal without disassembling the gun, so its total capacity does not exceed three shells"); Cal. Fish & Game Code § 2010 ("It is unlawful . . . to use or possess a shotgun capable of holding more than six cartridges at one time, to take a mammal or bird.").

Ultimately, though, we decline to decide those two sub-issues definitively. Neither we nor the Supreme Court has decided whether the passage in *Heller* pertaining to weapons "most useful in military service" should be read as establishing a legal standard and, if so, how to interpret that phrase for purposes of step one of the constitutional analysis. *See Heller*, 554 U.S. at 627 ("It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause."). Similarly, determining whether sufficiently longstanding regulations have governed large-capacity magazines likely would require an extensive historical inquiry. *See, e.g.*, *Young*, 992 F.3d at 784–826 (undertaking a detailed historical review of regulations concerning the open carrying of arms); *Teixeira*, 873 F.3d at 682–87 (reviewing historical materials in determining whether the Second Amendment encompasses a right to sell firearms).

In many cases raising Second Amendment challenges, particularly where resolution of step one is uncertain and where the case raises "large and complicated" questions, *United States v. Torres*, 911 F.3d 1253, 1261 (9th Cir. 2019), we have assumed, without deciding, that the challenged law implicates the Second Amendment. *E.g.*, *United States v. Singh*, 979 F.3d 697, 725 (9th Cir. 2020), *cert. denied*, *Matsura v. United States*, 2021 WL 2044557, No. 20-1167 (U.S. May 24, 2021); *Mai v. United States*, 952 F.3d 1106, 1114–15 (9th Cir. 2020), *cert. denied*, 2021 WL 1602649, No. 20-819 (U.S. Apr. 26, 2021); *Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018), *cert. denied*, 141 S. Ct. 108 (2020). Our sister circuits have followed this approach specifically with respect to laws restricting large-capacity magazines. *See Worman*, 922 F.3d at 36 (assuming, without deciding, at step one due to "reluctan[ce] to plunge into this factbound morass"); *ANJRPC*, 910 F.3d at 117 (assuming, without deciding, at step one); *NYSRPA*, 804 F.3d at 257 (assuming, without deciding, at step one "[i]n the absence of clearer guidance from the Supreme Court or stronger evidence in the record"); *Heller II*, 670 F.3d at 1261 (assuming, without deciding, at step one because "we cannot be certain whether" the requirements at this step are met). Accordingly, we follow the "well-trodden and 'judicious course'" of assuming, without deciding, that California's law implicates the Second Amendment. *Pena*, 898 F.3d at 976 (quoting *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013)).

2. *Step Two: Application of an Appropriate Level of Scrutiny*

a. *Determination of the Appropriate Level of Scrutiny*

At step two, we first determine the appropriate level of scrutiny. *Torres*, 911 F.3d at 1262. "[L]aws burdening

Second Amendment rights must withstand more searching scrutiny than rational basis review." *Id.* We apply either strict scrutiny, which requires both narrow tailoring to a compelling governmental interest and the use of the least-restrictive means, *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1226–28 (9th Cir. 2019), or intermediate scrutiny, which requires a reasonable fit with an important governmental interest, *Torres*, 911 F.3d at 1263.

"The precise level of heightened scrutiny depends 'on (1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right.'" *Mai*, 952 F.3d at 1115 (quoting *Chovan*, 735 F.3d at 1138). "Strict scrutiny applies only to laws that both implicate a core Second Amendment right and place a substantial burden on that right." *Id.* Intermediate scrutiny applies to laws that either do not implicate a core Second Amendment right or do not place a substantial burden on that right. *Id.*

Defendant does not dispute that California's ban on large-capacity magazines implicates, at least in some measure, the core Second Amendment right of self-defense in the home. *See, e.g.*, *Pena*, 898 F.3d at 977 (assuming without deciding that firearm regulations implicate the core right); *see also Worman*, 922 F.3d at 30, 36 (assuming without deciding that Massachusetts' ban on large-capacity magazines implicates the core right); *Heller II*, 670 F.3d at 332 (declining to decide whether the District of Columbia's prohibition on large-capacity magazines "impinge[s] at all upon the core right protected by the Second Amendment"). Instead, Defendant argues that the ban imposes only a small burden on the Second Amendment right and that, accordingly, intermediate scrutiny is the appropriate lens through which to view California's law. We

agree. Just as our sister circuits unanimously have applied intermediate scrutiny to other laws banning or restricting large-capacity magazines,[3] we hold that intermediate scrutiny applies to California's ban.

California's ban on large-capacity magazines imposes only a minimal burden on the exercise of the Second Amendment right. The law has no effect whatsoever on which firearms may be owned; as far as the challenged statute is concerned, anyone may own any firearm at all. Owners of firearms also may possess as many firearms, bullets, and magazines as they choose. *See ANJRPC*, 910 F.3d at 118 (holding that intermediate scrutiny applied, in part because the challenged law "has no impact on the many other firearm options that individuals have to defend themselves in their home"); *Kolbe*, 849 F.3d at 138 (same: "citizens [remain] free to protect themselves with a plethora of other firearms and ammunition"); *NYSRPA*, 804 F.3d at 260 (same: "while citizens may not acquire high-capacity

[3] *Worman*, 922 F.3d at 36–38; *ANJRPC*, 910 F.3d at 117–18; *Kolbe*, 849 F.3d at 138–39; *NYSRPA*, 804 F.3d at 257–61; *Heller II*, 670 F.3d at 1261–62; *see Fyock*, 779 F.3d at 998–999 (holding that the district court did not abuse its discretion in applying intermediate scrutiny to a municipal ban on large-capacity magazines).

As we described in note 2, the Seventh Circuit did not apply, at least by name, any of the traditional levels of scrutiny. *Friedman*, 784 F.3d at 410–12. But in upholding the municipal ban on large-capacity magazines, the court plainly applied a standard far less demanding than strict scrutiny, and its analysis is fully consistent with our selection of intermediate scrutiny. *See, e.g.*, *id.* at 411 (holding that the ordinance leaves residents "ample means to exercise the inherent right of self-defense that the Second Amendment protects" (internal quotations omitted)).

magazines, they can purchase any number of magazines with a capacity of ten or fewer rounds").

Owners of firearms also may *use* those items at will. They may fire as many bullets as they would like for whatever lawful purpose they choose. The ban on large-capacity magazines has the sole practical effect of requiring shooters to pause for a few seconds after firing ten bullets, to reload or to replace the spent magazine.

Nothing in the record suggests that the restriction imposes any more than a minimal burden on the Second Amendment right to keep and bear arms. Plaintiffs do not point to any evidence that a short pause after firing ten bullets during target practice or while hunting imposes any practical burden on those activities, both of which fall outside the core Second Amendment right in any event.

Similarly, the record suggests at most a minimal burden, if any burden at all, on the right of self-defense in the home. Experts in this case and other cases report that "most homeowners only use two to three rounds of ammunition in self-defense." *ANJRPC*, 910 F.3d at 121 n.25. The use of more than ten bullets in defense of the home is "rare," *Kolbe*, 849 F.3d at 127, or non-existent, *see Worman*, 922 F.3d at 37 (noting that neither the plaintiffs nor their experts "could . . . identify even a single example of a self-defense episode in which ten or more shots were fired"). An expert in this case found that, using varying methodologies and data sets, more than ten bullets were used in either 0% or fewer than 0.5% of reported incidents of self-defense of the home. Even in those situations, the record does not disclose whether the shooter fired all shots from the same weapon, whether the shooter fired in short succession such that reloading or replacing a spent cartridge was impractical, or whether the additional bullets had any practical effect after the first ten

shots. In other words, the record here, as in other cases, does not disclose whether the added benefit of a large-capacity magazine—being able to fire more than ten bullets in rapid succession—has *ever* been realized in self-defense in the home. *See ANJRPC*, 910 F.3d at 118 ("The record here demonstrates that [large-capacity magazines] are not well-suited for self-defense."); *Kolbe*, 849 F.3d at 138 (noting the "scant evidence . . . [that] large-capacity magazines are possessed, or even suitable, for self-protection"); *Heller II*, 670 F.3d at 1262 (pointing to the lack of evidence that "magazines holding more than ten rounds are well-suited to or preferred for the purpose of self-defense or sport"). Indeed, Plaintiffs have not pointed to a single instance in this record (or elsewhere) of a homeowner who was unable to defend himself or herself because of a lack of a large-capacity magazine.[4]

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[4] Judge VanDyke's dissent faults us for relying on the rarity of instances of self-defense that use more than ten bullets while not giving enough weight to the infrequency of mass shootings, which the dissent describes as "statistically very rare." Dissent by J. VanDyke at 160. To the extent that the dissent concludes that reducing the harm caused by mass shootings is not an "important" governmental objective at step two of the analysis, we disagree. Focusing solely on the frequency of mass shootings omits the second, critical part of the analysis set out below at pages 42 to 46[C]: the incredible harm caused by mass shootings. We do not ignore the relative infrequency of mass shootings. We instead conclude—and Plaintiffs do not dispute—that, considering the frequency of mass shootings *in combination with* the harm that those events cause, reducing the number of deaths and injuries caused by mass shootings is an important goal. The dissent's analogy to commercial flights, [Dissent by J. VanDyke at 161 n.11, is illustrative: Although accidents involving commercial flights are rare, legislatures recognize that the serious harm caused by even a single crash justifies extensive regulation of the industry.

Evidence supports the common-sense conclusion that the benefits of a large-capacity magazine are most helpful to a soldier: "the use of large-capacity magazines results in more gunshots fired, results in more gunshot wounds per victim, and increases the lethality of gunshot injuries." *Fyock*, 779 F.3d at 1000; *see Kolbe*, 849 F.3d at 137 ("Large-capacity magazines enable a shooter to hit 'multiple human targets very rapidly.'"); *NYSRPA*, 804 F.3d at 263–64 ("Like assault weapons, large-capacity magazines result in 'more shots fired, persons wounded, and wounds per victim than do other gun attacks.'" (quoting *Heller II*, 670 F.3d at 1263)). A 1989 report by the Bureau of Alcohol, Tobacco, and Firearms concluded that "large capacity magazines are indicative of military firearms," in part because they "provide[] the soldier with a fairly large ammunition supply." A 1998 report by that agency found that "detachable large capacity magazine[s] [were] originally designed and produced for . . . military assault rifles." The Fourth Circuit concluded that, "[w]hatever their other potential uses . . . large-capacity magazines . . . are unquestionably most useful in military service." *Kolbe*, 849 F.3d at 137.

To the extent that the dissent asks us to balance the interests of the lawful use of large-capacity magazines against the interests of the State in reducing the deaths and injuries caused by mass shootings, we disagree for two independent reasons. First, the Supreme Court expressly rejected that type of interest balancing. *Heller*, 554 U.S. at 634. Second, to the extent that an interest-balancing inquiry is relevant, we reiterate that Plaintiffs have not pointed to a single instance—in California or elsewhere, recently or ever—in which someone was unable to defend himself or herself due to a lack of a large-capacity magazine, whereas the record describes the many deaths and injuries caused by criminals' use of large-capacity magazines during mass shootings.

Recent experience has shown repeatedly that the same deadly effectiveness of a soldier's use of large-capacity magazines can be exploited by criminals, to tragic result. In Thousand Oaks, California, a shooter equipped with large-capacity magazines murdered twelve people at a bar in 2018. Firearms equipped with large-capacity magazines "have been the weapons of choice in many of the deadliest mass shootings in recent history, including horrific events in Pittsburgh (2018), Parkland (2018), Las Vegas (2017), Sutherland Springs (2017), Orlando (2016), Newtown (2012), and Aurora (2012)." *Worman*, 922 F.3d at 39. As the Fourth Circuit explained:

> Other massacres have been carried out with handguns equipped with magazines holding more than ten rounds, including those at Virginia Tech (thirty-two killed and at least seventeen wounded in April 2007) and Fort Hood, Texas (thirteen killed and more than thirty wounded in November 2009), as well as in Binghamton, New York (thirteen killed and four wounded in April 2009 at an immigration center), and Tucson, Arizona (six killed and thirteen wounded in January 2011 at a congresswoman's constituent meeting in a grocery store parking lot).

Kolbe, 849 F.3d at 120.

In sum, large-capacity magazines provide significant benefit to soldiers and criminals who wish to kill many people rapidly. But the magazines provide at most a minimal benefit for civilian, lawful purposes. Because California's ban on large-capacity magazines imposes only

a minimal burden on the Second Amendment right to keep and bear arms, we apply intermediate scrutiny.

Before applying intermediate scrutiny, we address Plaintiffs' argument that we need not apply any scrutiny at all. Plaintiffs assert that California's law falls within the category of regulations, like the handgun ban at issue in *Heller*, 554 U.S. at 628, that fail "[u]nder any of the standards of scrutiny." We have held that the only laws that are necessarily unconstitutional in this way are those laws that "amount[] to a destruction of the Second Amendment right." *Young*, 992 F.3d at 784 (quoting *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)). Because California's law imposes, as explained above, only a slight burden on the Second Amendment right, the law plainly does not destroy the right.

The handgun ban at issue in *Heller* failed under any level of scrutiny because it "amount[ed] to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society" for the lawful purpose of self-defense, including in the home. 554 U.S. at 628. The Supreme Court explained:

> There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-

> defense in the home, and a complete prohibition of their use is invalid.

Id. at 629.

California's prohibition on large-capacity magazines is entirely different from the handgun ban at issue in *Heller*. The law at issue here does not ban any firearm at all. It bans merely a subset (large-capacity) of a part (a magazine) that some (but not all) firearms use.[5] *Heller* clearly did not prohibit governments from banning some subset of weapons. *See, e.g.*, *Pena*, 898 F.3d at 978 (applying intermediate scrutiny to a ban on the commercial sale of handguns lacking certain safety features and upholding the

[5] Judge VanDyke's dissent suggests that California's ban on large-capacity magazines is akin to a ban on all cars or on large vehicles. Dissent by J. VanDyke at 151–152. But those analogies are inapt. A ban on large-capacity magazines cannot reasonably be considered a ban on firearms any more than a ban on leaded gasoline, a ban on dangerously designed gas tanks, or speed limits could be considered a ban on cars. *E.g.*, 42 U.S.C. § 7545(n); 49 C.F.R. § 393.67; Cal. Veh. Code § 22348. Like a ban on large-capacity magazines with respect to firearms, those laws retain the basic functionality of cars—driving within reasonable limits—while preventing specific societal harms from known dangers.

The same reasoning applies to the dissent's analogy to a ban on all commercial flights. Dissent by J. VanDyke at 161 n.11. A ban on large-capacity magazines cannot reasonably be considered a ban on firearms any more than the existing, extensive regulations of commercial airlines, aircraft, pilots, and so on could be considered a ban on commercial flights. All of the dissent's analogies start from the false premise that a ban on large-capacity magazines somehow amounts to a ban on the basic functionality of all firearms, despite the fact that, as we have explained, many firearms do not use magazines; all firearms may be used with magazines of ten or fewer rounds; and no limit applies to the number of firearms or magazines that a person may possess and use.

ban); *Kolbe*, 849 F.3d at 138–39 (holding that *Heller*'s "special consideration" for handguns "does not mean that a categorical ban on any particular type of bearable arm is unconstitutional"); *Friedman*, 784 F.3d at 410 ("[A]t least some categorical limits on the kinds of weapons that can be possessed are proper.").

Nor does the fact that, among the magazines in circulation, approximately half are of large capacity alter our conclusion. As an initial matter, we question whether circulation percentages of a part that comes standard with many firearm purchases meaningfully reflect an affirmative choice by consumers. More to the point, *Heller*'s ruling that handguns, "the quintessential self-defense weapon," cannot be prohibited rested on the premise that consumers overwhelmingly chose to purchase handguns *for the purpose of self-defense in the home*. *Heller*, 554 U.S. at 628–29; *see Kolbe*, 849 F.3d at 138 (emphasizing this point). By contrast, and as described in detail above, Plaintiffs have offered little evidence that large-capacity magazines are commonly used, or even suitable, for that purpose. *See Worman*, 922 F.3d at 36–37 (holding that, unlike "the unique popularity of the handgun as a means of self-defense," "the record . . . offers no indication that [large-capacity magazines] have commonly been used for home self-defensive purposes"); *Kolbe*, 849 F.3d at 138–39 ("The handgun, of course, is 'the quintessential self-defense weapon.' In contrast, there is scant evidence . . . that . . . large-capacity magazines are possessed, or even suitable, for self-protection." (citation omitted)); *NYSRPA*, 804 F.3d at 260 n.98 ("*Heller* . . . explain[ed] that handguns are protected as 'the most popular weapon chosen by Americans for self-defense in the home.' Of course, the same cannot be said of [large-capacity magazines]." (citation omitted)).

In sum, we decline to read *Heller*'s rejection of an outright ban on the most popular self-defense weapon as meaning that governments may not impose a much narrower ban on an accessory that is a feature of some weapons and that has little to no usefulness in self-defense. We therefore reject Plaintiffs' entreaty that we strike down California's law without applying any scrutiny at all. Because California's law imposes only a minimal burden on the Second Amendment right, we apply intermediate scrutiny.

b. *Application of Intermediate Scrutiny*

"To satisfy intermediate scrutiny, the government's statutory objective must be 'significant, substantial, or important,' and there must be a 'reasonable fit' between the challenged law and that objective." *Mai*, 952 F.3d at 1115 (quoting *Silvester*, 843 F.3d at 821–22). The legislature must have drawn "reasonable" conclusions, and the evidence must "fairly support" the legislative judgment. *Pena*, 898 F.3d at 979–80.

"The test is not a strict one," and the government need not use the "least restrictive means." *Silvester*, 843 F.3d at 827 (internal quotation marks omitted). "[W]e are weighing a legislative judgment, not evidence in a criminal trial," *Pena*, 898 F.3d at 979, so "we do not impose an 'unnecessarily rigid burden of proof,'" *id.* (quoting *Mahoney v. Sessions*, 871 F.3d 873, 881 (9th Cir. 2017)), and "we do not require scientific precision," *Mai*, 952 F.3d at 1118 (internal quotation marks omitted). We may consider "the legislative history of the enactment as well as studies in the record or cited in pertinent case law." *Fyock*, 779 F.3d at 1000 (quoting *Jackson*, 746 F.3d at 966).

We defer to reasonable legislative judgments. *Pena*, 898 F.3d at 979. "[I]n the face of policy disagreements, or

even conflicting legislative evidence, 'we must allow the government to select among reasonable alternatives in its policy decisions.'" *Id.* at 980 (quoting *Peruta v. County of San Diego*, 824 F.3d 919, 944 (9th Cir. 2016) (en banc) (Graber, J., concurring)). "Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Mai*, 952 F.3d at 1118 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)); *see also Jackson*, 746 F.3d at 969 (holding that, even if the relevant science were "an open question," that conclusion "is insufficient to discredit [a legislative body's] reasonable conclusions").

Both dissents suggest that, because we have not struck down any state or federal law under the Second Amendment, we have "give[n] a blank check to lawmakers to infringe on the Second Amendment right." Dissent by J. Bumatay at 111–112; *accord* Dissent by J. VanDyke at 169. To the contrary, we have carefully examined each challenge on its own merit. The Constitution binds legislators just as it binds us. That Congress and state legislatures located in our circuit have legislated within constitutional bounds is, properly viewed, a credit to those legislatures, not evidence of an abdication of our duty. Notably, California's law is more restrained than similar laws considered by our sister circuits. *See, e.g.*, *Worman*, 922 F.3d 26 (considering a Massachusetts law that bans large-capacity magazines *and assault weapons*); *Kolbe*, 849 F.3d 114 (same: Maryland law); *NYSRPA*, 804 F.3d 242 (same: New York law & Connecticut law); *Friedman*, 784 F.3d 406 (same: City of Highland Park, Illinois law); *Heller II*, 670 F.3d 1244 (same: District of Columbia law). And our sister circuits, applying the same two-step inquiry that we apply today, have not

hesitated to strike down provisions that go too far. *See, e.g.*, *NYSRPA*, 804 F.3d at 264 (striking down, under intermediate scrutiny, a provision of New York law that prohibited the loading of a magazine with more than seven rounds of ammunition).

The California legislature, and the people of California, enacted the ban on large-capacity magazines to prevent and mitigate gun violence. As Plaintiffs properly concede and, as we have recognized before, that interest is undoubtedly important. *E.g.*, *Wilson v. Lynch*, 835 F.3d 1083, 1093 (9th Cir. 2016). California's law aims to reduce gun violence primarily by reducing the harm caused by mass shootings. Although mass shootings may be an irregular occurrence, the harm that flows from them is extensive. We readily conclude that reducing the harm caused by mass shootings is an important governmental objective. The only question, then, is whether California's ban is a "reasonable fit" for reducing the harm caused by mass shootings. *Silvester*, 843 F.3d at 821.

Many mass shootings involve large-capacity magazines, and large-capacity magazines tragically exacerbate the harm caused by mass shootings.[6] One expert reported that "it is common for offenders to fire more than ten rounds when using a gun with a large-capacity magazine in mass shootings. In particular, in mass shootings that involved use of large-capacity magazine guns, the average number of

[6] Plaintiffs dispute the reliability of Defendant's experts and the underlying data, all of which are identical or similar to the reports and data that our sister circuits have cited. *E.g.*, *ANJRPC*, 910 F.3d at 121; *Kolbe*, 849 F.3d at 124 n.3. We conclude that the evidence is sufficiently reliable for purposes of weighing California's legislative judgment. *Pena*, 898 F.3d at 979–80.

shots fired was 99." More than twice as many people were killed or injured in mass shootings that involved a large-capacity magazine compared to mass shootings where the shooter had magazines with a smaller capacity. One expert looked solely at fatalities and the deadliest mass shootings (those with at least six deaths), and he discovered that the number of fatalities from mass shootings that involved a large-capacity magazine was at least 50% greater than the number of fatalities from those shootings that involved smaller magazines. "Moreover, since 1968, [large-capacity magazines] have been used in 74 percent of all gun massacres with 10 or more deaths, as well as in 100 percent of all gun massacres with 20 or more deaths."

The reasons are simple and verified by events: large-capacity magazines allow a shooter to fire more bullets from a single firearm uninterrupted, and a murderer's pause to reload or switch weapons allows potential victims and law enforcement officers to flee or to confront the attacker. One expert described the period after a shooter has exhausted the current magazine as "precious down-time" that "affords those in the line of fire with a chance to flee, hide, or fight back." *Accord ANJRPC*, 910 F.3d at 119 ("Weapon changes and reloading result in a pause in shooting and provide an opportunity for bystanders or police to intervene and victims to flee."); *Kolbe*, 849 F.3d at 128 ("[R]educing the number of rounds that can be fired without reloading increases the odds that lives will be spared in a mass shooting . . . [because there are] more chances for bystanders or law enforcement to intervene during a pause in firing, . . . more chances for the shooter to have problems quickly changing a magazine under intense pressure, and . . . more chances for potential victims to find safety." (internal quotation marks omitted)).

As other courts have pointed out, and as the record here establishes, examples abound of the harm caused by shooters using large-capacity magazines and of people fleeing, hiding, or fighting back during a shooter's pause. The Fourth Circuit noted high-profile examples in "Newtown (where nine children were able to run from a targeted classroom while the gunman paused to change out a large-capacity thirty-round magazine), Tucson (where the shooter was finally tackled and restrained by bystanders while reloading his firearm), and Aurora (where a 100-round drum magazine was emptied without any significant break in firing)." *Kolbe*, 849 F.3d at 128. The Third Circuit updated that list a year later by noting that "[v]ideos from the Las Vegas shooting in 2017 show that concert attendees would use the pauses in firing when the shooter's high capacity magazines were spent to flee." *ANJRPC*, 910 F.3d at 120 (internal quotation marks omitted). We provide yet another intervening example: after the 2018 shooting in Thousand Oaks, California, news outlets reported survivors' accounts of escaping when the shooter paused firing. *See Thousand Oaks Mass Shooting Survivor: "I Heard Somebody Yell, 'He's Reloading,'"* (ABC News, Nov. 8, 2018), https://abc7.com/thousand-oaks-ca-shooting-california/4649166/ ("I heard somebody yell, 'He's reloading!' and that was when a good chunk of us had jumped up and went and followed the rest of the people out the window."); *People Threw Barstools Through Window to Escape Thousand Oaks, California, Bar During Shooting*, (USA Today, Nov. 8, 2018), https://www.usatoday.com/story/news/nation-now/2018/11/08/thousand-oaks-bar-shooting-people-broke-windows-stools-escape/1928031002/ ("At that point I grabbed as many people around me as I could and grabbed them down under the pool table we were closest to until he ran out of bullets for that magazine and had to reload."). The record contains additional examples of persons confronting

a shooter or escaping during a pause in firing. *See also ANJRPC*, 910 F.3d at 120 & n.24 (listing other examples).

Approximately three-quarters of mass shooters possessed their weapons, as well as their large-capacity magazines, *lawfully*. Removing the ability of potential mass shooters to possess those magazines legally thus reasonably supports California's effort to reduce the devastating harm caused by mass shootings. "[L]imiting a shooter to a ten-round magazine could mean the difference between life and death for many people." *Kolbe*, 849 F.3d at 128 (internal quotation marks omitted). Moreover, removing all large-capacity magazines from circulation reduces the opportunities for criminals to steal them. *See, e.g.*, *id.* at 140 (noting the "evidence that, by reducing the availability of . . . [large-capacity] magazines overall, the [challenged law] will curtail their availability to criminals and lessen their use in mass shootings, other crimes, and firearms accidents"). For example, the shooter who targeted Sandy Hook's elementary school stole his mother's lawfully-possessed weapons and large-capacity magazines, which he then used to kill more than two dozen people, including twenty children.

Just as our sister circuits have concluded in assessing the fit between restrictions on large-capacity magazines and the goal of reducing gun violence, we conclude that California's ban is a reasonable fit, even if an imperfect one, for its compelling goal of reducing the number of deaths and injuries caused by mass shootings. *Worman*, 922 F.3d at 39–40; *ANJRPC*, 910 F.3d at 119–22; *Kolbe*, 849 F.3d at 139–41; *NYSRPA*, 804 F.3d at 263–64; *Heller II*, 670 F.3d at 1263–64. Because we apply intermediate scrutiny, the law need not be the least restrictive means, and some measure of over-inclusiveness is permissible. *E.g.*, *Torres*, 911 F.3d at 1264 n.6. Plaintiffs and their experts speculate

about hypothetical situations in which a person might want to use a large-capacity magazine for self-defense. But Plaintiffs' speculation, not backed by any real-world examples, comes nowhere near overcoming the deference that we must give to the reasonable legislative judgment, supported by both data and common sense, that large-capacity magazines significantly increase the devastating harm caused by mass shootings and that removing those magazines from circulation will likely reduce deaths and serious injuries. *See, e.g.*, *Worman*, 922 F.3d at 40 (rejecting, as "too facile by half," the argument that a ban on large-capacity magazines sweeps too broadly because it bars law-abiding citizens from possessing them); *Pena*, 898 F.3d at 980 (upholding a firearm-safety restriction because of the deference we owe to "[t]he legislative judgment that preventing cases of accidental discharge outweighs the need for discharging a gun" in the "rare instance" where the safety restriction "disables a gun capable of providing self-defense").

Because California's ban on large-capacity magazines is a reasonable fit for the compelling goal of reducing gun violence, we reverse the district court's grant of summary judgment to Plaintiffs on their Second Amendment claim.

B. *Takings Claim*

The Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. "There are two types of 'per se' takings: (1) permanent physical invasion of the property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); and (2) a deprivation of all economically beneficial use of the property, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–16 (1992)." *Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1188 (9th Cir. 2012).

Alternatively, a regulatory taking may occur if the regulation goes "too far." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). "[R]egulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005); *see generally Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071–72 (2021) (describing these concepts).

Because Plaintiffs bring a facial takings claim, they must show that "the mere enactment of [California's law] constituted a taking." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 318 (2002). Plaintiffs must demonstrate that "no set of circumstances exists under which the [law] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

California's law requires an owner of a large-capacity magazine to choose one of four options: (1) modify the magazine so that it accommodates ten rounds or fewer; (2) sell the magazine to a firearms dealer; (3) remove the magazine to another state (where, depending on that state's laws, the owner may lawfully possess it or sell it to any third party); or (4) turn it over to a law enforcement agency for destruction.[7] Cal. Penal Code §§ 16740(a), 32310(d)(1)–

[7] Judge Bumatay's dissent begins by asserting that, "[i]f California's law applied nationwide, it would require confiscating half of all existing firearms magazines in this country." Dissent by J. Bumatay at 103. That dramatic assertion is inaccurate. The government seizes nothing; many owners are unaffected entirely; and all owners have several choices other than voluntary relinquishment of large-capacity magazines for destruction. More specifically, if every state adopted California's law, many owners of large-capacity magazines, such as current and retired law enforcement officers, would be able to keep them. Other owners would retain many options. For instance, they could modify the

(3). California's law plainly does not deprive an owner of "all economically beneficial use of the property." *Laurel Park*, 698 F.3d at 1188. For example, Plaintiffs have neither asserted nor introduced evidence that no firearms dealer will pay for a magazine or that modification of a magazine is economically impractical.

Plaintiffs' facial regulatory takings claim fails for similar reasons. Assuming, without deciding, that a facial regulatory takings claim is ever cognizable, *id.* at 1189, Plaintiffs' claim fails because they have not introduced evidence of the "economic impact of the regulation on," or the "investment-backed expectations" of, any owner of a large-capacity magazine. *Penn Cent.*, 438 U.S. at 124. Whatever merit there may be to an individual's *as-applied* regulatory takings claim, an issue that we do not reach in connection with this facial challenge, we cannot say on this record that a regulatory taking has necessarily occurred with respect to every owner of a large-capacity magazine.

Nor does the law on its face effect a physical taking. California reasonably chose to prohibit the possession of large-capacity magazines due to the danger that they pose to society. Nothing in the case law suggests that any time a state adds to its list of contraband—for example, by adding a drug to its schedule of controlled substances—it must pay all owners for the newly proscribed item. To the contrary, the Supreme Court has made clear that "the property owner necessarily expects the uses of his property to be restricted,

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magazines to accommodate ten or fewer rounds; or they could sell the magazines to a firearms dealer (who could sell the magazines to buyers abroad or to those who remain authorized to possess them, such as the thousands of current and retired law enforcement officers in this country).

from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." *Lucas*, 505 U.S. at 1027. Here, an owner of a large-capacity magazine may continue to use the magazine, either by modifying it to accept a smaller number of bullets or by moving it out of state, or the owner may sell it. On review of a facial challenge, we fail to see how those options are necessarily inadequate in all circumstances.

We do not read the Supreme Court's decisions in *Loretto*, 458 U.S. 419, and *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), as expansively as Plaintiffs do. In *Loretto*, 458 U.S. at 426, the Court held that a mandated physical invasion of a landlord's real property for the installation of cable-television devices constituted a taking. The Court rejected, as "prov[ing] too much," the argument that a landlord could avoid the regulation by ceasing to rent the property. *Id.* at 439 n.17. Similarly, in *Horne*, 576 U.S. at 361, the Court held that a requirement that raisin growers and handlers grant the government possession and title to a certain percentage of raisins constituted a physical taking. The Court rejected the argument, "at least in this case," that no taking had occurred because grape farmers could avoid the raisin market altogether by, for example, making wine instead of raisins. *Id.* at 365.

Those cases differ from this one in at least two material ways. First, unlike in *Loretto* and *Horne*, the government here in no meaningful sense takes title to, or possession of, the item, even if the owner of a magazine chooses not to modify the magazine, remove it from the state, or sell it. That California opted to assist owners in the safe disposal of large-capacity magazines by empowering law enforcement agencies to accept magazines voluntarily tendered "for

destruction," Cal. Penal Code § 32310(d)(3), does not convert the law into a categorical physical taking.

Second, *Loretto* and *Horne* concerned regulations of non-dangerous, ordinary items—rental buildings and raisins, "a healthy snack." *Id.* at 366. Like the Third Circuit, *ANJRPC*, 910 F.3d at 124 & n.32, we do not read *Loretto* and *Horne* as requiring a government to pay whenever it concludes that certain items are too dangerous to society for persons to possess without a modest modification that leaves intact the basic functionality of the item. *See Loretto*, 458 U.S. at 436 (holding that a taking had occurred because the owner "can make no nonpossessory use of the property"). Mandating the sale, transfer, modification, or destruction of a dangerous item cannot reasonably be considered a taking akin to a physical invasion of a rental building or the physical confiscation of raisins. *See ANJRPC*, 910 F.3d at 124 (rejecting a similar takings challenge to a ban on large-capacity magazines because the owners can, among other things, sell or transfer the magazines or modify them to accept fewer rounds).

Because Plaintiffs' facial takings claim fails, we reverse the district court's grant of summary judgment to Plaintiffs on their takings claim.

REVERSED and REMANDED for entry of judgment in favor of Defendant.

GRABER, Circuit Judge, concurring:

As the majority opinion explains, *District of Columbia v. Heller*, 554 U.S. 570 (2008), does not provide a clear framework for deciding whether a statute does or does not

violate the Second Amendment. Indeed, the Court recognized as much when it wrote:

> Justice BREYER chides us for leaving so many applications of the right to keep and bear arms in doubt . . . . But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than *Reynolds v. United States*, 98 U.S. 145 (1879), our first in-depth Free Exercise Clause case, left that area in a state of utter certainty.

Id. at 635. But *Heller* does strongly suggest an analogy to the free speech guarantee of the First Amendment. For example:

–"Just as the First Amendment protects modern forms of communications, *e.g.*, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 (1997), . . . the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582.

–In regard to the extent of the Second Amendment right, the Court observed: "Of course the right [to keep and bear arms] was *not unlimited, just as the First Amendment's right of free speech was not*, *see*, *e.g.*, *United States v. Williams*, 553 U.S. 285 (2008)." *Id.* at 595 (emphasis added).

–"Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods. This Court first held a law to violate the First Amendment's guarantee of freedom of speech in 1931, almost 150 years after the Amendment was ratified . . . . Even a question as basic as

the scope of proscribable libel was not addressed by this Court until 1964, nearly two centuries after the founding." *Id.* at 625–26 (citations omitted).

–Rational-basis scrutiny cannot "be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech . . . or the right to keep and bear arms." *Id.* at 628 n. 27.

–And, finally:

> *The First Amendment contains the freedom-of-speech guarantee* that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong[-]headed views. *The Second Amendment is no different.* Like the First, it is the very *product* of an interest balancing by the people.

Id. at 635 (first and second emphases added).

Under the First Amendment, we review laws that regulate speech under the standard of intermediate scrutiny; laws that "leave open ample alternative channels for communication of the information" and that place "reasonable restrictions on the time, place, or manner of protected speech" are permissible. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). By repeatedly drawing an analogy to the First Amendment's Free Speech Clause, *Heller* strongly suggests that intermediate scrutiny can apply to the Second Amendment, too. Accordingly, reasonable restrictions on the time, place, or manner of exercising the Second Amendment right to keep and bear arms are permissible if they leave open ample alternative means of

exercising that right, the central component of which is individual self-defense. *Heller*, 554 U.S. at 599.

Other courts, including ours, have applied the First Amendment analogy to analyze a Second Amendment challenge. We held in *Jackson v. City & County of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014), that "First Amendment principles" inform our analysis. In particular, "firearm regulations which leave open alternative channels for self-defense are less likely to place a severe burden on the Second Amendment right than those which do not," and "laws which regulate only the '*manner* in which persons may exercise their Second Amendment rights' are less burdensome than those which bar firearm possession completely." *Id.* (quoting *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)); *accord Hirschfield v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 5 F.4th 407, 415 (4th Cir. 2021) ("Just as the First Amendment employs strict scrutiny for content-based restrictions but intermediate scrutiny for time, place, and manner regulations, the scrutiny in [the Second Amendment] context depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." (internal quotation marks omitted)); *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 198 (5th Cir. 2012) ("In harmony with well-developed principles that have guided our interpretation of the First Amendment, we believe that a law impinging upon the Second Amendment right must be reviewed under a properly tuned level of scrutiny—i.e., a level that is proportionate to the severity of the burden that the law imposes on the right."); *United States v. Decastro*, 682 F.3d 160, 167 (2d Cir. 2012) ("In deciding whether a law substantially burdens Second Amendment rights, it is therefore appropriate to consult principles from other areas of constitutional law, including the First

Amendment (to which *Heller* adverted repeatedly)."); *Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) ("*Heller II*") ("As with the First Amendment, the level of scrutiny applicable under the Second Amendment surely depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." (internal quotation marks omitted)); *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) ("Borrowing from the Court's First Amendment doctrine" in formulating an appropriate test for Second Amendment challenges); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (looking to "the First Amendment speech context" in applying intermediate scrutiny to a law that "is more accurately characterized as a regulation of the manner in which persons may lawfully exercise their Second Amendment rights").

Applying those principles here, intermediate scrutiny is the appropriate standard for assessing California's ban on large-capacity magazines. Other circuits have recognized, and I agree, that a ban on large-capacity magazines leaves open ample alternative means of self-defense. *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 118 (3d Cir. 2018) *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 260 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 411 (7th Cir. 2015). As the majority opinion describes more fully, citizens have a nearly unlimited array of weapons that they may use, and very close to 100% of instances of self-defense use fewer—typically far fewer—bullets than ten. But even considering a rare situation in which someone defending a home wishes to fire more than ten bullets in a short period of time, alternatives nevertheless remain: the shooter may carry more than one firearm, more than one magazine, or extra bullets for reloading the magazine. Because of the inconvenience of

carrying more than one firearm or the delay of a few seconds while a magazine is changed, those options are not a perfect substitute for a single magazine loaded with scores of bullets. But alternative-means analysis does not require an exact match. *See, e.g.*, *Jackson*, 746 F.3d at 964 (applying intermediate scrutiny to San Francisco's requirement that a gun be kept in a safe at home when not carried on the person because "a modern gun safe may be opened quickly" and because "San Franciscans are not required to secure their handguns while carrying them on their person"); *Mastrovincenzo v. City of New York*, 435 F.3d 78, 101 (2d Cir. 2006) ("The requirement that ample alternative channels exist does not imply that alternative channels must be perfect substitutes for those channels denied to plaintiffs by the regulation at hand." (internal quotation marks omitted)). Individuals plainly have ample alternative means for self-defense.

And, because the only practical effect of California's law is the inability of a shooter to fire more than ten bullets without pause, the regulation is akin to a reasonable manner restriction. As far as the challenged statute is concerned, a shooter may fire any firearm at all and as many times as the shooter chooses, but only in a manner that requires briefly pausing after ten shots. *See Heller II*, 670 F.3d at 1262 (holding that D.C.'s ban on large-capacity magazines was akin to a regulation of the manner in which speech takes place). In conclusion, because California's ban on large-capacity magazines imposes only a minimal burden on the Second Amendment right to keep and bear arms, intermediate scrutiny applies. The majority opinion explains why California's law meets that constitutional standard.

To be sure, the First Amendment and the Second Amendment differ in many important respects (including

text and purpose), and the analogy is imperfect at best. *See Young v. Hawaii*, 992 F.3d 765, 827–28 (9th Cir. 2021) (en banc), *petition for cert filed*, (U.S. May 11, 2021) (No. 20-1639) (rejecting analogy to the First Amendment's "prior restraint" doctrine when analyzing firearms-licensing laws). Among other things, firearms present an inherent risk of violence toward others that is absent in most First Amendment cases. *See Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) (distinguishing the Second Amendment right from other fundamental rights on this ground, as one justification for refusing to apply strict scrutiny). Nonetheless, in my view *Heller* suggests that we should apply that analogy when appropriate. And I think that it is appropriate here to conclude that the challenged law is similar to a permissible "manner" restriction on protected speech.

BERZON, Circuit Judge, with whom THOMAS, Chief Judge, and PAEZ, MURGUIA, WATFORD, and HURWITZ, Circuit Judges, join, concurring:

I concur in Judge Graber's principal opinion for the Court. I write separately to respond to the substance of the "text, history, and tradition" approach to Second Amendment legal claims, laid out in detail and advocated by Judge Bumatay's Dissent. Bumatay Dissent at 103–143. In connection with that response, I shall offer a brief theoretical and historical defense of the two-step, tiered scrutiny approach used by eleven of the federal courts of appeal in Second Amendment cases. *See* Principal Opinion at 23–24 (referencing cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits).

As I hope to demonstrate, the notion that judges can avoid so-called subjectivity—meaning, I gather, adjudging the validity of an arms-control regulation on the basis of their own biases rather than on the basis of ascertainable, self-limiting standards and procedures—more successfully under the "text, history, and tradition" approach than under the two-step, tiered scrutiny analysis is a simplistic illusion. Unlike the "text, history, and tradition" approach, the two-step, tiered scrutiny approach requires courts to show their work, so to speak, both to themselves and to readers and other courts. It incorporates historical analysis at the initial stage—that is, in considering whether a given kind of arms-related behavior falls within the scope of Second Amendment's protection at all. *See, e.g.*, *Young v. Hawaii*, 992 F.3d 765, 783–84 (9th Cir. 2021) (en banc), *petition for cert. filed* (U.S. May 11, 2021) (No. 20-1639); *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) (en banc); *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014). But where the available historical materials are either indeterminate, as here, Principal Opinion at 30, or indicate that the particular behavior *does* fall within the scope of the "right of law-abiding, responsible citizens to use arms in defense of hearth and home" that the Second Amendment was intended to protect, *District of Columbia v. Heller*, 554 U.S. 570, 616, 628, 635 (2008), a court applying the two-step approach moves on to the second stage of the inquiry. That stage requires the court expressly to consider and carefully to calibrate the nature of the challenged regulation and the government interests at hand, exposing the court's analysis and interpretive choices to plain view.

In contrast, resort to text, history, and tradition alone when assessing the constitutionality of particular, discrete arms regulations (as opposed to when assessing broader questions regarding the general reach of the Second

Amendment, as was undertaken in *Heller*, 554 U.S. at 576–628) obscures the myriad decisions that underlie coming to a resolution regarding the validity of a specific arms regulation using such an analysis. And so, far from limiting judicial discretion, the "text, history, and tradition" approach draws a veil over a series of decisions that are not preordained and that materially impact the outcome in any given case.

Additionally, the notion that text, history, and, especially, "tradition" are objectively ascertainable disregards what linguists, historians, and anthropologists have long recognized: language can be indeterminate, especially as time passes; ascertaining what happened in the past is contingent and variable, because both the data available and the means of structuring and analyzing that data vary over time; and "tradition" is a term with little stable meaning, both as to the time period it takes for a "tradition" to become established and as to the individuals or communities whose habits and behaviors are said to establish a "tradition."

In short, the appeal to objectivity in the Bumatay Dissent, while alluring, is spurious, as the "text, history, and tradition" approach is ultimately an exercise in wishful thinking. There is good reason that jurists have come to favor application of the tiered scrutiny approach to many forms of constitutional adjudication, including in Second Amendment cases. The tiered scrutiny approach requires judges carefully to attend to their own thought processes, keeping their eyes open, rather than closed, to the aspiration of bias-free and objective decisionmaking.

I.

An evaluation of the text of the Second Amendment and the history and traditions of our nation are assuredly important considerations in any case involving the Second Amendment. "[T]he Supreme Court's guidance in *Heller* and *McDonald* . . . looked extensively to history, text, and tradition in discussing the scope of the Second Amendment right." Principal Opinion at 25; *see also Young*, 992 F.3d at 783–84; *Teixeira*, 873 F.3d at 682; *Jackson*, 746 F.3d at 960. The principal opinion recognizes the important role that text, history, and tradition play in a Second Amendment case, noting that those considerations factor into both parts of the Court's two-step analysis. Principal Opinion at 25. Specifically, text, history, and tradition "greatly inform step one of the analysis, where we ask whether the challenged law implicates the Second Amendment," and they "also inform step two, where we choose strict scrutiny, intermediate scrutiny, or no scrutiny at all (as in *Heller*) by examining the effect of " a disputed law "on the core of the Second Amendment right as traditionally understood." *Id.*

Judge Bumatay agrees that the text, history, and tradition of the Second Amendment should guide our inquiry with respect to the overall scope of the Second Amendment. Bumatay Dissent at 104, 109–110. But his proposition is that those three factors must also be *dispositive* with respect to the question whether any given gun regulation, no matter how discrete, is constitutional. *Id.* In other words, under his view, *every* Second Amendment case should begin *and end* with an examination of text, history, and tradition. *Id.*

According to the Bumatay Dissent, precedent directs us to "dispense[]" with the principal opinion's two-step, tiered scrutiny approach and replace it with the "text, history, and tradition" test. *See, e.g.*, Bumatay Dissent at 104–105, 108,

111–112. Judge Graber's opinion for the Court explains why that precedent-based argument is mistaken, Principal Opinion at 25–26, as does Judge Ginsburg's majority opinion for the D.C. Circuit in *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1264–67 (D.C. Cir. 2011). I do not repeat that discussion.

Aside from the incorrect precedent argument, the Bumatay Dissent maintains, principally, that the "text, history, and tradition" test should govern Second Amendment legal disputes because it is inherently more objective and less subject to manipulation than the two-step approach. *See, e.g.*, Bumatay Dissent at 109–112, 121–125. Contrary to that assertion, there are several reasons why text and history and, especially, tradition fall short of the judge-constraining attributes with which they are endowed by Judge Bumatay and the (uniformly non-controlling) appellate opinions on which he relies. *See* Bumatay Dissent at 115–118. This concurrence will explain why a framework that relies exclusively on text, history, and tradition to adjudicate Second Amendment claims provides only the aura, but not the reality, of objectivity and resistance to manipulation based on a judge's supposed biases when applied to discrete regulations governing activity that falls within the scope of the Second Amendment, as that scope was determined by *Heller*.[1]

[1] There is no reason to think that "personal motives" such as a distaste for firearms or a lack of familiarity with firearms influenced the outcome of this case. Hurwitz Concurrence at 100–103. A judge's obligation is to be aware of their biases and vigorously avoid using them to decide cases, not to bleach their minds, an impossibility. *See, e.g.*, *Miles v. Ryan*, 697 F.3d 1090, 1090–91 (9th Cir. 2012).

A.

Beginning with the "text" prong of the "text, history, and tradition" framework, the evolution of language over time poses a significant problem. Words do not have inherent meaning. To the contrary, the meaning of a text depends in large part on "how the interpretive community alive at the time of the text's adoption understood" the words as they were used in the text, and that understanding is unlikely to match the understanding of a future interpretive community. Frank H. Easterbrook, *Foreword* to Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts xxv (2012).

This problem arises frequently in textual interpretation cases involving "statutes of long-standing vintage." *United States v. Kimsey*, 668 F.3d 691, 699–701 (9th Cir. 2012). To be sure, it is not impossible to navigate this difficulty and avoid erring in some such cases, *see, e.g.*, *id.* But the older a text is, the more distant we become from the interpretive community alive at the time of the text's adoption, and the less able we are to approach a text through the perspective of such people. Easterbrook, *supra*, at xxv. There comes a point where the original meaning of the text "is no longer recoverable reliably," as it has simply been lost to the passage of time. *Id.* When problems of this kind surface in Second Amendment cases involving the constitutionality of discrete firearm regulations, the text of the Second Amendment is unlikely to offer a dependable solution.

More importantly for present purposes, although the word "text" appears in the title of the Bumatay Dissent's "text, history, and tradition" test, the language of the Second Amendment does not play much of an operative role in the Dissent's application of that test to the large-capacity magazine regulation here challenged, and for good reason.

As the reasoning of the Dissent illustrates, the primary focus of the "text, history, and tradition" framework, as applied to specific regulations, is, unsurprisingly, on evidence of our nation's history and traditions. Bumatay Dissent at 125–142. The language of the Constitution was necessarily drafted at a high level of abstraction. Its broad language becomes less informative the more specific the inquiry at issue, and textual analysis therefore often plays only a minimal role in analyzing how a constitutional provision applies to a specific regulation. Put differently, although the language of the Second Amendment played a vital role in determining the overall scope of the Amendment in *Heller*, 554 U.S. at 576–603, the Amendment's text is unlikely to provide much guidance in cases involving the validity of discrete regulations. The "text" prong of the "text, history, and tradition" approach is therefore unlikely to yield ascertainable answers in cases where the Second Amendment's general language is applied to narrow, particular regulations targeting modern arms devices. I therefore concentrate my critique on the "history" and "tradition" prongs of the Bumatay Dissent's "text, history, and tradition" approach.

B.

The "history" prong, when relied upon as a mandatory, independently dispositive element of the "text, history, and tradition" approach, as applied to discrete regulations, has considerable shortcomings. To begin, without expressing any opinion regarding the actual accuracy of the historical analysis embedded in the *Heller* decision—which would be inappropriate, given that *Heller* is controlling precedent—I note that many "historians, scholars, and judges have . . . express[ed] the view that the [Supreme Court's] historical account was flawed." *McDonald v. City of Chicago*,

561 U.S. 742, 914 (2010) (Breyer, J., dissenting) (citing David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. Rev. 1295 (2009); Paul Finkelman, *It Really Was About a Well Regulated Militia*, 59 Syracuse L. Rev. 267 (2008); Patrick J. Charles, *The Second Amendment: The Intent and Its Interpretation by the States and the Supreme Court* (2009); William G. Merkel, The District of Columbia v. Heller *and Antonin Scalia's Perverse Sense of Originalism*, 13 Lewis & Clark L. Rev. 349 (2009); Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry Into the Right to Bear Arms*, 29 J. Early Republic 585 (2009); Saul Cornell, *St. George Tucker's Lecture Notes, the Second Amendment, and Originalist Methodology: A Critical Comment*, 103 Nw. U. L. Rev. 1541 (2009); Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, New Republic, Aug. 26, 2008 ("*In Defense of Looseness*"); Richard A. Epstein, *A Structural Interpretation of the Second Amendment: Why* Heller *Is* (*Probably*) *Wrong on Originalist Grounds*, 59 Syracuse L. Rev. 171 (2008)); *see also* Robert J. Spitzer, *Saving the Constitution from Lawyers: How Legal Training and Law Reviews Distort Constitutional Meaning* 146–48 (2008); Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 Hastings Const. L.Q. 509, 510–11, 513 (2009); Noah Shusterman, *Armed Citizens* 223–24 (2020).

We are, of course, bound by the conclusion *Heller* drew from historical materials regarding the protection accorded by the Second Amendment to the individual right to keep and bear arms for self-defense, and I do not mean to suggest that that conclusion should be revisited. Rather, the salient fact for present purposes is that many jurists and scholars well-educated on the subject fundamentally disagree with

the Supreme Court's historical analysis in *Heller*, demonstrating that Second Amendment history is very much open to dispute.

The Bumatay Dissent nonetheless characterizes history as both certain and static, as if we can obtain an enduring understanding of what happened in the past after engaging in a single, meticulous review of cut-and-dried evidence. *See, e.g.*, Bumatay Dissent at 120–121. But our understanding of history is, in fact, ever-changing. For one thing, we unearth new historical documents over time, and those documents sometimes lead us to revise our earlier understandings of history. *Cf.* Josh Blackman & James C. Phillips, *Corpus Linguistics and the Second Amendment*, Harv. L. Rev. Blog, Aug. 7, 2018. The advent of the internet and other tools has also dramatically changed our ability to access and systematically review historical documents. When *Heller* was decided, for example, the Supreme Court had access to "only a fairly narrow range of sources" regarding the common usage of the Second Amendment's terms at the time the Second Amendment was drafted. *Id*. Now, there are enormous databases of historical documents, including one overseen by Brigham Young University that comprises about one hundred thousand works produced between 1760 and 1799, such as letters, newspapers, sermons, books, and journals. *Id.* The ability to perform electronic searches using such databases has led to substantial new discoveries regarding our nation's history, including hypotheses related to the meaning of the term "keep and bear arms" in the Second Amendment. *Id.*

Society also progresses over time, resulting in changed attitudes that may in turn affect our view of history. Take the Reconstruction Era as an example. A "traditional portrait" of the era, showcased in films like *Birth of a Nation*

and embraced for much of the twentieth century, framed President Andrew Johnson as a hero who restored home rule and honest government to the South in a triumph over radical Northerners, who sought to plunder the spoils of the region, and childlike freedmen, who were not prepared to exercise the political power that had been foisted upon them. Eric Foner, *Reconstruction Revisited*, 10 Revs. Am. Hist. 82, 82–83 (1982). But in the 1960s, following the Second Reconstruction and a change in attitude toward people of color, the narrative flipped. Freedmen were recast as heroes, white Southerners as villains, and the Reconstruction governments as far more competent than had previously been let on. *Id.* at 83–84. A decade later, wary of exaggerating the faults and virtues of the people of the time, historians rejected both accounts and began questioning whether "much of importance happened at all" during the Reconstruction Era. *Id.* at 84–85. The dominant account of the Reconstruction Era has continued to evolve over time, both because new scholars, many of them scholars of color, have contributed to the conversation, and because the events of the period appear quite different from the vantage point of passing time. *Id.* at 86–95. In other words, interpreting history is not as simple as compiling and processing stacks of paper. *See also, e.g.*, David W. Blight, *Historians and "Memory*," Common Place, Apr. 2002; Jonathan Gienapp, *Constitutional Originalism and History*, Process: A Blog for American History (Mar. 20, 2017), http://www.processhistory.org/originalism-history/.

Additionally, judges are not trained historians, and the study of history is rife with potential methodological stumbling blocks. The volume of available historical evidence related to the legal question in any discrete Second Amendment controversy, for example, will vary enormously and may often be either vast or quite sparse.

On the one hand, for legal questions as to which there is a wealth of historical evidence, an imprecise research methodology can lead to what has been "derisively referred to . . . as 'law office history.'" *In Defense of Looseness*, *supra*. As then-Judge Posner explained it, "law office history" refers to a process by which a judge or advocate "sends his law clerks" or associates "scurrying to the library and to the Web for bits and pieces of historical documentation" that will support a given position on a legal issue. *Id.* When the clerks or associates are "numerous and able," when they "enjoy[] the assistance of . . . capable staffs" such as the staff at the Supreme Court library, or when they can rely on similar labor distilled into "dozens and sometimes hundreds of amicus curiae briefs," it becomes "a simple matter . . . to write a plausible historical defense" of the desired position. *Id.* Accordingly, even if an opinion appears to rely on a "breathtaking" number of historical references, the underlying analysis may not constitute "disinterested historical inquiry," but may instead represent "the ability of well-staffed courts" or firms to pick from among the available historical sources those most conducive to a given proposition. *Id.*

To so recognize is not to suggest that judicial inquiries under the "text, history, and tradition" test—as opposed to the inquiries of advocates, which are necessarily result-driven—would be directed in advance at reaching a foreordained result. Rather, the inquiries would be directed at reaching *a* result, which necessitates marshaling the available historical materials such that they support a single legal conclusion. *See, e.g.*, Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 Ann. Rev. L. & Soc. Scis. 307, 308–10 (2013). But history, assessed in a genuinely neutral fashion, may not support one

conclusion. Instead, it may support conflicting conclusions or no conclusion at all.

Although a historical account with a thesis or viewpoint may read better than one that acknowledges ambiguity or irresolution, historians are trained to sift through materials with an underlying acceptance that the materials may or may not support one conclusion or another, or that the conclusions that can be drawn from the evidence may evolve over time. Put differently, historians need not resolve apparent contradictions and may follow the evidence where it leads. *See* Gienapp, *supra*. Courts do not have that luxury. Judges must definitively answer specific, detailed legal questions—here, whether the Second Amendment permits states to ban high-capacity magazines that allow a weapon to fire more than ten rounds without reloading. That need to provide an answer—referred to in the literature as "motivated thinking" or "motivated reasoning," *see, e.g.*, Sood, *supra*—can skew a court's historical analysis, much as scientific research can be undermined by the desire to make some discovery rather than none, *see, e.g.*, Danielle Fanelli & John P. A. Ioannidis, *U.S. Studies May Overestimate Effect Sizes in Softer Research*, Proc. Nat'l Acad. Scis. U.S., Sept. 10, 2013, at 1–6.

On the other hand, an inquiry into some legal questions—such as the question whether a specific contemporary arms regulation is lawful under the "text, history, and tradition" test—may turn on a very narrow array of available historical resources. As the Supreme Court recognized in the context of a Title VII dispute, "small sample size may, of course, detract from the value" of evidence. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977). This Court has so recognized as well, noting that if an inquiry relies on an unduly small number of

data points, it will have "little predictive value and must be disregarded." *Morita v. S. Cal. Permanente Med. Grp.*, 541 F.2d 217, 220 (9th Cir. 1976). This "small sample size" problem has been discussed in numerous scholarly contexts, including with respect to historical analyses involving firearms. *See, e.g.*, James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 Wm. & Mary L. Rev. 1777, 1826 (2002) (maintaining that a scholar published a book that made unsubstantiated claims about gun ownership in America based on faulty science, including a failure to account for and report sample sizes). So there may be occasions in which the universe of available historical evidence is too small for courts to draw reliable conclusions, rendering the "history" prong of the "text, history, and tradition" framework inoperable.

Sample size issues and the drive to draw a single legal conclusion are not the only potential methodological pitfalls for the "text, history, and tradition" test. Cognitive biases ranging from confirmation bias to anchoring bias, *see, e.g.*, Daniel Kahneman, *Thinking Fast and Slow* 80–81, 119–28, 324, 333 (2011), can cloud a judge's analysis.[2] And very few judges have received formal training on technical elements of historiographical research design, such as the importance of drawing from varied sources and assessing sources to ferret out potential bias imparted by the author. The risk that error will result from these imperfections in the "history" prong of the "text, history, and tradition" framework counsels against adopting the framework as the *controlling* test for *all* Second Amendment disputes, as

[2] Confirmation bias refers to the tendency to interpret new information as confirmation of one's pre-existing assumptions or theories. Anchoring bias refers to the tendency to over-rely on the initial evidence we discover as we learn about a given topic. *See id.*

opposed to relying on history as a useful tool embedded in a structured, sequential inquiry such as the two-step, tiered scrutiny approach.

C.

As flawed as the suppositions of objectivity and certainty are for the "text" and "history" prongs of the Bumatay Dissent's proposed framework, as applied to discrete regulations, the focus on "tradition" is even more problematic with regard to those supposed virtues. Courts have "vast discretion in deciding which traditions to take into account" and "substantial discretion in determining how to define the tradition at issue." John C. Toro, *The Charade of Tradition-Based Substantive Due Process*, 4 N.Y.U. J. L. & Liberty 172, 181 (2009). Additionally, even if a court finds that tradition does support a given legal outcome, the court "must take the further step of determining whether" that tradition "*should* receive modern-day protection—an inquiry which depends heavily" on the court making a contextual judgment that accounts for the contemporary legal milieu. *Id.*

In particular, a foundational question plaguing any tradition-based framework is "[w]hose traditions count." *Id.* at 181. For example, in several substantive due process cases such as *Lawrence v. Texas*, 539 U.S. 558, 567–68 (2003), the Supreme Court appealed to historical attitudes going back to ancient times to support its interpretation. Toro, *supra*, at 181–83. But when determining in *Washington v. Glucksberg*, 521 U.S. 702 (1997), whether individuals have a right to physician-assisted suicide, the Supreme Court disregarded a trove of ancient history supporting the practice even though that history had been extensively referenced in the opinion on review, and instead began its analysis by citing commentators from the thirteenth

century. *Id.* at 710; *see also* Toro, *supra*, at 183–85. Whereas ancient authorities were, by and large, tolerant of suicide, St. Augustine's interpretation of the demands of the Fifth Commandment drastically reshaped the way Western societies viewed the subject by the time of the thirteenth century. Toro, *supra*, at 184–85. The Supreme Court chose to begin its analysis at that point and, accordingly, held that the right to physician-assisted suicide is not deeply rooted in tradition. *Glucksberg*, 521 U.S. at 735.

As this example illuminates, a framework that relies heavily on tradition is inherently indeterminate, because it often depends upon the choice of traditions on which to rely. My point is not that such choices are illegitimate—courts have to make decisions between competing legal positions, and such decisions necessarily require choices—but instead that there *are* choices that must be made in appealing to tradition. Without transparency as to those choices and a structured procedure for making those choices, the pretense of objectivity collapses.

Moreover, there are frequently traditions that support each side of a constitutional controversy. *Id.* at 186. A framework focused predominantly on tradition leaves litigants free to cherry-pick from those traditions to justify their preferred results. *Id.*

In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), for example, the Supreme Court addressed the constitutionality under the Fourteenth Amendment's Due Process Clause of a California statute providing that "a child born to a married woman living with her husband is presumed to be a child of the marriage." *Id.* at 113 (plurality opinion). The natural father of an adulterously conceived child brought suit, arguing that the law infringed upon his and the child's due process right to maintain a relationship with one another. *Id.*

Justice Scalia, writing for the plurality, disagreed, concluding that "our traditions have protected the marital family" and have generally declined to afford rights to the natural father of an adulterously conceived child. *Id.* at 124–27 & n.6.

Justice Brennan, in dissent, maintained that rather than focusing on historical traditions related to the rights of an adulterous natural father, the Court should instead focus on the historical tradition of affording great respect to the parent-child relationship. *Id.* at 139. In defending that position, Justice Brennan noted that the concept of tradition "can be as malleable and as elusive as 'liberty' itself," and admonished the plurality for "pretend[ing] that tradition places a discernible border around the Constitution." *Id.* at 137. Although that "pretense is seductive" because "it would be comforting to believe that a search for 'tradition' involves nothing more idiosyncratic or complicated than poring through dusty volumes on American history," "reasonable people can disagree about the content of particular traditions" and about "which traditions are relevant." *Id.*

With respect to the Second Amendment, historical sources from the Founding Era through the late nineteenth century indicate that members of the public held vastly different views on gun ownership and gun regulation depending on where they lived, both in terms of geographical region and in terms of whether the individual lived in an urban or rural environment. *See, e.g.*, Joseph Blocher & Darrell A. H. Miller, *The Positive Second Amendment: Rights, Regulation, and the Future of* Heller 20, 29–35 (2018); Joseph Blocher, *Firearm Localism*, 123 Yale L.J. 82, 112–21 (2013). Because a litigant who advocates a certain outcome may cite predominantly to authorities from

a region or locality that tends to support the litigant's view, the "tradition" prong of the "text, history, and tradition" test is highly manipulable. Indeed, this aspect of the approach renders it akin, in many ways, to an analysis of legislative intent—a practice rejected by textualists because the "legislature is a hydra-headed body whose members may not" share a common view. Richard A. Posner, *Reflections on Judging* 189 (2013); *see also* Gienapp, *supra*. Similarly, the annals of history and lore rarely divulge a common view on what practices qualify as traditional.

Relatedly, there are often permissive and restrictive traditions that "cut in opposite directions." Toro, *supra*, 189. In the context of a case involving a patient's right to refuse life-prolonging medical treatment, for example, the Supreme Court had to choose between two traditions—one permissive tradition of allowing the state to regulate suicide, and one restrictive tradition of forbidding states from interfering in private medical decisions involving refusal of treatment. *Cruzan ex rel. Cruzan v. Dir., Mo. Dept. Health*, 497 U.S. 261, 269–82 (1990). The Supreme Court ultimately ruled in favor of the restrictive tradition, but, from the perspective of adhering to our nation's traditions, the opposite conclusion would have also been justified.

So far, no jurist or academic has come forward with a workable method of choosing between conflicting restrictive and permissive traditions. *See* Toro, *supra*, at 190–91. Crucially, for our purposes, the "text, history, and tradition" test provides no guideposts on how a court should navigate indistinct traditions or weigh between conflicting traditions, and it therefore cannot provide a workably objective or bias-filtering framework for adjudicating Second Amendment controversies regarding discrete, specific regulations.

Even if there is only one relevant tradition at issue within a given case, there is still the problem of deciding how narrowly or broadly to define the tradition. That choice can be outcome determinative regarding the court's assessment of the impact of the given tradition on, for example, the validity of a specific arms regulation. *Id.* at 186. A historical prohibition on carrying firearms in "fairs, markets, and in the presence of the King's ministers," for example, "could support regulations of wildly different scope: wherever people congregate, wherever the state is in control, wherever people buy things, or wherever government agents are stationed." Blocher & Miller, *supra*, at 130; *see also* Peter J. Smith, *Originalism and Level of Generality*, 51 Ga. L. Rev. 485, 487 (2017); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. Chi. L. Rev. 349, 358 (1992).

According to an analysis of fifty recent Second Amendment opinions, a court's decision to use a higher level of generality when describing the core legal question in a given dispute usually supported striking down a challenged arms regulation, whereas a court's decision to use a lower degree of generality typically led to the law being upheld. Mark Anthony Frassetto, *Judging History: How Judicial Discretion in Applying Originalist Methodology Affects the Outcome of Post-*Heller *Second Amendment Cases*, 29 Wm. & Mary Bill Rights J. 413, 415, 438–39 (2020). In the context of public carry disputes, for example, the study found that "[j]udges favoring a broad right to carry in public have generally framed the question as whether the Second Amendment protects a right to carry arms in public at all," whereas "judges who have favored upholding public carry restrictions have" phrased the question more narrowly, characterizing the question as "whether carrying a concealed weapon in public was understood to be within the scope of the right protected by the Second Amendment at the time of

ratification." *Id.* at 439–41 (citation omitted). As this discussion highlights, several factors inherent in the "tradition" inquiry can have a dispositive impact on the outcome of a legal dispute. A mandatory, rigid "text, history, and tradition" framework, contrary to the assertions of its proponents, provides no objective method for navigating such factors that would ensure objectivity and consistency in the law.

Next, even if an asserted right does find support in a relevant tradition and even if courts can agree on the proper way to characterize that tradition, courts would still be left with the problem of determining whether a particular tradition should be carried forward as constitutionally sanctioned. That determination necessarily involves, albeit behind a veil, policy and value-balancing judgments of the kind that the Bumatay Dissent claims the "text, history, and tradition" test would avoid.

Our nation's history includes many traditions that would not now be accorded constitutional protection. *See* Toro, *supra*, at 193. One example that has been given is the now-rejected assumption that a woman is subject to her husband's control and governance, a concept that gave rise to the widespread doctrinal rule at common law that a husband could not be convicted of sexually assaulting his wife. *Id.* If a man sought constitutional protection for "the right to have forcible intercourse" with his wife, his claim would, unfortunately, find ample support in our nation's history and traditions. *Id.*; *see also, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257–62 (1964) (holding that private race discrimination in places of public accommodation, although traditional at the time, could be constitutionally forbidden). A test that places great weight on historical traditions can undermine the very bedrock of

constitutional governance, by overriding later, well-accepted legislative policies and by precluding the judiciary from deriving and applying principles of constitutional interpretation capable of adjudging when our practices, however traditional, have deviated from our nation's precepts.

Considering in this regard the Second Amendment in particular, racially discriminatory gun regulations have been commonplace throughout our nation's history, ranging from statutes that expressly singled out people of color in their text, to statutes that disproportionately impacted people of color, such as prohibitions on the sale of certain less costly guns. Br. of Amicus Curiae Rutherford Institute in Supp. Of Pet'rs at 13–18, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (July 20, 2021). Although a court would invalidate such a law in the modern day under the Equal Protection Clause, it is notable that the "text, history, and tradition" test itself provides no mechanism to distinguish unjust or unconstitutional traditions, such as the tradition of having race-based arms restrictions, from other traditions.

In short, the tradition prong of the "text, history, and tradition" test offers even less guidance on the validity of discrete arms regulations under the Second Amendment than the already inadequate "text" and "history" prongs. It thereby invites inconsistency in the law and reliance of judges on their own personal policy preferences, contrary to the purported attributes of the approach touted by Judge Bumatay and by others who have supported the adoption of the "text, history, and tradition" test.

D.

The "text, history, and tradition" approach, as laid out in the Bumatay Dissent, suffers from two major additional

defects. First, a key aspect of the rubric—the one most emphasized by the Dissent, *see* Bumatay Dissent at 127–137—is whether a particular weapon, ammunition, or other arms-related hardware is "in common use at the time." *Heller*, 554 U.S. at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). If so, the Bumatay Dissent posits, the device should receive Second Amendment protection.

But *when* must a device be in "common use" to receive protection? Apparently, at the time of a court's decision. Bumatay Dissent at 103, 105, 134—137 (reasoning that large-capacity magazines "are owned by millions of people nationwide" and "enjoy widespread popularity today"); *see also* VanDyke Dissent at 165–167 (discussing the present-day popularity of high-capacity weapons and relying on that evidence when assessing which weapons are "in common use"). Federal courts of appeal have indeed largely relied upon present-day statistical data when discussing whether a weapon qualifies as "in common use at the time." Blocher & Miller, *supra*, at 89 & n.126.[3] But, as our colleagues on the Seventh Circuit explained, "relying on how common a weapon is at the time of litigation would be circular."

[3] An unanswered question regarding this interpretation of the "common use" inquiry is what metric a court should apply when determining whether a weapon qualifies as in common use. "One can come to quite a range of conclusions" regarding the prevalence of the same weapon "depending on whether one calculates common use by absolute numbers, by absolute dollars, or by the percentage of the market," whether that be the market for firearms in general, for the specific type of firearm at issue, "or for all self-defense technology." Blocher & Miller, *supra*, at 89 (citing Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L. Rev. 1443, 1480 (2009)).

Friedman v. City of Highland Park, 784 F.3d 406, 409 (7th Cir. 2015). "[I]t would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it" which, in turn, prevented the weapon from becoming commonly owned. *Id.* In other words, "[a] law's existence can't be the source of its own constitutional validity." *Id.*; *see also* Blocher & Miller, *supra*, at 89 ("law-abiding people [must] choose weapons from among the weapons that are lawful to possess, leading to the seemingly circular result that what is protected by the Constitution depends on what has been regulated by the government").

To regard an arms-related device's popularity as "the source of its own constitutional[ity]" is no less circular. Devices may become popular before their danger is recognized and regulated, or the danger of a particular device may be exacerbated by external conditions that change over time. And a device may become popular because of marketing decisions made by manufacturers that limit the available choices. Here, for example, large-capacity magazines come as a standard part on many models of firearms, so a consumer who wants to buy those models has no choice regarding whether the weapon will include a magazine that can fire more than ten rounds without reloading. Principal Opinion at 17, 39–40. In any event, the prevalence of a particular device *now* is not informative of what the Second Amendment encompassed when adopted, or when the Fourteenth Amendment was added to the Constitution, or when the Second Amendment was declared incorporated into the Fourteenth Amendment and so applicable to state and local governments in *McDonald*, 561 U.S. at 791 (plurality opinion).

This is not to say that new weapons do not receive Second Amendment protection. To the contrary, *Heller*

makes clear that the Second Amendment protects "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller*, 554 U.S. at 582; *see also Caetano v. Massachusetts*, 577 U.S. 411, 411–12 (2016). And an assessment of prevalence must play *some* role in a court's analysis; *Heller* explained that the Second Amendment's protection extends only to those weapons commonly used "by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624–25, 627; *see also Fyock v. Sunnyvale*, 779 F.3d 991, 997–98 (9th Cir. 2015).

Notably, however, *Heller* focused not just on the prevalence of a weapon, but on the primary use or purpose of that weapon. The Supreme Court explained that, at the time of the Second Amendment's adoption, "all citizens capable of military service . . . would bring the sorts of lawful weapons that they possessed at home to militia duty" and although "[i]t may well be true today that a militia, to be as effective as militias in the [eighteenth] century, would require [more] sophisticated arms," such "modern developments" cannot change the scope of the Second Amendment right, which remains rooted in that original rationale. *Id.* at 627–28. The Bumatay Dissent's excessive focus on the current prevalence of high-capacity magazines is therefore misplaced, as a proper analysis must account for the purpose and use of a weapon in addition to its current popularity.

This discussion also surfaces another defect in the "text, history, and tradition" test—namely, the framework provides courts with little to no guidance in cases involving the regulation of new and emerging weapons technologies. Presumably, history and tradition will either be silent on or offer very little insight into the constitutionality of measures

aimed at such weapons, since, by definition, the weapons lack a historical pedigree.

Heller approves of the practice of adopting new regulations in the face of new technologies, as it expressly indicates that bans on the private possession of machine guns are valid. 554 U.S. at 624. Such bans arose gradually in the 1920s and 1930s after machine guns became widespread, more than 130 years after the states ratified the Second Amendment. *Friedman*, 784 F.3d at 408. And "[n]othing in *Heller* suggests that a constitutional challenge to bans on private possession of machine guns brought during the 1930s, soon after their enactment, should have succeeded." *Id.*

It appears likely that in many Second Amendment cases, courts will be called upon to assess whether a regulation targeting new and emerging weapons technologies adheres to the commands of the Second Amendment. Now-Justice Kavanaugh, in *Heller II*, responded to this concern by stating that courts must "reason by analogy from history and tradition." *Heller II*, 670 F.3d at 1275. But resort to analogy can go only so far, as it does not provide room to account for contemporary circumstances not foreseeable at the time of the Second Amendment's adoption or incorporation. Additionally, reasoning by analogy in these circumstances would have no guiderails and would be subject to the "level of generality" concerns discussed above. *See supra* pp. 73–74.

In sum, because the "text, history, and tradition" test does not adequately account for the primary purpose of currently popular weapons technologies and does not speak to how courts should analyze regulations targeting new and emerging technologies, the framework is, for those reasons

as well, inadequate for addressing the constitutionality of specific gun regulations.

* * *

We are, of course, bound by *Heller*, which directs us to consider the text of the Second Amendment and our country's history and traditions when determining the general scope of the Second Amendment right. But a framework that relies exclusively on those considerations simply does not provide an administrable framework for adjudicating Second Amendment controversies once a court's analysis moves beyond the overall scope of the Second Amendment and into the constitutionality of specific gun measures. As the Supreme Court of Ohio helpfully summarized, the "text, history, and tradition" test is not workable because it leaves the following critical questions unanswered:

> What should a court do when [text, history, and tradition] do not provide a clear answer? If the [district court] reviewed this case again and found the historical record unclear, would we not be right back where we started? More generally, how would the dissenting opinion address the concern that historical evidence can be viewed in different ways by different people? How would it deal with an argument that changed circumstances make reliance on certain Framing Era practices unjustified? Would it reject that notion reflexively on the ground that modern concerns are wholly irrelevant under the text-history-and-tradition-based approach? Or does it acknowledge that present-day judgments have a role to play? . . . Does one

> simply look for an historical analogue to the law at issue? And if analogues exist, how widespread must they be? How does one deal with modern technologies and circumstances that did not exist at the time of the Founding?

State v. Weber, 163 Ohio St. 3d 125, 139–40 (2020), *cert. denied*, --- S. Ct. --- (2021). Because the "text, history, and tradition" approach does not fill these gaps, it cannot supply both a necessary *and sufficient* condition for striking down a law which seeks to regulate the Second Amendment right. Nor, for the reasons I have surveyed, is the "text, history, and tradition" test the objective, principled method for adjudicating Second Amendment legal controversies that the Bumatay Dissent repeatedly insists that it is.

In contrast, the two-step, tiered scrutiny framework—which I discuss more fully in Part III—consistently applied in Second Amendment cases in this Court and in ten other Circuits, *see* Principal Opinion at 23–24, offers two cures for the key defects in the propounded "test, history, and tradition" approach. Specifically, under the two-step approach, a court may forthrightly recognize that, as to a specific form of contemporary regulation, the historical record is thin or inconclusive. The court may then move forward with its analysis by assuming without deciding that the Second Amendment is nevertheless implicated by the policy or regulation at issue, as the principal opinion does here. Principal Opinion at 30 (citing several additional examples). Moreover, the two-step approach provides guidance regarding a court's proper steps once ambiguity in the available materials is acknowledged, thereby *constraining* judicial discretion at that juncture. Once a court moves on to step two, it must decide what level of heightened scrutiny applies, and then engage in a relevant,

above-board, tiered analysis. *Id.* at 23–24,30–46. Under the "text, history, and tradition" approach, by contrast, the well runs dry as soon as the court has exhausted the text of the Second Amendment and evidence of our nation's history and traditions, even when those factors are, by any fair evaluation, indeterminate. The "text, history, and tradition" approach therefore obscures, rather than reveals and channels, the pivotal decisionmaking process, leaving judges with unfettered and unexamined discretion once a court's regulation-specific Second Amendment analysis moves beyond incontestable history and tradition, as it is often bound to do.

II.

The Bumatay Dissent provides a powerful illustration of the shortcomings of the "text, history, and tradition" approach. Beginning with the "common use" inquiry, the Dissent repeatedly emphasizes that large-capacity magazines are currently prevalent, but it spends close to no time discussing the primary purpose or use of such weapons, instead simply asserting that the weapons are "commonly used by Americans for lawful purposes." *See, e.g.*, Bumatay Dissent at 103, 108, 127–131, 134–137. Relatedly, in response to the principal opinion's observation that high-capacity magazines are specifically suited for large-scale military use rather than for self-defense, Principal Opinion at 28, 35–37, Judge VanDyke avers that, "almost every attribute of a weapon that makes it more effective for military purposes also makes it more effective for self-defense: more accurate, faster firing, the ability to engage multiple targets quickly—these are all characteristics of a weapon that make it better for *both* military and self-defense purposes." VanDyke Dissent at 162–163.

But, as Judge Gould explained in his concurrence in *Nordyke v. King*, 644 F.3d 776 (9th Cir. 2011) (Gould, J., concurring), *on reh'g en banc*, 681 F.3d 1041 (9th Cir. 2012), although "laws barring possession of military-grade weapons might be argued to substantially burden the right to have weapons," such laws "are indisputably permissible because they do not tread on the Second Amendment's core purposes." *Id.* at 797 n.6. "I do not mean to be facetious," Judge Gould wrote, "but to me it is obvious that the Second Amendment does not protect the right to keep a nuclear weapon in one's basement, or a chemical or biological weapon in one's attic." *Id.* Although nuclear bombs and chemical and biological weapons are, of course, in a completely different class of weapon than large-capacity magazines in terms of the level of danger they pose, and they are thankfully nowhere near as widespread as large-capacity magazines, neither of those observations gets to the heart of what the primary purpose or use of a large-capacity magazine *is*. Arguably, the primary use of a large-capacity magazine, by design, is for effective combat engagement in a theater of war. Principal Opinion at 28, 35–37. If true, then regardless of their prevalence in society, large-capacity magazines would not fall within the shelter of the Second Amendment.

Turning to the subject of assessing the constitutionality of regulations addressing new or emerging technologies, Judge Bumatay's analysis again misses the mark. As California and amici supporting the government explain, restrictions on semi-automatic weapons capable of firing a large number of rounds without reloading were enacted nationally and in several states shortly after such weapons became widely commercially available. Opening Br. at 27–31; Reply Br. at 10–12; Br. of Amicus Curiae Everytown for Gun Safety in Supp. Of Def.-Appellant at 4–9; *see also*

Blocher & Miller, *supra*, at 42–45; Robert J. Spitzer, *America Used to Be Good at Gun Control*, N.Y. Times (Oct. 3, 2017). Historically, gun regulation has followed that pattern, with regulations arising not when a new technology is *invented*, but instead when the technology begins "to circulate widely in society." Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 Law & Contemp. Probs. 55, 67–71 (2017). The ban on high-capacity magazines at issue in this case therefore represents a "continuation of nearly a century" of arms regulations targeting weapons that can fire a large number of rounds without reloading, Br. of Amicus Curiae Everytown for Gun Safety in Supp. Of Def.-Appellant at 9. The statute thereby arguably constitutes a longstanding prohibition that should not be disturbed by application of the Second Amendment, at least as long as the "longstanding prohibition" inquiry accounts for the date when the target of a restriction became commonplace. And based on *Heller*'s commentary regarding machine guns, 554 U.S. at 624; *see also supra* p. 79, the inquiry should account for that factor.

The Bumatay Dissent ignores this context. It asserts that large-capacity magazines have not been "subject to longstanding regulatory measures," and that it is "not a close question" whether the statute at issue must accordingly be struck down. Bumatay Dissent at 108. In support, the Dissent provides scattered examples of weapons with similar firing capacities that date back as far as 1580, but it does not contend that such weapons were widely commercially available at the time, arguing only that such weapons had become common "by the time of the Second Amendment's incorporation," apparently referring to 1868. Bumatay Dissent at 132–134 (citing David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 851 (2015)). Judge Bumatay nevertheless

declares that, because regulations targeting high-capacity magazines did not exist during the Founding Era, they cannot be considered longstanding regulations under the "text, history, and tradition" test. *Id.* at 140–141; *see also id.* at 137–142.

But, as explained, even taking a generous (to the Bumatay Dissent) view on what qualifies as "common," and even relying on the same source cited by the Dissent, high-capacity magazines did not become common until the late nineteenth century or early twentieth century. *See* Br. of Amicus Curiae Everytown for Gun Safety in Supp. Of Def.-Appellant at 4–9; Kopel, *supra*, at 851. The Bumatay Dissent's "text, history, and tradition" framework would thereby require states to adopt regulations before circumstances warrant, sometimes before a problem even exists. Such a requirement would hamstring the ability of states to regulate nearly any new or emerging weapons technologies. The "text, history, and tradition" test, as a result, would fail to comply with *McDonald*'s instruction that the Second Amendment must be construed such that states retain the ability to "devise solutions to social problems that suit local needs and values" and to "experiment[] with reasonable firearms regulations." 561 U.S. at 785 (plurality opinion).[4]

[4] The dissents assert that the Second Amendment right has been treated as if it were "disfavored." *See, e.g.*, Bumatay Dissent at 111–112; VanDyke Dissent at 145–146. But in terms of what the Second Amendment protects, the Supreme Court explained in *Heller* that the Second Amendment right has long existed in harmony with reasonable regulation, and the Court approved a non-exhaustive range of presumptively lawful regulations, without announcing any criteria for determining whether non-listed kinds of arms regulations are or are not lawful. 554 U.S. at 626–27; *see also, e.g.*, Blocher & Miller, *supra*, at

In terms of methodology, Judge Bumatay does not explain how he approached the historical research underlying the observations made in his opinion. Although such methodological disclosures are not common in judicial opinions, they are standard in academic articles, and for good reason. As explained above, *see supra* pp. 65–68, even slightly defective methodology can undermine the persuasive force of research, and historiographical research is full of potential methodological pitfalls. How large is the pool of available evidence that the Bumatay Dissent drew upon? Is it large enough that we may glean reliable conclusions from it? Did the Dissent draw from that pool in a fashion that would reflect the range of differing opinions throughout history on gun ownership and gun regulation, such as by ensuring that its sources came from differing geographical regions and from both urban and rural areas? Is it possible the Bumatay Dissent relies upon inaccurate sources, or sources that include bias imparted by the author? Is it possible that Judge Bumatay approached the research with a desire to find *a* clear answer—not any particular clear answer—to the legal question in this case, such that the research process itself became skewed? Were the individuals who performed the key research tasks for the Bumatay Dissent aware of cognitive biases like confirmation bias and anchoring bias, and did those individuals actively seek to counteract the impact of such biases on their research?

185. And there are several prominent examples of state and federal courts striking down gun regulations that press those indistinct boundaries. *Id.* at 185–86; *see also* Principal Opinion at 41–42.

The truth is, we simply do not know the answer to those questions, and the "text, history, and tradition" test is not designed to supply readers with those answers. As a result, we cannot be confident in the validity of the observations made in the Bumatay Dissent. In contrast, the two-step, tiered scrutiny approach embraced by the principal opinion, as I will explain in more detail in Part III, relies on a familiar, well-established methodology that requires judges to expressly disclose, on the public record, the reasoning that guides their decision in any given case. And it is designed to accommodate situations where evidence of history and tradition is conflicting or inconclusive. In this respect, the two-step, tiered scrutiny approach represents a superior framework for adjudicating Second Amendment controversies involving the constitutionality of discrete regulations.

III.

Looking in detail at the attributes of the two-step, tiered scrutiny approach more broadly, I begin from the established proposition that the Second Amendment is "not unlimited." *Heller*, 554 U.S. at 595. Although its reach extends to modern weapons just as the First Amendment protects modern forms of speech and the Fourth Amendment applies to searches of modern forms of technology, *id.* at 582, the Second Amendment has multiple limitations. It does not prevent regulation aimed at "dangerous or unusual" weapons, including complete bans on such weapons. *Id.* at 623, 627. It does not undermine the validity of "longstanding prohibitions" such as laws that prevent firearms from being carried into schools. *Id.* at 626–27. And it "by no means eliminates" a state's ability "to devise solutions to social problems that suit local needs and values," and to "experiment[] with reasonable firearms regulations."

McDonald, 561 U.S. at 785 (plurality opinion). Because the Second Amendment provides nuanced, not absolute, protection to individuals' right to keep and bear arms for self-defense, and because, for the reasons I surveyed, the "text, history, and tradition" test cannot meaningfully and predictably resolve which discrete regulations accord with the Amendment's protections, *see supra* Parts I, II, some other method of structuring judicial inquiry into that question is needed.

As the principal opinion explains, the two-step approach—which provides for *both* a historical inquiry and a tiered scrutiny inquiry similar to that used to apply other constitutional protections to discrete and variable regulations—has been embraced by the federal courts of appeal. Principal Opinion at 23–24. A consideration of the theoretical and historical underpinnings of the tiers of scrutiny indicates that the two-step approach represents a well-established framework for guiding and openly communicating, as opposed to hiding, a court's dual attention to historical background as well as to the real-world burdens and the governmental concerns at stake. The principal opinion's two-step, tiered scrutiny approach, in particular, is in no way the free-for-all vehicle for sanitizing judges' policy preferences that Judge Bumatay makes it out to be. To the contrary, the set of prescribed steps embedded in the tiers of scrutiny demand self-awareness on the part of judges and lead to a public-facing decisionmaking process grounded in an evidentiary record.

A.

Lochner v. New York, 198 U.S. 45 (1905), can be viewed as the "starting point" for the development of each of the three tiers of scrutiny. *See* Donald L. Beschle, *No More Tiers?*: *Proportionality as an Alternative to Multiple Levels*

of Scrutiny in Individual Rights Cases, 38 Pace L. Rev. 384, 387–88 (2018); *see also* Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 Int'l J. Const. L. 263, 280 (2010). There were three opinions in *Lochner*. Justice Peckham's opinion for the majority held that the "right" of employers and employees to contract with one another regarding working conditions was subsumed within the Fourteenth Amendment's Due Process Clause. *Lochner*, 198 U.S. at 53–54. For New York's statute limiting the working hours of bakers to survive review, Justice Peckham wrote, the government would need to satisfy an exacting test: demonstrating that the statute had a "direct relation" and was "necessary" to serve an "appropriate and legitimate" state interest, such as the state's interest in health and safety. *Id.* at 56–58. The opinion went on to invalidate the statute, concluding that the government failed to carry its burden under that test. *Id.* at 64–65. Over time, Justice Peckham's somewhat familiar test "evolve[d] into the modern strict scrutiny test." Beschle, *supra*, at 388.

Justice Holmes, in dissent, advocated on behalf of a substantially more deferential approach, whereby the statute would be invalidated only if it was clear that any "rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles." *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting). The Holmes dissent may therefore be viewed as an early predecessor of the rational basis test. Justice Harlan, also in dissent, struck a middle ground. He agreed with Justice Holmes that any "liberty of contract" implicit in the Constitution may be constitutionally subject to regulation that "the state may reasonably prescribe for the common good and the well-being of society." *Id.* at 68 (Harlan, J., dissenting). But his proposed approach was not nearly as deferential as Justice

Holmes's. Instead, he would have required the state to produce a reasonable amount of evidence in support of the regulation before it could be found valid. *Id.* at 69–74. This middle-of-the-road alternative can be characterized as a forebear to intermediate scrutiny.

Although *Lochner* did not survive the test of time, "a significant question remained" regarding whether the analytical frameworks employed by Justices Peckham, Holmes, and Harlan were themselves inappropriate, as opposed to being inappropriately applied in that case. *Id.* at 389. The Supreme Court began addressing this question in the late 1930s, ultimately embracing the use of heightened scrutiny in a variety of cases. *Id.*; Cohen-Eliya & Porat, *supra*, at 282–83. In *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), for instance, the Supreme Court clarified that heightened scrutiny is appropriate when a court evaluates any one of three types of legislation: a statute in conflict with a fundamental right such as those enumerated in the Bill of Rights, a statute that undermines the healthy functioning of our democracy, or a statute that harms "discrete and insular minorities." *Id.* at 152 n.4.

From the 1960s through the 1980s, the strict scrutiny test became entrenched in constitutional decisionmaking and was gradually shaped into the familiar two-part standard that requires government actors to demonstrate that a statute has a compelling underlying purpose, and that the statute is necessary—meaning there are not any less restrictive alternatives—to achieve the relevant purpose. *See, e.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290–91 (1978); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966); *McLaughlin v. Florida*, 379 U.S. 184, 191–92 (1964);

NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 307–08 (1964); *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1273–85 (2007). The earliest applications of the strict scrutiny test included, among other subjects, racial discrimination cases involving the Equal Protection Clause, *e.g.*, *Palmore*, 466 U.S. at 432–33, free speech cases, *e.g.*, *Flowers*, 377 U.S. at 307–08, and voting rights cases, *e.g.*, *Harper*, 383 U.S. at 670. Each application fell within at least one of the three buckets outlined in the *Carolene Products* footnote four. Rational basis review also became widespread during the same period, applying in essentially all other cases. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981); *N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 164–67 (1973); *Ferguson v. Skrupa*, 372 U.S. 726, 728–29 (1963).

Around this time, constitutional scholars such as Professor Gerald Gunther voiced a concern that strict scrutiny was overly harsh, as it was "strict in theory, [but] fatal in fact." Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 794 (2006). Others lamented that rational basis scrutiny veered too far in the opposite direction, leading to essentially per se findings of validity in every case where it applied. Beschle, *supra*, at 392. There was a sense that the two-tiered system of judicial scrutiny was lacking, and that some middle ground was needed. *Id.* at 393. After a series of cases in which the Supreme Court nominally applied rational basis review to gender discrimination claims but engaged in an analysis that appeared much more like strict scrutiny review, *see Weinberger v. Weisenfeld*, 420 U.S. 636, 642–45, 648–53 (1975); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–48 (1974); *Reed v. Reed*, 404 U.S. 71, 74–77 (1971),

the Supreme Court eventually expressly adopted a new tier of scrutiny, one that was less exacting than strict scrutiny but more rigorous than rational basis review, *see Craig v. Boren*, 429 U.S. 190, 197–98 (1976); *see also Plyler v. Doe*, 457 U.S. 202, 215–21 (1982). The middle-ground approach that had its roots in Justice Harlan's *Lochner* dissent developed into what is now referred to as intermediate scrutiny. Beschle, *supra*, at 393–94.

Although the development of intermediate scrutiny created a more nuanced version of the tiered system of judicial scrutiny in constitutional cases, a perception persisted that it may be useful for the tiers of scrutiny both to become less rigid and to include more context-specific guidance. *Id.* at 394–97. Over time, these critiques were met with changes to the tiered scrutiny method of analysis. For example, differing tests that embed a tiered scrutiny method of review have arisen in free speech cases, such that a slightly different structure of analysis applies depending on whether the speech is commercial in nature or occurs in a public forum, as well as whether a disputed regulation targets specific speech-related content, including by targeting a specific viewpoint. *See, e.g.*, *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (commercial speech regulation); *Carey v. Brown*, 447 U.S. 455, 461–62 (1980) (public forum speech regulation); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (content-neutral speech regulation); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48–49 (1983) (content-based speech regulation); *see also* R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing*, 8 Elon L. Rev. 291, 292–95 (2016). Numerous cases have also applied strict scrutiny and rational basis review more flexibly, such that per se findings

of validity and invalidity have become less common. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 631–36 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–42 (1985); *Grutter v. Bollinger*, 539 U.S. 306, 326–44 (2003); *see also* Marcy Strauss, Reevaluating Suspect Classification, 35 Seattle U. L. Rev. 135, 135–36 n.5 (2011). Thus, more than one hundred years after *Lochner* first aired the predecessors of the various available approaches, the tiered scrutiny method of analysis has developed into a framework that serves to guide and constrain judicial decisionmaking across a variety of scenarios. Although imperfect, the tiered scrutiny method of analysis has risen to the challenge of providing a structured framework for adjudicating cases involving individual rights.

B.

Today, a heightened tier of scrutiny applies when courts evaluate a wide range of legal claims, including equal protection claims involving suspect and quasi-suspect classifications; claims involving fundamental rights such as the right to vote, the right to free speech, and the right to freely exercise one's religion; and claims involving the inverse commerce clause. *See, e.g.*, *Loving*, 388 U.S. at 11 (race discrimination); *Craig*, 429 U.S. at 197–98 (gender discrimination); *Clark v. Jeter*, 486 U.S. 456, 465 (1988) (legitimate parenthood discrimination); *Burdick v. Takushi*, 504 U.S. 428, 432–34 (1992) (right to vote); *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566 (commercial speech regulation); *Turner Broad. Sys., Inc.*, 520 U.S. at 189 (content-neutral speech regulation); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876–77 (2021) (free exercise of religion); *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2467–68 & n.11, 2473–74 (2019) (inverse

commerce clause); *see also* Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* 510–11 (2012).

The second stage of the principal opinion's two-step approach, as mentioned, analyzes the degree to which an arms-related regulation burdens the Second Amendment right when determining whether to apply strict scrutiny, intermediate scrutiny, or "no scrutiny at all (as in *Heller*)." Principal Opinion at 25. Of the established, non-Second Amendment tiered scrutiny frameworks, this aspect of the two-step, tiered scrutiny approach is perhaps most analogous to the *Anderson-Burdick* doctrine used for election and voting rights cases. Under that doctrine, the rigor of a court's inquiry into the validity of an election-related regulation depends upon the extent to which the challenged regulation burdens constitutional rights, such as the right to vote. *Burdick*, 504 U.S. at 432–34. If the right to vote is severely burdened, strict scrutiny applies. *Id.* If the right to vote is burdened in a "reasonable" manner, then less rigorous scrutiny applies instead. *Id.*; *see also Dean Milk Co. v. City of Madison*, 340 U.S. 349, 353–54 (1951) (applying a similar framework to disputes involving the inverse commerce clause).

Use of the two-step, tiered scrutiny approach for Second Amendment cases, then, represents yet another instantiation of the tiered method of analysis evolving to meet the filtering needs of various contextual scenarios involving constitutional rights. No reason has been suggested, in the dissents in this case or elsewhere, as to why a well-established structure for constitutional adjudication should apply to a wide range of constitutional protections but not to the Second Amendment.

We adopted the two-step approach for Second Amendment claims in *United States v. Chovan*, 735 F.3d

1127 (9th Cir. 2013). There, we reviewed and analyzed other Circuits' application of the two-step inquiry and explained that the two-step approach "reflects the Supreme Court's holding in *Heller* that, while the Second Amendment protects an individual right to keep and bear arms, the scope of that right is not unlimited." *Id.* at 1136. As *Chovan* suggests, we adopted the two-step approach because it provides crucial guideposts that assist and constrain our inquiry once we move beyond assessing the overall scope of the Second Amendment and into applying the Amendment to a specific measure or regulation. This aspect of the two-step approach is, indeed, its greatest asset. The elements of a heightened scrutiny analysis are fixed and widely known, lending themselves to a mode of reasoning and explication on the part of judges that disciplines the judicial inquiry and is accessible to the litigants and the public. Application of the two-step approach to the Second Amendment is therefore likely to promote both judicial introspection and public insight into the judicial decisionmaking process.

Use of the two-step approach may also encourage participation in the development of an understanding about the constitutional reach of the Second Amendment by the other branches of government, nationally and locally. Because the tiers of scrutiny offer a clear structure that communicates to the audiences of judicial opinions the type and sequence of arguments that must be made to ensure that a piece of legislation or other governmental enactment survives constitutional review, application of the tiered scrutiny approach may encourage legislators and other government actors carefully to assess whether their actions have a proper purpose and are appropriately tailored to serving that purpose. In other words, judicial review under the two-step, tiered scrutiny approach would have a

disciplining effect not only on the judiciary, but on lawmakers as well.

The tiered method of scrutiny may also assist courts in isolating "process failures" in the legislative process. Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 Yale L.J. 3094, 3151 (2015). As the Bumatay Dissent acknowledges, *see* Bumatay Dissent at 103–104, 110, one of the primary functions of the judiciary is to ensure that the legislative process is not systemically infected by "process failures," which arise when lawmakers, either consciously or subconsciously, allow prejudice or discrimination to shape the law. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 102–04 (1980). But as I have explained, the "text, history, and tradition" approach is ill-suited to that end. *See supra* Parts I, II.

In contrast, at the second stage of the two-step, tiered scrutiny approach, a court must carefully consider—as the principal opinion does here, *see* Principal Opinion at 30–40—the parties' submissions and the evidentiary and legislative record to assess the degree of impact a particular regulation has on the Second Amendment right. Having done so, the court then chooses which level of scrutiny is appropriate and applies the prescribed level of rigor to its assessment of both the interests that gave rise to the regulation and—again, after detailed attention to the parties' submissions and the evidentiary and legislative records—the degree to which the regulation advances that asserted interest. Because heightened scrutiny requires the government to both articulate a justification for its disputed action and provide an evidentiary record supporting that justification, it is likely to smoke out process failures. At the same time, because legislators are aware of this fact, application of the two-step approach may also produce front-

end incentives that prevent many process failures from occurring in the first place. Application of the tiered scrutiny approach may thereby facilitate judicial oversight into whether the legislative branch is acting impartially and responsibly, with due regard to the underlying constitutional protection.

Rejecting this process-oriented mode of protecting constitutional rights as unreliable, Judge Bumatay characterizes the two-step, tiered scrutiny approach as "nothing more than a black box used by judges to uphold favored laws and strike down disfavored ones." Bumatay Dissent at 104. He is mistaken. For the reasons explained, the two-step approach is not an invitation to engage in freewheeling judicial decisionmaking or generalized interest-balancing. Instead, it prescribes a careful, structured evaluation that is preserved for posterity and based on an evidentiary record. The two-step, tiered scrutiny approach thus places a heavy burden on the state to justify any intrusions into individual rights and, again, requires judges to explain their decisions in an accessible, transparent fashion that encourages public oversight.

To be sure, analyses of this kind can be poorly done, and in any specific instance may or may not succeed in uncovering and minimizing the impact of judges' policy preferences on the outcome of the case. But where there is such failure, the failure will be exposed via ascertainable lapses in the court's logical or factual analysis, giving rise to either critiques by other courts or reversal on appeal. So the process-structuring aspects of the tiered scrutiny approach constrain the ability of the judicial system *as a whole* to allow personal policy preferences to determine outcomes, whether or not the process has the same success in each opinion written. The "text, history, and tradition"

framework offers none of these benefits. It provides no guidelines for the many cases in which the historical record is inconclusive, and thereby both invites biased decisionmaking and shrouds that decisionmaking in secrecy.

The Bumatay Dissent further asserts that the Supreme Court already rejected the two-step, tiered scrutiny approach when it "bristled" at the suggestion in Justice Breyer's dissent that courts should engage in a "freestanding 'interest balancing' approach" when adjudicating Second Amendment cases. *Id.* at 112–115 & n.10 (quoting *Heller*, 554 U.S. at 634). But, in fact, Justice Breyer's proposal was a thinly veiled reference to the proportionality test, the dominant international framework for adjudicating gun rights cases. *See, e.g.*, Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in* Heller: *The Proportionality Approach in American Constitutional Law*, 46 San Diego L. Rev. 368, 369–70 (2009). Although the proportionality test has some broad similarities to the tiers of scrutiny, comparative law theorists note that the tiered scrutiny approach offers substantial benefits that the proportionality approach lacks. Namely, the proportionality approach directs judges to engage in a case-by-case weighing analysis that assesses whether the benefits of a disputed policy outweigh or are sufficient to justify the degree of intrusion into the right at issue in the case. *Id.* at 380–81. The tiers of scrutiny, in contrast, supply a pre-determined weighing calculus triggered by the details of each case. Barak, *supra*, at 512, 521–22. In other words, the tiered scrutiny approach provides a real check on judicial power, because much of the central weighing analysis in each case is not within the control of individual judges and is instead "bounded" by a pre-existing categorical framework. *Id.* Once again, this aspect of the tiered scrutiny approach cabins judicial discretion and promotes long-run

objective decisionmaking, to the degree such decisionmaking is possible.

Finally, the Bumatay Dissent states that this Circuit's precedent regarding intermediate scrutiny in Second Amendment cases has "dispense[d] with the requirement of narrow tailoring" by adopting a "reasonable fit" tailoring requirement. Bumatay Dissent at 111 n.8. But *Vivid Entertainment, LLC v. Fielding*, 774 F.3d 566 (9th Cir. 2014), the case cited by the Dissent for the proposition that intermediate scrutiny ordinarily requires "narrow tailoring," clarified that "[i]n order to be narrowly tailored for purposes of intermediate scrutiny," the regulation need not be the least restrictive means of achieving the government interest, as the requirement is "satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 580. Our Second Amendment case law defines the "reasonable fit" requirement in exactly the same way, noting that although a firearm regulation need not utilize the least restrictive means of achieving its underlying objective, it must "promote a substantial government interest that would be achieved less effectively absent the regulation." *See, e.g.*, *Mai v. United States*, 952 F.3d 1106, 1116 (9th Cir. 2020), *reh'g denied*, 974 F.3d 1082 (2020), *cert. denied*, 141 S. Ct. 2566 (2021); *United States v. Torres*, 911 F.3d 1253, 1263 (9th Cir. 2019); *Fyock*, 799 F.3d at 1000. There is therefore no merit to the suggestion that the Ninth Circuit's application of intermediate scrutiny in Second Amendment cases is somehow less exacting than its application of the standard in other kinds of cases.

Further, Judge Bumatay cites no precedent in support of his assertion that intermediate scrutiny review would allow the government to justify a policy on grounds that are not

"genuine." Bumatay Dissent at 111 n.8. To the contrary, in cases where intermediate scrutiny applies, the burden falls on the government to demonstrate that an important interest underlies the policy, and that interest "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996); *see also, e.g.*, *Karnoski v. Trump*, 926 F.3d 1180, 1199–1202 (9th Cir. 2019).

CONCLUSION

Rather than representing a "much less subjective" framework for decisionmaking in Second Amendment cases involving discrete arms regulations, Bumatay Dissent at 121, the "text, history, and tradition" test obscures the myriad indeterminate choices that will arise in most such cases. The tiered scrutiny approach, in contrast, serves to guide and constrain a court's analysis in Second Amendment disputes regarding discrete arms regulations, as it has done for numerous other constitutional provisions. I therefore have no doubt that the principal opinion in this case properly rejects the Bumatay Dissent's invitation to abandon the tiered scrutiny approach for adjudicating Second Amendment controversies involving discrete regulations in favor of the "text, history, and tradition" approach. We are very wise not to do so, for all of the reasons I have explained.

HURWITZ, Circuit Judge, concurring:

I join Judge Graber's opinion for the Court unreservedly. I ordinarily would not say more, but I am reluctantly compelled to respond to the dissent of my brother Judge VanDyke, who contends that the "majority of our court distrusts gun owners and thinks the Second Amendment is a

vestigial organ of their living constitution." That language is no more appropriate (and no more founded in fact) than would be a statement by the majority that today's dissenters are willing to rewrite the Constitution because of their personal infatuation with firearms. Our colleagues on both sides of the issue deserve better.

I recognize that colorful language captures the attention of pundits and partisans, and there is nothing wrong with using hyperbole to make a point. But my colleague has no basis for attacking the personal motives of his sisters and brothers on this Court. His contention that prior decisions of this Circuit—involving different laws and decided by different panels—somehow demonstrate the personal motives of today's majority fails to withstand even cursory analysis. By such reasoning, one also would have to conclude that my friends in today's minority who, like me, are deciding a Second Amendment case for the first time, are also driven by personal motives.

Judge VanDyke has no way of knowing the personal views of other members of the Court about firearms. Indeed, members of the Court not among today's dissenters have firearms in their homes. Members of this Court not among today's dissenters have volunteered for service in the active military or the National Guard (the modern "well regulated Militia") and bore arms during that service. But those personal experiences—or the lack of them—do not drive the decision on the important issue at hand. That issue is whether the people of the State of California are forbidden by the United States Constitution to enact measures like the contested statute to protect themselves from gun violence.

Reasonable judges can disagree as to whether the California statute crosses a constitutional line. I believe that Judge Graber has persuasively explained why it does not.

But I do not question the personal motives of those on the other side of that issue. On the seriousness of the problem that California seeks to address, however, there should be no dispute. However infrequent mass shootings may be, hardly anyone is untouched by their devastation. The Ninth Circuit lost one of its own, Chief Judge Roll of the District of Arizona, to precisely such a shooting, notwithstanding Judge VanDyke's assumption that federal judges are somehow immune from such dangers. Other members of the Court have lost family and friends to gun violence. I recount these matters of common knowledge not, as Judge VanDyke suggests, to import my personal experiences into the decision-making process in this case, but instead to emphasize that despite the alleged "infrequency" of mass shootings, they have effects far beyond the moment that are the proper subject of legislative consideration. And, to the extent that the frequency of such carnage is relevant, surely the people and their elected representatives are far better situated in the first instance than we to make that determination. The people of California should not be precluded from attempting to prevent mass murders simply because they don't occur regularly enough in the eyes of an unelected Article III judge.

The crucial issue here is what level of scrutiny to apply to the California law. We can respectfully disagree whether the measures California has adopted violate the Second Amendment. But an attack on the personal motives of the members of this Court who reach the same result in this case as every other Circuit to address this issue neither advances our discourse nor gives intellectual support to the legal positions argued by my respected dissenting colleagues. I start from the assumption that Judge VanDyke, whose dissent displays an admirable knowledge of firearms and ammunition, dissents today not because of his personal

experiences or policy preferences but instead because he sincerely believes that his oath of fidelity to the Constitution requires that we invalidate what our colleague Judge Lee described in the now-vacated majority opinion for the three-judge panel as a "well-intentioned" law designed by the sovereign state of California to "curb the scourge of gun violence." *Duncan v. Becerra*, 970 F.3d 1133, 1140–41 (9th Cir. 2020). I simply ask that today's majority, each of whom took the very same oath, be treated with the same level of respect.

BUMATAY, Circuit Judge, with whom IKUTA, and R. NELSON, Circuit Judges, join, dissenting:

When Justice Brandeis observed that states are the laboratories of democracy, he didn't mean that states can experiment with the People's rights. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). But that's what California does here. The state bans magazines that can carry over ten rounds—a firearm component with a long historical lineage commonly used by Americans for lawful purposes, like self-defense. Indeed, these magazines are lawfully owned by millions of people nationwide and come standard on the most popular firearms sold today. If California's law applied nationwide, it would require confiscating half of all existing firearms magazines in this country. California nevertheless prevents its citizens from owning these magazines. But the Constitution protects the right of law-abiding citizens to keep and bear arms typically possessed for lawful purposes. On en banc review, we should have struck down the law.

Contrary to the Second Amendment, however, our court upholds California's sweeping ban on so-called large-

capacity magazines.[1] It can't be because these magazines lack constitutional protection. The majority assumes they are. And it can't be because the ban is longstanding. California's law is of recent vintage. Rather, the law survives because the majority has decided that the costs of enforcing the Second Amendment's promise are too high. The majority achieves this result by resorting to the tiers-of-scrutiny approach adopted by this court years ago. Under that balancing test, the government can infringe on a fundamental right so long as the regulation is a "reasonable fit" with the government's objective.

In reality, this tiers-of-scrutiny approach functions as nothing more than a black box used by judges to uphold favored laws and strike down disfavored ones. But that is not our role. While we acknowledge that California asserts a public safety interest, we cannot bend the law to acquiesce to a policy that contravenes the clear decision made by the American people when they ratified the Second Amendment.

In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court held that the Second Amendment confers "an individual right to keep and bear arms." This watershed case provided clear guidance to lower courts on the proper analytical framework for adjudicating the scope of the Second Amendment right. That approach requires an extensive analysis of the text, tradition, and history of the Second Amendment. Our court should have dispensed with

[1] We use the term "large-capacity magazine" for consistency with the majority but note that magazines with the capacity to accept more than ten rounds of ammunition are standard issue for many firearms. Thus, we would be more correct to refer to California's ban on "standard-capacity magazines."

our interest-balancing approach and hewed to what the Supreme Court told us to do. Under that approach, the outcome is clear. Firearms and magazines capable of firing more than ten rounds have existed since before the Founding of the nation. They enjoyed widespread use throughout the nineteenth and twentieth centuries. They number in the millions in the country today. With no longstanding prohibitions against them, large-capacity magazines are thus entitled to the Second Amendment's protection. It's the People's decision in ratifying the Constitution, not California's, that dictates the result here.

For these reasons, we respectfully dissent.

I. Factual Background

In California, a "large-capacity magazine" is "any ammunition feeding device with the capacity to accept more than 10 rounds." Cal. Penal Code § 16740. Since 2000, California has prohibited the manufacture, importation, and sale of large-capacity magazines. *See* Act of July 19, 1999, ch. 129, 1999 Cal. Stat. §§ 3, 3.5. Thirteen years later, the California legislature prohibited the receipt and purchase of large-capacity magazines. *See* 2013 Cal. Stat. 5299, § 1. And three years after that, the California legislature made it unlawful to possess large-capacity magazines. *See* 2016 Cal. Stat. 1549, § 1; Cal. Penal Code § 32310(a), (c). Shortly after, California voters adopted Proposition 63, which strengthened California's magazine ban by making possession punishable by up to one year in prison. *See* Cal. Penal Code § 32310(c). There's no grandfather clause—the law applies no matter when or how the magazine was acquired. *See id.*

Today, California citizens who possess large-capacity magazines have four options: remove the magazine from the

state; sell the magazine to a licensed firearms dealer; surrender the magazine to a law enforcement agency for destruction; or permanently alter the magazine so that it cannot accept more than ten rounds. *Id.* §§ 16740(a), 32310(d).

The question before us is whether California's magazine ban violates the Second Amendment. It does.

II. Legal Background

The Second Amendment commands that the "right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amend. II. At the outset, it's worth emphasis that the Second Amendment guarantees a pre-existing, fundamental, natural right. That's because it is necessary to "protect and maintain inviolate the three great and primary rights of personal security, personal liberty, and private property." 1 William Blackstone, Commentaries on the Laws of England, *136, *139. In other words, the right is among "that residuum of human rights, which is not intended to be given up to society, and which indeed is not necessary to be given for any good social purpose."[2]

The Second Amendment's fundamental nature follows from its close connection to the right of self-defense. As John Adams explained:

> Resistance to sudden violence, for the preservation not only of my person, my limbs and life, but of my property, is an

[2] Letter from Richard Henry Lee to Governor Edmund Randolph (Oct. 16, 1787), https://archive.csac.history.wisc.edu/Richard_Henry_Lee_to_Edmund_Randolph.pdf.

> indisputable right of nature which I have never surrendered to the public by the compact of society, and which perhaps, I could not surrender if I would.[3]

Judge George Thatcher, a member of the First United States Congress, contrasted rights conferred by law with those that are natural; the right of "keeping and bearing arms" belonged in the latter category as it is "coeval with man."[4]

The fundamental nature of the Second Amendment has been well recognized by the Supreme Court. At its core, the Court held, the Second Amendment protects the "right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. The protection is an individual one and extends to all bearable arms that are typically possessed by law-abiding citizens for lawful purposes, like self-defense. *Id.* at 582, 595, 625. Moreover, the right is so "fundamental" and "deeply rooted in this Nation's history and tradition," that it is "fully applicable to the States." *McDonald v. City of Chicago*, 561 U.S. 742, 750, 767 (2010) (simplified).

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[3] Boston Gazette, Sept. 5, 1763, *reprinted in* 3 The Works of John Adams 438 (Charles F. Adams ed., 1851), in Anthony J. Dennis, *Clearing the Smoke from the Right to Bear Arms and the Second Amendment*, 29 Akron L. Rev. 57, 73 (1995).

[4] Scribble-Scrabble, Cumberland Gazette, Jan. 26, 1787, *reprinted in* Firearms Law and the Second Amendment: Regulation, Rights, and Policy, Johnson et al. 300 (2d ed. 2017). Scribble-Scrabble was the pen name of George Thatcher. *See* Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 Nw. U. L. Rev. 1821, 1825 (2011).

III. California's Large-Capacity Magazine Ban Is Unconstitutional

From this background, we turn to the Second Amendment's application to this case. From the start, the majority misses the mark, the most fundamental error being the use of an improper framework to analyze Second Amendment challenges. Once again, our court applies a two-step, tiers-of-scrutiny approach. But that approach is inconsistent with what the Second Amendment commands and what the Supreme Court requires. On en banc review, we should have scrapped this regime and adopted what the Supreme Court tells us is the proper analytical framework—one that looks to the text, history, and tradition of the Second Amendment.

Under that analytical framework, California's ban on large-capacity magazines cannot withstand a Second Amendment challenge. Large-capacity magazines are bearable arms that are commonly owned for lawful purposes, and not subject to longstanding regulatory measures. This is not a close question. It flows directly from *Heller*.

A. *Heller*'s Analytical Framework

1. The Supreme Court Rejected an Interest-Balancing Test

Before turning to what *Heller* did, it's important to understand what it did not do. *Heller* did not give lower courts license to pursue their own conception of the Second Amendment guarantee. While *Heller* did not answer all questions for all times, as discussed below, it provided a framework for analyzing Second Amendment issues without resorting to the familiar tiers-of-scrutiny approach. Instead

of recognizing this, lower courts, including our own, routinely narrow *Heller* and fill the supposed vacuum with their own ahistorical and atextual balancing regime. This contradicts *Heller*'s express instructions.

The majority continues this error by reaffirming our court's two-step Second Amendment inquiry. Maj. Op. 23–24. Under that test, we ask two questions: (1) "if the challenged law affects conduct that is protected by the Second Amendment"; and if so, (2) we "choose and apply an appropriate level of scrutiny." *Id.* (simplified).

The step one inquiry often pays lip service to *Heller*: it asks whether the law "burdens conduct protected by the Second Amendment," *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013), "based on a historical understanding of the scope of the [Second Amendment] right," *Jackson v. City & Cnty. Of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (simplified). To determine whether the challenged law falls outside the scope of the Amendment, we look to whether "persuasive historical evidence show[s] that the regulation [at issue] does not impinge on the Second Amendment right as it was historically understood." *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). Thus, the first step asks if the conduct is protected by the Second Amendment as a historical matter.[5]

[5] The majority does not bother to do the hard work of examining the historical record and merely assumes that the magazine ban infringes on the Second Amendment. Such an analytical step blinds the majority to the long historical tradition of weapons capable of firing more than ten rounds in this country and the exceptional nature of California's ban here. *Cf. Mai v. United States*, 974 F.3d 1082, 1091 (Bumatay, J.,

It is at step two where our court goes astray. Instead of ending the inquiry based on history and tradition, our court layers on a tier of scrutiny—an exercise fraught with subjective decision-making. In picking the appropriate tier, we operate a "sliding scale" depending on the severity of the infringement. *Id.* Practically speaking, that means putting a thumb on that scale for "intermediate scrutiny." In over a dozen post-*Heller* Second Amendment cases, we have never adopted strict scrutiny for any regulation.[6] That's because our court interprets the sliding scale to require intermediate scrutiny so long as there are "alternative channels for self-defense." *Jackson*, 746 F.3d at 961.[7]

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dissenting from the denial of reh'g en banc) ("By punting the analysis of the historical scope of the Second Amendment . . . , we let false assumptions cloud our judgment and distort our precedent even further from the original understanding of the Constitution.").

[6] *See Young v. Hawaii*, 992 F.3d 765, 773 (9th Cir. 2021) (en banc); *United States v. Singh*, 979 F.3d 697, 725 (9th Cir. 2020); *Mai v. United States*, 952 F.3d 1106, 1115 (9th Cir. 2020); *United States v. Torres*, 911 F.3d 1253, 1263 (9th Cir. 2019); *Pena v. Lindley*, 898 F.3d 969, 979 (9th Cir. 2018); *Teixeira v. County of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017) (en banc); *Mahoney v. Sessions*, 871 F.3d 873, 881 (9th Cir. 2017); *Bauer v. Becerra*, 858 F.3d 1216, 1221 (9th Cir. 2017); *Fisher v. Kealoha*, 855 F.3d 1067, 1070–71 (9th Cir. 2017); *Fortson v. L.A. City Attorney's Office*, 852 F.3d 1190, 1194 (9th Cir. 2017); *Silvester*, 843 F.3d at 827; *Wilson v. Lynch*, 835 F.3d 1083, 1093 (9th Cir. 2016); *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 942 (9th Cir. 2016) (en banc); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 999 (9th Cir. 2015); *Jackson*, 746 F.3d at 965; *Chovan*, 735 F.3d at 1138.

[7] Once again, our court fails to pay attention to *Heller* with this type of analysis. *Heller* expressly says, "[i]t is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed." 554 U.S. at 629; *see also Caetano v. Massachusetts*, 577 U.S. 411, 421 (2016) (Alito, J.,

What's more, we often employ a toothless "intermediate scrutiny," upholding the regulation if it "reasonabl[y] fit[s]" the state's asserted public-safety objective.[8] Maj. Op. 15. In other words, so long as a firearms regulation aims to achieve a conceivably wise policy measure, the Second Amendment won't stand in its way. In effect, this means we simply give

concurring) ("But the right to bear other weapons is 'no answer' to a ban on the possession of protected arms."). Likewise, it is no answer to say—as Judge Graber's concurrence explicitly does—that citizens may defend their homes during an attack with multiple firearms or magazines or by reloading their firearms instead of using a large-capacity magazine. Graber Concurrence 54–55. While the concurrence calls the burden of carrying multiple firearms or magazines and the delay of reloading magazines mere "inconvenience[s]," *id*., the record shows that such alternatives impair the ability of citizens to defend themselves. Stated simply, the unpredictable and sudden nature of violent attacks may preclude the effective use of multiple firearms and magazines and the ability to reload weapons. Limiting self-defense to these alternate means would disadvantage law-abiding citizens, who may not have proper training to reload firearms or gather multiple armaments under the trauma and stress of a violent attack.

[8] The "reasonable fit" modification to intermediate scrutiny dispenses with the requirement of narrow tailoring. *See, e.g.*, *Vivid Entertainment, LLC v. Fielding*, 774 F.3d 566, 580 (9th Cir. 2014) (holding that a statute must be "narrowly tailored" to survive intermediate scrutiny). We appropriated the "reasonable fit" standard from "a specific, and very different context" under the First Amendment: "*facially neutral* regulations that *incidentally* burden freedom of speech in a way that is *no greater than is essential*." *Mai*, 974 F.3d at 1101 (VanDyke, J., dissenting from the denial of reh'g en banc). But tailoring ensures that the government's asserted interest is its "genuine motivation"—that "[t]here is only one goal the classification is likely to fit . . . and that is the goal the legislators actually had in mind." Brief for J. Joel Alicea as Amicus Curiae Supporting Petitioners at 20, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, (July 20, 2021) (No. 20-843) (quoting John Hart Ely, Democracy and Distrust 146 (1980)). Dispensing with narrow tailoring thus abdicates our responsibility to test the government's true interest in a regulation.

a blank check to lawmakers to infringe on the Second Amendment right. Indeed, post-*Heller*, we have never struck down a single firearms regulation.[9]

All this interest balancing is in blatant disregard of the Court's instructions. Nowhere in *Heller* or *McDonald* did the Supreme Court pick a tier of scrutiny for Second Amendment challenges. Nor did the Court compare the relative costs of firearms regulations to their potential public-safety benefits, adopt a sliding scale, look at alternative channels of self-defense, or see if there was a reasonable fit between the regulation and the state's objective. The absence of these balancing tools was not accidental. The Court made clear that such judicial balancing is simply incompatible with the guarantees of a fundamental right. Time and time again, the Supreme Court expressly rejected the means-end balancing approach inherent in the two-step test applied by our court. We should have followed their directions.

First was *Heller*. In that case, the Court soundly rejected any sort of interest-balancing in assessing a handgun ban. In dissent, Justice Breyer criticized the majority for declining to establish a level of scrutiny to evaluate Second Amendment restrictions. He then proposed adopting an "interest-balancing inquiry" for Second Amendment questions, weighing the "salutary effects" of a regulation against its "burdens." *Heller*, 554 U.S. at 689–90 (Breyer, J., dissenting). In response, the Court bristled at the suggestion that a constitutional right could hinge on the cost-benefit analysis of unelected judges:

[9] *See* footnote 6.

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

Heller, 554 U.S. at 634 (majority opinion). Rather than entertaining what tier of scrutiny should apply to the Second Amendment, the Court noted that the Amendment itself was "the very *product* of an interest balancing by the people," and that courts are simply not permitted to "conduct [that balancing] anew." *Id.* at 635 (emphasis in original). In sum, *Heller* struck down the handgun ban at issue because those firearms are commonly used by law-abiding citizens for lawful purposes, not because the ban failed intermediate scrutiny.[10]

[10] The majority asserts that *Heller* rejected Justice Breyer's "interest balancing inquiry"—not because of the Court's disapproval of tiers of scrutiny—but because Justice Breyer did not use the precise words "intermediate scrutiny." Maj. Op. 25–26. We do not think the Court would be so focused on form over substance to reject Justice Breyer's argument because of nomenclature. Indeed, the type of inquiry the majority engages in—such as weighing the ban's effect on mass shooters, *id*. at 46—is exactly the kind of balancing between "government public-safety concerns" and Second Amendment interests

Two years later came *McDonald*. There, the Court was again emphatic that the Second Amendment right was not subject to "interest balancing." 561 U.S. at 785. *McDonald* reiterated the Court's "express[] reject[ion]" of "the argument that the scope of the Second Amendment right should be determined by judicial interest balancing." *Id.* (citing *Heller*, 554 U.S. at 633–35). The Court explicitly rejected some state courts' approach to permit balancing tests for firearm rights. *Id.* The Court reasoned that the Fourteenth Amendment did not apply "only a watered-down, subjective version of the individual guarantees of the Bill of Rights" against the States. *Id.* (simplified).

Once again responding to Justice Breyer, *McDonald* disclaimed the notion that the Amendment is to be assessed by calculating its benefits and costs. Justice Breyer, in dissent, noted that incorporating the Second Amendment against the States would require judges to face "complex empirically based questions," such as a gun regulation's impact on murder rates, which are better left to legislatures. *Id.* at 922–26 (Breyer, J., dissenting). The Court answered

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that Justice Breyer called for, *see Heller*, 554 U.S. at 689 (Breyer, J., dissenting).

The majority also relies on *Heller*'s passing reference to D.C.'s handgun ban failing "under any standard of scrutiny" as license to engage in the judicial-interest balancing adopted by this court. Maj. Op. 25. But that misreads the statement. As then-Judge Kavanaugh noted, "that [reference] was more of a gilding-the-lily observation about the extreme nature of D.C.'s law—and appears to have been a pointed comment that the dissenters should have found D.C.'s law unconstitutional even under their own suggested balancing approach—than a statement that courts may or should apply strict or intermediate scrutiny in Second Amendment cases." *Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244, 1277–78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

that Justice Breyer was "incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise." *Id.* at 790–91. On the contrary, rejecting any "interest-balancing test" for the Second Amendment right obviates the courts from making those "difficult empirical judgments." *Id.* (citing *Heller*, 554 U.S. at 634).

Most recently, *Caetano* demonstrated the Court's application of *Heller* and, unsurprisingly, that case did not involve interest balancing. *See* 577 U.S. 411. *Caetano* viewed *Heller* as announcing rules for determining the constitutionality of firearms regulations and applied these rules to a state ban on stun guns. *See* 577 U.S. at 411. There, the Court drew three takeaways from *Heller*: (1) the Second Amendment protects arms "not in existence at the time of the founding"; (2) a weapon not "in common use at the time of the Second Amendment's enactment" does not render it "unusual"; and (3) the Second Amendment protects more than "only those weapons useful in warfare." *Id.* at 411–12 (simplified). The Court held the state court's reasoning contradicted *Heller*'s "clear statement[s]" and vacated its decision. *Id.* at 412. Notably, *Caetano* did not adopt a tier of scrutiny or otherwise engage in interest balancing. It certainly did not ask whether the stun gun ban was a "reasonable fit" with the state's public safety objective.

That the Court has uniformly rejected "interest balancing" when it comes to the Second Amendment is nothing new. Then-Judge Kavanaugh understood as much shortly after *Heller* and *McDonald* were decided. As he explained, the Supreme Court "set forth fairly precise guidance to govern" Second Amendment challenges. *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting). "*Heller* and

McDonald," he said, "leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." *Id.* More recently, Justice Kavanaugh has articulated his "concern that some federal and state courts may not be properly applying *Heller* and *McDonald*." *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1527 (2020) (Kavanaugh, J., concurring).

Other justices have similarly questioned the continued use of tiers of scrutiny by lower courts. Justice Thomas, for instance, observed that many courts of appeals "have resisted [the Court's] decisions in *Heller* and *McDonald*" and sought to "minimize [*Heller*'s] framework." *Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., dissenting from the denial of certiorari) (simplified). He emphasized that *Heller* "explicitly rejected the invitation to evaluate Second Amendment challenges under an 'interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other.'" *Id.* at 1867 (simplified).

Rogers wasn't the first time that Justice Thomas sounded the alarm on this issue. In *Friedman v. City of Highland Park*, Justice Thomas reiterated that the Court "stressed that the very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon." 136 S. Ct. 447, 448 (2015) (Thomas, J., dissenting from denial of certiorari) (simplified); *see also Silvester v. Becerra*, 138 S. Ct. 945, 948 (2018) (Thomas, J., dissenting from the denial of certiorari) (explaining that *Heller* rejected "weigh[ing] a law's burdens on Second Amendment rights against the

governmental interests it promotes"); *Jackson v. City & Cnty. of San Francisco*, 135 S. Ct. 2799, 2802 (2015) (Thomas, J., dissenting from the denial of certiorari). Moreover, Justice Thomas has criticized tiers-of-scrutiny jurisprudence in general as an atextual and ahistorical reading of the Constitution. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2327–28 (2016) (Thomas, J., dissenting) (characterizing the use of "made-up tests" to "displace longstanding national traditions as the primary determinant of what the Constitution means" as illegitimate (simplified).)[11]

Justices Alito and Gorsuch have also taken issue with how lower courts are applying *Heller*. After determining that the lower court improperly upheld a New York City handgun ordinance under "heightened scrutiny," Justice Alito, joined by Justice Gorsuch, commented, "[w]e are told that the mode of review in this case is representative of the way *Heller* has been treated in the lower courts. If that is true, there is cause for concern." *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1544 (Alito, J., dissenting).

A chorus of circuit judges from across the country has also rejected the tiers-of-scrutiny approach adopted by this

[11] For most of this country's history, judges viewed their role not as "weighing or accommodating competing public and private interests," but instead employing "boundary-defining techniques" which made their job a more "objective, quasi-scientific one." Richard Fallon, Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1274, 1285–86 (2007) (simplified). As Judge Berzon's concurrence demonstrates, the tiers-of-scrutiny approach is of recent vintage. Berzon Concurrence 90–91. Judge Berzon, thus, confirms Professor Fallon's view that strict scrutiny (and its rational-basis and intermediate-scrutiny cousins) have no "foundation in the Constitution's original understanding." Fallon, *supra*, at 1268.

and other courts. *See, e.g.*, *Mai*, 974 F.3d at 1083 (Collins, J., dissenting from the denial of reh'g en banc); *id*. at 1097 (VanDyke, J., dissenting from the denial of reh'g en banc); *Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. N.J.*, 910 F.3d 106, 127 (3d Cir. 2018) (Bibas, J. dissenting); *Mance v. Sessions*, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J., joined by Jones, Smith, Willett, Ho, Duncan, and Engelhardt, JJ., dissenting from the denial of reh'g en banc); *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 702 (6th Cir. 2016) (Batchelder, J., concurring); *id.* at 710 (Sutton, J., concurring).

We join this chorus. We cannot "square the type of means-ends weighing of a government regulation inherent in the tiers-of-scrutiny analysis with *Heller*'s directive that a core constitutional protection should not be subjected to a freestanding interest-balancing approach." *Mai*, 974 F.3d at 1086–87 (Bumatay, J., dissenting from the denial of reh'g en banc) (simplified)). That judges are not empowered to recalibrate the rights owed to the people has been stated again and again:

> Our duty as unelected and unaccountable judges is to defer to the view of the people who ratified the Second Amendment, which is itself the "very *product* of an interest balancing by the people." *Heller*, 554 U.S. at 635. By ignoring the balance already struck by the people, and instead subjecting enumerated rights, like the Second Amendment, to our own judicial balancing, "we do violence to the [constitutional] design." *Crawford v. Washington*, 541 U.S. 36, 67–68 (2004).

Id. at 1087. After all, "[t]he People, through ratification, have already weighed the policy tradeoffs that constitutional rights entail." *Luis v. United States*, 136 S. Ct. 1083, 1101 (2016) (Thomas, J., concurring).

Despite these warnings, our court charges ahead in applying the two-step-to-intermediate-scrutiny approach. Application of "intermediate scrutiny" to the large-capacity magazine ban, however, engages in exactly the sort of "costs and benefits" analysis the Court said we should not be doing. *McDonald*, 561 U.S. at 790–91. This approach, moreover, is nothing more than a judicial sleight-of-hand, allowing courts to feign respect to the right to keep and bear arms while "rarely ever actually using it to strike down a law."[12] Intermediate scrutiny, we fear, is just window dressing for judicial policymaking. Favored policies may be easily supported by cherry-picked data under the tier's black box regime. But whether we personally agree with California's firearms regulations, that is no excuse to disregard the Court's instructions and develop a balancing test for a

[12] Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 Geo. Wash. L. Rev. 703, 757 (2012) (explaining that lower courts consistently apply intermediate scrutiny in line with Justice Breyer's dissent despite Heller's rejection of that approach). Even if we were to ignore *Heller* and continue to follow our own misguided precedent, the majority still gets it wrong. As Judge Lee ably pointed out, strict scrutiny should apply because § 32310's categorical ban substantially burdens "the core right of law-abiding citizens to defend hearth and home." *Duncan v. Becerra*, 970 F.3d 1133, 1152 (9th Cir. 2020), reh'g en banc granted, opinion vacated, 988 F.3d 1209 (9th Cir. 2021). As the Supreme Court noted, laws that impinge on a "fundamental right explicitly . . . protected by the constitution" require "strict judicial scrutiny." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("[C]lassifications affecting fundamental rights are given the most exacting scrutiny." (simplified)).

fundamental right. Our job is not to give effect to our own will, but instead to "the will of the law"—in this case, the Constitution. *Osborn v. Bank of U.S.*, 22 U.S. 738, 866 (1824) (Marshall, C.J.).

Of course, this would not be the first time that our court struggled mightily to understand the Supreme Court's directions. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) ("This is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise."). We have done so again here, and it is a shame.

2. The Supreme Court Looks to Text, History, and Tradition

Contrary to the majority's reiteration of a tiers-of-scrutiny, sliding scale approach, *Heller* commands that we interpret the scope of the Second Amendment right in light of its text, history, and tradition. That's because constitutional rights "are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 634–35.

Heller announced a straightforward analytical framework that we are not free to ignore: the Second Amendment encompasses the "right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635. As a "prima facie" matter, that right extends to "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582. Any regulation that infringes on the exercise of this right implicates conduct protected by the Second Amendment.

But because the Second Amendment right is "not unlimited," *id.* at 595, regulations that are "historical[ly] justifi[ed]" do not violate the right, *id.* at 635. Primarily, the "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes," such as M-16s and short-barreled shotguns. *Id*. at 625. In making this inquiry, we look to the "historical tradition," which has excluded "dangerous and unusual" weapons from the Amendment's protection. *Id.* at 627. In the same way, the Amendment *does* protect weapons in "common us[age]." *Id*. Finally, the Second Amendment does not disturb "longstanding prohibitions" on the sale, possession, or use of guns with sufficient historical antecedents. *Id*. at 626–27.

Rather than rely on our own sense of what is the right balance of freedom and government restraint, then, the Court instructs lower courts to follow the meaning of the People's law as understood at the time it was enacted. Such an approach is more determinate and "much less subjective" because "it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor." *McDonald*, 561 U.S. at 804 (Scalia, J., concurring).

Far from obscuring the decision-making process, as Judge Berzon's concurrence contends, applying the text, history, and tradition approach forces judges to put their cards on the table. It sets out the ground rules under which constitutional decision-making is made. It ensures that only proper sources, datapoints, and considerations are used to determine the scope of the Second Amendment right. Adopting this approach necessarily constrains judges to the text and the historical record rather than to their own policy

preferences. To be sure, no mode of judicial decision-making is perfect or can eliminate discretionary calls, but relying on a historical methodology provides discernible rules that "hedge[]" discretion and expose the "misuse of these rules by a crafty or willful judge" as "an abuse of power."[13] Even if the method requires complicated historical research or interpretative choices, the text, history, and tradition approach offers a common ground to criticize a judge who glosses over the text or misreads history or tradition.[14] Otherwise, we are left with the majority's approach which all too often allows judges to simply pick the policies they like with no clear guardrails.

Moreover, contrary to Judge Berzon's portrayal, the fact that "[w]ords do not have inherent meaning" is a feature—not a bug—of *Heller*'s text-based approach. *See* Berzon Concurrence 61. We agree that the meaning of words may evolve over time. But enumerated rights do not. The People ratified the Second Amendment in 1791 to protect an enduring right—not one subject to the whims of future judges or the evolution of the words used to articulate the right.[15] This view is not radical. Chief Justice Marshall

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[13] Frank H. Easterbrook, Foreword to Antonin Scalia and Bryan A. Garner, Reading Law at xxiii (2012).

[14] *See generally* William Baude, *Originalism as a Constraint on Judges*, 84 U. Chi. L. Rev. 2213 (2018).

[15] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 862 (1989) ("The purpose of constitutional guarantees . . . is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable."); *see also* William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev 693, 697 (1976) ("Once we have abandoned the idea that the authority of the courts to declare laws unconstitutional

expressed a similar sentiment in 1827: The Constitution's words, he said, "are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them." *Ogden v. Saunders*, 25 U.S. 213, 332 (1827) (Marshall, C.J., dissenting).

Without hewing to the meaning of the right as understood at the time of enactment, we alter the rights chosen by the People and risk injecting our own policy judgments into the right's meaning. As for Judge Berzon's concern that the meaning of constitutional text may be "lost to the passage of time," Berzon Concurrence 61, we have been interpreting language going back millennia. As Justice Gorsuch observed, "[j]ust ask any English professor who teaches Shakespeare or Beowulf." Neil M. Gorsuch, A Republic, If You Can Keep It 112 (2020). Simply put, original meaning gives enduring meaning to the Constitution and preserves our rights as they were enshrined at the time of adoption.

The criticisms of history and tradition playing a role in constitutional interpretation fall equally flat. *See* Berzon Concurrence 62–75. As *Heller* shows, by looking to tradition and history, we see how constitutional text came to be and how the People closest to its ratification understood

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is somehow tied to the language of the Constitution that the people adopted, a judiciary exercising the power of judicial review appears in a quite different light. Judges then are no longer the keepers of the covenant; instead they are a small group of fortunately situated people with a roving commission to second-guess Congress [and] state legislatures . . . concerning what is best for the country.").

and practiced the right.[16] And by examining a firearm's history of common usage, we come to see the fundamental nature of the right and illuminate how a modern governmental regulation may infringe on a longstanding protection. Tradition and history may also allow us to take interpretive options off the table: they might say that two possible "answers" to a legal question are permissible, which "is worth something" because courts should not "impose a third possibility."[17] So, tradition and history inform the meaning of constitutional rights in ways that no tier-of-scrutiny can.

For sure, this approach can be difficult. Some of Judge Berzon's process critiques are not all wrong. *See* Berzon Concurrence 57–58 (noting that the "volume of available historical evidence . . . will vary enormously and may often be either vast or quite sparse"). Looking to text, history, and tradition to uncover meaning takes time and careful analysis.[18] And interpreting the meaning of documents and events from long-ago is much harder than simply consulting

[16] *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1, 28 (2015) ("[T]he original public meaning was, in part, determined by the public context of constitutional communication. Thus, the public at large would have been aware of (or had access to) the basic history of the Constitution.).

[17] Ilan Wurman, *Law Historians' Fallacies*, 91 N.D. L. Rev. 161, 171 (2015).

[18] *See, e.g.*, Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 Const. Comment. 47, 74–75 (2006); William Baude & Jud Campbell, *Early American Constitutional History: A Source Guide* (2021), https://ssrn.com/abstract=2718777 (describing the wide variety of available originalist sources such as ratification debates, dictionaries, treatises, and linguistic corpora).

our own policy views. But it is the high price our Constitution demands from judges who swear an oath to apply it faithfully. Indeed, the same criticisms leveled by Judge Berzon apply with greater force to the tiers-of-scrutiny approach because there is no historical backdrop to cabin a judge's discretion. While judges may not be historians, neither are we economists, statisticians, criminologists, psychologists, doctors, or actuarialists.[19] But that is exactly the type of expertise judges use to render judgment under the majority's approach. *See, e.g.*, *Mai*, 952 F.3d at 1118–20 (using Swedish statistical studies to justify the deprivation of the Second Amendment right of a formerly mentally ill citizen). While the text, history and tradition methodology may have shortcomings, it is better than the majority's approach.[20] Their judicial black box leaves critics grasping to understand the court's method for balancing policy interests. At the very least, text, history, and tradition has nothing to hide.

B. Under *Heller*, Large-Capacity Magazine Bans Are Unconstitutional

With a firm understanding of the approach directed by *Heller*, we turn to California's large-capacity ban.

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[19] *See* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 Law and Hist. Rev. 809, 816 (2019) ("[L]egal uncertainty is hardly restricted to matters of history. Judges and juries frequently face questions that might stump expert economists or toxicologists.").

[20] *See* Scalia, *supra*, at 862–63.

1. Large-capacity magazines are "arms" under the Second Amendment.

To begin, when assessing a ban on a category of weapons, we look to whether the regulation infringes on the use of instruments that constitute "bearable arms" under the Second Amendment. *Heller*, 554 U.S. at 582. The Court tells us that the term "bearable arms" includes any "[w]eapons of offence" or "thing that a man wears for his defence, or takes into his hands," that is "carr[ied] . . . for the purpose of offensive or defensive action." *Id.* at 581, 584 (simplified). It doesn't matter if the "arm" was "not in existence at the time of the founding." *See id.* at 582.

At issue here are magazines capable of carrying more than ten rounds. A "magazine" is a firearm compartment that stores ammunition and feeds it into the firearm's chamber.[21] The magazines are integral to the operation of firearms. As a result, many popular firearms would be practically inoperable without magazines.

That the law bans magazines rather than the guns themselves does not alter the Second Amendment inquiry. Constitutional rights "implicitly protect those closely related acts necessary to their exercise." *Luis*, 136 S. Ct. at 1097 (Thomas, J., concurring). "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized[.]" The Federalist No. 44, at 282 (James Madison) (Charles R. Kesler ed., 2003). Without protection of the components that render a firearm operable, the Second Amendment would be meaningless.

[21] *See Magazine*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/112144; *Magazine*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/magazine.

See Luis, 136 S. Ct. at 1098 (Thomas, J., concurring); *see also Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) (recognizing the "right to possess the magazines necessary to render . . . firearms operable").

Because California's law prohibits the possession of large-capacity magazines, it is within the scope of the Second Amendment's protection.[22]

2. Large-capacity magazines are typically possessed by law-abiding citizens for lawful purposes.

The next step in the Court's analysis requires that we determine whether large-capacity magazines are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. As we stated, this inquiry examines the historical record to determine whether the weapons are "dangerous and unusual," on the one hand, or whether they are in "common use," on the other. *Id.* at 627 (simplified).[23]

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[22] California asserts that the Second Amendment doesn't extend to weapons "most useful in military service." *Heller* did not establish such an exception. In fact, *Heller* said the opposite: the Amendment's prefatory clause reference to the "conception of the militia" means that the right protects "the sorts of lawful weapons that [citizens] possessed at home [to bring] to militia duty." 554 U.S. at 627. Justice Alito squarely dispensed with California's argument in *Caetano*, stating that the Court has "recognized that militia members traditionally reported for duty carrying the sorts of lawful weapons that they possessed at home, and that the Second Amendment therefore protects such weapons as a class, regardless of any particular weapon's suitability for military use." 577 U.S. at 419 (Alito, J., concurring) (simplified).

[23] We believe this inquiry is one and the same. *Heller* mentions both in the same breath. Referring to the Court's prior precedent that "the

First, a word about "common usage." We start with the well-established premise that the Constitution protects enduring principles: "The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 404 (1937). Thus, absent amendment, "the relevant [constitutional] principles must be faithfully applied not only to circumstances as they existed in 1787, 1791, and 1868, for example, but also to modern situations that were unknown to the Constitution's Framers." *Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting).

Here, we look to the Second Amendment's text for its enduring meaning. Its prefatory clause reads: "A well regulated Militia, being necessary to the security of a free State[.]" U.S. Const. amend. II. The Court has told us that this prefatory clause "fits perfectly" with the Amendment's operative clause's individual right to keep and bear arms: "the way tyrants had eliminated a militia consisting of all the

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sorts of weapons protected were those 'in common use at the time,'" the Court noted that "that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" 554 U.S. at 627 (citing *United States v. Miller*, 307 U.S. 174, 179–80 (1939)). As then-Judge Kavanaugh recognized, *Heller* "said that 'dangerous and unusual weapons' are equivalent to those weapons not 'in common use.'" *Heller II*, 670 F.3d at 1272 (Kavanaugh, J., dissenting) (simplified); *see also United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008) ("Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use."); *Wilson v. Cnty. of Cook*, 968 N.E.2d 641, 655 (Ill. 2012) ("*Heller* explicitly recognized a historical and long-standing tradition of firearms regulations prohibiting a category of 'dangerous and unusual weapons' that are 'not typically possessed by law-abiding citizens for lawful purposes.'").

able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents." *Heller*, 554 U.S. at 598. Thus, the prefatory clause "announces the purpose for which the right was codified: to prevent elimination of the militia." *Id.* at 599.

Understanding this background informs the type of weapons protected by the Second Amendment. As the Court wrote:

> In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defence. The possession of arms also implied the possession of ammunition, and the authorities paid quite as much attention to the latter as to the former.

Miller, 307 U.S. at 179–80 (simplified). The militia system then created a central duty: "ordinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Id.* at 179. Thus, the lifeblood of militia service was citizens armed with weapons typically possessed at home for lawful purposes. As a result, the Second Amendment protects such weapons *as a class*. *See Heller*, 554 U.S. at 627.

So, the Second Amendment protects the type of bearable weapons commonly used by citizens and at the ready for

militia service—whether it be in 1791 or today.[24] What remains is an inquiry that is simultaneously historical and contemporary. The historical inquiry is relevant because we "reason by analogy from history and tradition" when interpreting the Constitution. *Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. N.J.*, 974 F.3d 237, 257 (3d Cir. 2020) (Matey, J., dissenting) (simplified). The Second Amendment right thus extends to "modern-day equivalents" of arms protected at the Founding. *See Parker v. District of Columbia*, 478 F.3d 370, 398 (D.C. Cir. 2007) ("[J]ust as the First Amendment free speech clause covers modern communication devices unknown to the founding generation, e.g., radio and television, and the Fourth Amendment protects telephonic conversation from a 'search,' the Second Amendment protects the possession of the modern-day equivalents of the colonial pistol."), *aff'd sub nom.*, *Heller*, 554 U.S. 570. For this reason, even new or relatively unpopular firearms today might enjoy the Second Amendment's protection if they are "modern-day equivalents" of firearms that have been commonly owned for lawful purposes. Of course, the protection extends equally to weapons not in common use as a historical matter, so long as they are "commonly possessed by law-abiding citizens for lawful purposes *today*." *Caetano*, 577 U.S. at 420 (Alito, J., concurring).

Some courts have reviewed that common usage requirement as being "an objective and largely statistical

[24] It is no matter that citizens don't typically serve in militias today, or that the weapons protected by the Second Amendment would be comparatively ineffective in modern warfare. As *Heller* explained, "the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right." *Heller*, 554 U.S. at 627–28.

inquiry." *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 256 (2d Cir. 2015). For example, Justice Alito noted the quantity of stun guns (200,000) in circulation as proof that they're commonly owned for lawful purposes. *Caetano*, 577 U.S. at 420 (Alito, J., concurring). But a narrow focus on numbers may not capture all of what it means to be a weapon "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. As Judge Lee noted, "pure statistical inquiry may hide as much as it reveals." *Duncan*, 970 F.3d at 1147. A straight quantitative inquiry could create line-drawing problems and lead to bizarre results—such as the exclusion of a protectable arm because it is not widely possessed "by virtue of an unchallenged, unconstitutional regulation." *Id.*; *see also Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015) ("Yet it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly used. A law's existence can't be the source of its own constitutional validity."). Indeed, notably absent from *Heller* is any analysis of the number of handguns in circulation or the proportion of owned firearms that were handguns. *Heller* instead focused on the purpose for which the firearms are owned and used. *See* 554 U.S. at 629 ("It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon."). Thus, in addition to statistical analysis, some courts also look to "broad patterns of use and the subjective motives of gun owners." *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 256. We need not resolve all these questions today, since large-capacity magazines, as we show below, are "in common use" today under either rubric.

a. Large-capacity magazines enjoy a long historical pedigree.

Looking at the historical record, large-capacity magazines are clear modern-day equivalents of arms in common use by the incorporation of the Second Amendment and are, thus, entitled to constitutional protection. As Judge Lee concluded: "Firearms or magazines holding more than ten rounds have been in existence—and owned by American citizens—for centuries. Firearms with greater than ten round capacities existed even before our nation's founding, and the common use of [large-capacity magazines] for self-defense is apparent in our shared national history." *Duncan*, 970 F.3d at 1147; *see also* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 851 (2015) ("[I]n terms of large-scale commercial success, rifle magazines of more than ten rounds had become popular by the time the Fourteenth Amendment was being ratified.").

Rather than re-tell the long history of large-capacity magazines in this country, we offer some highlights:

- The first known firearm capable of firing more than ten rounds without reloading was a 16-shooter invented in 1580.

- The earliest record of a repeating firearm in America noted that it fired more than ten rounds: In 1722, Samuel Niles wrote of Indians being entertained by a firearm that "though loaded but once, . . . was discharged eleven times following, with bullets, in the space of two minutes." Harold L. Peterson, Arms and Armor in Colonial America 1526–1783, 215 (2000).

- At the Founding, the state-of the-art firearm was the Girandoni air rifle with a 22-shot magazine capacity.

- In 1777, Joseph Belton demonstrated a 16-shot repeating rifle before the Continental Congress, seeking approval for its manufacture. Robert Held, The Belton Systems, 1758 & 1784–86: America's First Repeating Firearms 37 (1986).

- By the 1830s, "Pepperbox" pistols had been introduced to the American public and became commercially successful. Depending on the model, the Pepperbox could fire 5, 6, 12, 18, or 24 rounds without reloading.

- It took several years for Samuel Colt's revolvers (also invented in the 1830s) to surpass the Pepperbox pistol in the marketplace.

- From the 1830s to the 1850s, several more rifles were invented with large ammunition capacities, ranging from 12- to 38- shot magazines.

- By 1855, Daniel Wesson (of Smith and Wesson fame) and Oliver Winchester collaborated to introduce the lever action rifle, which contained a 30-round magazine that could be emptied in less than one minute. A later iteration of this rifle, the 16-round Henry lever action rifle, became commercially successful, selling about 14,000 from 1860 to 1866.

- By 1866, the first Winchester rifle, the Model 1866, could hold 17 rounds in the magazine and one in the chamber, all of which could be fired in nine seconds. All told, Winchester made over 170,000 copies of the from 1866 to 1898. *See* Norm Flayderman, Flayderman's

Guide to Antique Firearms and Their Values 268 (6th ed. 1994).

- A few years later, Winchester produced the M1873, capable of holding 10 to 11 rounds, of which over 720,000 copies were made from 1873 to 1919.

From this history, the clear picture emerges that firearms with large-capacity capabilities were widely possessed by law-abiding citizens by the time of the Second Amendment's incorporation. In that way, today's large-capacity magazines are "modern-day equivalents" of these historical arms, and are entitled to the Second Amendment's protection.

b. Magazines with over ten rounds are widely used for lawful purposes today.

It is also uncontested that ammunition magazines that hold more than ten rounds enjoy widespread popularity today. This is evident from the fact that as many as 100,000,000 such magazines are currently lawfully owned by citizens of this country. It's also apparent from the fact that those magazines are a standard component on many of the nation's most popular firearms, such as the Glock pistol, which comes with a magazine that holds 15 to 17 rounds.[25]

[25] We can go on and on with examples. Since 1964, Ruger has sold six million copies of its 10/22 rifles, which is manufactured with 10-round, 15-round, and 25-round magazines. More than five million AR-15 rifles have been sold, typically with 30-round magazines. The commonality of large-capacity magazines is well accepted by other courts. *See, e.g.*, *Heller II*, 670 F.3d at 1261 ("We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use,' as the plaintiffs contend" because "fully 18 percent of all firearms owned by civilians in 1994 were

They are lawful in at least 41 states and under Federal law. Indeed, large-capacity magazines account for *half* of all magazines owned in the United States today. Thus, the record in this case shows that large-capacity magazines are in common use for lawful purposes today, entitling them to Second Amendment protection.

Not only are they ubiquitous, the large-capacity magazines are used for lawful purposes, like home defense. Millions of semiautomatic pistols, the "quintessential self-defense weapon" for the American people, *Heller*, 554 U.S. at 629, come standard with magazines carrying over ten rounds. Many citizens rely on a single, large-capacity magazine to respond to an unexpected attack. As one firearms expert put it: firearms equipped with a magazine capable of holding more than ten rounds are "more effective at incapacitating a deadly threat and, under some circumstances, may be necessary to do so." This is why many Americans choose to advantage themselves by possessing a firearm equipped with a large-capacity magazine and why the ownership of those magazines is protected by the Second Amendment.

California does not refute any of this.[26] Indeed, courts throughout the country agree that large-capacity magazines

equipped with magazines holding more than ten rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000.").

[26] Instead, California points to data suggesting that people using firearms in self-defense fire only "2.2 shots on average." On this basis, California argues that the banned magazines are not useful for self-defense. This is a non-sequitur. That a citizen did not expend the full magazine does not mean that the magazine was not useful for self-defense purposes. It is also immaterial that plaintiffs have not shown

are commonly used for lawful purposes. *See Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 116–17 ("The record shows that millions of magazines are owned, often come factory standard with semi-automatic weapons, are typically possessed by law-abiding citizens for hunting, pest-control, and occasionally self-defense[.]" (simplified)); *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 255 ("[S]tatistics suggest that about 25 million large-capacity magazines were available in 1995, . . . and nearly 50 million such magazines—or nearly two large-capacity magazines for each gun capable of accepting one—were approved for import by 2000.). Even our court has begrudgingly admitted as much. *See Fyock*, 779 F.3d at 998 ("[W]e cannot say that the district court abused its discretion by inferring from the evidence of record that, at a minimum, [large-capacity] magazines are in common use. And, to the extent that certain firearms capable of use with a magazine—e.g., certain semiautomatic handguns—are commonly possessed by law-abiding citizens for lawful purposes, our case law supports the conclusion that there must also be some corollary, albeit not unfettered, right to possess the magazines necessary to render those firearms operable.").

In sum, firearms with magazines capable of firing more than ten rounds are commonplace in America today. And they are widely possessed for the purpose of self-defense, the very core of the Second Amendment. Accordingly, an overwhelming majority of citizens who own and use large-capacity magazines do so for lawful purposes. "Under our

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when a large-capacity magazine was *necessary* to fend off attackers. That is not the test. *Heller* only looks to the *purpose* of the firearm's ownership—not that it is *effectively used* or *absolutely necessary* for that purpose. In fact, we are hopeful that most law-abiding citizens never have to use their firearms in self-defense.

precedents, *that is all that is needed* for citizens to have a right under the Second Amendment to keep such weapons." *Friedman*, 136 S. Ct. at 449 (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (emphasis added). So, unless subject to "longstanding prohibition," they are protected by the Second Amendment.

3. Bans on large-capacity magazines are not a presumptively lawful regulatory measure.

After completing its analysis, *Heller* cautioned: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626–27. The Court also noted that its list of "presumptively lawful regulatory measures" was not "exhaustive." *See id.* at 627 n.26. Thus, it would be wise to ask whether California's law enjoys the endorsement of history. Our task, therefore, is to determine "whether the challenged law traces its lineage to founding-era or Reconstruction-era regulations," *Duncan*, 970 F.3d at 1150, because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," *Heller*, 554 U.S. at 634–35. As a preview, California cannot meet this showing: the magazine ban's earliest analogues only show up in the early twentieth century, which doesn't meet the definition of "longstanding" under *Heller*.

The Court's first example of a longstanding and presumptively lawful regulatory measure is the "prohibition[] o[f] the possession of firearms by felons and the mentally ill." *Heller*, 554 U.S. at 626. Prohibiting the possession of arms by those found by the state to be

dangerous, like violent criminals, dates to the Founding.[27] And prohibiting the mentally ill from exercising firearms rights also has roots dating to the Founding. *See Mai*, 974 F.3d at 1090 (Bumatay, J., dissenting from the denial of reh'g en banc).

Heller next points to laws that forbid "the carrying of firearms in sensitive places," as an example of longstanding regulatory measures. 554 U.S. at 626. Again, this practice dates to the Founding: "colonial and early state governments routinely exercised their police powers to restrict the time, place, and manner in which Americans used their guns." Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context*

[27] *See Kanter v. Barr*, 919 F.3d 437, 464 (7th Cir. 2019) ("History . . . support[s] the proposition that the state can take the right to bear arms away from a category of people that it deems dangerous.") (Barrett, J., dissenting); C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 698 (2009) ("'[L]ongstanding' precedent in America and pre-Founding England suggests that a firearms disability can be consistent with the Second Amendment to the extent that . . . its basis credibly indicates a present danger that one will misuse arms against others and the disability redresses that danger."); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to 'Bear Arms'*, 49 Law & Contemp. Probs. 151, 161 (1986) ("[V]iolent criminals, children, and those of unsound mind may be deprived of firearms[.]"); *Binderup v. Att'y Gen. United States of Am.*, 836 F.3d 336, 369 (3d Cir. 2016) (Hardiman, J., concurring in part and concurring in the judgments) ("[T]he historical record leads us to conclude that the public understanding of the scope of the Second Amendment was tethered to the principle that the Constitution permitted the dispossession of persons who demonstrated that they would present a danger to the public if armed."). Because such prohibitions—in their contemporary form—date only to the early twentieth century, *Marshall, supra* at 695, some (including the majority) have mistakenly concluded that *any* firearm regulation dating to that period must be presumptively lawful. *See, e.g.*, Maj. Op. 28–29.

of the Second Amendment, 25 Law & Hist. Rev. 139, 162 (2007). For example, the Delaware Constitution of 1776 stated that "no person shall come armed to any" of the state elections, so as to "prevent any violence or force being used at the said elections." Del. Const., art. 28 (1776). And the multitude of Founding-era laws regulating the times and places in which firearms could be used are well documented. *See* Churchill, *supra* at 161–66.

The final demonstrative category in *Heller* is the imposition of "conditions and qualifications on the commercial sale of arms." 554 U.S. at 627. The historical lineage of such a broad set is necessarily difficult to trace; the more specific the "condition" or "qualification," the more varied the history will be. *Cf. Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018) ("Our circuit similarly has strained to interpret the phrase 'conditions and qualifications on the commercial sale of arms.'"). Still, in analyzing this category, our circuit has traced its antecedents to the Founding. We've noted that "colonial government regulation included some restrictions on the commercial sale of firearms." *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 685 (9th Cir. 2017) (en banc).[28]

[28] For example, several colonies "passed laws in the first half of the seventeenth century making it a crime to sell, give, or otherwise deliver firearms or ammunition to Indians." *Teixeira*, 873 F.3d at 685. And, for instance, "Connecticut banned the sale of firearms by its residents outside the colony." *Id.* Connecticut law also required a license to sell gunpowder that had been manufactured in the colony outside the colony. *See* An Act for encouraging the Manufactures of Salt Petre and Gun Powder, December 1775, *reprinted in* The Public Records of the Colony of Connecticut From May, 1775, to June, 1776 191 (Charles J. Hoadly ed., 1890); ("Be it . . . enacted, That no salt petre, nitre or gun-powder made and manufactured, or that shall be made and manufactured in this

As mentioned above, a pattern emerges. *Heller*'s examples of longstanding, presumptively lawful regulations have historical analogues at least dating to the Founding. This makes sense: determining the core of the Second Amendment's protection is, after all, a "historical inquiry [that] seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification." *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

That pattern is problematic for California. The first law limiting magazine capacity was enacted by Michigan in 1927, setting an upper limit of 16 rounds. *See* Act of June 2, 1927, No. 373, § 3, 1927 Mich. Public Acts 887, 888 (repealed 1959). Rhode Island passed a similar ban that year, prohibiting any firearm that could shoot more than 12 times without reloading. *See* Act of Apr. 22, 1927, ch. 1052, §§ 1, 4, 1927 R.I. Acts & Resolves 256, 256–57 (amended 1959). In 1932, the District of Columbia prohibited the possession of a firearm that could shoot more than 12 rounds without reloading. *See* Act of July 8, 1932, Pub. L. No. 72-275, §§ 1, 8, 47 Stat. 650, 650, 652. The next year, Ohio passed a law requiring a permit to possess any firearm with an ammunition capacity over 18 rounds. *See* Act of Apr. 8, 1933, No. 166, sec. 1, §§ 12819-3, -4, 1933 Ohio Laws 189, 189 (amended 1972). California's law, meanwhile, dates only to 1999.

Colony, shall be exported out of the same by land or water without the licence of the General Assembly or his Honor the Governor and Committee of Safety[.]"). Similarly, New Jersey law required that any gunpowder be inspected and marked before its sale. An Act for the Inspection of Gun-Powder, ch. 6, §1. 1776 N. J. Laws 6. (making it an "Offence" for "any Person" to "offer any Gun-Powder for Sale, without being previously inspected and marked as in herein after directed").

California does not dispute the historical record—it points to the above Prohibition-era laws of Michigan, Rhode Island, and Ohio to defend its own ban's historical pedigree. But such laws aren't nearly old enough to be longstanding. Even if, for the sake of argument, we granted that a regulation need only date to the Reconstruction era to be sufficiently longstanding, California's large-capacity magazine ban still fails. Thus, California's magazine ban is not longstanding or presumptively lawful.[29] *See Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 116–17 ("[T]here is no longstanding history of LCM regulation."); *id.* at 117 n.18 ("LCMs were not regulated until the 1920s, but most of those laws were invalidated by the 1970s. The federal LCM ban was enacted in 1994, but it expired in 2004.") (simplified).

Not only is California's ban not historically longstanding, but it also differs in kind from the regulatory measures mentioned in *Heller*. Regulations on possession by people dangerous to society, where a firearm may be carried, and how firearms may be exchanged, *see Heller*, 554 U.S. at 626–27, are about the manner or place of use and sale or the condition of the user. California's ban, on the other hand, is much more like a "prohibition on an entire class of 'arms' that is overwhelmingly chosen by American society" for home defense. *Id.* at 628. Also, like the ban in

[29] Sufficient historical pedigree is only capable of establishing a presumption in favor of constitutionality. But that presumption is not dispositive. Thus, even if California's magazine ban dated to a period that would plausibly render it longstanding (*i.e.*, the Founding or Reconstruction), we would still need to answer whether that presumption could be overcome. California's law effectively outlaws massive swaths of firearms chosen by law-abiding citizens for lawful purposes like self-defense. If a court were forced to answer the question, it's possible that the ban's history couldn't save it.

Heller, California's ban extends "to the home, where the need for defense of self, family, and property is most acute." *Id.*

In the end, California fails to point to a single Founding-era statute that is even remotely analogous to its magazine ban. Ironically, the closest Founding-era analogues to ammunition regulations appear to be laws *requiring* that citizens arm themselves with particular arms and a specific minimum amount of ammunition. *See* 1784 Mass. Acts 142; 1786 N. Y. Laws 228; 1785 Va. Statutes at Large 12 (12 Hening c. 1); 1 Stat. 271 (1792) (Militia Act); Herbert L. Osgood, *The American Colonies in the Seventeenth Century* 499–500 (1904) (showing that states required citizens to equip themselves with adequate firearms and sufficient ammunition—varying between twenty and twenty-four cartridges *at minimum*). That does not offer historical support for California's ban; in fact, it runs directly counter to California's position.

IV.

California's experiment bans magazines that are commonly owned by millions of law-abiding citizens for lawful purposes. These magazines are neither dangerous and unusual, nor are they subject to longstanding regulatory measures. In ratifying the Second Amendment, the People determined that such restrictions are beyond the purview of government. Our court reaches the opposite conclusion in contravention of the Constitution and Supreme Court precedent. In so doing, it once again employs analytical tools foreign to the Constitution—grafting terms like "intermediate scrutiny," "alternative channels," and "reasonable fit" that appear nowhere in its text. So yet again, we undermine the judicial role and promote ourselves to the position of a super-legislature—voting on which

fundamental rights protected by the Constitution will be honored and which will be dispensed with.

We respectfully dissent.

VANDYKE, Circuit Judge, dissenting:

I largely agree with Judge Bumatay's excellent dissent. And to paraphrase James Madison, if judges were angels, nothing further would need be said. But unfortunately, however else it might be described, our court's Second Amendment jurisprudence can hardly be labeled angelic. Possessed maybe—by a single-minded focus on ensuring that any panel opinions actually enforcing the Second Amendment are quickly reversed. The majority of our court distrusts gun owners and thinks the Second Amendment is a vestigial organ of their living constitution. Those views drive this circuit's caselaw ignoring the original meaning of the Second Amendment and fully exploiting the discretion inherent in the Supreme Court's cases to make certain that *no* government regulation ever fails our laughably "heightened" Second Amendment scrutiny.

This case is par for the course. The majority emphasizes the statistical rarity of law-abiding citizens' need to fire more than an average of 2.2 shots in self-defense, but glosses over the statistical rarity of the harm that California points to as supporting its magazine ban. Instead of requiring the government to make an actual heightened showing, it heavily weighs the government's claim that guns holding more than 10 rounds are "dangerous" (of course they are—all guns are) against a self-defense interest that the majority discounts to effectively nothing. Once again, our court flouts the Supreme Court's exhortation against such "a

freestanding 'interest-balancing' approach" to the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

If the Second Amendment is ever going to provide any real protection, something needs to change. I have some suggestions, which I offer below after first discussing some of the flaws in the majority's analysis of this case.[1] Until the Supreme Court requires us to implement a paradigm shift, the Second Amendment will remain a second-class right—especially here in the Ninth Circuit.

* * *

It should be presumptively unconstitutional to burden constitutional rights. But looking at our court's cases, you would assume that any burden on the right to bear arms is presumptively permitted. I've described before how our circuit's version of Second Amendment "heightened" scrutiny has no height. It is practically indistinguishable from rational basis review. *See Mai v. United States*, 974 F.3d 1082, 1097–106 (9th Cir. 2020) (VanDyke, J., dissenting from denial of rehearing en banc). While our court gives lip service to *Heller*, its practice of effectively applying rational basis review ignores *Heller*'s admonition that if passing rational basis review was "all that was required to overcome the right to keep and bear arms . . . the Second Amendment would be redundant . . . ." *Heller*, 554 U.S. at 628 n.27.

[1] Because Judge Bumatay's dissent explains at length the shortcomings of the majority's analysis, I provide only some supplemental observations.

The brokenness of our court's balancing approach is particularly evident in this case, where the majority weighs rarity like lead when it favors the ban, but then weighs rarity like helium when it undermines California's asserted interest. On one hand, the majority ignores the fact that California's claimed reason for its ban—mass shootings—involves a harm that, while tragic and attention-grabbing, is thankfully extremely rare by any statistical metric. You are much more likely to be randomly injured or killed by a drunk driver than a mass shooter. But on the other hand, the majority emphasizes the rarity of any individual American's use of ammunition in self-defense, latching onto California's argument that only 2.2 rounds are used on average in a self-defense shooting, and concludes that any more rounds than that are thus outside the "core" of the Second Amendment.

We might call this Version 2.2 of the Second Amendment. It cannot be the right way to analyze an alleged violation of the right to bear arms. The average number of times that any law-abiding citizen *ever* needs to "bear arms" at all in a self-defense situation is far below one—most people will (thankfully) *never* need to use a gun to defend themselves. Thus, applying the majority's rarity analysis, possession of a gun itself falls outside the "core" of the Second Amendment. But we know that cannot be true from *Heller*, where the Supreme Court determined "self-defense . . . was the *central component*" of the Second Amendment, notwithstanding the practical infrequency of any particular person's need to actually defend herself with a gun. 554 U.S. at 599.

So the majority's rarity balancing isn't just lopsided—it starts from the wrong premise. We would never treat fundamental rights we care about this way, particularly those expressly enumerated in the Constitution. We don't protect

the free speech of the taciturn less than the loquacious. We don't protect the free exercise of religion in proportion to how often people go to church. We wouldn't even allow soldiers to be quartered only in those parts of your house you don't use much. Express constitutional rights by their nature draw brighter and more prophylactic lines—precisely because those who recognized them were concerned that people like California's government and the judges on our court will attempt to pare back a right they no longer find useful. This is the sentiment James Madison expressed in extolling "the wisdom of descrying . . . the minute tax of 3 pence on tea, the magnitude of the evil comprized in the precedent. Let [us] exert the same wisdom, in watching agst every evil lurking under plausible disguises, and growing up from small beginnings." *Madison's "Detached Memoranda,"* 3 Wm. & Mary Q. (3d ser.) 534, 557–58 (E. Fleet ed., 1946). The majority here extends our circuit's practice of chipping away at a disfavored constitutional right, replacing the Second Amendment with their 2.2nd Amendment.

This case is the latest demonstration that our circuit's current test is too elastic to impose any discipline on judges who fundamentally disagree with the need to keep and bear arms. I consequently suggest two less manipulable tests the Supreme Court should impose on lower courts for analyzing government regulations burdening Second Amendment rights, replacing the current malleable two-step, two-pronged inquiry with something that would require courts to actually enforce the second provision of the Bill of Rights.

First, the Supreme Court should elevate and clarify *Heller*'s "common use" language and explain that when a firearm product or usage that a state seeks to ban is currently prevalent throughout our nation (like the magazines

California has banned here), then strict scrutiny applies. Second, the Court should direct lower courts like ours to compare one state's firearm regulation to what other states do (here a majority of states allow what California bans), and when most other states don't similarly regulate, again, apply strict scrutiny. Where many law-abiding citizens seeking to prepare to defend themselves have embraced a particular product or usage, or the majority of states have not seen a necessity to restrict it, real heightened scrutiny should be required instead of allowing our court to sloppily balance the citizen's "need" against the government's claimed "harm."

No doubt these proposed tests are not perfectly satisfying—doctrinally or academically. Few actual legal tests are, since the application of legal rules happens in the messiness of the real world. Nor would these suggested tests address every situation. Judge Berzon observes, for example, that under the "common use" test I seek to invigorate, gun-adverse states like California will predictably react to new technologies by trying to kill the baby in the cradle—immediately banning any new technology before it can become "commonly used." Perhaps so, but those are difficulties at the margin. Right now, as I discuss further below, we have a Second Amendment test that enables *zero* enforcement in this circuit. Ultimately, Judge Bumatay's and Judge Berzon's opinions converge at one very important point: *neither* our current two-step test *nor* any proposed alternative that allows much interpretative or balancing discretion will ultimately lead to consistent and rigorous enforcement of the Second Amendment—particularly with the many judges who disagree with its very

purpose.[2] It's now beyond obvious that you can't expect our court to faithfully apply any Second Amendment test that allows us to exercise much discretion. Many fundamental rights are protected by more bright-line tests.[3] It's past time we bring that to the Second Amendment.

I. The Majority Takes Our Circuit's "Heightened" Scrutiny to a New Low.

I've observed before how, for Second Amendment cases, our circuit has "watered down the 'reasonable fit' prong of intermediate scrutiny to little more than rational basis review," starting by borrowing an inapt test from the First Amendment context and then weakening it with each passing case upholding government restrictions. *Mai*, 974 F.3d at 1101–04 (VanDyke, J., dissenting from denial of rehearing en banc). This case furthers that trend. Instead of "demand[ing] a closer regulatory fit for a law that *directly* burdens a fundamental right," our en banc court fails to apply any "real heightened scrutiny, or even just faithfully appl[y] the [heightened scrutiny] test as articulated in" comparable First Amendment jurisprudence. *Id.* at 1104.

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[2] To be clear, I think Judge Bumatay has penned an exemplary dissent addressing "text, tradition, and history." My objection is not that judges *cannot* do good analysis under this framework, but rather that without a more bright-line test there is far too much opportunity for manipulation, especially with a right as unpopular with some judges as the Second Amendment.

[3] *See* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U.L.J. 193, 303 (2017) ("Bright-line rules declaring certain government actions categorically unconstitutional, without the need for a means/ends test, are common in constitutional law. They are found in the First Amendment, Fifth Amendment, Sixth Amendment, Eighth Amendment, Tenth Amendment, and Fourteenth Amendment.") (footnotes omitted).

Indeed, notwithstanding our court's early commitment that "we are . . . guided by First Amendment principles" in applying the Second Amendment, *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014), it is telling that comparisons between the First and Second Amendment in this latest case have largely been dropped by the majority and relegated to concurring opinions—likely because it gets embarrassing and wearisome to constantly rationalize why we treat the Second Amendment so differently than its close constitutional neighbor.

In analyzing whether California's magazine ban violates the Second Amendment, the majority here follows a now well-traveled path. It starts like many of our Second Amendment cases: by assuming, instead of deciding, that the Second Amendment even applies to California's ban. *See, e.g.*, *Mai v. United States*, 952 F.3d 1106, 1114–15 (9th Cir. 2020); *Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015).[4] This itself is very telling. It emphasizes the practical

[4] The majority claims that the current two-step inquiry "faithfully adheres" to *Heller*, since "history, text, and tradition greatly inform step one of the analysis . . . ." But this only illustrates my point about the malleability of our current framework. Our court consistently uses step one of our test to either: (1) wade through the complicated history to conclude the regulation does *not* burden conduct protected by the Second Amendment at all, *see, e.g.*, *Young v. Hawaii*, 992 F.3d 765, 785 (9th Cir. 2021) (en banc) ("As we might expect in this area, fraught with strong opinions and emotions, history is complicated, and the record is far from uniform."); or (2) as here, side-step this inquiry altogether by *assuming* the conduct implicates the Second Amendment, only to uphold the regulation at step two by applying an extremely loose balancing test (more on that below). It's clear that history, text, and tradition is currently comatose in our circuit's jurisprudence *enforcing* the Second Amendment—we only rely on it when deemed useful to support the

vacuity of the second step in our court's two-step test. The reason it is so effortless for our court to "assume" that the Second Amendment applies is because the plaintiff will always lose at our court's step-two intermediate scrutiny. If we genuinely applied any form of heightened scrutiny, we would have to be more careful and concise about what activity or item warrants protection under the Second Amendment. And something is wrong when most of our court's judges can't bring themselves to say the Second Amendment actually covers anything beyond a *Heller*-style total handgun ban. It's the judicial equivalent of holding your nose.

After the majority here assumes that California's magazine ban "implicates" the Second Amendment at step one of our test, at step two it concludes that banning the most commonly purchased magazine used in handguns for self-defense only places a "small burden" on the exercise of the right to bear arms and thus only intermediate scrutiny applies. And by this point we all know what that means: the regulation burdening the citizens' Second Amendment rights *always* wins under our version of Second Amendment "intermediate scrutiny." Repeatedly characterizing the legislation as a "minimal burden," the majority decries any possible need for the banned magazines and relies heavily on the rarity of their full use in self-defense, while giving no weight to the *effectiveness* of such magazines in self-defense.

Building on this rationale, Judge Graber's concurrence provides a list of unrealistic alternatives one could use in lieu of a higher-capacity magazine: carry multiple guns; carry

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conclusion that something falls outside our court's illusory Second Amendment protection.

extra magazines; carry some loose rounds in your pocket; carry a cop (okay, I made that last one up). I doubt many who actually carry a gun for self-defense would find these alternatives realistic. And the majority references no "heightened" showing made by the government, other than listing past tragic events across the nation in which criminals misused guns. Those events were, of course, horrific. But citing select (and in this case, statistically very rare) examples of misuse cannot be a basis to overcome the Second Amendment. If it was, then the much more prevalent misuse of guns in criminal activity generally would suffice to ban all guns. That is why, when applying real heightened scrutiny, a "substantial relation is necessary but not sufficient." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021) (applying exacting scrutiny in a First Amendment case).

The truth is that what our court calls "intermediate scrutiny" when reviewing Second Amendment cases doesn't even rise to the level of real rational basis review. That's a bold claim, I know. But think about it: if your state banned all cars, forcing all its citizens to use bicycles because many people are killed by drunk drivers (not to mention automobile accidents generally), would you think that was rational? No. What if California just banned all *large* vehicles (trucks, vans, etc.) because on rare occasions some crazed individual intentionally drives his car into a group of people, and large cars presumably do more damage? I doubt it. But that is what California has done here—banned a type of firearm magazine that has obvious self-defense benefits when used against a *group* of assailants, based on a purported harm that, while high-profile, is statistically

extraordinarily improbable.[5] Much more improbable than harm from misuse of a car. And while cars are not expressly protected by the Constitution, "arms" are.[6]

The reason I think most of my colleagues on this court would genuinely struggle more with a car ban than they do with a gun ban is that they naturally see the value in cars. They drive cars. So they are willing to accept some inevitable amount of misuse of cars by others. And my colleagues similarly have no problem protecting speech—even worthless, obnoxious, and hateful speech[7]—because they like and value speech generally. After all, they made

[5] By emphasizing their statistical rarity, I do not belittle the tragedy experienced by those affected by a mass shooting (any more than observing that airline crashes are thankfully rare detracts from the heartbreak of those involved when they happen).

[6] Characterizing my car ban analogies as "inapt," the majority says that California's magazine ban is more akin to "speed limits." But in attempting to trade my analogies for a more favorable one, the majority misses the obvious point: that in every context except our distorted Second Amendment jurisprudence, everyone agrees that when you evaluate whether a response to avoid some harm is "rational"—much less a "reasonable fit"—you takes into account *both* the gravity of the possible harm *and* the risk of it occurring. The majority here completely ignores the latter. Perhaps if I use the majority's own analogy it might click: If California chose to impose a state-wide 10 mph speed limit to prevent the very real harm of over 3,700 motor-vehicle deaths each year experienced from driving over 10 mph, *no one* would think such a response is rational—precisely because, even though the many deaths from such crashes are terrible, they are a comparatively rare occurrence (although much *more* common than deaths caused by mass shootings).

[7] *See, e.g.*, *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) ("indecent . . . [expression] is protected by the First Amendment"); *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 44 (1977) (per curiam) (protecting the First Amendment rights of Nazis to protest).

their careers from exercising their own speech rights. On the other hand, as clearly demonstrated by this case, most of my colleagues see "limited lawful" value in most things firearm-related.

But the protections our founders enshrined in the Bill of Rights were put there precisely because they worried our future leaders might not sufficiently value them. That is why our court's "intermediate scrutiny" balancing approach to the Second Amendment is no more appropriate here than it would be for any other fundamental right. As the Supreme Court explained in rejecting Justice Breyer's "'interest-balancing' approach," noting that "no other enumerated constitutional right['s] . . . core protection" was subject to such a test,

> [t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

Heller, 554 U.S. at 634–35.

The majority repeatedly denies that it is engaging in the type of "judge-empowering interest-balancing inquiry" rejected in *Heller*, insisting instead that it is merely applying our "traditional test" in this case. It's doing both. Our traditional two-part test *is* a "judge-empowering interest-balancing inquiry." It's a convoluted, multi-step balancing test that weighs different considerations at different times so as to give judges maximum discretion and mask when they treat the same considerations differently at the various stages

of the balancing (like here). When one steps back and evaluates our current Second Amendment test, it is clear the court is engaging in an interest-balancing test—it's just that the balancing is done in two or more steps instead of all together.

What we call our two-step test really has three parts, since the second "step" is divided into two parts. A play in two acts, so to speak. Step II, Part I: the court determines the proper level of scrutiny, which includes *weighing* "the severity of the law's burden on the right." Step II, Part II: the court then applies the "appropriate" level of scrutiny (which, in our court's case, is always intermediate), where the court *weighs* the government's interest in the regulation (including "reasonable fit"). An ever-adapting script, it is always these two *competing interests* that drive the court's analysis. Ultimately, the court is *comparing* the plaintiff's burden against the state's interest. If the burden on the plaintiff's Second Amendment rights is great (i.e., near the mythical "core" of the Second Amendment), then the government is (theoretically) required to make a stronger showing of its interest and fit. And vice-versa. Like a good Marvel movie, there's always lots of drama, but the result is fore-ordained.

This particularly pernicious balancing test is a shell game. The balancing is done piecemeal so that the court can use differently weighted scales at each step and obfuscate the stark disparity between how it weighs the impact from the claimed violation of an express constitutional right, versus how it weighs the government's justification and the regulation's fit. When weighing the impact on the elusive "core" of the Second Amendment, the court whips out a scale specially calibrated to always read "minimal burden" (unless the government officials were dumb enough to do

exactly the same thing Washington, D.C. and Chicago did in *Heller* and *McDonald*: entirely ban all handguns). But when it comes time to weigh the government's interest and the reasonableness of the regulation's fit under "intermediate scrutiny," the court puts away the first scale and pulls out a different scale calibrated to always read "close enough," even where, as here, the fit between the ban and the ultrarare harm asserted is not even rational.

The majority acknowledges that, applying our super-pliable test, "we have not struck down any state or federal law under the Second Amendment." But it insists "we have carefully examined each challenge on its own merit." If every case without fail leads to the same anti-firearms conclusion, however, then at some point it begs credulity to deny that something else is driving the outcomes.

Judge Hurwitz has penned a short concurrence respectfully characterizing as inappropriate and hyperbolic my observations regarding how my colleague's personal views influence our court's Second Amendment cases. I agree that it is a troubling charge to posit personal views as a driving force behind judicial decision-making, and not one I make lightly. But whatever else it may be, my claim is hardly hyperbolic. Here are the facts: We are a monstrosity of a court exercising jurisdiction over 20% of the U.S. population and almost one-fifth of the states—including states pushing the most aggressive gun-control restrictions in the nation. By my count, we have had at least 50 Second Amendment challenges since *Heller*—significantly more than any other circuit—*all* of which we have ultimately denied. In those few instances where a panel of our court has *granted* Second Amendment relief, we have *without fail* taken the case en banc to reverse that ruling. This is true regardless of the diverse regulations that have come before

us—from storage restrictions to waiting periods to ammunition restrictions to conceal carry bans to open carry bans to magazine capacity prohibitions—the common thread is our court's ready willingness to bless any restriction related to guns. Respectfully, Judge Hurwitz's claim that our judges' personal views about the Second Amendment and guns have not affected our jurisprudence is simply not plausible. Res ipsa loquitur.

Judge Hurwitz's own concurrence demonstrates this reality. In defending the validity of California's interest, he doesn't dispute that mass shootings are "infrequent," but expressly dismisses that reality as irrelevant. Why? Because, in his view, "hardly anyone is untouched by the[] devastation." His proof? A *very personal* anecdote about losing our beloved colleague to a mass shooting. No one disputes the depth of that tragedy, which is exactly why such uncommon occurrences nonetheless deeply influence my colleagues' views about gun control and the Second Amendment. But the fact that members of our court have been *personally* affected by a mass shooting is not a legitimate reason to ignore the undisputed statistical rarity when weighing the government's interest in its ban—it falls in the same category as choosing to drive instead of flying because you know someone who was tragically killed in a rare commercial airline accident. As a personal psychological phenomenon, such exaggeration of risks is completely understandable. As a legal matter, it should have no place in applying fundamental constitutional rights, including the Second Amendment. And just as irrelevant is Judge Hurwitz's reliance on yet more *personal* anecdotes—that "[o]ther members of the Court have lost family and friends to gun violence"—that are entirely unrelated to mass shootings. Defending California's regulation by sharing such deeply personal examples only demonstrates just how

hard it is for any judge, including my esteemed and talented colleagues, to evaluate these cases in the objective and detached manner required when the legal test itself offers no meaningful guiderails.

It is important to emphasize that I point to my valued colleagues' personal views not to engage in some unrelated ad hominem attack, but rather because the impact of those views is directly relevant to the purpose of this dissent. When judges are effectively told to balance the necessity for some particular gun-control regulation against that regulation's effect on the "core" of the Second Amendment, there isn't much for the judges to work with other than their own personal views about guns and the Second Amendment. Whether judges intend to bring in their personal views or not, those views inescapably control our holdings when applying a test as malleable as our Second Amendment intermediate scrutiny standard. Without rules that actually bind judges, personal intuition inescapably fills the void. The result of individual judges applying a formless test is a world where "equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve . . . ." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989).

Instead of striving to *avoid* this inequality of treatment, the majority *highlights* the inequality among the circuits as a defense of *our* current two-step approach. They do this by citing *one* case to show "our sister circuits, applying the same two-step inquiry that we apply today, have not hesitated to strike down provisions that go too far." This again bolsters my point. Because the prevailing two-step balancing test is so malleable and discretionary, one would expect that different judges with different conceptions of

guns and gun rights would weigh the different considerations differently and come to different conclusions.[8]

Until the Supreme Court forces our court to do something different than balance *our view* of the utility of some firearm product or usage against the government's claimed harm from its misuse, the Second Amendment will remain essentially an ink blot in this circuit.

II. The Majority's Second Amendment Scales Are Rigged.

Not content to just tilt the rules of the game heavily in the government's favor via our pathetically anemic "intermediate scrutiny," the majority here also stacks the evidentiary deck. The majority balances the average rarity of the use of ammunition in lawful self-defense situations as weighing heavily against its protection under the Second Amendment. Meanwhile, it studiously ignores the rarity of the harm (mass shootings) that California puts forward to support its ban. As explained, such balancing should have no place in a case like this—the founders already settled the weighty interest citizens have in lawfully bearing commonplace self-defense arms like those California has banned here. But the stark disparity between how the

[8] The majority defends our undefeated, 50–0 record against the Second Amendment by pointing out that the states in our circuit simply have "more restrained" gun-control laws than the states in other circuits. While the majority is apparently serious, this claim can't be taken seriously given that our circuit's jurisdiction includes states like California and Hawaii—which have enacted many of the most aggressive gun-control laws in the nation. The majority's failure to comprehend that reality underscores my point that something other than objective and impartial application of the two-part test is driving the outcomes in our Second Amendment cases.

majority treats the very same attribute depending on whether it supports or undercuts the majority's desired outcome illustrates well that, even if we thought balancing might have a proper role in evaluating our Second Amendment rights, we can't expect judges who fundamentally disagree with the Second Amendment to fairly read the scales.

The reality is that essentially everything the Second Amendment is about is rare, for which we all should be very grateful. Government tyranny of the sort to be met by force of arms has been, in the short history of our country, fortunately rare. The actual need for any particular person to use her firearm to defend herself is, again, extremely rare—most of us will thankfully never need to use a gun to defend ourselves during our entire life.[9] And in those rare instances where a firearm is used in self-defense, the amount of ammunition needed is generally very little—oftentimes none at all. It is certainly true that most of us will use exactly zero rounds of ammunition to defend ourselves—ever. So if the Second Amendment protects anything, it is our right to be prepared for dangers that, thankfully, very rarely materialize.

Given that, the majority's focus on the fact that only 2.2 bullets are used *on average* in a self-defense shooting, and concluding that a law banning more than that "interferes only minimally with the core right of self-defense," is

[9] Observing the rarity does not diminish the fact that thousands of citizens use their firearms for lawful self-defense each year. It simply means that as a percentage of the population generally, or even lawful gun owners, that percentage is tiny.

grossly misplaced.[10] An average of 0.0 rounds are fired on average in preventing government tyranny. And the average person will fire an average of 0.0 rounds in self-defense in their entire lifetime. If the rarity alone of *exercising* one's Second Amendment rights cuts so dispositively against their protection, then the Second Amendment protects nothing.

Yet when it comes to the uncommonness of mass shootings—the reason California says it needs its magazine ban—the majority counts *that* as nothing. You would think that if the government seeks to interfere with a fundamental right, the infrequency of the claimed harm would be a very important consideration. For example, if the government sought to ban some type of communication because it very infrequently resulted in harm, we would never countenance that. On the other hand, where some type of communication *frequently* results in harm, it might survive heightened scrutiny (e.g., fighting words).

Here, California relies on a statistically very rare harm as justifying its ban, but a harm that, while infrequent, grabs headlines and is emotionally compelling. The emotional impact of these tragedies does all the work for the government and our court. But if a court was going to balance a fundamental right against a claimed harm, that is precisely where judges must cut through the emotion and do

[10] California currently allows more than 2.2 rounds in a magazine, and does not prohibit carrying multiple magazines. But don't be fooled. Under the majority's Version 2.2 of the Second Amendment, there is no reason a state couldn't limit its citizens to carrying a (generous) 3 rounds total for self-defense.

their job of holding the government to its (supposedly heightened) burden. The majority here doesn't even try.[11]

The majority's uneven treatment of rarity is not the only example where its anti-Second Amendment bias shows through in how it reads the record. The majority questions whether law-abiding citizens even *want* higher capacity magazines for self-defense, speculating "whether circulation percentages of a part that comes standard with many firearm purchases meaningfully reflect an affirmative choice by consumers." But such musings only reveal a clear lack of knowledge about guns—or even basic economics, apparently. In free countries like this one, unless a market is interfered with by regulations like the one at issue in this case, it generally provides what consumers want. The market for self-defense firearms is no exception. Until only a few years ago, if you wanted a "micro-compact" firearm for self-defense (of the type that serves little or no military usage), you were generally limited to a six to eight-round magazine capacity. For example, the KelTec P3AT came with a six-round magazine, as did the Ruger LCP, Glock 43, Kimber Solo, and Walther PPK (of James Bond fame). The Kahr PM9 and Sig Sauer P238 offered six or seven-round

[11] The majority implies that by emphasizing the rarity of mass shootings, I omit the other relevant part of the analysis: "the incredible harm caused by mass shootings." I'm not ignoring the "incredible harm"; I'm simply saying that, just as we do with all serious harms, we must evaluate the seriousness of that harm *along with* the probability of it occurring. For example, no one doubts that commercial airline crashes, when they occur, result in "incredible harm." And yet no government has seriously considered banning commercial flights. Why? Because airplane crashes are extremely rare—just like mass shootings. The majority's response—doubling down on its emphasis of the harm while continuing to intentionally avoid its rarity—demonstrates that it is the majority, not me, that "omits . . . [a] critical part of the analysis."

magazines, while the Smith & Wesson M&P Shield came with seven or eight rounds. Not too long ago, it was basically impossible to find a lightweight, micro-compact firearm even capable of holding 10 rounds in its magazine.

Then, in 2019, Sig Sauer released the P365, which took the self-defense market by storm because suddenly law-abiding citizens could have the same size micro-compact firearm, but now carrying 12 or 15 rounds in its magazine. Other companies quickly followed suit, with Springfield Armory releasing the Hellcat (11 to 13-round magazines), Ruger releasing the Max-9 (12+1), Smith & Wesson releasing the M&P Shield Plus (13+1), and Kimber releasing the R7 Mako (13+1). Aftermarket magazine manufacturers like Shield Arms released flush-fitting magazines holding 15 rounds for diminutive guns like the Glock 43x and 48.

All this has happened in just the past few years, in segment of the firearms market that has essentially no "military" application. It has happened because many law-abiding citizens want higher capacity magazines for one purpose: self-defense. The majority's odd speculation that maybe the self-defense market doesn't want higher capacity magazines is as uninformed as wondering why cruise-control comes standard on their cars since nobody in their urban neighborhood wants it.

While the majority is happy to engage in ill-informed speculation when it comes to limiting gun rights, it demonstrates a distinct lack of imagination and basic logic when it comes to understanding why so many citizens desire a magazine holding over 10 rounds. First, the majority posits a classic false dilemma (a.k.a. an either-or fallacy) by waxing on at length about how larger magazines "provide significant benefits in a military setting," not self-defense. Of course, almost every attribute of a weapon that makes it

more effective for military purposes also makes it more effective for self-defense: more accurate, faster firing, the ability to engage multiple targets quickly—these are all characteristics of a weapon that make it better for *both* military and self-defense purposes. The majority's fixation on the effectiveness of higher-capacity magazines in the military context does not somehow demonstrate that the magazines are not also useful for self-defense.

The majority relatedly adopts California's argument that magazines over 10 rounds are "dangerous" when misused. Again, essentially every attribute of a weapon that makes it more effective for self-defense makes it more dangerous when misused. Good sights on a handgun make it more effective for lawful self-defense—but also make it more dangerous when misused. A pistol that doesn't malfunction is really nice to have in a self-defense situation—but is also more dangerous when misused. Modern hollow-point ammunition, with its dramatically increased stopping potential, has seriously improved the performance of handguns in a self-defense situation—but of course also make the handgun more dangerous when misused. This type of logic, applied the way the majority does, would justify banning all semi-automatics since they are more dangerous than revolvers, all revolvers since they are more dangerous than derringers, all derringers since they are more dangerous than knives . . . until we are left with toothpicks. That is why the Supreme Court in *Heller* only talked about weapons that are *both* "dangerous ***and*** unusual" being outside the purview of the Second Amendment. 554 U.S. at 627 (emphasis added) (citation omitted). The mere fact that some attribute (like a larger capacity magazine) might make a weapon more "dangerous" when misused cannot be a basis to avoid the Second Amendment—if so, the Second Amendment protects only nerf guns.

The majority also latches onto California's argument that "mass shootings often involve large-capacity magazines." That is hardly surprising, given that, as the majority itself acknowledges, "[m]ost pistols are manufactured with magazines holding ten to seventeen rounds, and many popular rifles are manufactured with magazines holding twenty or thirty rounds" (citation and internal quotation marks omitted). So, in other words, mass shootings involve the most common types of firearms. This is the sort of evidence that suffices to meet our circuit's "heightened" review under the Second Amendment?

The majority also relies on the argument that limiting magazine capacity provides "precious down-time" during reloading, giving "victims and law enforcement officers" time to "fight back." But here again, that same "down-time" applies equally to a mother seeking to protect herself and her children from a gang of criminals breaking into her home, or a law-abiding citizen caught alone by one of the lawless criminal mobs that recently have been terrorizing cities in our circuit. The majority focuses only on ways higher capacity magazines might cause more harm in the very rare mass shooting, while dismissing the life-threatening impact of being forced to reload in a self-defense situation as a mere "inconvenience," and characterizing as mere "speculat[ion] . . . situations in which a person might want to use a large-capacity magazine for self-defense."

Ultimately, it is not altogether surprising that federal judges, who have armed security protecting their workplace, home security systems supplied at taxpayer expense, and the ability to call an armed marshal to their upper-middleclass home whenever they feel the whiff of a threat, would have trouble relating to why the average person might want a magazine with over ten rounds to defend herself. But this

simply reinforces why those same judges shouldn't be expected to fairly balance any Second Amendment test asking whether ordinary law-abiding citizens *really need* some firearm product or usage.

III. The Supreme Court Needs to Constrain Lower Courts' Discretion.

We need tests that require real heightened scrutiny and will pull our courts out of the habit of inverted deference to burdens on Second Amendment rights. In that vein, I propose several less-discretionary tests the Supreme Court should impose to cabin my errant brethren.

A. Common Use

My first proposal is for the Supreme Court to put real teeth into a consideration that has been around since at least as far back as 1939, when the Supreme Court noted that the Second Amendment's reference to the Militia signified that the "arms" referenced by that provision are those "of the kind in common use at the time." *United States v. Miller*, 307 U.S. 174, 179 (1939). Again in *Heller*, the Court reiterated that "the sorts of weapons protected" by the Second Amendment are "those 'in common use at the time.'" 554 U.S. at 627 (quoting *Miller*, 307 U.S. at 179). Reinforcing this precedent, the Supreme Court should make clear that any regulation that prohibits a firearm product or usage that is "in common use" nationally must pass strict scrutiny. Not only would that curtail lower courts' abuse of their discretion in applying the Second Amendment, but it would also help address a perennial line-drawing difficulty inherent in the right to keep and bear arms.

One of the ongoing problems with defining the contours of any constitutional right is determining how it applies to

technologies that did not exist when the constitutional provision was enacted. For example, how does the First Amendment apply to social media or blog posts? But that problem is particularly vexing in applying the Second Amendment because "arms" by their very nature change over time as technology advances. As the Court in *Heller* correctly observed, the Second Amendment does not protect "only those arms in existence in the 18th century . . . . We do not interpret constitutional rights that way." *Id*. at 582. But while we know that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, *even those that were not in existence at the time of the founding*," *id*. (emphasis added), in an age where weapons run the gamut from fighter jets to tanks to fully-automatic machine guns to AR-15s to handguns to pocketknives, which weapons are protected by the Second Amendment and which are not? As this case and others like it demonstrate, we cannot rely on insular federal judges to weigh which weapons are appropriate for self-defense—they honestly don't have a clue, and their intuitions about firearms are not good. And we can't rely on governments to decide—that's who the Second Amendment was intended to protect against. But as *Heller* discusses, we can look to what weapons law-abiding citizens have chosen to defend themselves—that is, what weapons are currently "in common use . . . for lawful purposes." *Id.* at 624 (internal quotation marks omitted).

Here, law-abiding citizens across the nation have purchased literally millions upon millions of the type of magazines that California has banned. Americans currently possess between seventy to one hundred *million* of those

magazines for self-defense.[12] The majority here concludes that banning them is a "small burden" on the Second Amendment because they "provide at most a minimal benefit for civilian, lawful purposes." *Millions* of our fellow Americans disagree with my seven colleagues in the majority, evincing by their purchase and "keep[ing]" of those magazines that they consider them necessary for self-defense. That should count for something—actually, it should count for a lot, especially for a constitutional guarantee that ostensibly protects "the right of *the people* to keep and bear arms." As the *Heller* Court explained in rejecting the argument that handguns could be banned because rifles weren't, it was "enough to note . . . that the American people have considered the handgun to be the quintessential self-defense weapon." *Id.* at 629. That same rationale should apply for any firearm product or usage that law-abiding citizens across the nation have chosen for self-defense.

B. State Law Survey

A government should also have to meet strict scrutiny if it bans a firearm product or usage that is allowed throughout most of our nation. If most of the states in the Union allow a particular item to be used in the course of exercising a Second Amendment right, then the government's

[12] 67% of gun owners say self-defense is a major reason why they own their firearm. *See* Kim Parker, et al., *The demographics of gun ownership in the U.S.*, PEW RESEARCH CENTER (June 22, 2017), https://www.pewresearch.org/social-trends/2017/06/22/the-demographics-of-gun-ownership/; *see also* Christopher S. Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994–2002*, (June 2004), https://www.ojp.gov/pdffiles1/nij/grants/204431.pdf.

justification for forbidding or restricting that item or usage should be subjected to strict scrutiny.

Our court has often cited the practice of other states when it suits its purpose in analyzing constitutional rights. *See, e.g.*, *Young*, 992 F.3d at 805 (analyzing the Second Amendment, the court observed "[i]n contrast to these states, other states—also from the South—upheld good-cause restrictions on the open carry of certain dangerous firearms"); *Family PAC v. McKenna*, 685 F.3d 800, 811 n.12 (9th Cir. 2012) (First Amendment); *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1131 (9th Cir. 2004) (First Amendment); *Cammack v. Waihee*, 932 F.2d 765, 766–67 (9th Cir. 1991) (Establishment Clause). Indeed, the majority does so here, strangely observing that "California is not alone" because a few other states and local governments also ban some magazines (even though a super-majority of states don't).

The majority's instinct that it makes sense to look at other states is right; its execution is just wrong. The fact that a handful of states similarly regulate should not help justify infringement of a fundamental right. But the fact that *most* other states—here, 41 states and the federal government—*don't* similarly regulate should cause a court to suspect that maybe the government's supposed justification for its ban is lacking.

Like looking at "common use," considering other states' regulation would have at least one serious incidental side-benefit: it would reduce the troubling balkanization that currently afflicts a fundamental right supposedly protected by the Constitution. Right now, a lawful gun-owner's ability to lawfully "keep and bear arms" is subject to a widely varying patchwork quilt of state and local restrictions and bans that would be an embarrassment for any other

constitutional right. Requiring governments to satisfy real heightened scrutiny before they step too far out of line with what is working in most other jurisdictions would help deter states like California from using their "laboratory of democracy" to conduct ongoing experiments on how to subject a fundamental right to death by a thousand cuts. *See Teixeira v. Cty. of Alameda*, 873 F.3d 670, 694 (9th Cir. 2017) (en banc) (Tallman, J., concurring).

* * *

Our court is fond of saying that Second Amendment rights are not absolute. *See, e.g.*, *Young*, 992 F.3d at 793; *Silveira v. Lockyer*, 312 F.3d 1052, 1063 (9th Cir. 2002) *abrogated on other grounds by Heller*, 554 U.S. 570; *United States v. Vongxay*, 594 F.3d 1111, 1117 (9th Cir. 2010). I don't disagree with that truism—I just disagree with our court's reliance on it to uphold every single firearm regulation, ever. Requiring that any regulation that prohibits a firearm product or usage "in common use" must pass strict scrutiny would not mean that a government would be helpless to address substantial genuine threats from weapons or uses protected by the Second Amendment. It would just mean that those governments would actually need to make a real "heightened" showing of harm, and a response that is narrowly tailored to that harm. That shouldn't be asking too much for a constitutionally protected right.

If ever there was a case study illustrating Madison's concern about "evil lurking under plausible disguises, and growing up from small beginnings," it is our circuit's Second Amendment jurisprudence. In the thirteen years since the Supreme Court ruled in *Heller* that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," 554 U.S. at 592, our court has trimmed back that right at every opportunity—to the

point that now, in the nine Western states covered by our court, the right to "keep and bear arms" means, *at most*, you might get to possess one janky handgun and 2.2 rounds of ammunition, and only in your home under lock and key. That's it.

That's ridiculous, and so I must respectfully dissent.

THOUSAND OAKS MASS SHOOTING

Thousand Oaks mass shooting survivor: 'I heard somebody yell, 'He's reloading"

By Veronica Miracle

Thursday, November 8, 2018

A man who survived the Thousand Oaks massacre recalled the chilling moment when the gunman fired into the crowd and when someone yelled, "He's reloading!"

SIMI VALLEY, Calif. (KABC) -- A man who survived the Thousand Oaks massacre recalled

the chilling moment when the gunman fired into the crowd and when someone yelled, "He's reloading!"

Dylan Short of Simi Valley said he was sitting about 45 feet from the entrance of Borderline Bar & Grill, facing the door, talking to a friend of his on Wednesday night. Around 11:30 p.m., he noticed a silhouette at the door.

MORE: Dramatic video captures Thousand Oaks gunman shooting inside bar

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Newly released video shows the Thousand Oaks mass shooter opening fire inside a popular bar during the Wednesday night massacre that left 12 people dead, including a sheriff's sergeant.

"Next thing I know, I saw that silhouette turn, I saw the flash, I saw the girl behind the desk drop, and then he turned and shot another individual, and turned and initially shot another person sitting at the doorway," Short said.

Though he was in shock, Short said he recognized the sound of gunfire right away.

"Me being a responsible gun owner, I fired plenty of guns in my time," he said.

MORE: How to help victims of Thousand Oaks massacre

The friend Short was speaking with, who he said used to be in the U.S. Marine Corps, pushed Short, hard.

"That little extra shove is probably what kept me from getting hit by the shrapnel completely. Just made it so I was grazed, so I was very lucky," Short said, explaining that he was grazed by a bullet shrapnel.

Short then dropped to the ground, saying "I had many people laying on me." He said one of his friends, who used to be a bouncer at Borderline, busted a window. Then, others busted two other windows.

MORE: Thousand Oaks shooting survivor also survived Las Vegas shooting

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A man who survived the deadly mass shooting last year in Las Vegas also miraculously came out of a mass shooting at a bar in Thousand Oaks alive Wednesday.

"I saw a couple more flashes and then at that point, he had pretty much reloaded, and I heard somebody yell, 'He's reloading!' and that was when a good chunk of us had jumped up and went and followed the rest of the people out the window," Short said.

"I lost both my shoes, and it was my life or my shoes. I kept asking the person behind me, 'Am I bleeding?' because I felt me get hit, and he said, 'You're walking aren't you? Jump!' And I jumped. My leg caught the window and flung me," Short described.

He said upon jumping through the window, he rolled down a hillside for about 18 to 20 feet

over broken glass, then slammed into a fence bordering the freeway. In addition to the graze wound, Short injured his right leg from jumping out of the window.

"I got up and started running in my socks...At that point, I realized he had reloaded, and he had started firing on the crowd again," Short said.

Short described the shooter as lanky and wearing a beanie low to his eyes.

"What really, really got me was the fact that when he pointed the gun at the girl behind the desk, she's a very sweet girl...When I saw him take somebody so innocent, their life like that, like it was nothing, at that point, I knew we had something more sick on our hands than somebody who was just angry," Short said.

Short said four of his friends died in the massacre. The gunman killed 12 people before apparently fatally shooting himself.

MORE: Big brother-to-be, soon-to-retire sergeant among victims of Thousand Oaks massacre

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Jason Coffman, whose 22-year-old Cody was killed in the shooting at Borderline Bar & Grill, remembers his son.

Report a correction or typo

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People threw barstools through window to escape Thousand Oaks, California, bar during shooting

USA TODAY Network staff

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As a gunman dressed in black used a smoke grenade and opened fire at a bar in Thousand Oaks, California, Wednesday, a few people threw barstools through the bar's windows and helped people escape, according to witnesses.

Matt Wennerstrom, 20, told reporters that he and his friends often visited the Borderline bar and grill, which was hosting a college night when the shooting took place. Wennerstrom said he heard a loud sound, and saw a "tall black figure with a handgun opening fire at the employees working at the front desk."

"At that point I grabbed as many people around me as I could and grabbed them down under the pool table we were closest to until he ran out of bullets for that magazine and had to reload," Wennerstrom said.

As the gunman reloaded, Wennerstrom said he and a few others started throwing barstools through the window and "shuffling as many people out as possible."

Twelve people were killed, including a sheriff's sergeant. The shooter, identified by authorities as Ian David Long, 28, apparently fired at random, and died at the scene.

Sarah Rose DeSon told Good Morning America that the gunman appeared to throw a smoke grenade inside the bar.

"As soon as we all saw that, we jumped up," DeSon told GMA. "I ran out the front door, down some stairs, face-planted in the parking lot, but I was lucky enough to get out alive."

Cole Knapp, who said he goes to Borderline each week, told AP he thought the shooting was someone "playing a prank."

"I tried to get as many people to cover as I could," Knapp said. "There was an exit right next to me, so I went through that. That exit leads to a patio where people smoke. People out there didn't really know what was going on. There's a fence right there so I said, 'Everyone get over the fence as quickly as you can, and I followed them over."

A law enforcement official told The Associated Press the suspect was 29 years old, armed with a .45-caliber handgun and used a smoke device. The official declined to provide any other details, speaking on condition of anonymity for lack of authorization to publicly discuss the investigation.

More: Sheriff's sergeant, 11 other victims dead in Thousand Oaks, Calif., bar shooting

More: 'He died a hero': Ventura County Sheriff Sgt. Ron Helus among those killed in bar shooting

Wennerstrom, who had blood on his shoulder, said he and his friends continued to help people once they left the bar.

"At that point there was a couple of people carrying a guy out who had been shot .... and they were getting fatigued so a few of us took over, and this is his blood," Wennerstrom said.

Contributing: Joe Curley, Ventura County Star; Mary Bowerman, USA TODAY

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Constitutional Originalism and History

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BY JONATHAN GIENAPPON MARCH 20, 2017 COMMENTARY, PUBLIC

President Donald Trump announces Neil Gorsuch as a Supreme Court nominee. Source: Wikimedia.

Thanks to President Donald Trump's nomination of Justice Neil Gorsuch—a self-identified "originalist"—to the Supreme Court, constitutional originalism is yet again at the forefront of American consciousness. Historians would do well to take special notice. Because while most forms of American constitutional jurisprudence have drawn on the history of the Constitution's creation, only originalism—the theory that seeks to construe the Constitution today in accordance with its original meaning when it was first enacted—implicates the role of historical study in constitutional interpretation. Moreover, despite several assurances through the years that originalism's death knell had sounded, the theory enjoys more champions, and more influential champions, than at any point previously.[1] Beyond the federal judiciary, leading originalists can be found on most esteemed law school faculties and in a growing network of influential constitutional law centers and think tanks. The thriving annual "Originalism Works In-Progress Conference" at the University of San Diego Law School's Center for the Study of Constitutional Originalism (which just hosted its eighth iteration) is one prominent marker of popularity and influence; the well-funded annual "Originalism Boot Camp," which hosts aspiring law students each summer at the Georgetown Center for the Constitution is another. A new mountain of originalist scholarship and new lines of influence linking this academic work with the world of political and judicial action, meanwhile, appears every year.[2] As Gorsuch's selection illustrates, originalism is as powerful as ever, so its relationship to history remains as urgent as ever.

Despite that urgency, historians continue to show little interest in originalism. But in scoffing it off as quaint curiosity, outlandish absurdity, or both, they ignore how a largely one-sided and consequential debate has evolved. Fortunately, Gorsuch's nomination offers a fresh opportunity to probe originalism's relationship to history. It has evolved significantly since its emergence, around the time that Antonin Scalia—the theory's most visible champion for the past three decades and the justice Gorsuch has been nominated to replace—first took his seat on the Supreme Court. But originalism's development is not simply intriguing in its own right. By understanding how it has changed, we can appreciate the unique, little understood, and urgent threat it now poses to the practice of history.

Since few historians know how originalism has evolved, few appreciate how deeply it has come to challenge *all* historians, not merely those, like myself, who focus on the history of American constitutionalism and the political and intellectual history of Revolutionary America. Most historians will be surprised to learn that,

ABOUT

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increasingly, debates over originalism have gravitated away from constitutional history and the eighteenth century and towards the philosophical foundations of historical meaning. In the process, originalists have come to wage a steady war—one whose intensity has spiked in recent years—against the methods of history themselves. If historians care about what their discipline can offer, then they should answer originalists' challenge. For it is hard to imagine any area of contemporary civic life where historical expertise could play a more consequential role.

1. Originalism 1.0: Doing History

Originalists' retreat from history was not pre-ordained. Indeed, initially, to do originalism was to know history—at least in theory. Originalism first emerged in the 1970s and 1980s as a conservative response to the perceived activism and abuses of the progressive Warren and Burger Supreme Courts. Those on the political right complained that, under the auspices of a "living Constitution," judges were substituting their own progressive preferences in place of what the Constitution actually licensed. In so doing, judges, rather than dutifully following the Constitution, were authoring it anew, an activity that subverted the foundational relationship of constitutionalism—that those in power are subject to the Constitution and not the other way around. If justices were to be constrained from legislating from the bench, then they had to be stripped of their interpretive license. And the only way to do that, the thinking went, was to undermine the living Constitution. The document's meaning could not evolve with the times; barring formal amendments emanating from the sovereign people, its meaning had to remain fixed and constant over time. Combined, these theoretical presuppositions thus mandated that the Constitution's operative meaning had to be its original meaning. And those who endorsed this constitutional vision began calling themselves originalists. [3]

Privileging original meaning was, thus, at its inception, driven by presentist aims. The theory's main agenda was to recalibrate how judges, lawyers, and citizens related to the Constitution in the present. But no matter the primary goals, the theory necessarily required a methodological corollary; it was one thing to defend the notion that original meaning ought to constrain contemporary judicial behavior, it was quite another to explain how a committed interpreter might locate such meaning in the first place. Only by identifying original meaning credibly could originalists advance the second and altogether more important aspect of their agenda, one that directly implicated historical practice. For on its face, recovering something like original constitutional meaning would seemingly require doing history.

And, indeed, in the early years that was more or less true. Whatever else early originalists might have claimed, deciphering the original meaning of the Constitution seemed to turn on the conventional facts of eighteenth-century constitutional history. Straight-forward historical questions seemed to matter, such as: what were the Constitution's framers, or at least James Madison and Alexander Hamilton, thinking when they wrote it? What were the document's ratifiers thinking when they voted for or against it? Which political agendas shaped its construction? How did social relations shape people's understandings and motivations? Accordingly, when Edwin Meese, then attorney general under Ronald Reagan, declared in a 1985 speech that marked the official arrival of originalism as an identifiable interpretive theory for many, that the administration favored a jurisprudence of "original intention," he supported his position with recognizably historical accounts about what the Constitution's framers had intended.[4] Others followed suit, and originalism, for a time, was primarily dedicated to recovering the original intent of the Constitution's framers. Such intent was always conceptualized loosely, but, minus additional critical refinement, it served as the organizing interpretive target. This was Originalism 1.0.

But the method of Originalism 1.0 was subjected to powerful criticisms. For one, it was challenged on conceptual grounds, most famously by the constitutional lawyer Paul Brest, who claimed that it was nearly impossible to recover the framers' intent because of the inherent complexity of group authorship—of the fifty-five delegates who had convened in Philadelphia in the summer of 1787, whose intent was to be privileged?[5] The same question applied to the nearly 1,700 Americans who gathered in the special state ratifying conventions. Historians, themselves meanwhile, were quick to highlight this particular complexity. A careful look at the multitude of voices involved in the Constitution's creation pointed only to "original meanings" in the plural.[6] And then there was the matter of the Anti-Federalists (the Constitution's earliest opponents); did their original understanding also merit consideration?[7] Meanwhile, legal scholar Jefferson Powell, in one of the most cited law review articles of the decade, challenged originalism on empirical grounds, contending that the framers' original intent was actually that the Constitution *not* be interpreted in


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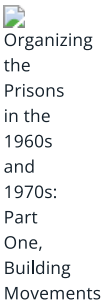
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accordance with original intent.[8] Originalism, if followed faithfully, thus canceled itself out. In yet another line of attack, historians lambasted originalists' shoddy historical work, for engaging in what was derisively called "law office history," a term used to describe what lawyers did when they both cherry-picked evidence and otherwise ripped it from its operative historical context. The past, historians insisted, was deeply complex, requiring more careful study than originalists were willing to dedicate.[9] Against the backdrop of these penetrating academic critiques, Judge Robert Bork, President Ronald Reagan's appointment to the Supreme Court in 1987 and an outspoken originalist, was rejected by the Senate. Originalism 1.0 teetered on the brink.[10]

2. Originalism 2.0: Escaping History

But, contrary to the predictions of many, originalism did not pass quietly into the night. Instead, partly in response to these initial setbacks, originalism evolved. A prominent subset of its supporters, including Justice Scalia, began altering the theory's methodological focus by abandoning original intent. Rather than attempting to recover the subjective intent or understanding of real eighteenth-century individuals—be it the framers who drafted the Constitution, the ratifiers who approved it, or the broader public who made sense of it—originalists began targeting the document's so-called public meaning.[11] Public meaning has been understood in various ways, but, to quote leading originalists John McGinnis and Michael Rappaport, it references "how the words of the document would have been understood by a competent speaker of the language when the Constitution was enacted."[12] In singling out public meaning, interpreters no longer had to worry about parsing multiple intents or pinning down the elusive relationship between the Framers' personal thoughts and what they wrote in the Constitution. There would be no more "channeling the Framers"—an inherently subjective exercise. Originalists could instead focus on deciphering something they claimed was "objective": what the constitutional text would have meant to an average reader when it first went public.[13] Ever since this conceptual transformation, what is variously called public meaning originalism, the "new originalism," semantic originalism, original meaning originalism—or, for our purposes, Originalism 2.0—has been ascendant.[14] Even though not all originalists subscribe to Originalism 2.0, and even though important differences divide its followers, unquestionably it is the theory's dominant mode.[15] Not only was Scalia a fierce partisan during his time on the Court, but so too are a vaunted array of leading constitutional lawyers who command significant influence within and beyond the profession as well as a bevy of federal judges, Neil Gorsuch among them.[16]

Source: Wikimedia.

In changing the target of originalist interpretation, public meaning originalists also fundamentally altered the method of originalism. With an eye towards respecting only what the sovereign people locked into the Constitution, they have dismissed most eighteenth-century historical evidence as irrelevant to their quest.[17] Deciphering public meaning, according to originalists, requires simply elucidating what the Constitution's words would have communicated to an ordinary reader at the time of enactment. And contrary to other kinds of historical inquiry, as leading originalist Randy Barnett has put it, "You don't need a PhD. in history to discover this."[18] Since linguistic meaning is conventional (predicated on the arbitrary rules that determine the appropriate usage of words), to grasp what the Constitution originally communicated all one needs to pin down are the linguistic conventions operative when the Constitution or any of its amendments were constructed. And because these conventions are embedded in linguistic usage, discovering them only requires studying word usage in the aggregate—by consulting period dictionaries or grammar manuals or by running keyword searches in digitized document databases to perform so-called "corpus linguistics."[19] For instance, if the goal is to know what "commerce" meant in the original Constitution, say, one should not consult the intellectual debates prior to or during the Philadelphia Convention about government regulation of interstate commerce, nor should one investigate the broader intellectual culture that informed such a concept; one should simply collect all evidence of word usage at the time to decipher the public meaning of the word.[20] If, after consulting such linguistic usage, the meanings of certain words remain ambiguous, then such ambiguities can be resolved through context—context that can be supplied in two ways. First, one can look to the "publicly available communicative context" at the time the Constitution was written to understand what ambiguous words actually referenced. Such context—which in originalists' hands is persistently vague and seems to amount to little more than common sense—that would supposedly enable an eighteenth-century reader to know that Article IV's

pronouncement that the government could protect against "domestic violence" originally referenced internal uprisings rather than spousal abuse. Second, by probing the nature of language itself, and in particular a very narrow brand of philosophy of language with which originalists have become uniquely obsessed, one can understand how ambiguity works generally in language use.[21] More important, though, is what it does not require—knowledge of the broader contexts of eighteenth-century constitutionalism. Whether it be the various political, social, or economic contexts from which the Constitution developed, the motivations of the participants involved in its construction, or the broader purposes that constitutional partisans hoped to achieve through its enactment, none of these have much bearing on the Constitution's purely linguistic public meaning.

In short, Originalism 2.0 was a neat trick: it had the imprimatur of history without the actual work and, in fact, asserted that the work was wholly unnecessary. This turn towards public meaning has enabled originalists to claim, as they now frequently do, that they and historians, by targeting categorically distinct kinds of meaning, are simply engaged in fundamentally different tasks. The Constitution's legal and historical meaning are simply different in kind. If historians claim otherwise, it is because they are guilty of conceptual confusion; because they have made—not a historical error—but a philosophical one.[22] Rather than pledging to do history—as Originalism 1.0 did—Originalism 2.0 claims instead to have escaped history.

In other words, originalists have stopped trying to beat historians at their own game—by rewriting the very rules by which that game is played. They seem to have realized that they will never know as much as historians about the Constitution's origins or historical development, so instead of fighting a losing empirical battle why not stake out different conceptual foundations altogether? That way, most disputes can turn on philosophy of language, interpretive method, and legal doctrine (as they now do) without dwelling on the details of the historical past. And if historians wish to object, they dare not mention the Framers' thoughts or agendas or the broader political, social, or intellectual contexts of the late eighteenth century; they must, instead, offer a series of methodological and philosophical arguments targeting originalists' conceptual formulations. In other words, historians must fight originalists on their own non-historical turf. So even while those few historians who have engaged Originalism 2.0 have levered a persuasive bevy of criticisms against it—Jack Rakove has correctly called it "tone-deaf to the past" and Paul Cornell has appropriately labeled it "thin description"—champions of Originalism 2.0 have easily sidestepped such assessments.[23] For, in appealing to precisely the kinds of historical materials that originalists have studiously circumvented, historians have played into originalists' hands. Originalists have not engaged this historical work on its merits, but simply dismissed it as irrelevant, mocking historians' conceptual confusion in the process. After being criticized by historians for years, originalists have built Originalism 2.0 such that no amount of historical empiricism can ever challenge it. It has enabled them seemingly to speak with authority about the past without being subject to historians' judgment. Charges of "law office history" no longer apply. In fact, not only is it inapt when historians level them, but it actually reveals what originalists claim is the more pressing issue: historians' penchant to practice "history office law," or what happens when historians weigh in on legal matters without a law degree.[24]

How originalists have exploited their new fortifications to repel historical expertise is best captured in their reaction to the so-called historians' amicus brief filed for the Supreme Court in conjunction with the controversial Second Amendment case from 2008, *District of Columbia v. Heller*.[25] That case—which centered on a D. C. handgun ban—ultimately turned on the original meaning of the amendment. And historians reached the diametrically opposite conclusion from the one advanced by Justice Scalia in the Court's majority opinion.[26] Since, public meaning originalists have not so much disputed the historical arguments advanced in the historians' brief; instead they have dismissed the historians for failing to understand what constitutes original meaning in the first place. In probing the amendment's drafting history and the deeper intellectual and political context from which it arose, and, relatedly, by *not* dwelling on the conventional, semantic meaning of the amendment's words, historians simply missed the point.[27] This was Originalism 2.0 personified.

3. Rising to the Challenge: Historians' Obligation

The battle between originalists and historians has thus evolved from an empirical to a methodological one. The dispute is no longer over historical knowledge of the Founding era. It is now over what methods are needed to identify the original meaning of a historical text. And it is particularly over whether champions of Originalism 2.0 are right that historical methods are, as originalist Lawrence Solum has put it, merely

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"supplementary and complementary to the methods employed by originalists."[28] Are originalists justified in claiming that, in targeting a certain kind of historical meaning, they are in fact immune from historical critique? Is it true that historical methods are not useful for discovering the original public meaning of a historical text?

Originalism 1.0 was an affront to Founding-era American historians. But Originalism 2.0 is an affront to *all* historians. For its advocates contend that they can acquire exactly what they would like to know about history without behaving like historians; they insist that historical methods are only incidental to their chosen historical inquiry. Here originalists make a common mistake, one that all historians should challenge: they fundamentally fail to understand what historians do. They effectively concede that if other forms of original meaning mattered (like those important to Originalism 1.0), historical expertise would indeed be relevant; but they also presume that historical expertise has little bearing on the recovery of public meaning.[29] They draw this distinction because they assume that historical knowledge is a form of knowing *that* rather than a form of knowing *how*. They assume that historians know that this or that happened in the past in this or that way; they assume that historians' contribution is that they have scoured the archives and have assembled and organized the relevant facts; they assume that what historians principally offer is empirical knowledge. But this characterization largely misses the mark. *Of course*, historians have vast empirical knowledge of the past and, *of course*, it is critical to what they do. But, at base, historians' expertise is that they know *how* to read historical sources and properly decipher their historical meaning—that is, the meaning such sources had in their original historical context. The foundational skill of historical practice is knowing how to think historically. As all historians appreciate, this gestures towards something far greater than mastery of facts; it means knowing how to abstract oneself from the present to navigate an alien, past world. It means knowing how to bracket the assumptions, values, and logics that shape contemporary consciousness in order to replace them with the assumptions, values, and logics that framed the very different mental universe of those living in a different time and place. No matter the text in question (be it a formal treatise, a law, a novel, a painting, a riot, a slave's freedom suit, a political speech, or a material object), the skill is common to all historical investigations. This knowhow is the defining attribute of historical expertise, organizing the profession and guiding its training.

No doubt historians investigate a plethora of historical meanings, often privileging exactly the kinds of subjective intents and understandings that public meaning originalists disparage—such as, for instance, the authorial intent that shaped a text's production, the intellectual purposes that a text served, or the broader intellectual or cultural context from which a text emerged. But that choice is irrespective of knowing how to think historically. If the goal happens to be deciphering the public meaning of a historical text, then this foundational historical skill remains every bit as essential. The reason why is what originalists' favored keyword searches (detailed above) fail to take into account: that, as Bernard Bailyn has put it, "the past is a different world."[30] Words and concepts that appear in historical sources often bear a superficial similarity to our own, but grasping what they actually meant in their original historical context requires first reconstructing the foreign conceptual world from which they issued. Keyword searches can never disclose this world (in fact, such searches presuppose that this world is immediately accessible and virtually identical to our own). But, as all historians know, bringing this world into focus requires a much deeper level of immersion. It requires a version of what is needed to decode early modern French cat massacres, crowd activity in eighteenth-century Britain, or early nineteenth-century New York ordinances on pig-keeping.[31] It requires taking up residence with the natives of the historical past, engrossing oneself in their logics, tracing the patterns made by their thoughts and meanings, and learning how to think and reason as they once did. In the case of the American Constitution, it requires knowing how to think and reason as Founding-era Americans did, knowing how to see the world as an original constitutional reader would have. It requires learning how to speak eighteenth century. It requires knowing how to think historically. It requires, in short, behaving like a historian.[32]

* * * * *

Historians should keep all of this in mind when Neil Gorsuch—the latest spokesman for Originalism 2.0—answers questions in the United States Senate about his interpretive approach to the Constitution. As citizens or interested residents, historians should ask whether originalism makes sense as a constitutional theory. But specifically as historians, they should appreciate that Gorsuch speaks for a powerful and growing intellectual movement whose goal is to decipher the Constitution's original meaning and whose assumption is that historians have little to contribute to that enterprise. Champions of Originalism 2.0

assume they have escaped history because they fundamentally misunderstand what historians do. If, as historians, we fail to explain why this is misguided, unless we articulate and defend the value and applicability of our unique scholarly knowhow, then the discipline of history will be weaker for it. Because it would be hard to find a better example of the practical consequences of history than the practice of constitutional originalism. It is the stuff of power, in the deepest sense; and people's lives are fundamentally impacted by the rulings made in its name. If those judgments are based, in part, on the interpretation of historical sources and reached through methods that violate historians' accepted practices, then historians must respond. For this debate transcends mere method. It is ultimately about authority, legitimacy, and integrity—about who can credibly explicate the meaning of a historical text and why. And the answers to these questions impact the character of our civic culture. Historians should not cede the ground.

Jonathan Gienapp is an assistant professor of history at Stanford University. He is currently writing a book that explores the history of the earliest understandings of the United States Constitution.

[1] Regarding originalism's endurance in the face of such pronouncements, see Jack N. Rakove, "Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism," *San Diego Law Review* 48 (May 2011), 575-576; and Randy E. Barnett, "An Originalism for Nonoriginalists," *Loyola Law Review* 45 (Winter 1999), 611-620.

[2] For an entry point to recent scholarship, see two prominent, oft-cited law review forums, "Symposium: Original Ideas on Originalism," *Northwestern University Law Review* 103 (Spring 2009), 491-1006; and "Symposium: The New Originalism in Constitutional Law," *Fordham Law Review* 82 (Nov. 2013), 371-826. For arguments that originalism pervades American constitutional culture and judicial reasoning, see William Baude, "Is Originalism Our Law?," *Columbia Law Review* 115 (Dec. 2015), 2349-2408; and Randy Barnett, "The Gravitational Force of Originalism," *Fordham Law Review* 82 (Nov. 2013), 411-432.

[3] The best historical account of the emergence of early originalism is Johnathan O'Neill, *Originalism in American Law and Politics: A Constitutional History* (Baltimore: The Johns Hopkins University Press, 2005); also see Daniel T. Rodgers, *Age of Fracture* (Cambridge: Harvard University Press, 2011), 232-242; and Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton: Princeton University Press, 2008). The crucial early work that paved the way for originalism included, Robert H. Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (Fall 1971), 1-35; William H. Rehnquist, "The Notion of a Living Constitution," *Texas Law Review* 54 (May 1976), 693-706; and Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge: Harvard University Press, 1977). The term "originalism" was coined by Paul Brest in an influential law review article otherwise critical of the theory, "The Misconceived Quest for the Original Understanding," *Boston University Law Review* 60 (Mar. 1980), 204-238.

[4] Edwin Meese, III, "Speech Before the American Bar Association," in *Originalism: A Quarter-Century of Debate*, ed. Steven G. Calabresi (Washington, D. C.: Regnery, 2007), 47-54, quote 54.

[5] Brest, "Misconceived Quest for the Original Understanding."

[6] For the leading work of constitutional history that explicitly engaged originalism, Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1996).

[7] Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America* (Chapel Hill: University of North Carolina Press, 1999).

[8] H. Jefferson Powell, "The Original Understanding of Original Intent," *Harvard Law Review* 98 (Mar. 1985), 885-948. Powell's findings were subjected to vigorous criticisms from many sides. But, the merits of his conclusions withstanding, they played a profound role in recalibrating the defense of originalism.

[9] For the leading work of constitutional history that explicitly engaged originalism, Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1996).

[10] For a good compilation of early originalist arguments and criticisms, see Jack N. Rakove, ed., *Interpreting the Constitution: The Debate over Original Intent* (Boston: Northeastern University Press, 1990).

[11] On the rise of public meaning originalism and what has differentiated and defined it, see the recent introductions, Lawrence W. Solum, "What is Originalism? The Evolution of Contemporary Originalist Theory," in *The Challenge of Originalism: Theories of Constitutional Interpretation*, ed. Grant Huscroft and Bradley W. Miller (New York: Cambridge University Press, 2011), 12-41; and Keith E. Whittington, "Originalism: A Critical Introduction," *Fordham Law Review* 82 (Nov. 2013), 378-387.

[12] John M. McGinnis and Michael Rappaport, *Originalism and the Good Constitution* (Cambridge: Harvard University Press, 2013), 8. For other representative, influential definitions, see, e.g., Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, updated ed. (Princeton: Princeton University Press, 2004; 2009), 393; Lawrence B. Solum, "*District of Columbia v. Heller* and Originalism," *Northwestern University Law Review* 103 (Spring 2009), 952; Jack M. Balkin, *Living Originalism* (Cambridge: Harvard University Press, 2011), 6-13; and Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: West, 2012).

[13] Barnett, "Gravitational Force of Originalism," 412, 415.

[14] On the "new originalism" and how it emerged out of so-called first-wave originalism, see Keith E. Whittington, "The New Originalism," *Georgetown Journal of Law and Public Policy* 2 (2004), 599-614; and Barnett, "An Originalism for Nonoriginalists," 620-629.

[15] For examples of originalists who have clung to original intent, see, e.g., Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University of Kansas Press, 1999)—although his account effectively bridges any difference between the two; Larry Alexander and Saikrishna Prakash, "'Is that English You're Speaking?' Why Intention Free Interpretation is an Impossibility," *San Diego Law Review* 41 (Aug. 2004), 967-996; William Michael Treanor, "Against Textualism," *Northwestern University Law Review*, 103 (Spring 2009), 983-1006; Richard S. Kay, "Original Intention and Public Meaning in Constitutional Interpretation," *Northwestern University Law Review* 103 (Spring 2009), 703-726; and Stanley Fish, "The Intentionalist Thesis Once More," in *Challenge of Originalism*, 99-119. Public meaning originalists also divide over the issue of construction—the idea that certain portions of the Constitution are irredeemably ambiguous, vague, or indeterminate and thus must be given operative meaning by contemporary political actors. For more on the concept, see Keith E. Whittington, "Constructing a New American Constitution," *Constitutional Commentary* 27 (Fall 2010), 119-138; and Lawrence B. Solum, "Originalism and Constitutional Construction," *Fordham Law Review* 82 (Nov. 2013), 453-537.

[16] In addition to those works cited in f.n. 13, for additional leading work see, Antonin Scalia, "Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," in *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Guttman (Princeton: Princeton University Press, 1997), 3-47; Ronald Dworkin, "Comment," in *A Matter of Interpretation*, 115-129; Akhil Reed Amar, "Intratextualism," *Harvard Law Review* 112 (Feb. 1999), 747-802; and Lawrence B. Solum, "Semantic Originalism," *Illinois Public Law Research Paper* No. 07-24 (2008), 1-173.

[17] For why public meaning originalism better accords with popular sovereignty, see esp. Scalia, "Common Law Courts"; Barnett, *Restoring the Lost Constitution*, ch. 2; and Balkin, *Living Originalism*, ch. 3. While a great deal of historical knowledge would be needed to elucidate other kinds of constitutional meaning—be it the document's original intent (what the framers were thinking), original understanding (what the ratifiers were thinking), or original expected applications meaning (what either group thought would follow from the Constitution's words)—hardly any of that knowledge would be needed, the argument goes, to discover original public meaning. Perhaps historical evidence might be found that a framer applied an idiosyncratic meaning to a portion of the text, but this subjective understanding cannot change the document's public meaning. And because an average reader would not have had access to the secret proceedings of the Philadelphia Convention and most likely would have been separated by great distances (geographic and contextual) from the document's authors, all that reader could have drawn upon was the text. See Vasan Kesavan and Michael Stokes Paulsen, "The Interpretive Force of the Constitution's Secret Drafting History," *Georgetown Law Journal*, 91 (2003), 1113-1187; and Lawrence B. Solum, "Communicative Content and Legal Content," *Notre Dame Law Review* 89 (Dec. 2013), 479-519.

[18] Randy Barnett, "Another Oblivious Critique of Neil Gorsuch and Originalism," March 14, 2017 *Washington Post*, available at: https://www.washingtonpost.com/news/volokh-

conspiracy/wp/2017/03/14/another-oblivious-critique-of-neil-gorsuch-and-originalism/?utm_term=.a532c13a1828.

[19] Hence originalists' current fascination with corpus linguistics, see Solum, "Originalism and History," 12-13; James C. Phillips, Daniel M. Ortner, and Thomas R. Lee, "Corpus Linguistics and Original Public Meaning: A New Tool to Make Originalism More Empirical," *Yale Law Journal Forum* (2016), 21-32; Lawrence M. Solan, "Can Corpus Linguistics Help Make Originalism Scientific?," *The Yale Law Journal Forum* 126 (2016), 57-64.

[20] Randy Barnett, "The Original Meaning of the Commerce Clause," *University of Chicago Law Review* (2001), 101-147.

[21] For public meaning originalists' multi-step method, see the tidy synopsis in Barnett, *Restoring the Lost Constitution*, 389-391, quote 390; and for a fuller explication, see Solum, "Semantic Originalism." For more on "corpus linguistics," or the searching of databases, see Solum, "Originalism and History," 12-13. Public meaning originalists endlessly draw upon the language philosophy of Paul Grice, see, e.g., Solum, "Originalism and History," 14, 25-27; Solum, "Intellectual History as Constitutional Theory," 1129-1132, 1134-1136, 1137, 1151-1153, 1155; Barnett, *Restoring the Lost Constitution*, 390; Larry Alexander, "Originalism, the Why and the What," *Fordham Law Review*, 82 (Nov. 2013), 540-541; and John Mikhail, "The Constitution and the Philosophy of Language: Entailment, Implicatures, and Implied Power," *Virginia Law Review* 101 (Jun. 2015), 1069-1084, 1091-1097.

[22] See Solum, "Intellectual History as Constitutional Theory," 1155-1158, 1163-1164; Lawrence B. Solum, "Originalism and History" (unpublished manuscript on file with the *Virginia Law Review*) and Barnett, "An Originalism for Nonoriginalists," 621-622.

[23] Jack Rakove, "Tone Deaf to the Past: More Qualms About Public Meaning Originalism," *Fordham Law Review* 84 (Dec. 2015), 969-976; Saul Cornell, "Originalism as Thin Description: An Interdisciplinary Critique," *Fordham Law Review Res Gestae* 84 (2015), 1-10. Also see, e.g., Rakove, "Joe the Ploughman"; Saul Cornell, "*Heller*, New Originalism and Law Office History: 'Meet the New Boss, Same as the Old Boss,'" *UCLA Law Review* 56 (2009), 1095-1125; and the recent forum, "Forum: Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning," *Fordham Law Review* 84 (Dec. 2015), 905-976.

[24] For use of this label, see Barnett, "Another Oblivious Critique of Neil Gorsuch and Originalism"; Solum, "Originalism and History," 27-29.

[25] "Brief of Amici Curiae Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, Lois G. Schwoerer et al. In Support of Petitioners," *District of Columbia v. Heller*, 554 U.S. 570 (2008).

[26] *District of Columbia v. Heller*, 554 U. S. 570 (2008). Following the ruling, leading historians subjected the Court's opinion to merciless criticism, see Saul Cornell, "Originalism on Trial: The Use and Abuse of History in *District of Columbia v. Heller*," *Ohio State Law Journal* 69 (2008), 625-640; David Thomas Konig, "Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America," *UCLA Law Review*, 56 (2009) 1295-1342.

[27] See, e.g., Solum, "Originalism and History," 27-29; and Barnett, *Restoring the Lost Constitution*, 397.

[28] Solum, "Intellectual History as Constitutional Theory," 1155.

[29] These assumptions have become clear in a recent exchange between a historian and an originalist. For the historical challenge to originalist methodology, see Saul Cornell, "Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism," *Fordham Law Review*, 82 (Nov. 2013), 721-755; and for the originalist response, see Solum, "Intellectual History as Constitutional Theory"; and Solum, "Originalism and History."

[30] Bernard Bailyn, *Sometimes an Art: Nine Essays on History* (New York: Alfred A. Knopf, 2015), 22.

[31] Robert Darnton, *The Great Massacre and Other Episodes in French Cultural History* (New York: Basic, 1984), 75-106; E. P. Thompson, "The Moral Economy of the English Crowd in the Eighteenth Century," *Past &*

Present 50 (Feb. 1971), 76-136; Hendrik Hartog, "Pigs and Positivism," *Wisconsin Law Review* (1985), 899-935.

[32] For more on thinking historically and its relationship to originalism, see Jonathan Gienapp, "Historicism and Holism: Failures of Originalist Translation," *Fordham Law Review* 84 (Dec. 2015), 935-956.

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17 COMMENTS

BRIDGING HISTORY (@BRIDGINGHISTORY) on MARCH 20, 2017 4:20 PM

I view the Constitution and religious texts (like the Bible and Qur'an) as those in which historical context MUST be taken into account. Example from the Bible is Proverbs 31 which some use to push the issue of stay home mothers. YET, the women in question wasn't a "work at home mom" in the 21st century sense considering that culturally when written, you lived IN YOUR BUSINESS (not the other way around). This woman also bought land and managed servants. Clearly, she also had money, power, and responsibility well beyond "cooking and baby tending." SO, if you don't read the cultural along with this, you miss vital clues. So, too, is our Constitution. The Founders knew there would be needs for alteration over time. That's why they created the AMENDMENT process. Amendment by definition is a change made by correction, addition, or deletion. Therefore, it IS possible (and always has been) to alter the document. HOWEVER, it was NEVER meant to alter in "real time" and without the approval of the governed. That is why I agree with originalism. Look to the original intent, see if it still applies, and if not AMMEND. Do not just say "that's no longer applicable and go about your business of change because otherwise, the consent of the governed is circumvented entirely and that is VITAL!

MIKE SHAY on MARCH 24, 2017 12:54 PM

The Constitution gives Congress the power to "raise and support Armies" and to "provide and maintain a Navy" but says nothing about establishing an Air Force. Does that mean all American warplanes should be grounded until an appropriate amendment can be added to the Constitution? I think not. Original intent is an important consideration, but it must be tempered by recognition that the world changes over time. Who can doubt that the founders would have authorized an air force had they been able to envision such a thing? Another example is gay marriage, which is admittedly more of a stretch. The framers of the Fourteen Amendment almost certainly would not have sanctioned same-sex marriage even if they had been able to conceive of it. But here again the world has changed so much that I think original intent must yield to common sense. Now that the existence of gay people is recognized, they must be accorded the equal protection of the law.

ASLEEP on MARCH 21, 2017 1:27 PM

This essay seeks to elevate academic historians to a privileged position, to grant them a monopoly on "credibly explicat[ing] the meaning of a historical text," without offering much in the way of justification beyond their "behaving like historians" and abiding by "historians' accepted practices." This is a dangerous appeal to technocratic partitioning of access to knowledge and claims of authority. Are there no limitations or alternatives to these behaviors and practices that could render them incomplete, flawed, or biased? Are such dutiful adherents capable of seeing such issues?

This technocratic division, which saw the early church exercise control by limiting access to holy texts to the anointed priestly class, has exploded in modern times. Under the guise of inaccessible expertise, more and more fields of inquiry have sought to insulate themselves from common understanding and external criticism through just such appeals to special divining qualifications. Technocratic authority is a means of control through delineating acceptable thought and intrinsically shutting out challenges.

With respect to historical study, a major issue derives from the fact that we are all inextricably chained to the present and to our personal worldviews and beliefs. This essay would have us accept that historians possess an ability to "bracket the assumptions, values, and logics that shape contemporary consciousness" through, in part, a "deeper level of immersion." But how, and with what ballast? Immersion is no panacea for such issues; bias affects every step of the process. Nor are academic methodologies and tools a reliable restraint; they too are forged in the crucible of "contemporary consciousness." I know many well-educated individuals who are deeply immersed in their personal bubbles of present-day politics with little outside perspective.

It is misguided to expect a field as ideologically uniform as academic history to adequately control internally for group think and bias, especially when such problems are rife in ostensibly more objective scientific fields. For example, what percentage of academic historians support greater gun control laws? 95+%? At any rate approaching that, how can their collective Second Amendment scholarship be relied upon? Jurisprudence by ideologically-mired academic technocracy is no better than that by unelected, ideologically-driven judges.

This is not to say that the work of historians has no value. Just as historians seek to understand history in its relevant contexts, their present-day efforts must be understood in their proper political, sociological, philosophical, and other contexts today.

ENRIQUE GUERRA-PUJOL on MARCH 23, 2017 9:19 PM

Ironically, I find Prof. Gienapp's critique of originalism to be narrow and parochial. After all, history can be just as contested as language; the work of history does not get us any closer to truth than the study of linguistics does.
The problem with public meaning originalism is not that it neglects the methods of historians. Rather, the main problem with originalism as a theory is that there often is no single or obvious public meaning of open-textured words and phrases like "equal protection" or "due process of law." In reality, the public meaning of such words can still be open to interpretation because there were so many possible readers of the Constitution at the time the words of the founding charter were drafted and ratified. Those same words could have many public meanings, depending on the identity of who was reading them ...

JOHN ASHMAN on MARCH 28, 2017 2:03 PM

If only there were a way to fit more smug elitism into this essay.

JOHN ASHMAN on MARCH 28, 2017 2:05 PM

This is from a group of people that can't even explain the "Civil War" properly, yet they propose to lecture us on how the law works because "history". It isn't just wrong, it's rude and obnoxious.

PANTLESS PHD on MARCH 28, 2017 2:34 PM

"Can't even explain the "Civil War" properly?" Oh bless your heart…

JOHN ASHMAN on MARCH 28, 2017 3:23 PM

Can you? I doubt it.

PANTLESS PHD on MARCH 28, 2017 3:37 PM

Can I explain the Civil War properly? Yeah. Southern states seceded to protect and expand chattel slavery. Northern states fought a war to preserve the Union. Said war effort was eventually linked to the end of slavery.

Phew, that wasn't hard at all!

PANTLESS PHD on MARCH 28, 2017 3:38 PM

But if you're asking if I can bless your heart, sadly I can't. I'm a pantless PhD, not a pantless priest.

JOHN ASHMAN on MARCH 28, 2017 6:00 PM

Well, Congrats to you for being mostly correct, though clearly not omitting the part where Lincoln, against advice, used an act of war to goad the South into a war he thought he could win easily.

JOHN ASHMAN on MARCH 28, 2017 3:04 PM

What makes this diatribe simple diatribe is that the one leftist historian dissent is wrong on its face, because the plain language of the 2nd amendment, that "the right of the people to keep and bear arms shall not be infringed", is 100% counter to their argument. The rationale is separate from the prohibition and the rationale for a law doesn't limit the law itself. If they had wanted to connect it to militia, they would have said "the rights of militia members to keep and bear arms shall not be infringed". Instead, they said "the people". They knew what they were doing and nothing about their writing suggest they were as sloppy as the left thinks.

HAPPY FELLA on MARCH 30, 2017 1:09 PM

This is constitutional law as told by an historian: not on point. For a clear analysis of Justice Scalia's original-public-meaning "originalism" and its irreparable flaws, you ought to read "Justice Scalia's Originalism: A Flawed Theory that Obscures an Important Truth" on the Social Science Research Network: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2746859

JOHN ASHMAN on MARCH 30, 2017 5:39 PM

Quick and dirty, but also is basically a strawman. I think most originalists would be quick to admit that the words then are the words now, but the big issue is between ACTUAL meaning and TWISTED meaning. Originalism is looking for the foundation of the meaning in order to make it less easily twisted. It isn't even difficult stuff. Madison and Jefferson ridicule the "taxing and spending" interpretation that is now actually real "precedent". History itself mocks the many other leftist interpretations. With or without the input of arrogant "historians".

JOHN ASHMAN on MARCH 30, 2017 5:42 PM

What the "historian" is trying to do here is to say that if your interest is in fixing a Model T Ford, being a mechanic that specializes in antiques and researches the parts design, quality, fabrication method and makeup is not good enough, because only a "historian" can tell you enough about that part for the mechanic to fix it. Because a historian just "knows more stuff" and "has better methods". None of which is really applicable or important, but "historians" need to FEEL important. Their jobs are boring, they are boring and no one really cares about them. But they want to be important to someone. Well, if they want to be important, they should have done a better job on Vikings.

JOHN ASHMAN on MARCH 30, 2017 6:29 PM

You have to give a guy kudos for using the word "intellectual" 8 times in a single article (and 5 times in the footnotes!).

See, the problem is, it's not just that the words have essentially identical meanings, it's that by showing that the meanings are essentially the same, you miss all the NONessential nuance that makes "historians" feel special. I mean, it doesn't matter, but it FEELS like it matters to them. The words mean the same, but they just FEEL different. And how do we know? Because a "historian" told us. I mean, c'mon, you gotta FEEL the smell of the 1790s. When you say "commerce", do you hear the horse drawn carriages? Smell the poop in the streets and the smell perfumes and sweat? NO YOU DON'T. And that's exactly what's wrong with you.

DAVID E. YOUNG on APRIL 2, 2017 4:57 PM

In the above article, Jonathan Gienapp attempts to rouse all historians to oppose a judicial nomination based upon a particular example of historians' work, the rejected conclusion presented by fifteen historians in their brief to the Supreme Court in the Heller case(2008). The two historians specifically mentioned in the article were among those involved in the brief, and Jack Rakove was the primary author. This is what I wrote about Prof. Rakove's Heller brief shortly after it appeared. My comments were published by History News Network.
http://historynewsnetwork.org/article/47238

"One would expect such a brief to be historically accurate, address the Second Amendment in its proper Bill of Rights related context, and include the most relevant figures, statements, and actions for understanding any historical issues in the dispute. However, any such expectation is left largely unfulfilled in the historians' brief."

Neither Justice Scalia in the majority opinion, nor Stevens in his historical dissent, cited the historians' brief for American history, the sole cite by Stevens' relating to the English Bill of Rights. Note also, Justice Stevens and the three other dissenting justices directly contradicted the historians' brief regarding conclusions about two specific documents. To understand why historical reliance on this brief was not possible, consider the numerous errors of historical fact regarding just one of the brief's many assertions, this one regarding the eight early state declarations of rights:

"In only two states (Pennsylvania in 1776, Massachusetts in 1780) were they made part of the actual constitutions."

The fact is that North Carolina, 1776, and Vermont, 1777, copied the language of Pennsylvania's Form of Government Section 46 making the Declaration of Rights part of the Constitution. Also, New Hampshire, 1784, copied the feature of Massachusetts on this matter, its Bill of Rights being Part 1 of the Constitution. Not only do these three facts directly contradict this specific historians' claim, but Vermont's Constitution alone has three separate clear indications that its Declaration of Rights is part of the State Constitution. It is clearly stated at the end of the long introductory statement declaring independence from Great Britain and New York, also appears in the Declaration of Rights heading of Chapter 1 (the Form of Government being Chapter 2), and is clearly stated in Section XLII of the Form of Government, the provision copied from Pennsylvania's Constitution. This historian Heller amici assertion to the Supreme Court is at odds with multiple historical documents directly contradicting it. Anyone with a smartphone or CPU at hand can look up these documents right now and confirm these facts.

The were so many errors in Prof. Rakove's Heller brief, and they were so extensive and fundamental, I decided in early 2009 to analyze and document them, then publish the results. This effort resulted in 16 numbered errors of fact along with presentation of the extensive historical evidence overlooked by the

Heller amici in 24 short essays published at my blog, On Second Opinion. The series title is Root Causes of Never-Ending Second Amendment Dispute, with Part 1 addressing the multiple error noted above. http://onsecondopinion.blogspot.com/2009/01/root-cause-of-never-ending-second.html

Historians disagree all the time about how to interpret particular facts of history, but rarely do they produce a historical disgrace of the magnitude found in Prof. Rakove's Heller brief to the Supreme Court of the United States. Setting up the professional historians' Heller brief as the poster child for a campaign to defeat nomination of a Supreme Court Justice is a mistake. It can only erode the intellectual stature of American historians. Prof. Rakove's Heller brief is an intellectual embarrassment of the highest order and other historians need to fully inform themselves of that fact.

Richard Henry Lee to Edmund Randolph, New York, 16 October 1787

DEAR SIR, I was duly honored with your favor of September 17th, from Philadelphia, which should have been acknowledged long before now, if the nature of the business that it related to had not required time...

...Yet there is no restraint in form of a bill of rights, to secure (what Doctor Blackstone calls) that residuum of human rights, which is not intended to be given up to society, and which indeed is not necessary to be given for any good social purpose.—The rights of conscience, the freedom of the press, and the trial by jury are at mercy. It is there stated, that in criminal cases, the trial shall be by jury. But how? In the state. What then becomes of the jury of the vicinage or at least from the county in the first instance, for the states being from 50 to 700 miles in extent? This mode of trial even in criminal cases may be greatly impaired, and in civil causes the inference is strong, that it may be altogether omitted as the constitution positively assumes it in criminal, and is silent about it in civil causes.—Nay, it is more strongly discountenanced in civil cases by giving the supreme court in appeals, jurisdiction both as to law and fact. Judge Blackstone in his learned commentaries, art. jury trial, says, it is the most transcendant privilege which any subject can enjoy or wish for, that he cannot be affected either in his property, his liberty, his person, but by the unanimous consent of 12 of his neighbours and equals. A constitution that I may venture to affirm has under providence, secured the just liberties of this nation for a long succession of ages.—The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely *entrusted* to the magistracy, a select body of men, and those generally selected by the prince, or such as enjoy the highest offices of the state, these decisions in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity. It is not to be expected from human nature, that the few should always be attentive to the good of the many. The learned judge further says, that every tribunal selected for the decision of *facts*, is a step towards establishing aristocracy; the most oppressive of all governments. The answer to these objections is, that the new legislature may provide remedies!—But as they may, so they may not, and if they did, a succeeding assembly may repeal the provisions.—The evil is found resting upon constitutional bottom, and the remedy upon the mutable ground of legislation, revocable at any annual meeting. It is the more unfortunate that this great security of human rights, the trial by jury, should be weakened in this system, as power is unnecessarily given in the second section of the third article, to call people from their own country in all cases of controversy about property between citizens of different states and foreigners, with citizens of the United States, to be tried in a distant court where the Congress may sit. For although inferior congressional courts may for the above purposes be instituted in the different states, yet this is a matter altogether in the pleasure of the new legislature, so that if they please not to institute them, or if they do not regulate the right of appeal reasonably, the people will be exposed to endless oppression, and the necessity of submitting in multitudes of cases, to pay unjust demands, rather than follow suitors, through great expence, to far distant tribunals, and to be determined upon there, as it may be, without a jury...

...I will conclude with assuring you, that I am with the sincerest esteem and regard, dear Sir, your most affectionate and obedient servant, RICHARD HENRY LEE.

Cite as: The Documentary History of the Ratification of the Constitution Digital Edition, ed. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan. Charlottesville: University of Virginia Press, 2009.
Canonic URL: http://rotunda.upress.virginia.edu/founders/RNCN-02-08-02-0001-0045-0001 [accessed 14 Jan 2013]
Original source: Ratification by the States, Volume VIII: Virginia, No. 1

Early American Constitutional History: A Source Guide

William Baude* and Jud Campbell**

(work-in-progress, last updated September 9, 2021)

This is a concise guide to source materials relevant to late 18th-century and early 19th-century constitutional history in the United States, often with accompanying reflections about using these sources in historical and legal scholarship. The guide aims to be useful to those who are just entering the field as well as to more established historians and lawyers who want to keep up with newly available sources. Further suggestions are welcome.

* Professor of Law and Faculty Director, Constitutional Law Institute, University of Chicago Law School.
** Associate Professor, University of Richmond School of Law.
The authors thank a lot of people. You know who you are.

INTRODUCTION

USES OF HISTORY

From nearly any vantage point, studying American constitutional law is a deeply historical endeavor.[1] One well-known approach is originalism, which now comes in many varieties. Some originalist scholars, building on modern "textualism," look to the public meaning of constitutional text at the time of its enactment to learn its original meaning.[2] Other originalists are more willing to probe the purposes or intentions behind constitutional provisions,[3] or look to the original methods of legal interpretation at the time of enactment.[4] For some originalists these inquiries largely control the modern legal meaning.[5] For many other scholars, including those who do not call themselves originalists, this "founding" history is one element of a broader interpretive theory.[6]

Constitutional history, however, extends well beyond particular founding moments. Historical study, for instance, can reveal the origins and development of early constitutional settlements that we have chosen to follow ever since—what some have called the process of "liquidating" constitutional meaning.[7] Others look to history to

[1] For thoughts on the "historical turn" in modern scholarship, see G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485 (2002). Whenever possible, we will provide hyperlinks to publicly available digital versions of articles and other cited sources; for materials available only in subscription databases, we will identify the link as leading to a subscription-only service. Unfortunately, we do not yet receive any kickbacks from these subscription services.
[2] *See, e.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); *see also* JACK BALKIN, LIVING ORIGINALISM (2011).
[3] *See, e.g.*, Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004).
[4] *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).
[5] One of the authors takes this approach. *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019).
[6] *See, e.g.*, Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 616, 676 (1999) (noting the importance of early history to nearly any theory of constitutional interpretation). For other approaches to "founding" history, see Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721 (2013); Bernadette A. Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006).
[7] *See, e.g.*, William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. (2019); Stephen E. Sachs, *The "Unwritten Constitution" and Unwritten Law*, 2013 U. ILL. L. REV. 1797; David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 1015-19 (2010); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003).

understand our modern constitutional commitments as the result of a continuing process of constitutional development.[8] On this view, historical inquiry illuminates but does not fix constitutional meaning. Yet another group of scholars seeks to better understand our constitutional traditions for historical reasons, leaving others to consider how the past may inform modern constitutional disputes.[9]

The scholarly literature is full of ominous warnings about "law office history"[10]—mostly used as an epithet for lawyers doing history "incompetently,"[11] but perhaps better defined as lawyers using history for reasons that serve present-minded lawyerly goals.[12] Easy access to primary sources, and especially those that are readily text searchable, surely facilitates these "law office" uses of history. In this guide, our commentary focuses on using particular sources rather than on broader methodological or interpretive issues. Readers interested in learning more about historical methods or originalist interpretation should look elsewhere.[13]

HISTORICAL SOURCES

Both of us frequently take a historical perspective on American constitutional law, and we thought it might be useful to provide a brief guide to some of the key sources used in American constitutional history. Our focus is on the late 18th and early 19th centuries—a particularly important epoch for American constitutional history, and one that happens to match our interest and familiarity.

This guide has two principal goals: (1) to collect and organize key primary sources—especially sources available online—in order to facilitate historical research, and (2) in some cases to comment on the uses of those sources in order to improve the quality of historical analysis. To that end, this guide focuses on *primary* historical sources rather than more recent *secondary* scholarship. We make scattered

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[8] *See, e.g.*, Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998); Larry Kramer, *Fidelity to History—And Through It*, 65 FORDHAM L. REV. 1627 (1997).
[9] *See, e.g.*, Golove & Hulsebosch, *A Civilized Nation*, *supra* note 7. The other author usually takes this approach. *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017); Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104 (2013).
[10] *E.g.*, Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 132.
[11] Rebecca Piller, *History in the Making: Why Courts Are Ill-Equipped to Employ Originalism*, 34 REV. LITIG. 187, 188 (2015).
[12] Gordon S. Wood, *The Supreme Court and the Uses of History*, 39 OHIO N.U. L. REV. 435, 443 (2013); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 119 (2001). *See also* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809 (2019).
[13] *See, e.g.*, Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111 (2015) (focusing on originalist methodology); Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935 (2015) (focusing on historical methodology); Saul Cornell, *Originalism as Thin Description: An Interdisciplinary Critique*, 84 FORDHAM L. REV. RES. GESTAE 1 (2015) (discussing the relationship between intellectual history and originalism).

references to pertinent secondary works, enabling readers to dig deeper into particular topics, but this guide does not aim to be a comprehensive bibliography.[14] (Readers looking for a more comprehensive introduction to historical research may find immensely useful a book by John B. Nann and (the late) Morris L. Cohen, *The Yale Law School Guide to Research in American Legal History*.[15])

ORTHOGRAPHY

Before we get to those sources, here are a few tips for reading some of them. Americans in the late 18th and early 19th centuries usually wrote in a way that is familiar to modern readers of English. But there are some exceptions.

- Americans often used a "long s" which appears to modern readers as an "*f*" but was indistinguishable from any other "*s*." The word Congress, for instance, sometimes appeared as "*Congreſs*." In modern scholarship, this word should be read—and transcribed—as ending with "*ss*," not with "*fs*."
- Americans often abbreviated words using superscript characters. For instance, the word "*would*" was often written as "w^d," and "*obedient*" could be written as "ob^t." Given context, most instances are easy to decipher. It is conventional to transcribe in any of the following ways: without alteration ("w^d"), without reproducing the abbreviation ("would"), or with any missing letters in brackets ("w[oul]d"). We suggest not just removing the superscript ("wd").
- Americans frequently used different spelling practices, like "shew" (for "show") and "it's" (for the possessive pronoun "its"). Other linguistic practices differed, too. For instance, plural nouns commonly took plural verbs (*e.g.*, "Congress are in session!"). In our view, "[sic]" should generally be avoided for orthographical and grammatical practices that were acceptable at the time.
- Americans sometimes used "*y*" in place of a "thorn," an antiquated English letter, usually followed by a superscript letter. For instance, "*the*," "*this*," and "*that*," were sometimes written as "y^e," "y^s," and "y^t," respectively. This letter was pronounced "*th*" and it should be transcribed as "*th*," not as a "*y*." (Hence, it would have been "The Curiosity Shop" not "Ye Curiosity Shop.")
- Perhaps the most important American constitutional decision is *M'Culloch v. Maryland*—not *M'Culloch v. Maryland*. The "turned comma," much like the

[14] For an introduction to founding-era historiography, see Alan Gibson's very helpful discussions in INTERPRETING THE FOUNDING (rev. ed., 2010) and UNDERSTANDING THE FOUNDING (rev. ed. 2010). Useful (and much shorter) bibliographical essays also appear in each of the *New Histories of American Law* volumes, including GERALD LEONARD & SAUL CORNELL, THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS' CONSTITUTION, 1780S-1830S, at 225-37 (Cambridge University Press, 2019).

[15] (Yale University Press, 2018).

use of superscript characters (mentioned above) functioned as a placeholder for missing letters.[16] "*McCulloch*" is an acceptable modern transcription.

- The Constitution's text includes punctuation and capitalization,[17] but readers should be cautious when making assumptions about founding-era punctuation and spelling practices.[18] Use of dashes instead of periods was common, for instance. We think it is acceptable to modernize punctuation for clarity, but make note of the change.

GOVERNMENT SOURCES

CONSTITUTIONS

The texts of federal and state constitutions are readily available online. A congressionally commissioned compilation of state constitutions, published in 1909, is available for download at Liberty Fund and for online viewing at HathiTrust. Another useful source is material digitized by the Rutgers Law Library (organized by state), from the microfilm series of *The Records of the States of the United States of America*.

The ConSource website provides a neat way to see the federal Constitution adjacent to a transcription (with annotations), and it also has a page featuring transcriptions of contemporary state constitutions and charters and other seminal documents in Anglo-American constitutional history.

Constitutional Conventions

Alongside *The Federalist* (*see entry for* FEDERALIST AND ANTI-FEDERALIST PAPERS), James Madison's notes from the Philadelphia Convention of 1787 are perhaps the most famous source in American constitutional history. Madison's notes, along with others taken at the Convention, are published in Max Farrand, *The Records of the Federal Convention of 1787*, and later James H. Hutson, *Supplement to Max Farrand's The Records of the Federal Convention of 1787*.[19] Volume 1, Volume 2, Volume 3, and the Supplement are available online. The official records, including the convention journal, are also available online (free registration required). Volume 3 of the

[16] *See* Michael G. Collins, M'Culloch *and the Turned Comma*, 12 GREEN BAG 2D 265 (2009).
[17] Interestingly, the modern "official" version of the Constitution differs from the version authorized by the several states at the founding. *See* David S. Yellin, *The Elements of Constitutional Style: A Comprehensive Analysis of Punctuation in the Constitution*, 79 TENN. L. REV. 687, 709-10 (2012).
[18] *See* Michael Nardella, Note, *Knowing When to Stop: Is the Punctuation of the Constitution Based on Sound or Sense?*, 59 FLA. L. REV. 667 (2007).
[19] (New Haven: Yale University Press, 1911 & 1987, respectively).

Documentary History of the Constitution,[20] available online to subscribers of HeinOnline, includes more detailed notations of Madison's revisions to his notes.[21]

Given their prominence, the records of the Philadelphia Convention of 1787 have been the subject of extensive scholarly inquiry. Particularly useful and well-regarded expositions are Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution,*[22] and Richard Beeman, *Plain, Honest Men: The Making of the American Constitution.*[23]

For discussion of the Convention records as historical sources, see Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*[24] and her book, *Madison's Hand: Revising the Constitutional Convention*,[25] as well as Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution*.[26]

Amendments to the U.S. Constitution have never been proposed or adopted by a national constitutional convention, only by Congress (though Article V creates both options). So for material on the framing and promulgation of constitutional amendments, see CONGRESSIONAL DEBATES ABOUT CONSTITUTIONAL AMENDMENTS.

While the Philadelphia Convention of 1787 is by far the most famous founding-era constitutional convention, records from state constitutional conventions offer valuable information as well. They can shed light both on their own state constitutions and also on principles and concerns that are sometimes relevant to federal constitutional law. Here are some of the recorded debates available online for state constitutional conventions prior to 1840:

- Connecticut, 1818,[27] available online to subscribers of HeinOnline
- Maine, 1819
- Massachusetts, 1820
- New York, 1821
- Virginia, 1830
- Delaware, 1831

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[20] (5 vols.; Washington, D.C.: Department of State, 1894-1905).
[21] MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTION CONVENTION 237 (Cambridge: Harvard University Press, 2015).
[22] (New York: Knopf, 1997).
[23] (New York: Random House, 2009).
[24] 80 GEO. WASH. L. REV. 1620 (2012).
[25] (Cambridge: Harvard University Press, 2015).
[26] 80 GEO. WASH. L. REV. 1707 (2012).
[27] These debates were published contemporaneously in Connecticut newspapers, but they were not compiled in book form until 1991. Other contemporaneous reports have since been published in THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT FROM MAY THROUGH OCTOBER 1818: VOLUME XIX (Hartford: Connecticut State Library, 2007), which source is not presently available online.

- North Carolina, 1835
- Michigan, 1835-36
- Pennsylvania, 1837

Additionally, many earlier state constitutional conventions kept official journals that have been transcribed and published.[28] They typically include motions and votes but do not record debates among the delegates. An old but still helpful guide to state primary sources is *Sources and Documents of the United States Constitutions*.[29] For a wonderful collection of state convention journals, including the original manuscripts, see the colossal microfilm series of *The Records of the States of the United States of America*, currently being digitized by LLMC. Much of the collection is already available online. A useful guide is available online at HathiTrust, including a section on "Constitutional Records." Those records are freely accessible here via Rutgers.

Federalist and Anti-Federalist Papers

The eighty-five essays that Alexander Hamilton, John Jay, and James Madison published under the pseudonym "Publius" from late-1787 through mid-1788—essays known collectively to historians as *The Federalist* (N.B.: not "The Federalist Papers")—are notable mainly for their thoroughness and the brilliance of their authors. Their significance in the ratification debates and their representativeness of founding-era views tends to be overstated.[30] But the essays are clearly important sources in constitutional history. The essays were often responsive to particular anti-federalist publications and arguments.

The full text of *The Federalist* is readily available online in HTML webpages or as a print-quality PDF. Readers should be aware of minor differences between the essays originally published in newspapers and those later published as the "McLean" and "Gideon" editions.[31] ConSource's "Federalist Papers" webpage has a cool feature showing the transcribed text of each *Federalist* essay adjacent to a digital version of the original newspaper record.

Somewhat less well known are the so-called "Anti-Federalist Papers." These writings were not composed as part of a coordinated effort; their compilation came

[28] Available convention journals include Massachusetts (1780), Pennsylvania (1776 and 1790), and many others. For materials about the ratification of the Massachusetts constitution of 1780, see THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780 (Oscar Handlin & Mary Handlin eds.; Cambridge: Harvard University Press, 1966).
[29] (10 vols.; William Finley Swindler, ed.; Dobbs Ferry, N.Y.: Oceana Publications, 1973).
[30] *See* Kramer, *Madison's Audience*, supra note 6, at 665.
[31] For more information about *The Federalist*, see Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801 (2007). A concise account of the various editions appears in THE FEDERALIST xii-xviii (Jacob E. Cooke ed., 1961), which reproduces the original newspaper essays and notes later revisions in footnotes.

only in the 20th century, most famously in *The Antifederalist Papers*[32] and in a seven-volume series entitled *The Complete-Anti-Federalist*,[33] though only the middle five volumes include primary sources. Anti-federalist essays are readily available online—at http://www.constitution.org/afp.htm, for instance, and (combined with "pro-Federalist" writings) at ConSource.[34] Authorship and circulation of other commentaries are discussed in the *Documentary History of the Ratification of the Constitution*, available online to subscribers of Rotunda.

Ratification Debates

Following the circulation of the proposed federal constitution in 1787, state legislatures called conventions to consider ratification. The resulting debates that erupted across the country are nicely chronicled in Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788*,[35] among countless other sources.

By far the best way to find primary materials is to examine *The Documentary History of the Ratification of the Constitution*, a multi-volume series organized mostly by state and still in progress, available online to subscribers of Rotunda. (The volumes are also freely available on the Wisconsin Digital Collections website, but they are substantially harder to navigate.) A more limited but still canonical source is *Elliot's Debates*,[36] available for free online at the Library of Congress website. (The four-volume first edition is also on Hathitrust.) Another highly useful compilation of materials, organized by subject (often by constitutional clause) is Philip B. Kurland & Ralph Lerner, *The Founders' Constitution*, freely available online.[37]

Our notes of caution about the accuracy of Congressional debates and constitutional-convention debates (*see entries for* CONGRESSIONAL RECORDS *and* CONSTITUTIONAL CONVENTIONS) apply with even more force to records of the debates in the state ratification conventions of 1787 and 1788. Elbridge Gerry once described these debates, "published by short-hand writers," as "generally partial and mutilated," and he warned that "the speech of one member is not to be considered as expressing the sense of a Convention."[38]

Gerry's point is well taken. For scholarly commentaries on these sources, see James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary*

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[32] (Morton Borden, ed.; East Lansing: Michigan State University Press, 1965).
[33] (Herbert J. Storing, ed.; Chicago: University of Chicago Press, 1981).
[34] For the best analysis of the authorship of the essays of Brutus and Federal Farmer, see MICHAEL P. ZUCKERT & DEREK A. WEBB, THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE (Indianapolis: Liberty Fund, 2009).
[35] (New York: Simon & Schuster, 2010).
[36] (5 vols; 2d ed. 1827-1830).
[37] (5 vols.; Chicago: University of Chicago Press, 1986).
[38] 2 ANNALS OF CONG. 2005.

Record,[39] and Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*.[40] (Hutson provides particular warnings about the widely-cited *Elliot's Debates*, noting: "[s]ome scholars believe that one of Elliot's purposes in preparing his Debates was to advance Calhoun's cause, for Elliot supplemented proceedings in the conventions with such states' rights classics as the Virginia and Kentucky Resolves and deleted from the 1836 second edition a letter from Madison, which appeared in the first edition, attacking nullification.")[41]

LEGISLATIVE MATERIALS

Modern constitutional interpretation overwhelmingly centers on judicial exposition, but historically the primacy of the courts was hotly contested, and other branches of government had a prominent role in constitutional debates.[42] Congressional records are thus an indispensable source for early American constitutional history.

Continental Congress

A fruitful source for constitutional history in the 1770s and 1780s is material from the Continental Congress. The journals are available online (and to subscribers of HeinOnline), as are the collected papers of the Continental Congress. The leading history of the Continental Congress is Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress*.[43] For the study of constitutional ideas, be sure to examine Gordon Wood, *The Creation of the American Republic, 1776-1787*.[44] For correspondence of the members of the Continental Correspondence, see *Letters of Delegates to Congress, 1774-1789*,[45] available online (and to subscribers of LLMC Digital and subscribers of HeinOnline). Materials focusing on Rhode Island are collected in *Rhode Island in the Continental Congress*.[46]

[39] 65 TEX. L. REV. 1 (1986).
[40] 2009 U. ILL. L. REV. 457.
[41] 65 TEX. L. REV. at 13, 20 (1986).
[42] *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (New York: Oxford University Press, 2004).
[43] (New York: Alfred A. Knopf, 1979).
[44] (Chapel Hill: University of North Carolina Press, 1969).
[45] (26 vols.; Washington, D.C.: Library of Congress, 1976-2000). These volumes have supplanted LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS (8 vols.; Washington, D.C.: The Carnegie Institution of Washington, 1921-1936).
[46] WILLIAM STAPLES, RHODE ISLAND IN THE CONTINENTAL CONGRESS: WITH THE JOURNAL OF THE CONVENTION THAT ADOPTED THE CONSTITUTION, 1765-1790 (Providence, 1870).

Congressional Records

For summaries of constitutional debates in Congress from 1789 to 1861, the place to start is David Currie's wonderful four-volume series, *The Constitution in Congress*. The books are not fully available online, but three of the volumes can be previewed—and, perhaps more importantly, text-searched—on Google Books.[47] Currie is opinionated but fair.

Debates from 1861 to 1870 are also covered in some of Currie's last articles, which have not been collected into a book and are freely available online: *The Civil War Congress*,[48] *The Reconstruction Congress*,[49] and (for the losing side) *Through the Looking-Glass: The Confederate Constitution in Congress*.[50]

The Congressional debates themselves, initially recorded unofficially by reporters, are available for free on the Library of Congress website (but with limited search options):

- The Annals of Congress (1789-1824)
- The Register of Debates (1824-1837)
- The Congressional Globe (1833-1873)
- The Congressional Record (1873-1875)

A more extensive set of Congressional materials (which are text-searchable) are available to subscribers of HeinOnline and subscribers of NewsBank's Archive of Americana. The University of North Texas also has searchable versions of the Annals, Register, Globe, and Record. These are available to the public and somewhat easier to text-search, but more difficult to browse, than the Library of Congress site.

As with case reports, researchers should be cautious about taking the Congressional debates at face value. The Annals "were not published contemporaneously, but were compiled between 1834 and 1856, using the best records available, primarily

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[47] DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801 (Chicago: University of Chicago Press, 1997); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-1861 (Chicago: University of Chicago Press, 2005); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829-1861 (Chicago: University of Chicago Press, 2005). For whatever reason, the second volume is not currently available for text searching: DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829 (Chicago: University of Chicago Press, 2005), not quite available online. Prior to publishing the books, Currie published some chapters in law reviews. *See, e.g.*, David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775 (1994), available online to subscribers of JSTOR.
[48] 73 U. CHI. L. REV. 1131 (2006).
[49] 75 U. CHI. L. REV. 383 (2008).
[50] 90 VA. L. REV. 1257 (2004).

newspaper accounts," and the "[s]peeches are paraphrased rather than presented verbatim."[51] The earliest reporter (to March 8, 1790), Thomas Lloyd, is reported to have been unskilled and, as James Madison noted, "became a votary of the bottle and perhaps made too free use of it sometimes at the period of his printed debates."[52] Elbridge Gerry once criticized Lloyd for attributing to congressmen "arguments directly the reverse of what they had advanced."[53] And, according to one appraisal, "the accounts in the *Annals of Congress* are even less satisfactory than those in the newspapers from which they were taken."[54]

Controversies persisted with the Annals's successors: The Register of Debates was run by partisan Whigs (who also worked on the Annals), while the founders of the Congressional Globe were thought to be biased in the other direction.[55] Congress switched to stenographic reporting written in the first person in 1848-1850 (though still published in the Globe), and took direct control with the establishment of the Congressional Record in 1873.[56]

For materials regarding the First Congress (1789-1791), a wonderful resource is the *Documentary History of the First Federal Congress*, available online to subscribes at Rotunda, including newspaper accounts of debates, transcriptions of draft legislation, and other valuable sources. (There's also a harder-to-use version for subscribers of The Early Republic Online.)

Readers should also be aware that the first two volumes of the *Annals* were published in *two different editions, with two different paginations*. The issue seems to have arisen because "after the first few volumes were printed in 1834 the publication was halted until 1846 when Congress appropriated money for its completion which occurred in 1856. During the second effort the first few volumes of the Annals were reprinted and repaginated."[57] A 1843 newspaper article that discussed the plans of

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[51] Annals of Congress, http://memory.loc.gov/ammem/amlaw/lwac.html
[52] *See* James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 37-38 (1986).
[53] *Id.* at 38; *see also* Marion Tinling, *Thomas Lloyd's Reports on the First Federal Congress*, 18 WM. & MARY Q. 519, 521-43 (1961), available online to subscribers of JSTOR (providing a short biography of Lloyd).
[54] NATIONAL HISTORICAL PUBLICATIONS COMMISSION, A NATIONAL PROGRAM FOR THE PUBLICATION OF HISTORICAL DOCUMENTS 93 (1954); *see also* Tinling, *Thomas Lloyd's Reports*, *supra* note 53, at 520-21 ("Gales and Seaton revised copy freely, omitted debates (even some in Fenno's reports), and sometimes introduced errors, while rarely correcting any.").
[55] Senate Historical Office, *Reporters of Debate and the Congressional Record*.
[56] *Id.* For more details, see Elizabeth G. McPherson, *Reporting the Debates of Congress*, 28 Q.J. OF SPEECH 141 (1942); Elizabeth G. McPherson, *Major Publications of Gales and Seaton*, 31 Q.J. OF SPEECH 430 (1945); Elizabeth G. McPherson, *The Southern States and the Reporting of Senate Debates*, 12 J. SOUTHERN HIST. 223 (1946).
[57] Richard J. McKinney, Law Librarians' Society of Washington, DC, *An Overview of the Congressional Record and Its Predecessor Publications: A Research Guide* n.4 (2015).

"Messrs. Gales & Seaton" referred to "the sample volume (of the First Congress,) already published." This produces a couple of minor quandaries for modern scholars.

First, how do we distinguish them? The title pages for the two versions are identical (except for the typography), bearing the same dates and editors. This seems to belie Currie's claim that "one [was] edited by Gales alone, the other by Gales and Seaton."[58] Both say that they were "compiled from authentic materials, by Joseph Gales, Senior" and "Printed and published by Gales and Seaton." Similarly, the identical title pages create confusion because law reviews often cite to "__ ANNALS OF CONG. __ (Joseph Gales ed., 1834)" in reference to *both* versions.[59] The latest edition of the "Bluebook" states, "For volume one of the *Annals* give the name(s) of the editor(s) and year of publication in parentheses: 1 Annals of Cong. 486 (1789) (Joseph Gales ed., 1834)."[60] but again the two editions of the first two volumes have identical title pages that contain identical publication information. The most effective way to distinguish them may simply be a brief explanatory footnote.[61] For the convenience of readers, here are links to both versions:

> "Gales & Seaton's History of Debates in Congress" headings (N.B.: these are the first edition[62]): Vol. 1; Vol. 2.
>
> "History of Congress" headings (consistent with later volumes): Vol. 1; Vol. 2.

Which version should scholars and lawyers cite? Currie uses the earlier volumes with headings that read "Gales & Seaton's History of Debates in Congress." That usage also seems to be slightly more common in top law reviews, perhaps out of a belief that citations to reprints should be disfavored, or perhaps because that edition is available on the Library of Congress website.

But on balance we prefer the reprinted volumes with headings that read "History of Congress" because these are consistent with the formatting of later volumes.

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[58] Currie, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, *supra* note 47, at ix n.1.

[59] *Compare* Note, *Congress's Power to Define the Privileges and Immunities of Citizenship*, 128 HARV. L. REV. 1206, 1212 n.55 (2015) (citing "1 ANNALS OF CONG. 1116 (Joseph Gales ed., 1834)" in reference to the volumes with head titles reading "History of Congress"), *with* Note, *The Ineligibility Clause's Lost History: Presidential Patronage and Congress, 1787-1850*, 123 HARV. L. REV. 1727, 1731 n.36 (2010) (citing "1 ANNALS OF CONG. 762 (Joseph Gales ed., 1834)" in reference to the volumes with head titles reading "Gales & Seaton's History of Debates in Congress").

[60] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 13.5, at 140 (Columbia Law Review Ass'n et al. eds., 21st ed 2020)

[61] *See, e.g.*, Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?*, 5 NYU J.L. & LIBERTY 1, 29 (2010).

[62] *See* Tinling, *Thomas Lloyd's Reports*, *supra* note 53, at 520 n.2. For instance, a book published in 1841 uses pagination that corresponds to the "Gales & Seaton's History of Debates in Congress" version and not the "History of Congress" version. (The reference to the "First Series" alludes to the ongoing publication by Gales and Seaton of Congressional debates from 1824 onward.)

Moreover, because the Annals themselves are neither contemporaneous nor verbatim accounts, a preference for the "original" printing seems misplaced. In any event, those who cite the first two volumes of the Annals should be aware of the pagination problem. And for any points where the details matter, the best practice is to check the *Documentary History of the First Federal Congress*—a scholarly compilation that includes reprints of the original newspaper accounts.

For the public correspondence of congressmen to their constituents, often mentioning constitutional issues, see *Circular Letters of Congressmen to Their Constituents, 1789-1829*.[63]

An additional miscellany of early legislative and executive documents (1789-1838) are available in the *American State Papers*. The collection is available for free online, with text-searching for the indices and tables of contents only. Full-text searches are available to subscribers of NewsBank's *American State Papers, 1789-1838* and to subscribers of HeinOnline.

Congressional Debates about Constitutional Amendments

Congressional debates (along with other sources) about the Bill of Rights are arranged by topic in *The Complete Bill of Rights: The Drafts, Debates, Sources, & Origins*.[64] Pertinent materials about the drafting process are available online on ConSource's "Bill of Rights Legislative History" webpage. Eventually, the *Documentary History of the Ratification of the Constitution* will include two volumes on the Bill of Rights.

Pertinent debates and materials about the Eleventh Amendment appear in volumes 4 and 5 of the *Documentary History of the Supreme Court of the United States, 1789-1800*,[65] available online to subscribers of LLMC Digital and to subscribers of HeinOnline.

The premier compilation of primary sources regarding the Thirteenth, Fourteenth, and Fifteenth Amendments is a two-volume set, *The Reconstruction Amendments: The Essential Documents* (2021), edited by Kurt Lash. Digital copies can be purchased on the University of Chicago Press website (here are links to volume 1 and volume 2), or in a Kindle Edition on Amazon. These volumes collect a wide range of edited materials, including Congressional debates, newspaper editorials, and judicial opinions. Volume One includes Antebellum materials that give necessary context for

[63] (3 vols.; Chapel Hill: University of North Carolina Press, 1978).
[64] (rev. ed.; Neil H. Cogan ed., 2015).
[65] (Maeva Marcus ed., 1985-2007).

understanding the Reconstruction Amendments. For a lengthier collection of Congressional debates on the Reconstruction Amendments and Reconstruction-Era Civil Rights Acts, see *The Reconstruction Amendments' Debates.*[66]

State Legislative Records

For state court records, see the entry for OTHER FEDERAL AND STATE COURT RECORDS, *and for state constitutional convention records, see the entry for* CONSTITUTIONAL CONVENTIONS.

Most states have published collections of bills, resolutions, and laws. Often these are stand-alone volumes, and other times they are included in larger compilations of state materials. For instance:

The Archives of Maryland, 864 vols. to date
The Massachusetts Archives Collection, 328 vols.
The New Hampshire State Papers, 40 vols.
The State Records of North Carolina, 26 vols.
The Pennsylvania Archives, 138 vols.
Calendar of Virginia State Papers and Other Manuscripts, 11 vols.

Similar compilations exist for many other states. Materials about particular bills can also sometimes be discovered by consulting the archives of particular states. For a wonderful collection of state laws, see the colossal microfilm series of *The Records of the States of the United States of America*, currently being digitized by LLMC, with much of the collection already available online. A guide, which serves as a useful (but outdated) bibliography, is available online at HathiTrust.

Another useful trove of historical state legislation is available and searchable in *State Statutes: A Historical Archive*, for subscribers of Hein Online. And for those with access to Gale Databases, Gale's new Making of Modern Law: Primary Sources collection contains "a fully searchable digital archive of the published records of the American colonies, documents published by state constitutional conventions, state codes, city charters, law dictionaries, digests, and more." (Gale Databases require IP-specific links, so check with your academic library for availability).

State legislative debates have not been collected in a series comparable to the *Annals of Congress*. So far as we know, the only available compilation is the four-volume set of Thomas Lloyd's notes of the *Proceedings and Debates of the General*

[66] (Alfred Avins ed., 1967).

Assembly of Pennsylvania,[67] covering 1787 and 1788. Accounts of state legislative debates occasionally appeared in newspapers (see entry for NEWSPAPERS), more commonly in the 19th century, but these are scattered.

State legislative journals are often available in published form. These usually list bills, motions, and votes but rarely include any recorded debates. For an incredible collection of these materials, see the section on "Legislative Records" in the microfilm series of *The Records of the States of the United States of America*, summarized in a guide available online at HathiTrust.

Finally, petitioning was a core feature of legislative proceedings in the eighteenth and early nineteenth centuries.[68] Back then, petitions triggered a legislative duty to respond, often spurring the passage of private bills or public laws. Some state archives have started putting this materials online: *e.g.*, Delaware, North Carolina, South Carolina (on the search page, enter "Petition" as the document type), and Virginia (see here for explanatory document), often with accompanying search features or indices. Indices only are sometimes available online: *e.g.*, New Hampshire and Tennessee. For petitions relating to race and slavery, an essential resource is the Race & Slavery Petitions Project.

EXECUTIVE MATERIALS

As with other branches of government, the executive branch often faced questions of constitutional implementation and interpretation. Consequently, executive-branch materials can be a fruitful source for constitutional history.[69]

Federal Executive Records

Official presidential messages are compiled in various forms by James Richardson, see generally *Compilation of the Messages and Papers of the Presidents*, available to subscribers of HeinOnline. The first eleven volumes (covering all of the 18th and 19th centuries) are available for free online.

The executive branch began without an Office of Legal Counsel, and the Attorney General used to give legal advice to the President or other members of the executive branch. The officially published volumes of those opinions, on a wide range of topics, are available to subscribers of HeinOnline.

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[67] (Philadelphia: Daniel Humphreys, 1787-1788), available online to subscribers of Gale's Eighteenth Century Collections Online (depending on your network configuration, this link may not work even if your institution is a subscriber) and to subscribers of NewsBank's America's Historical Imprints.
[68] For a very helpful discussion, see Maggie Blackhawk et al., *Congressional Representation by Petition ...*, LEGIS. STUD. Q. (2020); *see also* Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L. J. 1537 (2018).
[69] *See, e.g.*, Gregory Ablavsky, *Beyond the Indian Commerce Clause*. 124 YALE L.J. 1012 (2015).

Note that official volumes are not complete. For instance, Attorney General Edmund Randolph wrote an opinion for President Washington on the legality of a recess appointment to the office of Chief Coiner of the mint—an opinion that became an important source in debates over the original meaning of the Recess Appointments Clause.[70] But the opinion is not collected in the Attorney General volumes, and instead was located in the papers of Thomas Jefferson, serving as a useful reminder to examine the correspondence of executive-branch members (*see entry for* CORRESPONDENCE).

Some other miscellaneous executive documents are in the *American State Papers*, also discussed in CONGRESSIONAL RECORDS. The collection is available for free online, with text-searching for the indices and table of contents only. Researchers should be aware that a huge volume of executive materials, particularly those in the custody of the National Archives, are neither published nor online.

State Executive Records

State executive records, including the published statements and correspondence of governors and other state officials, are sometimes available in published compilations (*see entry for* STATE LEGISLATIVE RECORDS). (Hein Online also has (for subscribers) a state-by-state collection of State Attorney General Reports and Opinions, going back in some cases to the mid-19th century.)

The microfilm series of *The Records of the States of the United States of America*, currently being digitized by LLMC, includes sections on "Executive Records" and "Administrative Records." Much of that collection already available online. A collection guide, which serves as a useful (though outdated) bibliography, is available online at HathiTrust.

Another good place to look for state executive materials is the correspondence of state executive officers (*see entry for* CORRESPONDENCE). Researchers should consult with the archives of particular states for more information about state executive materials.

[70] *See* Noel Canning v. N.L.R.B., 134 S. Ct. 2550, 2570 (2014); *id.* at 2607, 2610-2611 (Scalia, J., dissenting); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1518-1519 (2005).

JUDICIAL MATERIALS

Federal and State Case Reports

Published reports of American judicial decisions were unknown at the founding and somewhat rare in the early republic. As James Kent memorably described New York law reporting as of 1798: "When I came to the Bench there were no reports or State precedents. The opinions from the Bench were delivered ore tenus. We had no law of our own, and nobody knew what it was."[71]

Once underway, reporting differed substantially from the official reports that are prevalent today. In the late 18th century and early 19th century, private parties usually prepared case reports and then sold them to lawyers, judges, and members of the public.[72] These unofficial reports came with no assurance of accuracy apart from the reputation of the reporter. Footnotes were often added by the reporter rather than by the court.

A few volumes of unofficial reports were published in the late 18th century,[73] and American states began to authorize official reports in the early 19th century.[74] Judges and lawyers often supplemented published reports, or made up for their absence, by referring to unpublished manuscript notes, legal treatises, and reports of decisions from other states (or from England).[75] Reports did not adhere to the modern

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[71] Letter from James Kent to Thomas Washington (Oct. 6, 1828), *in* 3 VA. L. REG. 563, 568 (1897). Others have suggested that Kent was exaggerating. *See* John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 571 n.117 (1993); DANIEL HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830, at 277 (Chapel Hill: University of North Carolina Press, 2005) (suggesting that Kent accurately described the state of reporting but understated the amount of legal knowledge).

For an introduction to English reporting practices, see James Oldham, *The Indispensability of Manuscript Case Notes to Eighteenth-Century Barristers and Judges*, *in* MAKING LEGAL HISTORY: APPROACHES AND METHODOLOGIES 30 (Anthony Musson and Chantal Stebbings, eds.; New York: Cambridge University Press, 2012), and James Oldham, *Underreported and Underrated: The Court of Common Pleas in the Eighteenth Century*, *in* LAW AS CULTURE AND CULTURE AS LAW: ESSAYS IN HONOR OF JOHN PHILLIP REID 119 (Hendrik Hartog and William E. Nelson, eds.; 2000). For a guide to English manuscript reports, see J. H. BAKER, ENGLISH LEGAL MANUSCRIPTS (2 vols.; 1975-1978). For more information about the English legal system, see JOHN H. LANGBEIN, RENEE LETTOW LERNER, & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS (2009).

[72] *See* MORRIS L. COHEN & SHARON HAMBY O'CONNOR, A GUIDE TO THE EARLY REPORTS OF THE SUPREME COURT OF THE UNITED STATES 2 (1995).

[73] *See, e.g.*, EPHRAIM KIRBY, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT FROM THE YEAR 1785, TO MAY 1788 (Litchfield: Collier & Adam, 1789); FRANCIS HOPKINSON, JUDGMENTS IN THE ADMIRALTY IN PENNSYLVANIA IN FOUR SUITS (Philadelphia: Dobson & Lang, 1789).

[74] *See* COHEN & O'CONNOR, supra note 72, at 2 n.3 (noting authorizations of Massachusetts (1804), New York (1804), Kentucky (1804), and New Jersey (1806)).

[75] For a recent discussion of manuscript records in Virginia, see W.H. Bryson, *Virginia Law Reports*, 54 AM. J. LEGAL HIST. 107 (2014). For a discussion of American lawyering and judging practices in

distinction between "precedential" and "nonprecedential" opinions, so referring to a decision as "published" or "unpublished" usually says nothing about its precedential status. It is worth emphasizing that many American legal practices were dominated by localism, and the "law in action" did not always (or even usually) follow the "law on the books."[76]

Transcriptions of judicial opinions from over two centuries ago are often included in modern electronic databases like Google Scholar (free) and Westlaw (subscription service). These text-searchable databases are invaluable but occasionally include errors. For scholarly endeavors, the best practice is to confirm the text with the *original* case report, either in hard copy at a library or in "format-preserving" digital copy online. Many format-preserving reports are available on Google Books (free), the Law Library Microform Consortium (LLMC) website (subscription service), and the *America's Historical Imprints* series (subscription service), among other websites.

Keep these early reporting practices in mind when citing judicial decisions. Consider, for example, the decision in *Hunscom v. Hunscom*, 15 Mass. (14 Tyng.) 184 (1818), reported by lawyer Dudley Atkins Tyng in 1819 and discussed in this article. Based on the citation, modern lawyers and scholars would assume that the decision was a precedential ruling by the highest court in Massachusetts. In fact, however, Tyng was reporting a trial-level evidentiary ruling, apparently "not decided on argument."[77] (The judges of the Massachusetts Supreme Judicial Court, it turns out, also sat as "nisi prius" trial-level judges on circuit courts throughout Massachusetts.) About a decade after *Hunscom*, one legal magazine noted that it was "permitted, on the highest authority, to say that the Judges of the Supreme Court of Massachusetts do not consider that note [in *Hunscom*] as the record of a decision by which they feel themselves to be bound. The note was made by the Reporter himself, and no written decision was given in that case by the court."

Finally, another set of legal adjudications were appeals from colonial courts to the Privy Council in England. These appeals were designed to judge colonial compliance with English law and hence functioned somewhat like later Supreme Court review.[78] The files do not include written opinions, but they do have the equivalent of briefs, which can be used to reconstruct the reasons for appeal. A number of these

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absence of state judicial reports, see JOHN PHILIP REID, CONTROLLING THE LAW 163 (Dekalb: Northern Illinois University Press 2004).

[76] *See, e.g.*, LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH (Chapel Hill: University of North Carolina Press, 2009). *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (3rd ed.; 2005).

[77] [John Appleton], "On the Admissibility of Atheists as Witnesses," *The Yankee; and Boston Literary Gazette* [Boston, Mass.] (June 11, 1829), 188.

[78] *See* Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006).

"printed cases" are now available online in a searchable database with useful navigation tools. Many are admiralty cases. The historical context and significance of the appeals are discussed in Sharon Hamby O'Connor & Mary Sarah Bilder, *Appeals to the Privy Council Before American Independence: An Annotated Digital Catalogue*.

U.S. Supreme Court Materials

Supreme Court decisions from the founding era and early 19th century are reported in the *United States Reports*. The publication of these volumes in a sequentially numbered series makes them seem official, but this appearance is misleading. Like other early case reports (*see entry for* FEDERAL AND STATE CASE REPORTS), founding-era Supreme Court decisions were privately reported and privately published.[79]

Reports of Supreme Court decisions before 1800 are sometimes unreliable. The justices usually gave their opinions orally, often based on notes they had jotted down. The Court's unofficial reporter, Alexander Dallas, apparently referred to these notes on occasion, but the leading scholarly study remarks that "Dallas exercised his own editorial judgment and made changes in the language of the opinions."[80] Format-preserving digital copies of Dallas's published volumes are available online.[81] Most opinions in the 1790s were issued "By the Court," without being attributed to a particular justice, but important decisions (often constitutional ones) were typically issued "seriatim," with each justice delivering his opinion individually.[82]

The premier source for materials relating to the U.S. Supreme Court during its first decade is the eight-volume series *Documentary History of the Supreme Court of the United States, 1789-1800*,[83] available online to subscribers of LLMC Digital and to subscribers of HeinOnline. In addition to historical sources and scholarly commentary regarding Supreme Court cases, the series includes private correspondence and details of the justices' dreaded circuit-riding activities.

After 1800 the Court typically issued decisions in writing. Many of the published volumes are still incomplete and may include errors, but the practice of issuing written decisions makes these reports substantially more reliable.[84] Supreme Court

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[79] COHEN & O'CONNOR, supra note 72, at 2.
[80] 5 DOCUMENTARY HISTORY OF THE SUPREME COURT xxiv-xxv. For a brief biography of Dallas and a summary of his reporting activities, see COHEN & O'CONNOR, supra note 72, at 11-22.
[81] The first four volumes are available to subscribers (search the author field for "Dallas, Alexander"). At least two of the volumes are available on Google Books. *See* Alexander J. Dallas, *Reports of Cases Ruled and Adjudged in the Several Courts of the United States and of Pennsylvania*, vol. 1 (2d ed.; Philadelphia: 1806); Alexander J. Dallas, *Reports of Cases Ruled and Adjudged in the Several Courts of the United States and of Pennsylvania*, vol. 4 (Philadelphia: 1807).
[82] *See* John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L. Q. 137, 140-141 (1999).
[83] (New York: Columbia University Press, 1985-2007).
[84] COHEN & O'CONNOR, supra note 72, at 3-4, 31-32, 47-48.

reporters in the 19th century often included arguments of counsel and summaries of the holdings. Apparently they also "would improve the opinions by checking the accuracy of citations and the development of the court's reasoning."[85] Manuscript versions of the opinions, however, are usually missing, so the published reports are generally the best available evidence of the Court's decisions. Format-preserving digital copies of the original volumes are available in the *America's Historical Imprints* series, available online to subscribers of NewsBank, and to subscribers of HeinOnline.

The published volumes of Supreme Court reports are inaccurate in one other respect: they sometimes contain inaccurate argument and decision dates. The Supreme Court library has a list of the actual dates of argument and decision online, based on the original minutes and dockets.

Researchers will often want to look beyond the reports for underlying source materials. A very helpful overview for digging into a particular Supreme Court case is this post by Zvi Rosen, How to Research a Supreme Court Case (to Excess).

Finding Supreme Court source materials between 1800 and 1832 is cumbersome. The best place to look is the microfilm series of the *Appellate Case Files of the Supreme Court of the United States, 1792-1831*, available at select libraries (with a guide available online). These files usually contain manuscript versions of pleadings, exhibits, and other materials from the court below. Occasionally typescript appellate briefs are included. The files are arranged by file number based on the date of filing (sometimes years prior to an opinion), thus requiring use of another microfilm series: *Index to the Appellate Case Files of the Supreme Court of the United States, 1792-1909*, available at select libraries (with a guide available online). Some reports of oral arguments prior to 1850, simply copied from the published case reports, are collected in the first and second volumes of *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*.

For source materials after 1832, see the *Records and Briefs of the United States Supreme Court, 1832-1978*, available online to subscribers of Gale's *Making of Modern Law: U.S. Supreme Court Records and Briefs, 1832-1978*. (Gale Databases require IP-specific links, so check with your academic library for availability). Researchers may also consult the Library of Congress's page on Resources for Locating Records & Briefs of the U.S. Supreme Court.

As one might expect, the secondary literature on the Supreme Court is voluminous. Early constitutional decisions are helpfully summarized in David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*,[86] partly available online. The multivolume *History of the Supreme Court of the United States*,

[85] *Id.* at 48.
[86] (Chicago: University of Chicago Press, 1992).

funded by the Oliver Wendell Holmes devise, provides broader studies of the Court's decisions. Volumes relevant to the founding-era and early 19th century are:

- Julius Goebel, *Antecedents and Beginnings to 1801*[87]
- George Lee Haskins & Herbert A. Johnson, *Foundations of Power: John Marshall, 1801-1815*[88]
- G. Edward White, *The Marshall Court and Cultural Change, 1815-1835*[89]
- Carl Brent Swisher, *The Taney Period, 1836-1864*[90]

Other Federal and State Court Records

Constitutional history research typically focuses on U.S. Supreme Court decisions, but some projects may benefit from examining other court records. The main repository for federal court records is the National Archives, especially Record Group 21. These records are sometimes available on microfilm through Inter-Library Loan.

The best resource for locating state judicial sources is *Red Book: American State, County, and Town Sources* (3d ed.; 2004), with information extracted into a series of websites. Original records from states and localities are increasingly available online, especially on the American records page of FamilySearch, where countless microfilms of American primary records are being digitized and uploaded each day (a free account is required to access many records). Finally, court records from other states are sometimes available online on state archives websites (*e.g.*, *New Jersey Supreme Court Case Files, 1704-1844*).

For pre-statehood legal research, be sure to see *Prestatehood Legal Materials: A Fifty-State Research Guide, Including New York City and the District of Columbia*.[91]

Election Records

A great source for founding-era constitutional history is *The Documentary History of the First Federal Elections, 1788-1790*.[92] The volumes are organized by state and by federal office. The series partly overlaps with other compilations—especially *The Documentary History of the First Federal Congress*—but it is usually worth checking both. As far as we know, these volumes are not available to read online, though Google Books has searchable "previews" of each volume here: volume 1, volume 2, volume 3, and volume 4. Hathitrust also provides search-only access.

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[87] (New York: Macmillan, 1971).
[88] (New York: Macmillan, 1971).
[89] (New York: Macmillan, 1988).
[90] (New York: Macmillan, 1974).
[91] (2 vols.; Michael G. Chiorazzi & Marguerite Most eds.; New York: Haworth Information Press, 2005).
[92] (4 vols.; 1976-1990).

For election returns, see Tufts University's *A New Nation Votes: American Election Return 1787-1825*. The site allows for text searches, and tabs along the left side of the page enable selection of search criteria. Data mostly comes from contemporary newspaper records, by way of Philip Lampi's extensive compilation effort.

OTHER SOURCES

DICTIONARIES

Dictionaries are a tempting source for easy citations, but they should be used with delicacy. Most English speakers do not learn English from a dictionary, nor do they routinely use dictionaries before deciding what to say. Instead, dictionaries are more useful as descriptive accounts of how contemporary speakers tend to use particular words.

Even then, because dictionaries are generally a commercial product, their choices about length and coverage are shaped by contemporary market demand rather than the needs of modern research. And given the primitive nature of lexicology two centuries ago, scholars should maintain skepticism about whether the definitions provided in historical dictionaries are accurate or complete.[93]

Another danger of using dictionaries is that American constitutions frequently use legal terms of art.[94] Understanding a term like "breach of the peace,"[95] for instance, plainly requires research far beyond looking up "breach" and "peace" in a historical dictionary.[96]

All that said, really old dictionaries are sometimes useful, and they are now readily available online. For perhaps the most commonly cited founding-era dictionary, see Samuel Johnson, *A Dictionary of the English Language*,[97] which went through many editions that judges and scholars seem to cite indiscriminately. For Webster's well-known 1828 dictionary, see Noah Webster, *An American Dictionary of*

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[93] *See* Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 370-71 (2014).
[94] Lawrence B. Solum, *We Are All Originalists Now*, *in* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 34–35 (2011).
[95] *See, e.g.*, U.S. CONST. art. 1, sec. 6.
[96] As it turns out, defining the founding-era legal meaning of "breach of the peace" is far more difficult than one might expect. *See* Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 271-300 (2002).
[97] (10th ed.; London: Rivington et al., 1792). The Seventh edition, published in 1785, is the last to contain revisions from Samuel Johnson himself. *See* ALLEN REDDICK, THE MAKING OF JOHNSON'S DICTIONARY, 1746-1773, at 175 (Cambridge: Cambridge University Press, 1990).

the English Language.[98] Its text is available for free (with some religious messages) at http://1828.mshaffer.com/ and available in format-preserving copy on HathiTrust (volume 1 only) and to subscribers of Sabin Americana (both volumes).

For a useful compilation of other 18th-century dictionaries, with accompanying commentary and digital links, see the appendix (pages 382-93) to Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*.[99] Maggs's article also contains more information about methodological shortcomings associated with using old dictionaries.

TREATISES AND LEGAL DICTIONARIES

Among most important English legal treatises (still used by Americans in the 18th and 19th centuries) were:

- Edward Coke's *Institutes* (first published during the 1640s; N.B.: Coke's name is pronounced "Cook")
- Matthew Hale's *History of the Pleas of the Crown* (first published posthumously in 1736)
- William Hawkins's *Pleas of the Crown* (first published in 1716)
- William Blackstone's *Commentaries on the Laws of England* (first published from 1764 to 1769).

These sources all went through many editions, most of which are readily available online, including on Google Books, HathiTrust's website, and the subscription services at the end of the entry for LEGAL PERIODICALS.

The most famous of these, of course, is Blackstone's *Commentaries*,. We have linked above to the 10th edition, which is the edition whose pagination corresponds to the standardized "star" pagination used in later editions (*i.e.*, "1 WILLIAM BLACKSTONE, COMMENTARIES *120" refers to page 120 in the 10th edition). The final version published while Blackstone was alive was the 8th edition.

Americans also used English legal dictionaries, particularly Giles Jacob's *A New Law Dictionary* (first published in 1729), and English justice of the peace manuals, especially Richard Burn's *Justice of the Peace and Parish Officer* (first published in 1755). American spin-off versions included William Waller Hening's *New Virginia Justice* (first published in 1794) and William Simpson's *Practical Justice of … South*

[98] (2 vols.; New York: S. Converse, 1828).
[99] 82 GEO. WASH. L. REV. 358 (2014).

Carolina (first published in 1761).[100] For an 1839 American legal dictionary, see volume 1 and volume 2 of John Bouvier's *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America*.

More information about English legal books used in the American colonies appears in Herbert A. Johnson, *Imported Eighteenth-Century Law Treatises in American Libraries 1700-1799*,[101] Eldon R. James, *A List of Legal Treatises Printed in the British Colonies and the American States Before 1801*,[102] and Jenni Parrish, *Law Books and Legal Publishing in America, 1760-1840*.[103] A database of early American book collections is available online (select the category "Libraries of Early America").

Americans began to write their own legal treatises toward the end of the 18th century. Particularly worth mentioning in the field of constitutional law are:

- John Adams's *A Defence of the Constitutions of Government of the United States of America*, 2 vols. (1787)
- Nathaniel Chipman's *Sketches of the Principles of Government* (1793)
- Zephaniah Swift's *System of the Law of Connecticut*, 2 vols. (1795-1796)
- St. George Tucker's American edition of Blackstone's *Commentaries* (1803), which includes footnotes on American law but is especially notable for its erudite essays in the appendix, including "Of the Several Forms of Government" ("Note B," appendix p. 7), "Of the Constitution of Virginia" ("Note C," appendix p. 79), and "View of the Constitution of the United States" ("Note D," appendix p. 140)
- John Taylor's *Construction Construed, and Constitutions Vindicated* (1820)
- Thomas Sergeant's *Constitutional Law* (1822)
- John Taylor's *New Views of the Constitution of the United States* (1823)
- Nathan Dane's *General Abridgment and Digest of American Law* (1823)
- William Rawle, *A View of the Constitution of the United States* (1825)
- James Kent's *Commentaries on American Law*, 4 vols. (1826-1830)[104]
- Joseph Story's *Commentaries on the Constitution of the United States* 3 vols. (1833)
- Peter DuPonceau's *A Brief View of the Constitution of the United States* (1834)

[100] *See* Davies, *supra* note 96, at 279 n. 121 ("Most of the justice of the peace manuals printed in America in the decades just prior to or during the framing era essentially repeated Burn, sometimes with minor variations or updatings, often with deletions of material not deemed germane to American law and practice.").
[101] (Knoxville: Unviersity of Tennessee Press, 1978).
[102] (Cambridge: Harvard University Press, 1934)
[103] 72 LAW LIBRARY J. 355 (1979).
[104] A second edition of Kent's *Commentaries* is available here, and a third edition is available here.

Useful summaries of these and other works appears in Elizabeth Kelley Bauer's *Commentaries on the Constitution, 1790-1860*.[105] Readers should particularly note the profound division in early American constitutional commentaries over the "nature of the Union."

For digital copies of American legal treatises, check Google Books, HathiTrust's website, and the subscription services at the end of the entry for LEGAL PERIODICALS, especially Gale's *Making of Modern Law: Legal Treatises, 1800-1926*. (Gale Databases require IP-specific links, so check with your academic library for availability). Later in the 19th century, Thomas M. Cooley's *Treatise on the Constitutional Limitations* became the most prominent constitutional-law treatise of its era.

While not technically legal treatises, Whig tracts on government can still be very useful in thinking about underlying first principles of constitutional law. Two examples we've found useful are Joseph Priestley, An Essay on the First Principles of Government, and on the Nature of Political, Civil, and Religious Liberty (1768) and Richard Price, Observations on the Nature of Civil Liberty, The Principles of Government, and the Justice and Policy of the War with America (1776), though we don't claim them to be representative.[106]

Beyond legal treatises, another useful secondary source are the student notebooks from Litchfield Law School, which taught approximately 1000 students between 1774 to 1833 Some of these have been digitized and made available online, and they can contain useful nuggets of information.

For a detailed bibliography of American legal sources from the 18th and 19th centuries, see Morris L. Cohen's *Bibliography of Early American Law*,[107] available online to subscribers of HeinOnline. Volume 1 and the supplement each include entries for Constitutional Law and Constitutional Rights.

LINGUISTIC CORPORA

An important alternative to DICTIONARIES for determining historical meaning is the method of "corpus linguistics." Corpus linguistics allows researchers to search large bodies of texts (called "corpora") to discover how words were used in practice. Major corpora also have tools to discover which words tend to be used together ("collocates"), and other more advanced grammatical tools.[108] Many scholars have recently

[105] (New York: Russell & Russell Inc., 1965).
[106] See Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189 (1984).
[107] (6 vols.; 1998; supplement; 2003).
[108] *See* James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. FORUM 20, 23-26 (2016).

touted the promise of corpus linguistics for originalist methodology[109] though others have emphasized its limitations.[110] Already, corpus linguistics has been applied to help understand the historical meaning of constitutional terms like "Officer,"[111] among many others.[112]

The most useful corpora for historical scholarship are likely the Corpus of Founding Era American English (COFEA), which contains over 100,000 texts from 1760 to 1799, and the Corpus of Early Modern English, which contains over 40,000 texts from 1475-1800. These and other legal corpora are hosted by BYU Law School available at https://lawcorpus.byu.edu. BYU also hosts the Corpus of Historical American English, which is nearly three times the size of COFEA, but runs from the 1810s to the 2000s and is therefore less useful for those focusing on the founding era.

LEGAL PERIODICALS

Case reports (*see entry for* FEDERAL AND STATE Case Reports) and treatises (*see entry for* TREATISES AND LEGAL DICTIONARIES) were the dominant form of published legal writing in the 18th century.[113] But in the 19th century an exciting new genre emerged: legal periodicals. The first in the United States was apparently the *American Law Journal and Miscellaneous Repertory*, published at Philadelphia beginning in 1808, with early volumes now available online here and here.[114] Other law journals sprung up but flopped quickly. These magazines usually printed case reports and other factual matter rather than anything resembling legal "scholarship."[115]

[109] *See generally id.*; Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 B.Y.U. L. REV. 1621, 1643-49 (2017); Lee J. Strang, *How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181 (2017).

[110] *See* Ethan J. Herenstein, Note, *The Faulty Frequency Hypothesis: Difficulties in Operationalizing Ordinary Meaning Through Corpus Linguistics*, 70 STAN. L. REV. ONLINE 112 (2017); Lawrence M. Solan, *Can Corpus Linguistics Help Make Originalism Scientific?*, 126 YALE L.J. FORUM 57, 59-64 (2016). For briefer thoughts from one of us, see William Baude, Heller *Survives the Corpus*, SECOND THOUGHTS, Duke Center for Firearms Law (July 9, 2021).

[111] Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 484-506 (2018).

[112] *See, e.g.*, Jake Linford, *Datamining the Meaning(s) of Progress*, 2017 B.Y.U. L. REV. 1531 (2017); Lee J. Strang, *The Original Meaning of "Religion" in the First Amendment: A Test Case of Originalism's Utilization of Corpus Linguistics*, 2017 B.Y.U. L. REV. 1683 (2017); James Cleith Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English from 1760-1799*, 59 S. TEX. L. REV. 181 (2017).

[113] For an introduction to legal literature in England and the United States, see JOHN H. LANGBEIN, RENÉE LETTOW LERNER, & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 815-72 (2009).

[114] *See* Michael L. Swygert and Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L. J. 739, 751 (1985).

[115] *Id.* at 752-53.

More scholarly legal periodicals apparently emerged with the *United States Law Intelligencer and Review* (1829-1831), the *American Jurist and Law Magazine* (1829-1842), the *Law Reporter* (1838-1866), and the *Pennsylvania Law Journal* (1842-1848). The latter became the *American Law Journal* and then morphed into the highly successful *American Law Register*. Student-edited law reviews did not emerge until much later in the 19th century.[116]

Many other historical legal writings are available through subscription services. (Depending on your institution's network configuration, these links may not work, even if your institution is a subscriber; check with your library about availability.) Particularly notable are:

- Gale's *Eighteenth Century Collections Online*
- Gale's *Nineteenth Century Collections Online*
- Gale's *Sabin Americana, 1500-1926* (may be accessible from Gale Databases)
- Gale's *Making of Modern Law: Legal Treatises, 1800-1926* (may be accessible from Gale Databases)
- Gale's *Making of Modern Law: Trials, 1600-1926* (may be accessible from Gale Databases)
- Gale's *Making of Modern Law: Foreign, Comparative and International Law, 1600-1926* (may be accessible from Gale Databases)
- NewsBank's *Archive of Americana*, one component of which—the Evans *Early American Imprints, Series I*—is also available for free here.
- The American Antiquarian Society's *Historical Periodicals Collection* (accessible through EBSCOhost's "research databases"; coverage list provided here)

NEWSPAPERS

In an age without modern technology, newspapers reigned supreme in the spread of ideas. Quickly searching the text of many historical newspapers is now easy, but online holdings are surprisingly scattered and incomplete, and the optical character recognition that enables searching is highly unreliable.

The Library of Congress has a helpful compilation of newspapers published in the United States, but its digital holdings start only in 1836. Google has also digitized a large volume of newspapers, all available free of charge. But coverage is limited, the company is no longer adding content, and the search feature does not work on most holdings.

Perhaps the best subscription-based website for old American newspapers is America's Historical Newspapers, hosted by NewsBank. Other subscription sites that

[116] *Id.* at 763.

offer scattered newspaper access include Gale's Nineteenth Century U.S. Newspapers (depending on your network configuration, this link may not work even if your institution is a subscriber), the Newspapers.com website (which is particularly user-friendly but has very limited 18th-century coverage), the GenealogyBank.com website, and Ancestry.com's newspaper records. These collections rarely are comprehensive even for particular newspapers.

For further information about digital and non-digital newspaper collections in the United States, use the links under "Newspapers in the States."

CORRESPONDENCE

Founding-era and early 19th-century correspondence can be found in unpublished manuscript collections as well as compiled volumes or online databases.

Manuscript collections are located at countless archives throughout the world. Occasionally an individual's personal papers are collected in one location, but more often they are scattered. In addition to using an internet search engine, good starting points for identifying manuscript collections are the OCLC WorldCat catalogue and the *American National Biography Online*, the latter of which includes bibliographic information for each entry, often with information about relevant manuscript collections. For papers of former members of Congress, another useful (though sometimes incomplete) database is the *Biographical Dictionary of the United States Congress* (after searching, click "Research Collections" to see available manuscript information).

Published volumes of private papers are increasingly common, and many now appear online as well. Most modern compilations were supported with grants from the National Historical Publications and Records Commission and are listed here. Series that are most useful to early American constitutional history include:

- *Documentary History of the Ratification of the Constitution*, available online to subscribers of Rotunda. (There's also a substantially-harder-to-use free version on the Wisconsin Digital Collections website.)
- *Documentary History of the First Federal Congress*, available online to subscribes at Rotunda. (There's also a harder-to-use version for subscribers of The Early Republic Online.)
- *Documentary History of the First Federal Elections, 1788-1790*, 4 vols. (Madison: University of Wisconsin Press, 1976-1990)[117]

[117] Google Books has searchable online "previews" of volume 1, volume 2, volume 3, and volume 4. Hathitrust provides search-only access.

- *Documentary History of the Supreme Court of the United States, 1789-1800*, available online to subscribers of LLMC Digital and to subscribers of HeinOnline.

And here are papers of particular early American leaders:

Adams, Abigail (1744-1818)

- First Lady, married to President John Adams
- Much correspondence available in *The Adams Family Papers*, available online to subscribers of Rotunda

Adams, John (1735-1826)

- Second President of the United States
- *The Adams Papers* (free), and also available online to subscribers of Rotunda

Belknap, Jeremy (1744-1798)

- American clergyman and historian
- *The [Jeremy] Belknap Papers*

Calhoun, John C. (1782-1850)

- U.S. Senator and Vice President
- *The Papers of John C. Calhoun*, 28 vols. (Columbia: University of South Carolina Press, 1959-2003)

Carroll, John (1735-1815)

- First Roman Catholic bishop and archbishop in the United States
- *The John Carroll Papers*, 3 vols. (Notre Dame: University of Notre Dame Press, 1976)

Clay, Henry (1777-1852)

- U.S. Senator, Congressman, and Secretary of State
- *The Papers of Henry Clay, 1797-1852*, 11 vols. (Lexington: University Press of Kentucky, 1959-1992)

Franklin, Benjamin (1706-1790)

- Constitutional framer and diplomat
- *The Papers of Benjamin Franklin* (free), and also available online at Founders.gov (free)

Gallatin, Albert (1761-1849)

- U.S. Congressman, Senator, and Secretary of the Treasury
- *The Writings of Albert Gallatin*, 3 vols. (1879)

Hamilton, Alexander (1755-1804)

- Constitutional framer and Secretary of the Treasury
- *The Papers of Alexander Hamilton* (free but incomplete), and also available online to subscribers of Rotunda

Jackson, Andrew (1767-1845)

- Seventh President of the United States
- *The Papers of Andrew Jackson*, available online to subscribers of Rotunda

Jay, John (1745-1829)

- First Chief Justice of the United States
- *The Papers of John Jay*, available online to subscribers of Rotunda

Jefferson, Thomas (1743-1826)

- Third President of the United States
- *The Papers of Thomas Jefferson* (free but incomplete), and also available online to subscribers of Rotunda

Laurens, Henry (1724-1792)

- President of the Continental Congress
- *The Papers of Henry Laurens*, 16 vols. (Columbia: University of South Carolina Press, 1968-2002)

Lee, Richard Henry (1732-1794)

- President of the Continental Congress and U.S. Senator
- The Letters of Richard Henry Lee, 2 vols. (New York: Macmillan 1914)

Madison, Dolley (1768-1849)

- First Lady, married to President James Madison
- Correspondence of Dolley Madison, available online to subscribers of Rotunda

Madison, James (1751-1836)

- Constitutional framer and fourth President of the United States
- *The Papers of James Madison* (free but incomplete), and also available online to subscribers of Rotunda

Marshall, John (1755-1835)

- Fourth Chief Justice of the Supreme Court
- *The Papers of John Marshall*, online for subscribers of Rotunda

Monroe, James (1758-1831)

- Fifth President of the United States
- *The Papers of James Monroe*, 5 vols. to date (Westport, Ct.: Greenwood Press, 2003-)

Morris, Gouverneur (1752-1816)

- Constitutional framer and Federalist politician
- *The Diary and Letters of Gouverneur Morris*, 2 vols. (New York: Charles Scribner's Sons, 1888), and more extensive diaries available online to subscribers of Rotunda.

Paine, Thomas (1737-1809)

- Renowned troublemaker

- *The Writings of Thomas Paine*, 4 vols. (New York: G.P. Putnam's Sons, 1894-1896)

Pendleton, Edmund (1721-1803)

- Continental Congress delegate and judge
- *The Letters and Papers of Edmund Pendleton, 1734-1803*, 2 vols. (Charlottesville: University Press of Virginia, 1967)

Pinckney, Eliza Lucas (1722-1793)

- South Carolina businesswoman
- *The Papers of Eliza Lucas Pinckney and Harriet Pinckney Horry*, available online to subscribers of Rotunda

Sherman, Roger (1721–1793)

- Only founder to sign the Articles of Association, the Declaration of Independence, the Articles of Confederation, and the Constitution.
- *Collected Works of Roger Sherman* (Indianapolis; Liberty Fund, 2016)

Tucker, St. George (1752-1827)

- Law professor and judge
- *St. George Tucker's Law Reports and Selected Papers, 1782-1825*, 3 vols. (Williamsburg, Va.: Omohundro Institute of Early American History and Culture, 2013)

Washington, George (1732-1799)

- Commander-in-Chief of the Continental Army, President of the Constitutional Convention, and First President of the United States
- *The Papers of George Washington* (free), and also available online to subscribers of Rotunda

Webster, Daniel (1782-1852)

- U.S. Senator and Secretary of State
- *The Papers of Daniel Webster*, 14 vols. (Hanover, N.H.: University Press of New England, 1974-1988)

Wilson, James (1742-1798)

- Constitutional framer and U.S. Supreme Court Justice
- *The Collected Works of James Wilson* (free)

Some correspondence is now freely available and searchable at ConSource. Particularly fun about this site is the fact that original letters are often shown adjacent to the text-searchable transcriptions.

Oxford English Dictionary | The definitive record of the English language

magazine, *n.*

Pronunciation: Brit. /magəˈziːn/, /ˈmagəziːn/, U.S. /ˈˌmægəˈˌzin/

Forms: 1500s **magason**, 1500s **magosine**, 1500s–1600s **magasin**, 1500s–1600s **magasine** , 1500s–1700s **magazin**, 1500s– **magazine**, 1600s **magaseine**, 1600s **magazen**, 1600s **maggazeene**, 1600s **maggazin**, 1600s **maggezzine**, 1600s **magisine** (*Scottish*), 1600s **magozin**, 1600s **megasine**, 1600s **megazin**, 1600s **megazine**, 1600s–1700s **magazeen**, 1600s–1700s **magazeene**.

Frequency (in current use):

Origin: A borrowing from French. **Etymon:** French *magasin*.

Etymology: < Middle French *magasin* (1409; 1389 as *maguesin*) < Italian *magazzino* (1348; compare post-classical Latin *magazinus* (1214 in an Italian source)), ultimately < Arabic *maḵzan*, *maḵzin* storehouse < *ḵazana* to store up. Compare post-classical Latin *magazenum* (1228 in a document from Marseilles), Italian regional *magazeno*, *magazzeno* (from 14th cent.), Spanish †*magazén*. The Arabic word, with prefixed article *al-*, appears also as Spanish *almacén* (1225), Portuguese *armazém* warehouse (16th cent.).

Sense 6 is an innovation in English (perhaps compare post-classical Latin *thesaurus* THESAURUS *n.*), subsequently borrowed (1650 as *magasin* , 1776 as *magazine*) into French; sense 7 is also not attested in French before 1873.

I. Senses denoting a storehouse or repository, and closely allied uses.

1.

a. A place where goods are kept in store; a storehouse for goods or merchandise; a warehouse or depot. *New rare.*

1583 J. NEWBERY *Let.* in Purchas *Pilgrims* (1625) II. 1643 That the Bashaw, neither any other Officer shall meddle with the goods, but that it may be kept in a Magosine.

1588 T. HICKOCK tr. C. Federici *Voy. & Trauaile* f. 27 The merchants haue all one house or Magason..and there they put all their goods of any valure.

1613 S. PURCHAS *Pilgrimage* VI. x. 511 Vnder which Porches or Galleries [of the Church] are Magazines or Store-houses, wherein are kept lampes, oile, mats, and other necessaries.

1704 DUKE OF MARLBOROUGH *Let.* 20 July in H. L. Snyder *Marlborough–Godolphin Corr.* (1975) I. 339 The two days we have been here has been spent in endeavoring to make a magazin of corn in this town, that we might not want bread.

1731 *Gentleman's Mag.* **1** Introd. This Consideration has induced several Gentlemen to promote a Monthly Collection to treasure up, as in a Magazine, the most remarkable Pieces on the Subjects abovemention'd.

1768 L. STERNE *Sentimental Journey* I. 73 Mons. Dessein came up with the key of the Remise in his hand, and forthwith let us into his magazine of chaises.

1793 E. BURKE *Corr.* (1844) IV. 143 No magazine, from the ware~houses of the East India Company to the grocer's and the baker's shop, possesses the smallest degree of safety.

1808 Z. M. PIKE *Acct. Exped. Sources Mississippi* III. App. 23 A public magazine for provisions, where every farmer brings whatever grain and produce he may have for sale.

1875 STANLEY in *Contemp. Rev.* **25** 489 Imported..from the magazines of France and of Belgium, according to the last fashions of Brussels or Paris.

1904 *Westm. Gaz.* 24 Aug. 7/3 A later cemetery, containing larnax burials, yielded bronze implements, beads, and vases like those in the palace magazines.

1986 T. Mo *Insular Possession* iii. 12 Also to be seen are a few storage magazines against the walls, and..a secure treasury with heavy iron doors.

†**b.** A country or district rich in natural products, a centre of commerce. *Obsolete.*

1596 W. Raleigh *Discoverie Guiana* (new ed.) 3 Guiana (the Magazin of all rich mettels).

1632 W. Lithgow *Totall Disc. Trav.* iv. 165 Constantinople..Aleppo..and grand Cayro..are the three Maggezzines of the whole Empire.

1640 Digby in *Lismore Papers* (1888) 2nd Ser. IV. 133 He conceaued that the City of London was the Magazine of money.

1650 T. Fuller *Pisgah-sight of Palestine* iii. 410 Timber they fetched from mount Libanus (the magazeen of Cedars).

1718 J. Addison *Remarks Italy* (ed. 2) 259 The great Magazine for all kinds of Treasure is supposed to be the Bed of the Tiber.

1787 *Gentleman's Mag.* **57** ii. 1115/2 The Dutch islands of Curaçoa and St. Eustatius are now converted into complete magazines for all kinds of European goods.

1833 L. Ritchie *Wanderings by Loire* 109 The..bourg of Chouzé, set down in a perfect magazine of fruit and vegetables, grain and wine.

c. A portable receptacle (usually for articles of value). Now *historical.*

1768 L. Sterne *Sentimental Journey* II. 112 She open'd her little magazine, laid all her laces..before me.

1781 S. Johnson *Thomson* in *Pref. Wks. Eng. Poets* LX. 6 He had recommendations..which he had tied up carefully in his handkerchief; but..his magazine of credentials was stolen from him.

1861 J. G. Holland *Lessons in Life* viii. 120 The great army of little men that is yearly commissioned to go forth into the world with a case of sharp knives in one hand, and a magazine of drugs in the other.

1969 E. H. Pinto *Treen* 331 Wooden pocket cases, to hold any number from three to six cheroots or slender cigars,..were made from about 1830. The enterprising Smith family..were quick off the mark with what they described as 'magazines'.

2. *Military* *(a)* A building, room, or compartment (of a ship, etc.), for the storage of arms, ammunition, or other military provisions. *(b) spec.* A store for large quantities of explosives.

*a*1599 E. Spenser *View State Ireland* 97 in J. Ware *Two Hist. Ireland* (1633) Then would I wish that there should bee good store of Houses and Magazins erected in all those great places of garrison, and in all great townes, as well for the victualling of Souldiers, and Shippes, as for..preventing of all times of dearth.

?1610 H. Wotton *Let.* in L. P. Smith *Life & Lett. Sir H. Wotton* (1907) I. 497 A way how to save gunpowder from all mischance of fire in their magazines.

1616 J. Bullokar *Eng. Expositor* *Megasine*, a storehouse for warre.

1647 N. Nye *Art of Gunnery* ii. 72 A barrell of the best powder in the Magazine.

1667 J. Milton *Paradise Lost* iv. 816 A heap of nitrous Powder, laid Fit for the Tun som Magazin to store Against a rumord Warr.

1711 A. Pope *Ess. Crit.* 39 Thus useful Arms in Magazines we place.

1745 J. Swift in *Ann. Reg.* (1759) II. 328 Here Irish wit is seen, When nothing's left, that's worth defence, We build a magazine.

1769 W. Falconer *Universal Dict. Marine* sig. Bb2 *Magazine*, a..store-house, built in the fore, or after-part of a ship's hold, to contain the gun-powder.

1800 Duke of Wellington *Dispatches* (1837) I. 213 I have no power to order the repair of magazines, storerooms, &c.

1847 W. H. Prescott *Hist. Conquest Peru* I. iii. iii. 373 In another quarter they beheld one of those magazines destined for the army, filled with grain, and with articles of clothing.

1868 *Queen's Regulations & Orders Army* ¶1238 The reserve Ammunition will be kept in the Magazine.

1877 A. B. Edwards *Thousand Miles up Nile* ix. 239 To provide a safe underground magazine for gunpowder.

1904 R. Kipling *Traffics & Discov.* 53 The Gunner mops up a heathenish large detail for some hanky-panky in the magazines.

1931 *Amazing Stories* Dec. 804/1 The rayguns of the battlecraft, being of superior range, melted down the mortars of the fort at the magazine.

†**3.** A ship which supplies provisions. Cf. *magazine ship n.* at Compounds 2. *Obsolete*.

1624 J. Smith *Gen. Hist. Virginia* iv. 155 Some pety Magazines came this Summer.

1624 J. Smith *Gen. Hist. Virginia* v. 189 About this time arriued the *Diana* with a good supply of men and prouision, and the first Magazin euer seene in those Iles.

1624 J. Smith *Gen. Hist. Virginia* v. 195 He made..a large new storehouse of Cedar for the yeerely Magazines goods.

1624 J. Smith *Gen. Hist. Virginia* v. 198 Constrained to buy what they wanted, and sell what they had at what price the Magazin pleased.

[1769 W. Falconer *Universal Dict. Marine* sig. *1 *Magasins*, the store-ships which attend on a fleet of men of war.]

II. That which is kept in a storehouse, and related uses.

†**4.**

a. *Military*. The contents of a magazine; a store. In *plural*, also with collective sense (rarely as mass noun): military stores, provisions, munitions; armaments, military equipment. *Obsolete*.

1588 *Narr. Def. Berghen* 27 Sept. in *Ancaster MSS* (Hist. MSS Comm.) (1907) 208 Sir John Wingfield sent all the said victualles to Berghen, being then besieged, to be emploied as Magasin for that garrison.

1591 W. Raleigh *Rep. Fight Iles of Açores* sig. A4 Of which [Armada] the number of souldiers,..with all other their magasines of prouisions, were put in print.

*a*1613 T. Overbury *Obseruations Xvii. Prouinces* (1626) 11 They allowed neither Cannon vpon the Rampier, nor Megazins of powder.

1644 in J. Rushworth *Hist. Coll.: Third Pt.* (1692) II. 670 The Kings forces..marcht away with their Artillery and Magazeen towards Oxford.

1667 J. Dryden *Annus Mirabilis 1666* cclxxi. 69 And bad him swiftly driv'the approaching fire From where our Naval Magazins were stor'd.

1671 J. Milton *Samson Agonistes* 1281 Thir Armories and Magazins .

1774 T. West *Antiq. Furness* (1805) 48 They took most part of their arms..with a coup laden with magazeen, drawn by six oxen.

1781 E. Gibbon *Decline & Fall* III. xxxi. 259 He used, with so much skill and resolution, a large magazine of darts and arrows, that [etc.].

1810 Duke of Wellington *Dispatches* (1836) VI. 23 A corps of 5000 men..had carried away a magazine of arms.

1830 E. S. N. Campbell *Dict. Mil. Sci.* *Base-line*, in Military Tactics, signifies the line on which all Magazines and means of Supply of an Army are established.

1864 T. Carlyle *Hist. Friedrich II of Prussia* IV. xvii. iv. 540 Seize Saxony..and in that rich corny Country, form Magazines.

1889 'M. Twain' *Connecticut Yankee* xxiii. 289 We placed a whole magazine of Greek fire on each corner of the roof.

b. *gen.* A store of provisions, materials; a pile; a stock of clothing. *Obsolete.*

1615 H. Crooke *Μικροκοσμογραφια* 61 Next vnder the Skin lyeth the Fat..a Stowage or Magazine of nourishment against a time of dearth.

1637 T. Heywood *Londini Speculum* sig. C3 By which small mites to Magozines increase.

*a*1641 T. Heywood *Captives* (1953) ii. iii. 47 That have no more left off a Magazin, then these wett Cloathes vpon mee.

1661 J. Evelyn *Fumifugium* To Rdr. sig. a2 The Deformity of so frequent Wharfes and Magazines of Wood, Coale, Boards, and other course Materials.

1669 J. Rose *Eng. Vineyard* (1675) 34 A load of lime, to every ten loads of dung, will make an admirable compost..but your magazine will require the maturity of two, or three years.

1712 J. Arbuthnot *John Bull in his Senses* iv. 18 She [sc. Usury] had amass'd vast Magazines of all sorts of Things.

1714 J. Gay *Fan* i. 13 Should you the Wardrobe's Magazine rehearse, And glossy Manteaus rustle in thy Verse.

1719 D. Defoe *Life Robinson Crusoe* 180 A..Magazine of Flesh, Milk, Butter and Cheese.

1771 O. Goldsmith *Hist. Eng.* III. 165 A magazine of coals were usually deposited there.

1790 T. Bewick *Hist. Quadrupeds* (1807) 419 Each Beaver forms its bed of moss, and each family lays in its magazine of winter provisions.

1828 S. Smith *Wks.* (1859) II. 21/1 Distillation, too, always insures a magazine against famine... It opens a market for grain.

1849 T. B. Macaulay *Hist. Eng.* II. ix. 437 In every asylum were collected magazines of stolen or smuggled goods.

5. *figurative.* In literary use or rhetorically: a store or repertoire (of resources, ideas, rhetorical weapons, etc.). Usually with *of*.

1600 B. Jonson *Every Man out of his Humor* ii. i. sig. Eiv^v What more than heauenly pulchritude is this? What Magazine, or treasurie of blisse?

*a*1610 J. Healey in tr. Theophrastus *Characters* To Rdr., in tr. Epictetus *Manuall* (1616) That great Magazine or Storehouse of all learning M. Cassaubon.

1638 R. Baker tr. J. L. G. de Balzac *New Epist.* III. 242 I take not upon me to contend with you in Compliments..who..have whole Magasins of good words.

1656 A. Cowley *Misc.* 23 in *Poems* The Lace, the Paint, and warlike things That make up all their Magazins.

1709 H. Sacheverell *Communic. of Sin* 15 What a Magazine of Sin, what an Inexhaustible Fund of Debauchery,..does any Author of Heresie..set up!

1738 G. Smith *Curious Relations* II. 216 My Friend! the Rich are the Poor Man's Magazine.

1750 S. Johnson *Rambler* No. 76. ¶6 He has stored his magazine of malice with weapons equally sharp.

1795 E. Burke *Let. to W. Elliot* in *Wks.* VII. 348 The magazine of topicks and common-places which I suppose he keeps by him.

1817 *Parl. Deb.* 1st Ser. 352 A magazine of petitions had been opened in Scotland.

*a*1856 W. Hamilton *Lect. Metaphysics* (1859) I. ii. 23 An individual may possess an ample magazine of knowledge, and still be little better than an intellectual barbarian.

1878 P. Robinson *In my Indian Garden* (ed. 2) 49 The monstrous jáck that in its eccentric bulk contains a whole magazine of tastes and smells.

1918 J. Woodroffe *Shakti & Shâkta* 49 According to Shâkta doctrine each man and woman contains within himself and herself a vast latent magazine of Power or Shakti.

III. (Figuratively from senses 1, 2.)
6.

†**a.** A book providing information on a specified subject or for a specified group of people. (Frequently as part of the title.) *Obsolete*.

1639 R. Ward (*title*) Animadversions of Warre; or, a Militarie Magazine of the trvest rvles..for the Managing of Warre.

1669 S. Sturmy (*title*) The Mariners Magazine.

1705 G. Shelley (*title*) The Penman's Magazine: or, a New Copy-book, of the English, French and Italian Hands.

1719 R. Hayes (*title*) Negociator's Magazine.

1802 J. Allen (*title*) Spiritual Magazine, or Christian's Grand Treasure.

b. A periodical publication containing articles by various writers; *esp.* one with stories, articles on general subjects, etc., and illustrated with pictures, or a similar publication prepared for a special-interest readership.

The use of the word (rather than *periodical*) typically indicates that the intended audience is not specifically academic.

Cf. quot. 1731 at sense 1a, with reference to the *Gentleman's Magazine*.

1731 (*title*) The Gentleman's magazine; or, Trader's monthly intelligencer.

1742 A. Pope *New Dunc.* I. 42 Hence Journals, Medleys, Merc'ries, Magazines;..and all the Grub-street race.

1748 Lady Luxborough *Let.* 28 Apr. in *Lett. to W. Shenstone* (1775) 23 Nothing can be more just than the criticism upon the Play in the Magazine.

1762 O. Goldsmith in *Lloyd's Evening Post* 8–10 Feb. 142/1 It is the life and soul of a Magazine never to be long dull upon one subject.

1798 A. Tilloch (*title*) The Philosophical Magazine.

1819 Ld. Byron *Don Juan: Canto I* ccxi. 108 All other magazines of art or science, Daily, or monthly, or three monthly.

1823 (*title*) The Mechanics' Magazine.

1857 A. Mathews *Tea-table Talk* I. 2 A Magazine is the fancy fair of literature—a reader's veritable bazaar.

1860 (*title*) Baily's Monthly Magazine of Sports and Pastimes.

1880 J. McCarthy *Hist. our Own Times* IV. lix. 304 He wrote largely on the subject in reviews and magazines.

1929 R. S. Lynd & H. M. Lynd *Middletown* xvii. 241 As in its reading of books Middletown appears to read magazines primarily for the vicarious living in fictional form they contain.

1948 E. Waugh *Loved One* 1 Each in his rocking-chair, each with his whisky and soda and his outdated magazine.

1987 S. Bellow *More die of Heartbreak* 85 It was no longer an impropriety, according to the women's magazines and TV, to take the initiative.

2003 *PC Mag.* 25 Mar. 86/2 AlterNet is an online magazine devoted to independent coverage of important issues.

c. *Broadcasting*. A regular programme comprising a variety of topical items, often dealing with a specific subject area. Formerly also: a short film released as part of a regular series of this type.

1921 A. C. Lescarboura *Cinema Handbk.* (1922) x. 351 Paralleling all this is the filming of short features for the news and magazine films.

1936 *Radio Times* 30 Oct. 88/2 'Picture Page'. A Magazine of Topical and General Interest.

1957 *B.B.C. Handbk.* 153 *Family affairs*: a weekly magazine for mothers with children.

1984 *Broadcast* 7 Dec. 47/1 The channel's weekday 07.00 to 09.00 programme band..will be given a magazine format.

1989 *Listener* 4 May 41/1 The Survivors' Guide (Thursday 6.30–7 p.m.), an advice and info magazine, is the last of C4's spring youth-show launches.

IV. (In various extended uses of sense 2.)

7.

†**a.** An air-chamber in a wind-gun; (also) a chamber for a supply of bullets in a 'magazine wind-gun'. *Obsolete*.

1677 R. Hooke *Diary* 4 Oct. (1935) 317 Pappin shewd wind gun..[Section] ff was a magazine for the air and might hold almost half a pint.

1744 J. T. Desaguliers *Course Exper. Philos.* II. 399 The small or shooting Barrel, which receives the Bullets one at a time from the Magazine, being a serpentine Cavity, wherein the Bullets..nine or ten, are lodged.

b. A container or (detachable) receptacle in a repeating rifle, machine-gun, etc., containing a supply of cartridges which are fed automatically to the breech.

1868 C. B. Norton & W. J. Valentine *Rep. to Govt. U.S. on Munitions of War at Paris Universal Exhib. 1867* 28 Drop the cartridges into the outer magazine, ball foremost, to the number of seven.

1884 H. Bond *Treat. Small Arms* 89 Magazine arms in which the cartridges are placed in a tube or magazine under the barrel.

1890 G. A. Henty *With Lee in Virginia* 153 Many of the men carried repeating rifles, and the magazines were filled before these were slung across the riders' shoulders.

1915 'I. Hay' *First Hundred Thousand* vii. 77 Pumpherston graciously accepted the charger of cartridges.., rammed it into the magazine, adjusted the sights,..and fired his first shot.

1930 W. S. Churchill *My Early Life* xv. 208 I found I had fired the whole magazine of my Mauser pistol, so I put in a new clip of ten cartridges before thinking of anything else.

1964 H. L. PETERSON *Encycl. Firearms* 255/1 This turret system was revived many years later as a practical magazine for the Lewis machine gun.

1990 *Guns & Weapons* Sept.–Oct. 15/1 Remove the magazine and make sure the chamber is empty.

c. A store of essential supplies in a machine or apparatus, or the compartment or receptacle in which these supplies are contained.

1873 J. RICHARDS *On Arrangem. Wood-working Factories* 45 Exhausting the air from the magazine by fans.

*a*1884 E. H. KNIGHT *Pract. Dict. Mech.* Suppl. 570/2 As in the Daniells' battery, which has a magazine of sulphate of copper crystals.

1889 *Judge* (U.S.) 22 June 180/2 Every operator can develop and print his own negatives and refill his magazine.

1893 C. H. BOTHAMLEY *Ilford Man. Photogr.* xix. 136 Hand-cameras..in which the plate-reservoir or magazine is detachable.

1936 E. A. POWELL *Aerial Odyssey* x. 148 The film is still in the magazine.

1958 *Amateur Photographer* 31 Dec. 3/2 (*advt.*) The Hanomatic slide changer is complete with a plastic magazine holding 36 slides.

1964 C. WILLOCK *Enormous Zoo* v. 77 John Buxton used up one magazine of film and then reloaded with terrible precision.

1967 H. M. R. SOUTO *Technique Motion Pict. Camera* i. 13 The first mechanism has the task of drawing the unexposed film (or raw stock) from the storage chamber, called a *magazine*, and after exposure, driving it into a similar magazine.

1970 E. A. D. HUTCHINGS *Surv. Printing Processes* (1978) i. 7 The matrices are carried in magazines located at the front of the machine at the top.

1989 *Which?* Apr. 186/2 The Pioneer and Technics have removable 'magazines' which can be loaded with six CDs.

†**d.** A case in which a supply of cartridges is carried. *Obsolete. rare.*

1892 W. W. GREENER *Breech-loader* 184 Cartridges are best carried in a magazine of solid leather.

COMPOUNDS

C1. General *attributive*, objective, etc.
a. (In senses 1a, 2.)

magazine door *n.*

1646 *Mercurius Academicus* No. 12 111 Our daring and undaunted Foot..brought away two of their Gunners, with their Spunges, Ladles, and Wormes, the Key of their Magazine doore, and 16 of their Common Souldiers prisoners.

1761 J. CALL in R. O. Cambridge *Acct. War in India* 167 They were employed..in making traverses before the magazine doors of the Nabob's bastion.

1848 G. C. FURBER *Twelve Months Volunteer* xii. 551 Near the magazine door, in which set the powder-men, are a number of shells, loaded, with their fuses driven in them.

1998 *Knoxville News-Sentinel* (Knoxville, Tennessee) (Nexis) 13 May A4 Maybe something went wrong as they went to close the magazine doors.

† **magazine house** *n. Obsolete*

1645 in D. Robertson *S. Leith Rec.* (1911) 57 To gait the kyes of Peter Cochrins house in the links to make ane magazine house therof to lay in beer, aill, bread and uthir necessars therin.

*a*1649 W. Drummond *Wks.* (1711) 185 That..the Town's Magazine-Houses, be furnished with Arms.

1678 in M. Wood *Extracts Rec. Burgh Edinb.* (1950) X. 354 Keeper of the merchant magazine hous or wairhous within this burgh.

† **magazine storehouse** *n. Obsolete rare*

*a*1654 in H. Wotton *Lett.* (1654) II. 91 To erect and set up..a Company, to be called The East Indian Company of Scotland, making their first Magazin Storehouse..in some parts of our Realm of Ireland.

b. (In sense 1c.)

† **magazine bag** *n. Obsolete*

1653 I. Walton *Compl. Angler* iv. 117 You must be sure you want not in your Magazin bag, the Peacocks feather.

1681 J. Chetham *Angler's Vade Mecum* xxxiv. 127 The Angler must always have in readiness a large Magazine Bag or Budget, plentifully furnished with the following materials.

† **magazine chest** *n. Obsolete rare*

1694 R. Gibson in S. Pepys *Corr.* (1926) I. 124 Your Majesty will please to..alter the present method of letting your sea-surgeons provide..their own medicines, but that it be done by a magazine chest from Apothecary's Hall.

c. (In sense 6b.)

magazine article *n.*

1820 C. Brown *Let.* 21 Dec. in J. Keats *Lett.* (1958) II. 365 The fellow forsooth must have the chapters somewhat converted into the usual style of magazine articles.

1888 *N.Y. Herald* 29 July (Farmer) The editor of the *Century Magazine* blue pencils magazine articles by the bushel.

1955 *Times* 5 May 15/4 There is..a key-note running through the essays and magazine articles here reprinted.

1993 R. Hughes *Culture of Complaint* I. 15 One morning in 1991, a waitperson named Barbara..saw a journalist sitting on his own and perusing a magazine article.

magazine editor *n.*

1857 *Ladies' Repository* **17** 563 Thus is the magazine editor enabled to benefit by useful information, or by plain and moral appeals to the sentiments.

1942 H. Haycraft *Murder for Pleasure* xi. 267 Some..magazine editors have been experimenting with novelette-length condensations.

1990 *Technol. Rev.* Nov. 4/1 A magazine editor is like a conductor, encouraging one theme, discouraging another, ensuring a measure of coordination and perhaps a kind of vision.

magazine-monger *n.*

1767 'Coriat Junior' *Another Traveller!* II. 134 A noted book-maker, magazine-monger, and anti~critic of the eighteenth-century.

1994 *Steyr GB Magazine Found* in *rec.guns* (Usenet newsgroup) 28 Mar. The magazine monger at our local gun shows (Eastern PA) finally had a Steyr GB magazine.

magazine rack *n.*

1917–18 *T. Eaton & Co. Catal.* Fall–Winter 416/1 Morris Chair... Paper and magazine rack under arm.

1955 E. Bowen *World of Love* ii. 42 One or two ruched taffeta cushions and a magazine-rack..survived from her few attempts to bring the room into line with her ideas.

1990 *Gay Scotl.* Dec. 9/1 Remove all tales of lesbian love and dyke dalliances from your bookcase, the same applies for *Gay Scotland* from coffee tables, magazine racks.

magazine-reader *n.*

1833 J. S. Mill *Let.* 24 Sept. in *Wks.* (1963) XII. 179 They would not be attractive to the bulk of Magazine-readers.

1897 W. James *Will to Believe* 109 Thousands of innocent magazine readers lie paralyzed and terrified in the network of shallow negations which the leaders of opinion have thrown over their souls.

1992 M. Margetts *Classic Crafts* 10/3 Increased wealth and leisure time has given many more people the opportunity either to take up a craft or to pursue their enthusiasms as craft collectors, exhibition goers, magazine readers and bespoke home-makers.

magazine rights *n.*

1909 *Westm. Gaz.* 14 July 11/2 In America 'magazine rights' did not necessarily mean publication by instalments. The term was used to distinguish magazine rights from newspaper syndicate rights.

magazine table *n.*

1966 H. Roth *Button, Button* (1967) i. 15 A small, locked safe..unnoticeable..because the top was extended to make it look like a magazine table.

1967 A. Diment *Dolly Dolly Spy* xi. 145 The magazine table caught them neatly behind the naked knees and..they overbalanced.

1988 M. Bishop *Unicorn Mountain* (1989) iii. 25 He lay on the low-slung sofa with a Bloody Mary on the magazine table beside him.

magazine verse *n.*

1885 *Overland Monthly* **5** 653/1 Two or three touch the level of possible magazine verse.

1915 L. M. Montgomery *Anne of Island* xxvii. 233 But it was very tolerable magazine verse.

magazine world *n.*

1833 *Fraser's Mag.* **8** 482/1 He [*sc.* Bulwer] came into our magazine world with an impertinent swagger.

1964 M. McLuhan *Understanding Media* (1967) I. v. 65 The magazine world has discovered a hybrid that ended the supremacy of the short story.

1991 *Atlantic* Dec. 4/2 Lemann avidly followed the magazine world's debates about 'the New Journalism' and 'the nonfiction novel'.

magazine-writer *n.*

1787 P. H. Maty tr. J. K. Riesbeck *Trav. Germany* II. xlv. 206 Reviewers, magazine-writers.

1901 F. Harrison *Autobiogr. Mem.* (1911) II. 203 Ah! when the dream is over—and I wake up to find myself an average magazine writer.

1948 F. R. Leavis *Great Tradition* (1955) iii. 180 Conrad must here stand convicted of borrowing the arts of the magazine-writer.

1992 *Chicago* Jan. 57/3 He meets a trailer-park tart with a 24-karat heart and learns that the veneer separating a..magazine writer from a blue-collar grunt is fairly thin after all.

magazine writing *n.*

1835 F. Marryat *Olla Podrida* xxx, in *Metrop. Mag.* Magazine writing..is the most difficult of all writing.

1976 *National Observer (U.S.)* 11 Sept. 20/1 This colorful chap..teaches photojournalism, magazine writing, and investigative reporting at Brigham Young University in Utah.

d. (In sense 7b.)

magazine arms *n.*

1868 C. B. Norton & W. J. Valentine *Rep. to Govt. U.S. on Munitions of War at Paris Universal Exhib. 1867* 19 These cartridges cannot with safety be used in magazine arms.

1884 H. Bond *Treat. Small Arms* 89 Magazine arms in which the cartridges are placed in a tube or magazine under the barrel.

magazine rifle *n.*

1867 *Rep. Artisans Visit Paris Universal Exhib.* II. 98 Repeating or magazine rifles.

1908 *Chambers's Jrnl.* Feb. 141/1 Scarlet-coated British infantrymen with magazine-rifles.

1945 C. E. Balleisen *Princ. Firearms* viii. 79 In some firearms, notably magazine rifles, the magazine remains in the gun at all times.

1985 *Christie's Sale Catal. Mod. & Vintage Firearms* 20 Mar. A .44-40 'Lightning' Slide-action magazine rifle.

magazine-slot *n.*

1910 R. Kipling *Land & Sea Tales* (1923) 178 The tiny twenty-two cartridge had dropped into the magazine-slot.

magazine weapon *n.*

1884 *Pall Mall Gaz.* 28 Aug. 5/1 The information as to magazine or repeating weapons is very meagre.

1945 C. E. Balleisen *Princ. Firearms* i. 2 Those which require manual operation by the gunner before and after each shot to actuate the firearm are known as *single-shot* or *magazine weapons*.

C2.

† **magazine battery** *n. Obsolete* a galvanic battery with a perforated container for holding crystals by which the solution was kept saturated.

*a*1884 E. H. Knight *Pract. Dict. Mech.* Suppl. 570/2 *Magazine battery*, one in which a magazine contains the crystals which are supplied to the liquid as exhausted, to keep the liquid saturated.

magazine camera *n.* now *historical* a camera in which the plates for exposure are inserted in batches.

1893 *Beginner's Guide to Photogr.* (ed. 5) 130 The..Magazine Camera was highly extolled..as least complicated of Reservoir Cameras.

1989 *Miller's Collectables Price Guide 1989–90* 50/3–4 A Rex magazine camera.

magazine clothing *n.* woollen clothing to be put on before entering a powder magazine.

1876 G. E. Voyle & G. de Saint-Clair-Stevenson *Mil. Dict.* (ed. 3) 558 All persons employed in magazines..will..change their own clothes and boots for magazine clothing and slippers.

magazine cover *n.* the (usually pictorial) cover of a magazine.

1893 *Overland Monthly* **21** 448/1 She objects to changes in magazine covers that make them lose the charm of the familiar.

1914 S. Lewis *Our Mr. Wrenn* i. 2 A newsstand was heaped with the orange and green and gold of magazine covers.

1938 *Toronto Daily Star* 30 Dec. 12/6 Famous Hollywood Glamour Girls. Magazine cover models.

1951 M. McLuhan *Mech. Bride* 120/2 The feminine images of our ads and magazine covers.

1990 *N.Y. Woman* Oct. 91/2 Brooke Shields is widely seen as..a chimera off a magazine cover.

magazine-day *n. Publishing* (chiefly *historical*) the day on which a particular magazine is issued to the trade.

1821 *Guardian* 4 Mar. 3/1 There is no bustle, to our minds, half so agreeable as the bustle of Paternoster-row on the last day of the month. This is Magazine-day.

1837 J. S. Mill *Let.* in *Wks.* (1963) XII. 332 The review shall always be ready for publication by the *20th* of the month so that it may be brought out at..the most advantageous moment between that & magazine-day.

1872 J. Forster *Life Dickens* I. 129 The magazine-day of that April month, I remember, fell upon a Saturday.

magazine gun *n.* †*(a)* = *magazine wind-gun n.* (*obsolete rare*); *(b)* a firearm provided with a ‘magazine’ (sense 7b).

1744 J. T. Desaguliers *Course Exper. Philos.* II. 399 The Magazine-Gun, as he calls it.

1880 *Encycl. Brit.* XI. 284/2 The Vetterli gun..is a repeater or magazine gun.

magazine paper *n.* now *rare* a magazine article.

1833 *Fraser's Mag.* **8** 482/1 He had written some smart magazine papers, bound up in a volume called *Pelham*.

1855 W. M. Thackeray *Let.* 22 Sept. (1946) III. 471 I think it's the best magazine paper that ever was written.

magazine programme *n.* (see sense 6c).

1941 *B.B.C. Gloss. Broadcasting Terms* 18 *Magazine programme*, programme made up of miscellaneous items (e.g. talks, interviews, musical acts), loosely related one to the other by a compère or by other means of presentation.

1970 *Times* 23 Feb. 25/3 B.B.C. Newcastle..will have its own budget which will be sufficient to allow the production of another 30-minute weekly magazine programme.

1972 P. Black *Biggest Aspidistra* iii. iv. 175 Godfrey Bazely, a Midland Region broadcaster..loved the world of farming... The BBC gave him a new magazine programme aimed at farmers and their families.

magazine release *n.* a catch which allows the magazine of a gun to be removed; frequently *attributive*.

1970 R. A. Steindler *Firearms Dict.* 150/2 *Magazine release catch*, on rifles and pistols, a small spring-activated knob or protrusion that, when pushed or moved, permits the magazine to be removed from the magazine housing.

1992 *Guns Illustr.* (ed. 24) 118/1 Extended beavertail grip safety; improved magazine release; skeletonized trigger and hammer.

magazine section *n.* a section in a newspaper the contents of which resemble a magazine.

1941 P. Sturges *Palm Beach Story* in *Four more Screenplays* (1995) 187 I mean you read things like that in the Sunday magazine section but you don't run up against them in real life.

1959 N. Mailer *Advts. for Myself* (1961) 158 Sam throws the Magazine Section away... Sam is enraged at editorial dishonesty.

1969 *Listener* 30 Jan. 148/1 Leavis did not apologise that his terms of reference should be the Robbins Report and Harold Wilson and the magazine sections of the English Sundays.

1993 *Coloradoan (*Fort Collins*)* 4 Sept. A10/4 Years ago, during the pre-political correctness era *The New York Times* magazine section ran a recipe..for..a Crazy Pancake.

magazine ship *n.* now *historical* a ship which supplies provisions, or (occasionally) munitions (cf. sense 3).

1617–18 S. Argall *Memoranda* in S. M. Kingsbury *Rec. Virginia Company* (1933) III. 78 Ye most convenient times & Seasons..for ye Magazine Ship to Set forth..towards Virga.

1647 *Let.* 12 Feb. in *William & Mary Q. Hist. Mag.* (1929) **9** 302 The Deputy of the Sommer Ilands Company..will transmit them [*sc.* the letters]..by their Magazine ship that they send to us everie yeare about November.

1862 *Rep. U.S. Quartermaster's Dept.* 18 Nov. 7 Other vessels of the fleet served as tenders,..ordnance and magazine ships, hospital ships, and store ships.

1963 *William & Mary Q.* **20** 496 The Privy Council took up his petition and held a two-day hearing on the Company's magazine ship monopoly.

magazine story *n.* a story written for publication in a magazine.

1841 *Southern Literary Messenger* 7 664 The young gentleman or lady who cannot refrain from devouring..every silly magazine story, that chance presents.

1885 C. M. Yonge *Nuttie's Father* II. ii. 23 The hero of many a magazine story.

1932 Q. D. Leavis *Fiction & Reading Public* I. iii. 47 The magazine story is almost without exception a commercial article.

1942 *John o' London's Weekly* 10 Apr. 6/2 The short story of today is roughly one of two kinds—what is called the Magazine Story; and the newer kind which derives from Tchekov.

1974 E. Bowen *Henry & Other Heroes* ix. 186 There was a magazine story containing the grim notion that how one went about being forty was of no consequence because the whole world was headed for a youth-in.

magazine stove *n.* now chiefly *historical* a kind of stove with a fuel-chamber which supplies the grate.

1875 E. H. Knight *Amer. Mech. Dict.* II. 1369/1 *Magazine-stove*, one in which is a fuel-chamber which supplies coal to the fire as that in the grate burns away.

1974 L. Gay *Compl. Bk. Heating with Wood* (1980) 81 Dr. Nott's..base-burning magazine stove was a forerunner of the modern Riteway pictured next.

magazine well *n.* the aperture into which a magazine is loaded on an automatic firearm.

1948 W. H. B. Smith *Rifles* II. xix. 82 The magazine well..is the square-sided hole milled through the receiver from top to bottom, immediately to the rear of the breech face of the barrel.

1993 *Soldier of Fortune* Feb. 13/1 By the time anyone could..insert a magazine in the magazine well..the shooters would be gone down the street and around the corner.

† **magazine wind-gun** *n.* *Obsolete rare* a type of wind-gun fitted with a magazine of bullets.

1744 J. T. Desaguliers *Course Exper. Philos.* II. 399 An ingenious Workman call'd L. Colbe has very much improv'd it [*sc.* the old Wind-Gun], by making it a Magazine Wind-Gun; so that 10 Bullets are so lodg'd in a Cavity..that they may be..successively shot.

magazine work *n.* *(a)* writing for magazines; *(b) Printing* setting up type for magazines.

1831 T. Carlyle *Let.* 8 May in *Coll. Lett. T. & J. W. Carlyle* (1976) V. 272 Magazine work is below street sweeping as a trade.

1891 *Labour Commission Gloss.* *Magazine Work*, printing work paid by the 100 lines.

This entry has been updated (OED Third Edition, March 2000; most recently modified version published online September 2021).

magazine noun

Save Word

mag·a·zine | \ ˈma-gə-ˌzēn, ˌma-gə-ˈzēn \

Definition of *magazine*

1 a : a print periodical containing miscellaneous pieces (such as articles, stories, poems) and often illustrated

// a fashion *magazine*

// a gardening *magazine*

also : such a periodical published online

b : a similar section of a newspaper usually appearing on Sunday

c : a radio or television program presenting usually several short segments on a variety of topics

2 : a place where goods or supplies are stored WAREHOUSE

3 : a room in which powder and other explosives are kept in a fort or a ship

4 : the contents of a magazine: such as

a : an accumulation of munitions (see MUNITION sense 2) of war

b : a stock of provisions (see PROVISION entry 1 sense 2) or goods

5 : a supply chamber: such as

Synonyms

More Example Sentences

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Synonyms for *magazine*

Synonyms

depository, depot, repository, storage, storehouse, warehouse

Examples of *magazine* in a Sentence

// She subscribes to several gardening *magazines*.

// the village kept a *magazine* where people left common supplies

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// Fenster, the managing editor of online *magazine* Frontier Myanmar, was sentenced to 11 years of hard labor Friday but had his release negotiated by former U.S. diplomat Bill Richardson.
— Miriam Marini, *Detroit Free Press*, 15 Nov. 2021

// The founders of the *magazine* and London wine bar of the same name, Dan Keeling and Mark Andrew, go far and wide on all aspects of wine in their joyful, engaging tome.
— Sara L. Schneider, *Robb Report*, 15 Nov. 2021

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First Known Use of *magazine*

1583, in the meaning defined at sense 2

Middle French, from Old Occitan, from Arabic *makhāzin*, **plural of** *makhzan* **storehouse**

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People are talking about

More Definitions for *magazine*

magazine noun

English Language Learners Definition of *magazine*

: a type of thin book with a paper cover that contains stories, essays, pictures, etc., and that is usually published every week or month

: a radio or television program that discusses different topics

: a part of a gun that holds bullets

magazine noun

mag·a·zine | \ˈma-gə-ˌzēn\

Kids Definition of *magazine*

1 : a publication issued at regular intervals (as weekly or monthly)

2 : a storehouse or warehouse for military supplies

3 : a container in a gun for holding cartridges

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The author(s) shown below used Federal funds provided by the U.S. Department of Justice and prepared the following final report:

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An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003

Report to the National Institute of Justice, United States Department of Justice

By

Christopher S. Koper
(Principal Investigator)

With

Daniel J. Woods and Jeffrey A. Roth

June 2004

Jerry Lee Center of Criminology
University of Pennsylvania
3814 Walnut Street
Philadelphia, PA 19104

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PREFACE

Gun violence continues to be one of America's most serious crime problems. In 2000, over 10,000 persons were murdered with firearms and almost 49,000 more were shot in the course of over 340,000 assaults and robberies with guns (see the Federal Bureau of Investigation's annual *Uniform Crime Reports* and Simon et al., 2002). The total costs of gun violence in the United States – including medical, criminal justice, and other government and private costs – are on the order of at least $6 to $12 billion per year and, by more controversial estimates, could be as high as $80 billion per year (Cook and Ludwig, 2000).

However, there has been good news in recent years. Police statistics and national victimization surveys show that since the early 1990s, gun crime has plummeted to some of the lowest levels in decades (see the *Uniform Crime Reports* and Rennison, 2001). Have gun controls contributed to this decline, and, if so, which ones?

During the last decade, the federal government has undertaken a number of initiatives to suppress gun crime. These include, among others, the establishment of a national background check system for gun buyers (through the Brady Act), reforms of the licensing system for firearms dealers, a ban on juvenile handgun possession, and Project Safe Neighborhoods, a collaborative effort between U.S. Attorneys and local authorities to attack local gun crime problems and enhance punishment for gun offenders.

Perhaps the most controversial of these federal initiatives was the ban on semiautomatic assault weapons and large capacity ammunition magazines enacted as Title XI, Subtitle A of the *Violent Crime Control and Law Enforcement Act of 1994*. This law prohibits a relatively small group of weapons considered by ban advocates to be particularly dangerous and attractive for criminal purposes. In this report, we investigate the ban's impacts on gun crime through the late 1990s and beyond. This study updates a prior report on the short-term effects of the ban (1994-1996) that members of this research team prepared for the U.S. Department of Justice and the U.S. Congress (Roth and Koper, 1997; 1999).

ACKNOWLEDGMENTS

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The author wishes to thank several people and organizations that assisted this effort in numerous ways. Daniel Woods assisted with data analysis. Jeffrey Roth, who directed our first study of the assault weapons ban, provided advice and editorial input. Additional research assistance was provided by the following former employees of the Urban Institute: Gretchen Moore, David Huffer, Erica Dinger, Darin Reedy, Kate Bunting, Katie Gorie, and Michele Waul. The following persons and organizations provided databases, information, or other resources utilized for this report: Glenn Pierce (Northeastern University), Pamela Shaw and Edward Koch (Baltimore Police Department), Robert Shem (Alaska State Police), Bill McGill and Mallory O'Brien (currently or formerly of the Firearm Injury Center, Medical College of Wisconsin), Rick Ruddell (California State University, Chico), Scott Doyle (Kentucky State Police), Terrence Austin and Joe Vince (currently or formerly of the Bureau of Alcohol, Tobacco, Firearms, and Explosives), Carlos Alvarez and Alan Lynn (Metro-Dade Police Department), Charles Branas (Firearm and Injury Center, University of Pennsylvania), Caroline Harlow (Bureau of Justice Statistics), and Rebecca Knox (Brady Center to Prevent Handgun Violence). Robert Burrows (Bureau of Alcohol, Tobacco, Firearms, and Explosives) and Wain Roberts (Wain Roberts Firearms) shared technical expertise on firearms. Anonymous reviewers for the National Institute of Justice provided thorough and helpful comments on earlier versions of this report, as did Terrence Austin and Robert Burrows of the Bureau of Alcohol, Tobacco, Firearms, and Explosives. Finally, I thank Lois Mock, our National Institute of Justice grant monitor, for her advice and encouragement throughout all of the research that my colleagues and I have conducted on the assault weapons ban.

1. IMPACTS OF THE FEDERAL ASSAULT WEAPONS BAN, 1994-2003: KEY FINDINGS AND CONCLUSIONS

This overview presents key findings and conclusions from a study sponsored by the National Institute of Justice to investigate the effects of the federal assault weapons ban. This study updates prior reports to the National Institute of Justice and the U.S. Congress on the assault weapons legislation.

The Ban Attempts to Limit the Use of Guns with Military Style Features and Large Ammunition Capacities

- Title XI, Subtitle A of the Violent Crime Control and Law Enforcement Act of 1994 imposed a 10-year ban on the "manufacture, transfer, and possession" of certain semiautomatic firearms designated as assault weapons (AWs). The ban is directed at semiautomatic firearms having features that appear useful in military and criminal applications but unnecessary in shooting sports or self-defense (examples include flash hiders, folding rifle stocks, and threaded barrels for attaching silencers). The law bans 18 models and variations by name, as well as revolving cylinder shotguns. It also has a "features test" provision banning other semiautomatics having two or more military-style features. In sum, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) has identified 118 models and variations that are prohibited by the law. A number of the banned guns are foreign semiautomatic rifles that have been banned from importation into the U.S. since 1989.

- The ban also prohibits most ammunition feeding devices holding more than 10 rounds of ammunition (referred to as large capacity magazines, or LCMs). An LCM is arguably the most functionally important feature of most AWs, many of which have magazines holding 30 or more rounds. The LCM ban's reach is broader than that of the AW ban because many non-banned semiautomatics accept LCMs. Approximately 18% of civilian-owned firearms and 21% of civilian-owned handguns were equipped with LCMs as of 1994.

- The ban exempts AWs and LCMs manufactured before September 13, 1994. At that time, there were upwards of 1.5 million privately owned AWs in the U.S. and nearly 25 million guns equipped with LCMs. Gun industry sources estimated that there were 25 million pre-ban LCMs available in the U.S. as of 1995. An additional 4.7 million pre-ban LCMs were imported into the country from 1995 through 2000, with the largest number in 1999.

- Arguably, the AW-LCM ban is intended to reduce gunshot victimizations by limiting the national stock of semiautomatic firearms with large ammunition capacities – which enable shooters to discharge many shots rapidly – and other features conducive to criminal uses. The AW provision targets a relatively small number of weapons based on features that have little to do with the weapons'

operation, and removing those features is sufficient to make the weapons legal. The LCM provision limits the ammunition capacity of non-banned firearms.

The Banned Guns and Magazines Were Used in Up to A Quarter of Gun Crimes Prior to the Ban

- AWs were used in only a small fraction of gun crimes prior to the ban: about 2% according to most studies and no more than 8%. Most of the AWs used in crime are assault pistols rather than assault rifles.

- LCMs are used in crime much more often than AWs and accounted for 14% to 26% of guns used in crime prior to the ban.

- AWs and other guns equipped with LCMs tend to account for a higher share of guns used in murders of police and mass public shootings, though such incidents are very rare.

The Ban's Success in Reducing Criminal Use of the Banned Guns and Magazines Has Been Mixed

- Following implementation of the ban, the share of gun crimes involving AWs declined by 17% to 72% across the localities examined for this study (Baltimore, Miami, Milwaukee, Boston, St. Louis, and Anchorage), based on data covering all or portions of the 1995-2003 post-ban period. This is consistent with patterns found in national data on guns recovered by police and reported to ATF.

- The decline in the use of AWs has been due primarily to a reduction in the use of assault pistols (APs), which are used in crime more commonly than assault rifles (ARs). There has not been a clear decline in the use of ARs, though assessments are complicated by the rarity of crimes with these weapons and by substitution of post-ban rifles that are very similar to the banned AR models.

- However, the decline in AW use was offset throughout at least the late 1990s by steady or rising use of other guns equipped with LCMs in jurisdictions studied (Baltimore, Milwaukee, Louisville, and Anchorage). The failure to reduce LCM use has likely been due to the immense stock of exempted pre-ban magazines, which has been enhanced by recent imports.

It is Premature to Make Definitive Assessments of the Ban's Impact on Gun Crime

- Because the ban has not yet reduced the use of LCMs in crime, we cannot clearly credit the ban with any of the nation's recent drop in gun violence. However, the ban's exemption of millions of pre-ban AWs and LCMs ensured that the effects

of the law would occur only gradually. Those effects are still unfolding and may not be fully felt for several years into the future, particularly if foreign, pre-ban LCMs continue to be imported into the U.S. in large numbers.

The Ban's Reauthorization or Expiration Could Affect Gunshot Victimizations, But Predictions are Tenuous

- Should it be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement. AWs were rarely used in gun crimes even before the ban. LCMs are involved in a more substantial share of gun crimes, but it is not clear how often the outcomes of gun attacks depend on the ability of offenders to fire more than ten shots (the current magazine capacity limit) without reloading.

- Nonetheless, reducing criminal use of AWs and especially LCMs could have non-trivial effects on gunshot victimizations. The few available studies suggest that attacks with semiautomatics – including AWs and other semiautomatics equipped with LCMs – result in more shots fired, more persons hit, and more wounds inflicted per victim than do attacks with other firearms. Further, a study of handgun attacks in one city found that 3% of the gunfire incidents resulted in more than 10 shots fired, and those attacks produced almost 5% of the gunshot victims.

- Restricting the flow of LCMs into the country from abroad may be necessary to achieve desired effects from the ban, particularly in the near future. Whether mandating further design changes in the outward features of semiautomatic weapons (such as removing all military-style features) will produce measurable benefits beyond those of restricting ammunition capacity is unknown. Past experience also suggests that Congressional discussion of broadening the AW ban to new models or features would raise prices and production of the weapons under discussion.

- If the ban is lifted, gun and magazine manufacturers may reintroduce AW models and LCMs, perhaps in substantial numbers. In addition, pre-ban AWs may lose value and novelty, prompting some of their owners to sell them in undocumented secondhand markets where they can more easily reach high-risk users, such as criminals, terrorists, and other potential mass murderers. Any resulting increase in crimes with AWs and LCMs might increase gunshot victimizations for the reasons noted above, though this effect could be difficult to measure.

2. PROVISIONS OF THE ASSAULT WEAPONS BAN

2.1. Assault Weapons

Enacted on September 13, 1994, Title XI, Subtitle A of the *Violent Crime Control and Law Enforcement Act of 1994* imposes a 10-year ban on the "manufacture, transfer, and possession" of certain semiautomatic firearms designated as assault weapons (AWs).[1] The AW ban is not a prohibition on all semiautomatics. Rather, it is directed at semiautomatics having features that appear useful in military and criminal applications but unnecessary in shooting sports or self-defense. Examples of such features include pistol grips on rifles, flash hiders, folding rifle stocks, threaded barrels for attaching silencers, and the ability to accept ammunition magazines holding large numbers of bullets.[2] Indeed, several of the banned guns (e.g., the AR-15 and Avtomat Kalashnikov models) are civilian copies of military weapons and accept ammunition magazines made for those military weapons.

As summarized in Table 2-1, the law specifically prohibits nine narrowly defined groups of pistols, rifles, and shotguns. A number of the weapons are foreign rifles that the federal government has banned from importation into the U.S. since 1989. Exact copies of the named AWs are also banned, regardless of their manufacturer. In addition, the ban contains a generic "features test" provision that generally prohibits other semiautomatic firearms having two or more military-style features, as described in Table 2-2. In sum, the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) has identified 118 model and caliber variations that meet the AW criteria established by the ban.[3]

Figures 2-1 and 2-2 illustrate a few prominent AWs and their features. Figure 2-1 displays the Intratec TEC-9 assault pistol, the AW most frequently used in crime (e.g., see Roth and Koper 1997, Chapter 2). Figure 2-2 depicts the AK-47 assault rifle, a weapon of Soviet design. There are many variations of the AK-47 produced around the world, not all of which have the full complement of features illustrated in Figure 2-2.

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[1] A semiautomatic weapon fires one bullet for each squeeze of the trigger. After each shot, the gun automatically loads the next bullet and cocks itself for the next shot, thereby permitting a somewhat faster rate of fire relative to non-automatic firearms. Semiautomatics are not to be confused with fully automatic weapons (i.e., machine guns), which fire continuously as long as the trigger is held down. Fully automatic weapons have been illegal to own in the United States without a federal permit since 1934.

[2] Ban advocates stress the importance of pistol grips on rifles and heat shrouds or forward handgrips on pistols, which in combination with large ammunition magazines enable shooters to discharge high numbers of bullets rapidly (in a "spray fire" fashion) while maintaining control of the firearm (Violence Policy Center, 2003). Ban opponents, on the other hand, argue that AW features also serve legitimate purposes for lawful gun users (e.g., see Kopel, 1995).

[3] This is based on AWs identified by ATF's Firearms Technology Branch as of December 1997.

Table 2-1. Firearms Banned by the Federal Assault Weapons Ban

Firearm	Description	1993 Blue Book Price	Pre-Ban Federal Legal Status	Examples of Legal Substitutes
Avtomat Kalashnikov (AK) (by Norinco, Mitchell, Poly Technologies)	Chinese, Russian, other foreign and domestic: .223 or 7.62x39mm caliber, semiauto. rifle; 5, 10, or 30 shot magazine, may be supplied with bayonet	$550 (generic import); add 10-15% for folding stock models	Imports banned in 1989.	Norinco NHM 90/91 [1]
Uzi, Galil	Israeli: 9mm, .41, or .45 caliber semiauto. carbine, mini-carbine, or pistol. Magazine capacity of 16, 20, or 25, depending on model and type (10 or 20 on pistols).	$550-$1050 (Uzi) $875-$1150 (Galil)	Imports banned in 1989	Uzi Sporter [2]
Beretta AR-70	Italian: .222 or .223 caliber semiauto. paramilitary design rifle; 5, 8, or 30 shot magazine.	$1050	Imports banned in 1989.	
Colt AR-15	Domestic: primarily .223 caliber paramilitary rifle or carbine; 5 shot magazines, often comes with two 5-shot detachable magazines. Exact copies by DPMS, Eagle, Olympic, and others.	$825-$1325	Legal (civilian version of military M-16)	Colt Sporter, Match H-Bar, Target models
Fabrique National FN/FAL, FN/LAR, FNC	Belgian design: .308 caliber semiauto. rifle or .223 combat carbine with 30 shot magazine. Rifle comes with flash hider, 4 position fire selector on automatic models. Discontinued in 1988.	$1100-$2500	Imports banned in 1989.	L1A1 Sporter (FN, Century) [2]
Steyr AUG	Austrian .223/5.56mm caliber semiauto. paramilitary design rifle.	$2500	Imports banned in 1989	
SWD M-10, 11, 11/9, 12	Domestic: 9mm, .380, or .45 caliber paramilitary design semiauto. pistol; 32 shot magazine. Also available in semiauto. carbine and fully automatic variations.	$215 (M-11/9)	Legal	Cobray PM11, 12
TEC-9, DC9, 22	Domestic: 9mm caliber semiauto. paramilitary design pistol, 10 or 32 shot magazine.; .22 caliber semiauto. paramilitary design pistol, 30 shot magazine.	$145-$295	Legal	TEC-AB
Revolving Cylinder Shotguns	Domestic: 12 gauge, 12 shot rotary magazine; paramilitary configuration	$525 (Street Sweeper)	Legal	

[1] Imports were halted in 1994 under the federal embargo on the importation of firearms from China.
[2] Imports banned by federal executive order, April 1998.

Table 2-2. Features Test of the Federal Assault Weapons Ban

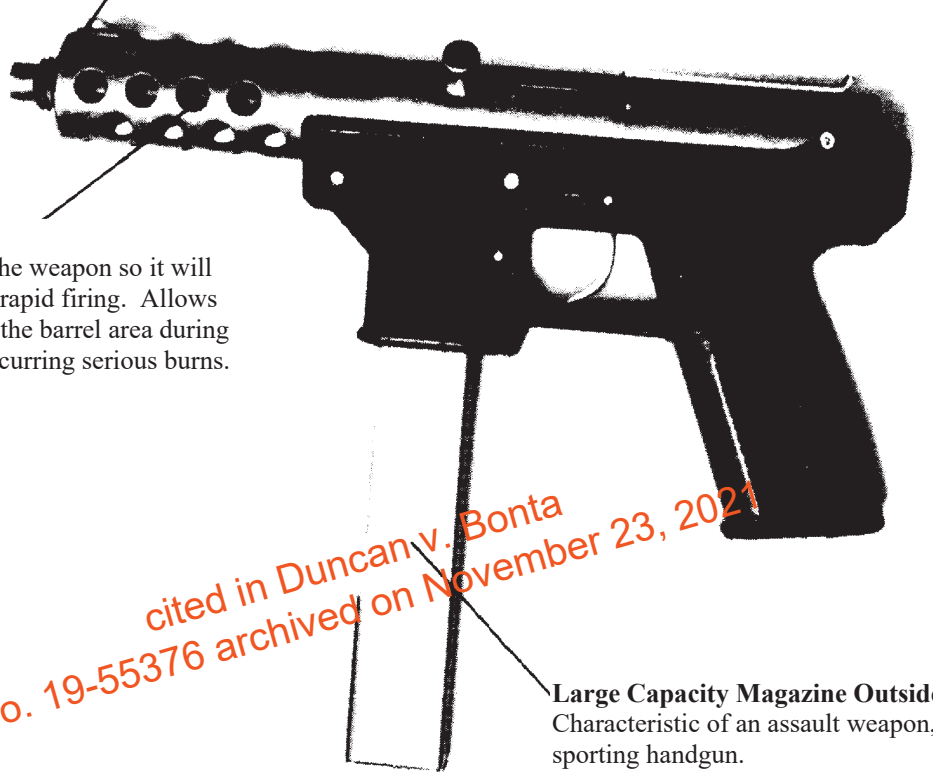
Weapon Category	Military-Style Features (Two or more qualify a firearm as an assault weapon)
Semiautomatic pistols accepting detachable magazines:	1) ammunition magazine that attaches outside the pistol grip 2) threaded barrel capable of accepting a barrel extender, flash hider, forward handgrip, or silencer 3) heat shroud attached to or encircling the barrel 4) weight of more than 50 ounces unloaded 5) semiautomatic version of a fully automatic weapon
Semiautomatic rifles accepting detachable magazines:	1) folding or telescoping stock 2) pistol grip that protrudes beneath the firing action 3) bayonet mount 4) flash hider or threaded barrel designed to accommodate one 5) grenade launcher
Semiautomatic shotguns:	1) folding or telescoping stock 2) pistol grip that protrudes beneath the firing action 3) fixed magazine capacity over 5 rounds 4) ability to accept a detachable ammunition magazine

2.2. Large Capacity Magazines

In addition, the ban prohibits most ammunition feeding devices holding more than 10 rounds of ammunition (referred to hereafter as large capacity magazines, or LCMs).[4] Most notably, this limits the capacity of detachable ammunition magazines for semiautomatic firearms. Though often overlooked in media coverage of the law, this provision impacted a larger share of the gun market than did the ban on AWs. Approximately 40 percent of the semiautomatic handgun models and a majority of the semiautomatic rifle models being manufactured and advertised prior to the ban were sold with LCMs or had a variation that was sold with an LCM (calculated from Murtz et al., 1994). Still others could accept LCMs made for other firearms and/or by other manufacturers. A national survey of gun owners found that 18% of all civilian-owned firearms and 21% of civilian-owned handguns were equipped with magazines having 10 or more rounds as of 1994 (Cook and Ludwig, 1996, p. 17). The AW provision did not affect most LCM-compatible guns, but the LCM provision limited the capacities of their magazines to 10 rounds.

[4] Technically, the ban prohibits any magazine, belt, drum, feed strip, or similar device that has the capacity to accept more than 10 rounds or ammunition, or which can be readily converted or restored to accept more than 10 rounds of ammunition. The ban exempts attached tubular devices capable of operating only with .22 caliber rimfire (i.e., low velocity) ammunition.

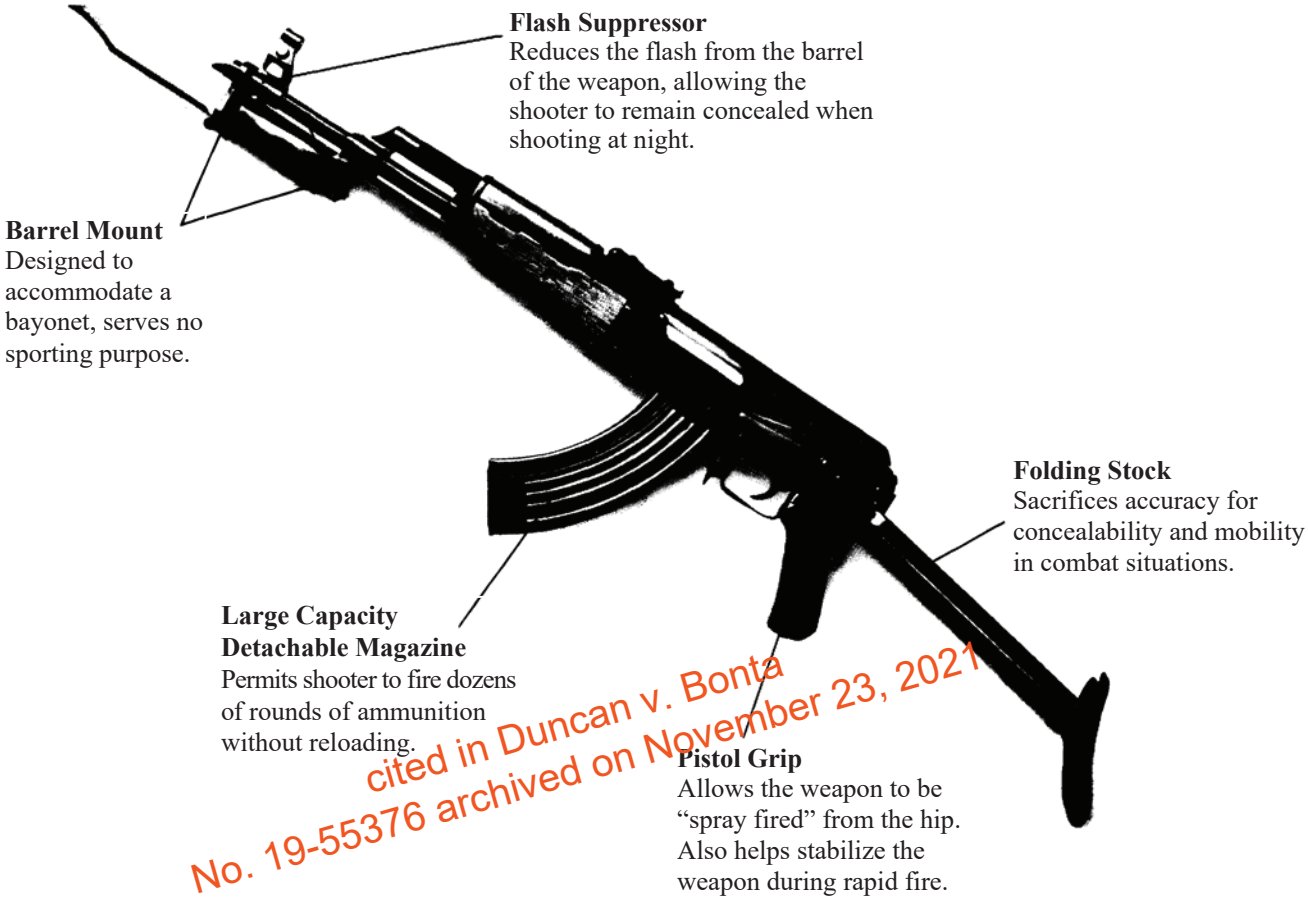
Figure 2-1. Features of Assault Weapons: The Intratec TEC-9 Assault Pistol



Adapted from exhibit of the Center to Prevent Handgun Violence.

As discussed in later chapters, an LCM is perhaps the most functionally important feature of many AWs. This point is underscored by the AW ban's exemptions for semiautomatic rifles that cannot accept a detachable magazine that holds more than five rounds of ammunition and semiautomatic shotguns that cannot hold more than five rounds in a fixed or detachable magazine. As noted by the U.S. House of Representatives, most prohibited AWs came equipped with magazines holding 30 rounds and could accept magazines holding as many as 50 or 100 rounds (U.S. Department of the Treasury, 1998, p. 14). Also, a 1998 federal executive order (discussed below) banned further importation of foreign semiautomatic rifles capable of accepting LCMs made for military rifles. Accordingly, the magazine ban plays an important role in the logic and interpretations of the analyses presented here.

Figure 2-2. Features of Assault Weapons: The AK-47 Assault Rifle



Adapted from exhibit of the Center to Prevent Handgun Violence.

2.3. Foreign Rifles Accepting Large Capacity Military Magazines

In April of 1998, the Clinton administration broadened the range of the AW ban by prohibiting importation of an additional 58 foreign semiautomatic rifles that were still legal under the 1994 law but that can accept LCMs made for military assault rifles like the AK-47 (U.S. Department of the Treasury, 1998).[5] Figure 2-3 illustrates a few such rifles (hereafter, LCMM rifles) patterned after the banned AK-47 pictured in Figure 2-2. The LCMM rifles in Figure 2-3 do not possess the military-style features incorporated into the AK-47 (such as pistol grips, flash suppressors, and bayonet mounts), but they accept LCMs made for AK-47s.[6]

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[5] In the civilian context, AWs are semiautomatic firearms. Many semiautomatic AWs are patterned after military firearms, but the military versions are capable of semiautomatic and fully automatic fire.

[6] Importation of some LCMM rifles, including a number of guns patterned after the AK-47, was halted in 1994 due to trade sanctions against China (U.S. Department of the Treasury, 1998).

Figure 2-3. Foreign Semiautomatic Rifles Capable of Accepting Large Capacity Military Magazines: AK47 Copies Banned by Executive Order in 1998

MISR

ARM

MAK90

WUM 1

Taken from U.S. Department of the Treasury (1998)

2.4. Ban Exemptions

2.4.1. Guns and Magazines Manufactured Prior to the Ban

The ban contains important exemptions. AWs and LCMs manufactured before the effective date of the ban are "grandfathered" and thus legal to own and transfer. Around 1990, there were an estimated 1 million privately owned AWs in the U.S. (about 0.5% of the estimated civilian gun stock) (Cox Newspapers, 1989, p. 1; American Medical Association Council on Scientific Affairs, 1992), though those counts probably did not correspond exactly to the weapons prohibited by the 1994 ban. The leading domestic AW producers manufactured approximately half a million AWs from 1989 through 1993, representing roughly 2.5% of all guns manufactured in the U.S. during that time (see Chapter 5).

We are not aware of any precise estimates of the pre-ban stock of LCMs, but gun owners in the U.S. possessed an estimated 25 million guns that were equipped with LCMs or 10-round magazines in 1994 (Cook and Ludwig, 1996, p. 17), and gun industry sources estimated that, including aftermarket items for repairing and extending magazines, there were at least 25 million LCMs available in the United States as of 1995 (Gun Tests, 1995, p. 30). As discussed in Chapter 7, moreover, an additional 4.8 million pre-ban LCMs were imported into the U.S. from 1994 through 2000 under the grandfathering exemption.

2.4.2. Semiautomatics With Fewer or No Military Features

Although the law bans "copies or duplicates" of the named gun makes and models, federal authorities have emphasized exact copies. Relatively cosmetic changes, such as removing a flash hider or bayonet mount, are sufficient to transform a banned weapon into a legal substitute, and a number of manufacturers now produce modified, legal versions of some of the banned guns (examples are listed in Table 2-1). In general, the AW ban does not apply to semiautomatics possessing no more than one military-style feature listed under the ban's features test provision.[7] For instance, prior to going out of business, Intratec, makers of the banned TEC-9 featured in Figure 2-1, manufactured an AB-10 ("after ban") model that does not have a threaded barrel or a barrel shroud but is identical to the TEC-9 in other respects, including the ability to accept an ammunition magazine outside the pistol grip (Figure 2-4). As shown in the illustration, the AB-10 accepts grandfathered, 32-round magazines made for the TEC-9, but post-ban magazines produced for the AB-10 must be limited to 10 rounds.

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[7] Note, however, that firearms imported into the country must still meet the "sporting purposes test" established under the federal Gun Control Act of 1968. In 1989, ATF determined that foreign semiautomatic rifles having any one of a number of named military features (including those listed in the features test of the 1994 AW ban) fail the sporting purposes test and cannot be imported into the country. In 1998, the ability to accept an LCM made for a military rifle was added to the list of disqualifying features. Consequently, it is possible for foreign rifles to pass the features test of the federal AW ban but not meet the sporting purposes test for imports (U.S. Department of the Treasury, 1998).

Another example is the Colt Match Target H-Bar rifle (Figure 2-5), which is a legalized version of the banned AR-15 (see Table 2-1). AR-15 type rifles are civilian weapons patterned after the U.S. military's M-16 rifle and were the assault rifles most commonly used in crime before the ban (Roth and Koper, 1997, Chapter 2). The post-ban version shown in Figure 2-5 (one of several legalized variations on the AR-15) is essentially identical to pre-ban versions of the AR-15 but does not have accessories like a flash hider, threaded barrel, or bayonet lug. The one remaining military feature on the post-ban gun is the pistol grip. This and other post-ban AR-15 type rifles can accept LCMs made for the banned AR15, as well as those made for the U.S. military's M-16. However, post-ban magazines manufactured for these guns must hold fewer than 11 rounds.

The LCMM rifles discussed above constituted another group of legalized AW-type weapons until 1998, when their importation was prohibited by executive order. Finally, the ban includes an appendix that exempts by name several hundred models of rifles and shotguns commonly used in hunting and recreation, 86 of which are semiautomatics. While the exempted semiautomatics generally lack the military-style features common to AWs, many take detachable magazines, and some have the ability to accept LCMs.[8]

2.5. Summary

In the broadest sense, the AW-LCM ban is intended to limit crimes with semiautomatic firearms having large ammunition capacities – which enable shooters to discharge high numbers of shots rapidly – and other features conducive to criminal applications. The gun ban provision targets a relatively small number of weapons based on outward features or accessories that have little to do with the weapons' operation. Removing some or all of these features is sufficient to make the weapons legal. In other respects (e.g., type of firing mechanism, ammunition fired, and the ability to accept a detachable magazine), AWs do not differ from other legal semiautomatic weapons. The LCM provision of the law limits the ammunition capacity of non-banned firearms.

[8] Legislators inserted a number of amendments during the drafting process to broaden the consensus behind the bill (Lennett 1995). Among changes that occurred during drafting were: dropping a requirement to register post-ban sales of the grandfathered guns, dropping a ban on "substantial substitutes" as well as "exact copies" of the banned weapons, shortening the list of named makes and models covered by the ban, adding the appendix list of exempted weapons, and mandating the first impact study of the ban that is discussed below.

Figure 2-4. Post-Ban, Modified Versions of Assault Weapons: The Intratec AB ("After Ban") Model (See Featured Firearm)

Figure 2-5. Post-Ban, Modified Versions of Assault Weapons: The Colt Match Target HBAR Model

3. CRIMINAL USE OF ASSAULT WEAPONS AND LARGE CAPACITY MAGAZINES BEFORE THE BAN

During the 1980s and early 1990s, AWs and other semiautomatic firearms equipped with LCMs were involved in a number of highly publicized mass murder incidents that raised public concern about the accessibility of high powered, military-style weaponry and other guns capable of discharging high numbers of bullets in a short period of time (Cox Newspapers, 1989; Kleck, 1997, pp.124-126,144; Lenett, 1995). In one of the worst mass murders ever committed in the U.S., for example, James Huberty killed 21 persons and wounded 19 others in a San Ysidro, California MacDonald's restaurant on July 18, 1984 using an Uzi carbine, a shotgun, and another semiautomatic handgun. On September 14, 1989, Joseph Wesbecker, armed with an AK-47 rifle, two MAC-11 handguns, and a number of other firearms, killed 7 persons and wounded 15 others at his former workplace in Louisville, Kentucky before taking his own life. Another particularly notorious incident that precipitated much of the recent debate over AWs occurred on January 17, 1989 when Patrick Purdy used a civilian version of the AK-47 military rifle to open fire on a schoolyard in Stockton, California, killing 5 children and wounding 29 persons.

There were additional high profile incidents in which offenders using semiautomatic handguns with LCMs killed and wounded large numbers of persons. Armed with two handguns having LCMs (and reportedly a supply of extra LCMs), a rifle, and a shotgun, George Hennard killed 22 people and wounded another 23 in Killeen, Texas in October 1991. In a December 1993 incident, a gunman named Colin Ferguson, armed with a handgun and LCMs, opened fire on commuters on a Long Island train, killing 5 and wounding 17.

Indeed, AWs or other semiautomatics with LCMs were involved in 6, or 40%, of 15 mass shooting incidents occurring between 1984 and 1993 in which six or more persons were killed or a total of 12 or more were wounded (Kleck, 1997**,** pp.124-126, 144**).** Early studies of AWs, though sometimes based on limited and potentially unrepresentative data, also suggested that AWs recovered by police were often associated with drug trafficking and organized crime (Cox Newspapers, 1989; also see Roth and Koper, 1997, Chapter 5), fueling a perception that AWs were guns of choice among drug dealers and other particularly violent groups. All of this intensified concern over AWs and other semiautomatics with large ammunition capacities and helped spur the passage of AW bans in California, New Jersey, Connecticut, and Hawaii between 1989 and 1993, as well as the 1989 federal import ban on selected semiautomatic rifles. Maryland also passed AW legislation in 1994, just a few months prior to the passage of the 1994 federal AW ban.[9]

Looking at the nation's gun crime problem more broadly, however, AWs and LCMs were used in only a minority of gun crimes prior to the 1994 federal ban, and AWs were used in a particularly small percentage of gun crimes.

[9] A number of localities around the nation also passed AW bans during this period.

3.1. Criminal Use of Assault Weapons

Numerous studies have examined the use of AWs in crime prior to the federal ban. The definition of AWs varied across the studies and did not always correspond exactly to that of the 1994 law (in part because a number of the studies were done prior to 1994). In general, however, the studies appeared to focus on various semiautomatics with detachable magazines and military-style features. According to these accounts, AWs typically accounted for up to 8% of guns used in crime, depending on the specific AW definition and data source used (e.g., see Beck et al., 1993; Hargarten et al., 1996; Hutson et al., 1994; 1995; McGonigal et al., 1993; New York State Division of Criminal Justice Services, 1994; Roth and Koper, 1997, Chapters 2, 5, 6; Zawitz, 1995). A compilation of 38 sources indicated that AWs accounted for 2% of crime guns on average (Kleck, 1997, pp.112, 141-143).[10]

Similarly, the most common AWs prohibited by the 1994 federal ban accounted for between 1% and 6% of guns used in crime according to most of several national and local data sources examined for this and our prior study (see Chapter 6 and Roth and Koper, 1997, Chapters 5, 6):

- Baltimore (all guns recovered by police, 1992-1993): 2%
- Miami (all guns recovered by police, 1990-1993): 3%
- Milwaukee (guns recovered in murder investigations, 1991-1993): 6%
- Boston (all guns recovered by police, 1991-1993): 2%
- St. Louis (all guns recovered by police, 1991-1993): 1%
- Anchorage, Alaska (guns used in serious crimes, 1987-1993): 4%
- National (guns recovered by police and reported to ATF, 1992-1993): 5%[11]
- National (gun thefts reported to police, 1992-Aug. 1994): 2%
- National (guns used in murders of police, 1992-1994): 7-9%[12]
- National (guns used in mass murders of 4 or more persons, 1992-1994): 4-13%[13]

Although each of the sources cited above has limitations, the estimates consistently show that AWs are used in a small fraction of gun crimes. Even the highest

[10] The source in question contains a total of 48 estimates, but our focus is on those that examined all AWs (including pistols, rifles, and shotguns) as opposed to just assault rifles.
[11] For reasons discussed in Chapter 6, the national ATF estimate likely overestimates the use of AWs in crime. Nonetheless, the ATF estimate lies within the range of other presented estimates.
[12] The minimum estimate is based on AW cases as a percentage of all gun murders of police. The maximum estimate is based on AW cases as a percentage of cases for which at least the gun manufacturer was known. Note that AWs accounted for as many as 16% of gun murders of police in 1994 (Roth and Koper, 1997, Chapter 6; also see Adler et al., 1995).
[13] These statistics are based on a sample of 28 cases found through newspaper reports (Roth and Koper, 1997, Appendix A). One case involved an AW, accounting for 3.6% of all cases and 12.5% of cases in which at least the type of gun (including whether the gun was a handgun, rifle, or shotgun and whether the gun was a semiautomatic) was known. Also see the earlier discussion of AWs and mass shootings at the beginning of this chapter.

estimates, which correspond to particularly rare events such mass murders and police murders, are no higher than 13%. Note also that the majority of AWs used in crime are assault pistols (APs) rather than assault rifles (ARs). Among AWs reported by police to ATF during 1992 and 1993, for example, APs outnumbered ARs by a ratio of 3 to 1 (see Chapter 6).

The relative rarity of AW use in crime can be attributed to a number of factors. Many AWs are long guns, which are used in crime much less often than handguns. Moreover, a number of the banned AWs are foreign weapons that were banned from importation into the U.S. in 1989. Also, AWs are more expensive (see Table 2-1) and more difficult to conceal than the types of handguns that are used most frequently in crime.

3.1.1. A Note on Survey Studies and Assault Weapons

The studies and statistics discussed above were based primarily on police information. Some survey studies have given a different impression, suggesting substantial levels of AW ownership among criminals and otherwise high-risk juvenile and adult populations, particularly urban gang members (Knox et al., 1994; Sheley and Wright, 1993a). A general problem with these studies, however, is that respondents themselves had to define terms like "military-style" and "assault rifle." Consequently, the figures from these studies may lack comparability with those from studies with police data. Further, the figures reported in some studies prompt concerns about exaggeration of AW ownership (perhaps linked to publicity over the AW issue during the early 1990s when a number of these studies were conducted), particularly among juvenile offenders, who have reported ownership levels as high as 35% just for ARs (Sheley and Wright, 1993a).[14]

Even so, most survey evidence on the actual use of AWs suggests that offenders rarely use AWs in crime. In a 1991 national survey of adult state prisoners, for example, 8% of the inmates reported possessing a "military-type" firearm at some point in the past (Beck et al., 1993, p. 19). Yet only 2% of offenders who used a firearm during their conviction offense reported using an AW for that offense (calculated from pp. 18, 33), a figure consistent with the police statistics cited above. Similarly, while 10% of adult inmates and 20% of juvenile inmates in a Virginia survey reported having owned an AR, none of the adult inmates and only 1% of the juvenile inmates reported having carried them at crime scenes (reported in Zawitz, 1995, p. 6). In contrast, 4% to 20% of inmates surveyed in eight jails across rural and urban areas of Illinois and Iowa reported having used an AR in committing crimes (Knox et al., 1994, p. 17). Nevertheless, even assuming the accuracy and honesty of the respondents' reports, it is not clear what

[14] As one example of possible exaggeration of AW ownership, a survey of incarcerated juveniles in New Mexico found that 6% reported having used a "military-style rifle" against others and 2.6% reported that someone else used such a rifle against them. However, less than 1% of guns recovered in a sample of juvenile firearms cases were "military" style guns (New Mexico Criminal Justice Statistical Analysis Center, 1998, pp. 17-19; also see Ruddell and Mays, 2003).

weapons they were counting as ARs, what percentage of their crimes were committed with ARs, or what share of all gun crimes in their respective jurisdictions were linked to their AR uses. Hence, while some surveys suggest that ownership and, to a lesser extent, use of AWs may be fairly common among certain subsets of offenders, the overwhelming weight of evidence from gun recovery and survey studies indicates that AWs are used in a small percentage of gun crimes overall.

3.1.2. Are Assault Weapons More Attractive to Criminal Users Than Other Gun Users?

Although AWs are used in a small percentage of gun crimes, some have argued that AWs are more likely to be used in crime than other guns, i.e., that AWs are more attractive to criminal than lawful gun users due to the weapons' military-style features and their particularly large ammunition magazines. Such arguments are based on data implying that AWs are more common among crime guns than among the general stock of civilian firearms. According to some estimates generated prior to the federal ban, AWs accounted for less than one percent of firearms owned by civilians but up to 11% of guns used in crime, based on firearms reported by police to ATF between 1986 and 1993 (e.g., see Cox Newspapers, 1989; Lennett, 1995). However, these estimates were problematic in a number of respects. As discussed in Chapter 6, ATF statistics are not necessarily representative of the types of guns most commonly recovered by police, and ATF statistics from the late 1980s and early 1990s in particular tended to overstate the prevalence of AWs among crime guns. Further, estimating the percentage of civilian weapons that are AWs is difficult because gun production data are not reported by model, and one must also make assumptions about the rate of attrition among the stock of civilian firearms.

Our own more recent assessment indicates that AWs accounted for about 2.5% of guns produced from 1989 through 1993 (see Chapter 5). Relative to previous estimates, this may signify that AWs accounted for a growing share of civilian firearms in the years just before the ban, though the previous estimates likely did not correspond to the exact list of weapons banned in 1994 and thus may not be entirely comparable to our estimate. At any rate, the 2.5% figure is comparable to most of the AW crime gun estimates listed above; hence, it is not clear that AWs are used disproportionately in most crimes, though AWs still seem to account for a somewhat disproportionate share of guns used in murders and other serious crimes.

Perhaps the best evidence of a criminal preference for AWs comes from a study of young adult handgun buyers in California that found buyers with minor criminal histories (i.e., arrests or misdemeanor convictions that did not disqualify them from purchasing firearms) were more than twice as likely to purchase APs than were buyers with no criminal history (4.6% to 2%, respectively) (Wintemute et al., 1998a). Those with more serious criminal histories were even more likely to purchase APs: 6.6% of those who had been charged with a gun offense bought APs, as did 10% of those who had been charged with two or more serious violent offenses. AP purchasers were also more likely to be arrested subsequent to their purchases than were other gun purchasers.

Among gun buyers with prior charges for violence, for instance, AP buyers were more than twice as likely as other handgun buyers to be charged with any new offense and three times as likely to be charged with a new violent or gun offense. To our knowledge, there have been no comparable studies contrasting AR buyers with other rifle buyers.

3.2. Criminal Use of Large Capacity Magazines

Relative to the AW issue, criminal use of LCMs has received relatively little attention. Yet the overall use of guns with LCMs, which is based on the combined use of AWs and non-banned guns with LCMs, is much greater than the use of AWs alone. Based on data examined for this and a few prior studies, guns with LCMs were used in roughly 14% to 26% of most gun crimes prior to the ban (see Chapter 8; Adler et al., 1995; Koper, 2001; New York Division of Criminal Justice Services, 1994).

- Baltimore (all guns recovered by police, 1993): 14%
- Milwaukee (guns recovered in murder investigations, 1991-1993): 21%
- Anchorage, Alaska (handguns used in serious crimes, 1992-1993): 26%
- New York City (guns recovered in murder investigations, 1993): 16-25%[15]
- Washington, DC (guns recovered from juveniles, 1991-1993): 16%[16]
- National (guns used in murders of police, 1994): 31%-41%[17]

Although based on a small number of studies, this range is generally consistent with national survey estimates indicating approximately 18% of all civilian-owned guns and 21% of civilian-owned handguns were equipped with LCMs as of 1994 (Cook and Ludwig, 1996, p. 17). The exception is that LCMs may have been used disproportionately in murders of police, though such incidents are very rare.

As with AWs and crime guns in general, most crime guns equipped with LCMs are handguns. Two handgun models manufactured with LCMs prior to the ban (the Glock 17 and Ruger P89) were among the 10 crime gun models most frequently recovered by law enforcement and reported to ATF during 1994 (ATF, 1995).

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[15] The minimum estimate is based on cases in which discharged firearms were recovered, while the maximum estimate is based on cases in which recovered firearms were positively linked to the case with ballistics evidence (New York Division of Criminal Justice Services, 1994).

[16] Note that Washington, DC prohibits semiautomatic firearms accepting magazines with more than 12 rounds (and handguns in general).

[17] The estimates are based on the sum of cases involving AWs or other guns sold with LCMs (Adler et al., 1995, p.4). The minimum estimate is based on AW-LCM cases as a percentage of all gun murders of police. The maximum estimate is based on AW-LCM cases as a percentage of cases in which the gun model was known.

3.3. Summary

In sum, AWs and LCMs were used in up to a quarter of gun crimes prior to the 1994 AW-LCM ban. By most estimates, AWs were used in less than 6% of gun crimes even before the ban. Some may have perceived their use to be more widespread, however, due to the use of AWs in particularly rare and highly publicized crimes such as mass shootings (and, to a lesser extent, murders of police), survey reports suggesting high levels of AW ownership among some groups of offenders, and evidence that some AWs are more attractive to criminal than lawful gun buyers.

In contrast, guns equipped with LCMs – of which AWs are a subset – are used in roughly 14% to 26% of gun crimes. Accordingly, the LCM ban has greater potential for affecting gun crime. However, it is not clear how often the ability to fire more than 10 shots without reloading (the current magazine capacity limit) affects the outcomes of gun attacks (see Chapter 9). All of this suggests that the ban's impact on gun violence is likely to be small.

4. OVERVIEW OF STUDY DESIGN, HYPOTHESES, AND PRIOR FINDINGS

Section 110104 of the AW-LCM ban directed the Attorney General of the United States to study the ban's impact and report the results to Congress within 30 months of the ban's enactment, a provision which was presumably motivated by a sunset provision in the legislation (section 110105) that will lift the ban in September 2004 unless Congress renews the ban. In accordance with the study requirement, the National Institute of Justice (NIJ) awarded a grant to the Urban Institute to study the ban's short-term (i.e., 1994-1996) effects. The results of that study are available in a number of reports, briefs, and articles written by members of this research team (Koper and Roth, 2001a; 2001b; 2002a; Roth and Koper, 1997; 1999).[18] In order to understand the ban's longer-term effects, NIJ provided additional funding to extend the AW research. In 2002, we delivered an interim report to NIJ based on data extending through at least the late 1990s (Koper and Roth, 2002b). This report is based largely on the 2002 interim report, but with various new and updated analyses extending as far as 2003. It is thus a compilation of analyses conducted between 1998 and 2003. The study periods vary somewhat across the analyses, depending on data availability and the time at which the data were collected.

4.1. Logical Framework for Research on the Ban

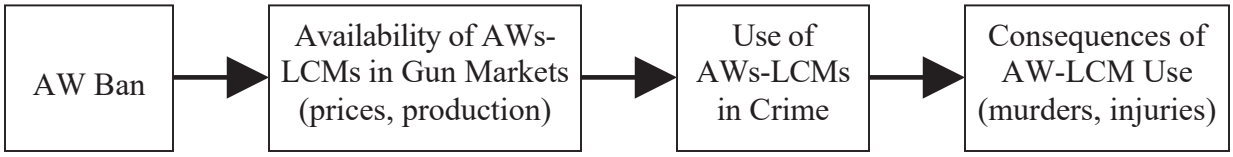
An important rationale for the AW-LCM ban is that AWs and other guns equipped with LCMs are particularly dangerous weapons because they facilitate the rapid firing of high numbers of shots, thereby potentially increasing injuries and deaths from gun violence. Although AWs and LCMs were used in only a modest share of gun crimes before the ban, it is conceivable that a decrease in their use might reduce fatal and non-fatal gunshot victimizations, even if it does not reduce the overall rate of gun crime. (In Chapter 9, we consider in more detail whether forcing offenders to substitute other guns and smaller magazines can reduce gun deaths and injuries.)

It is not clear how quickly such effects might occur, however, because the ban exempted the millions of AWs and LCMs that were manufactured prior to the ban's effective date in September 1994. This was particularly a concern for our first study, which was based on data extending through mid-1996, a period potentially too short to observe any meaningful effects. Consequently, investigation of the ban's effects on gun markets – and, most importantly, how they have affected criminal use of AWs and LCMs – has played a central role in this research. The general logic of our studies, illustrated in Figure 4-1, has been to first assess the law's impact on the availability of AWs and LCMs, examining price and production (or importation) indices in legal markets and relating them to trends in criminal use of AWs and LCMs. In turn, we can relate these market patterns to trends in the types of gun crimes most likely to be affected by changes in the use of AWs and LCMs. However, we cannot make definitive assessments of the

[18] The report to Congress was the Roth and Koper (1997) report.

ban's impact on gun violence until it is clear that the ban has indeed reduced criminal use of AWs and LCMs.

Figure 4-1. Logic Model for Research on the Assault Weapons Ban



4.2. Hypothesized Market Effects

4.2.1. A General Description of Gun Markets

Firearms are distributed in markets commonly referred to as primary and secondary markets. Illicit gun transactions occur in both markets. Primary markets include wholesale and retail transactions by federally-licensed gun dealers, referred to as federal firearm licensees. Licensed dealers are required to, among things, follow federal and state background procedures to verify the eligibility of purchasers, observe any legally required waiting period prior to making transfers, and maintain records of gun acquisitions and dispositions (though records are not required for sales of ammunition magazines).

Despite these restrictions, survey data suggest that as many as 21% of adult gun offenders obtained guns from licensed dealers in the years prior to the ban (Harlow, 2001, p. 6; also see Wright and Rossi, 1986, pp. 183,185). In more recent years, this figure has declined to 14% (Harlow, 2001, p. 6), due likely to the Brady Act, which established a national background check system for purchases from licensed dealers, and reforms of the federal firearms licensing system that have greatly reduced the number of licensed gun dealers (see ATF, 2000; Koper, 2002). Some would-be gun offenders may be legally eligible buyers at the time of their acquisitions, while others may seek out corrupt dealers or use other fraudulent or criminal means to acquire guns from retail dealers (such as recruiting a legally entitled buyer to act as a "straw purchaser" who buys a gun on behalf of a prohibited buyer).

Secondary markets encompass second-hand gun transactions made by non-licensed individuals.[19] Secondary market participants are prohibited from knowingly transferring guns to ineligible purchasers (e.g., convicted felons and drug abusers). However, secondary transfers are not subject to the federal record-keeping and background check requirements placed on licensed dealers, thus making the secondary

[19] Persons who make only occasional sales of firearms are not required to obtain a federal firearms license (ATF, 2000, p. 11).

market almost entirely unregulated and, accordingly, a better source of guns for criminal users.[20] In the secondary market, ineligible buyers may obtain guns from a wide variety of legitimate or illegitimate gun owners: relatives, friends, fences, drug dealers, drug addicts, persons selling at gun shows, or other strangers (e.g., see Wright and Rossi, 1986; Sheley and Wright, 1993a). Of course, ineligible purchasers may also steal guns from licensed gun dealers and private gun owners.

Secondary market prices are generally lower than primary market prices (because the products are used), though the former may vary substantially across a range of gun models, places, circumstances, and actors. For example, street prices of AWs and other guns can be 3 to 6 times higher than legal retail prices in jurisdictions with strict gun controls and lower levels of gun ownership (Cook et al., 1995, p. 72). Nonetheless, experts note that primary and secondary market prices correspond to one another, in that relatively expensive guns in the primary market are also relatively expensive in the secondary market. Moreover, in any given locality, trends in secondary market prices can be expected to track those in the primary market because a rise in primary market prices for new weapons will increase demand for used weapons and therefore increase secondary market prices (Cook et al., 1995, p. 71).

4.2.2. The AW-LCM Ban and Gun Markets

In the long term, we can expect prices of the banned guns and magazines to gradually rise as supplies dwindle. As prices rise, more would-be criminal users of AWs and LCMs will be unable or unwilling to pay the higher prices. Others will be discouraged by the increasing non-monetary costs (i.e., search time) of obtaining the weapons. In addition, rising legal market prices will undermine the incentive for some persons to sell AWs and LCMs to prohibited buyers for higher premiums, thereby bidding some of the weapons away from the channels through which they would otherwise reach criminal users. Finally, some would-be AW and LCM users may become less willing to risk confiscation of their AWs and LCMs as the value of the weapons increases. Therefore, we expect that over time diminishing stocks and rising prices will lead to a reduction in criminal use of AWs and LCMs.[21]

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[20] Some states require that secondary market participants notify authorities about their transactions. Even in these states, however, it is not clear how well these laws are enforced.

[21] We would expect these reductions to be apparent shortly after the price increases (an expectation that, as discussed below, was confirmed in our earlier study) because a sizeable share of guns used in crime are used within one to three years of purchase. Based on analyses of guns recovered by police in 17 cities, ATF (1997, p. 8) estimates that guns less than 3 years old (as measured by the date of first retail sale) comprise between 22% and 43% of guns seized from persons under age 18, between 30% and 54% of guns seized from persons ages 18 to 24, and between 25% and 46% of guns seized from persons over 24. In addition, guns that are one year old or less comprise the largest share of relatively new crime guns (i.e., crime guns less than three years old) (Pierce et al., 1998, p. 11). Similar data are not available for secondary market transactions, but such data would shorten the estimated time from acquisition to criminal use.

However, the expected timing of the market processes is uncertain. We can anticipate that AW and LCM prices will remain relatively stable for as long as the supply of grandfathered weapons is adequate to meet demand. If, in anticipation of the ban, gun manufacturers overestimated the demand for AWs and LCMs and produced too many of them, prices might even fall before eventually rising. Market responses can be complicated further by the continuing production of legal AW substitute models by some gun manufacturers. If potential AW buyers are content with an adequate supply of legal AW-type weapons having fewer military features, it will take longer for the grandfathered AW supply to constrict and for prices to rise. Similarly, predicting LCM price trends is complicated by the overhang of military surplus magazines that can fit civilian weapons (e.g., military M-16 rifle magazines that can be used with AR-15 type rifles) and by the market in reconditioned magazines. The "aftermarket" in gun accessories and magazine extenders that can be used to convert legal guns and magazines into banned ones introduces further complexity to the issue.

4.3. Prior Research on the Ban's Effects

To summarize the findings of our prior study, Congressional debate over the ban triggered pre-ban speculative price increases of upwards of 50% for AWs during 1994, as gun distributors, dealers, and collectors anticipated that the weapons would become valuable collectors' items. Analysis of national and local data on guns recovered by police showed reductions in criminal use of AWs during 1995 and 1996, suggesting that rising prices made the weapons less accessible to criminal users in the short-term aftermath of the ban.

However, the speculative increase in AW prices also prompted a pre-ban boost in AW production; in 1994, AW manufacturers produced more than twice their average volume for the 1989-1993 period. The oversupply of grandfathered AWs, the availability of the AW-type legal substitute models mentioned earlier, and the steady supply of other non-banned semiautomatics appeared to have saturated the legal market, causing advertised prices of AWs to fall to nearly pre-speculation levels by late 1995 or early 1996. This combination of excess supply and reduced prices implied that criminal use of AWs might rise again for some period around 1996, as the large stock of AWs would begin flowing from dealers' and speculators' gun cases to the secondary markets where ineligible purchasers may obtain guns more easily.

We were not able to gather much specific data about market trends for LCMs. However, available data did reveal speculative, pre-ban price increases for LCMs that were comparable to those for AWs (prices for some LCMs continued to climb into 1996), leading us to speculate – incorrectly, as this study will show (see Chapter 8) – that there was some reduction in LCM use after the ban.[22]

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[22] To our knowledge, there have been two other studies of changes in AW and LCM use during the post-ban period. One study reported a drop in police recoveries of AWs in Baltimore during the first half of 1995 (Weil and Knox, 1995), while the other found no decline in recoveries of AWs or LCMs in Milwaukee homicide cases as of 1996 (Hargarten et al., 2000). Updated analyses for both of these cities

Determining whether the reduction in AW use (and perhaps LCM use) following the ban had an impact on gun violence was more difficult. The gun murder rate dropped more in 1995 (the first year following the ban) than would have been expected based on preexisting trends, but the short post-ban follow-up period available for the analysis precluded a definitive assessment as to whether the reduction was statistically meaningful (see especially Koper and Roth, 2001a). The reduction was also larger than would be expected from the AW-LCM ban, suggesting that other factors were at work in accelerating the decline. Using a number of national and local data sources, we also examined trends in measures of victims per gun murder incident and wounds per gunshot victim, based on the hypothesis that these measures might be more sensitive to variations in the use of AWs and LCMs. These analyses revealed no ban effects, thus failing to show confirming evidence of the mechanism through which the ban was hypothesized to affect the gun murder rate. However, newly available data presented in subsequent chapters suggest these assessments may have been premature, because any benefits from the decline in AW use were likely offset by steady or rising use of other guns equipped with LCMs, a trend that was not apparent at the time of our earlier study.

We cautioned that the short-term patterns observed in the first study might not provide a reliable guide to longer-term trends and that additional follow-up was warranted. Two key issues to be addressed were whether there had been a rebound in AW use since the 1995-1996 period and, if so, whether that rebound had yet given way to a long-term reduction in AW use. Another key issue was to seek more definitive evidence on short and long-term trends in the availability and criminal use of LCMs. These issues are critical to assessing the effectiveness of the AW-LCM ban, but they also have broader implications for other important policy concerns, namely, the establishment of reasonable timeframes for sunset and evaluation provisions in legislation. In other words, how long is long enough in evaluating policy and setting policy expiration dates?

are presented in Chapters 6 and 8.

5. MARKET INDICATORS FOR ASSAULT WEAPONS: PRICES AND PRODUCTION

This chapter assesses the ban's impact on the availability of AWs in primary and secondary markets, as measured by trends in AW prices and post-ban production of legal AW substitute models. Understanding these trends is important because they influence the flow of grandfathered weapons to criminals and the availability of non-banned weapons that are close substitutes for banned ones. In the next chapter, we assess the impact of these trends on criminal use of AWs, as approximated by statistics on gun seizures by police. (Subsequent chapters present similar analyses for LCMs.)

Following our previous methods, we compare trends for AWs to trends for various non-banned firearms. The AW analyses generally focus on the most common AWs formerly produced in the U.S., including Intratec and SWD-type APs and AR-15-type ARs produced by Colt and others. In addition, we selected a small number of domestic pistol and rifle models made by Calico and Feather Industries that fail the features test provision of the AW legislation and that were relatively common among crime guns reported by law enforcement agencies to ATF prior to the ban (see Roth and Koper, 1997, Chapter 5). Together, this group of weapons represented over 80% of AWs used in crime and reported to ATF from 1993 through 1996, and the availability of these guns was not affected by legislation or regulations predating the AW-LCM ban.[23] We also examine substitution of legalized, post-ban versions of these weapons, including the Intratec AB-10 and Sport-22, FMJ's PM models (substitutes for the SWD group), Colt Sporters, Calico Liberty models, and others. We generally did not conduct comparative analyses of named foreign AWs (the Uzi, Galil, and AK weapons) because the 1989 federal import ban had already limited their availability, and their legal status was essentially unchanged by the 1994 ban.

The exact gun models and time periods covered vary across the analyses (based on data availability and the time at which data were collected). The details of each analysis are described in the following sections.

5.1. Price Trends for Assault Weapons and Other Firearms

To approximate trends in the prices at which AWs could be purchased throughout the 1990s, we collected annual price data for several APs, ARs, and non-banned comparison firearms from the *Blue Book of Gun Values* (Fjestad, 1990-1999). The *Blue Book* provides national average prices for an extensive list of new and used firearms based on information collected at gun shows and input provided by networks of dealers

[23] The Intratec group includes weapons made by AA Arms. The SWD group contains related models made by Military Armaments Corporation/Ingram and RPB Industries. The AR-15 group contains models made by Colt and copies made by Bushmaster, Olympic Arms, Eagle Arms, SGW Enterprises, Essential Arms, DPMS, and Sendra.

and collectors. The *Blue Book* is utilized widely in the gun industry, though prices in any given locality may differ notably from the averages appearing in the *Blue Book*.

To assess time trends in gun prices, we conducted hedonic price analyses (Berndt, 1990) in which the gun prices were regressed upon a series of year and model indicators. The coefficients for the year indicators show annual changes in the prices of the guns relative to 1994 (the year the ban went into effect), controlling for time-stable differences in the prices of various gun models. Since manufacturers' suggested retail prices (MSRP) were not available for banned AWs during post-ban years, we utilized prices for AWs in 100% condition for all years.[24] For non-banned firearms, we used MSRP.[25] For all models, we divided the gun prices by annual values of the gross domestic product price deflator provided in the December 2001 and 2000 issues of *Economic Indicators* and logged these adjusted prices.

Each model presented below is based on data pooled across a number of firearm models and years, so that observation P_{jt} represents the price of gun model j during year t. We weighted each observation, P_{jt}, based on cumulative estimates of the production of model j from 1985 or 1986 (depending on data availability) through year t using data provided by gun manufacturers to ATF and published by the Violence Policy Center (1999).[26, 27]

[24] Project staff also collected prices of weapons in 80% condition. However, the levels and annual changes of the 80% prices were very highly correlated (0.86 to 0.99) with those of the 100% condition prices. Therefore, we limited the analysis to the 100% prices.

[25] We utilized prices for the base model of each AW and comparison firearm (in contrast to model variations with special features or accessories).

[26] The regression models are based on equal numbers of observations for each gun model. Hence, unweighted regressions would give equal weight to each gun model. This does not seem appropriate, however, because some guns are produced in much larger numbers than are other guns. Weighting the regression models by production estimates should therefore give us a better sense of what one could "typically" expect to pay for a generic gun in each study category (e.g., a generic assault pistol).

[27] Several of the selected weapons began production in 1985 or later. In other cases, available production data extended back to only the mid-1980s. Published production figures for handguns are broken down by type (semiautomatic, revolver) and caliber and thus provide perfect or very good approximations of production for the handgun models examined in this study. Rifle production data, however, are not disaggregated by gun type, caliber, or model. For the ARs under study, the production counts should be reasonable approximations of AR production because most of the rifles made by the companies in question prior to the ban were ARs. The rifles used in the comparison (i.e., non-banned) rifle analysis are made by companies (Sturm Ruger, Remington, and Marlin) that produce numerous semiautomatic and non-semiautomatic rifle models. However, the overall rifle production counts for these companies should provide some indication of differences in the availability of the comparison rifles relative to one another. Because production data were available through only 1997 at the time this particular analysis was conducted (Violence Policy Center, 1999), we used cumulative production through 1997 to weight the 1998 and 1999 observations for the comparison handgun and comparison rifle models. This was not a consideration for AWs since their production ceased in 1994 (note that the AW production figures for 1994 may include some post-ban legal substitute models manufactured after September 13, 1994). Nonetheless, weighting had very little effect on the inferences from either of the comparison gun models.

5.1.1. Assault Pistol Prices

The analysis of AP prices focuses on the Intratec TEC-9/DC-9, TEC-22, SWD M-11/9, and Calico M950 models. Regression results are shown in Table 5-1, while Figure 5-1 graphically depicts the annual trend in prices for the period 1990 through 1999. None of the yearly coefficients in Table 5-1 is statistically significant, thus indicating that average annual AP prices did not change during the 1990s after adjusting for inflation. Although the model is based on a modest number of observations (n=40) that may limit its statistical power (i.e., its ability to detect real effects), the size of the yearly coefficients confirm that prices changed very little from year to year. The largest yearly coefficient is for 1990, and it indicates that AP prices were only 4% higher in 1990 than in 1994.[28]

This stands in contrast to our earlier finding (Roth and Koper, 1997, Chapter 4) that prices for SWD APs may have risen by as much as 47% around the time of the ban. However, the earlier analyses were based on semi-annual or quarterly analyses advertised by gun distributors and were intended to capture short-term fluctuations in price that assumed greater importance in the context of the first AW study, which could examine only short-term ban outcomes. *Blue Book* editions released close in time to the ban (e.g., 1995) also cautioned that prices for some AWs were volatile at that time. This study emphasizes longer-term price trends, which appear to have been more stable.[29]

[28] To interpret the coefficient of each indicator variable in terms of a percentage change in the dependent variable, we exponentiate the coefficient, subtract 1 from the exponentiated value, and multiply the difference by 100.

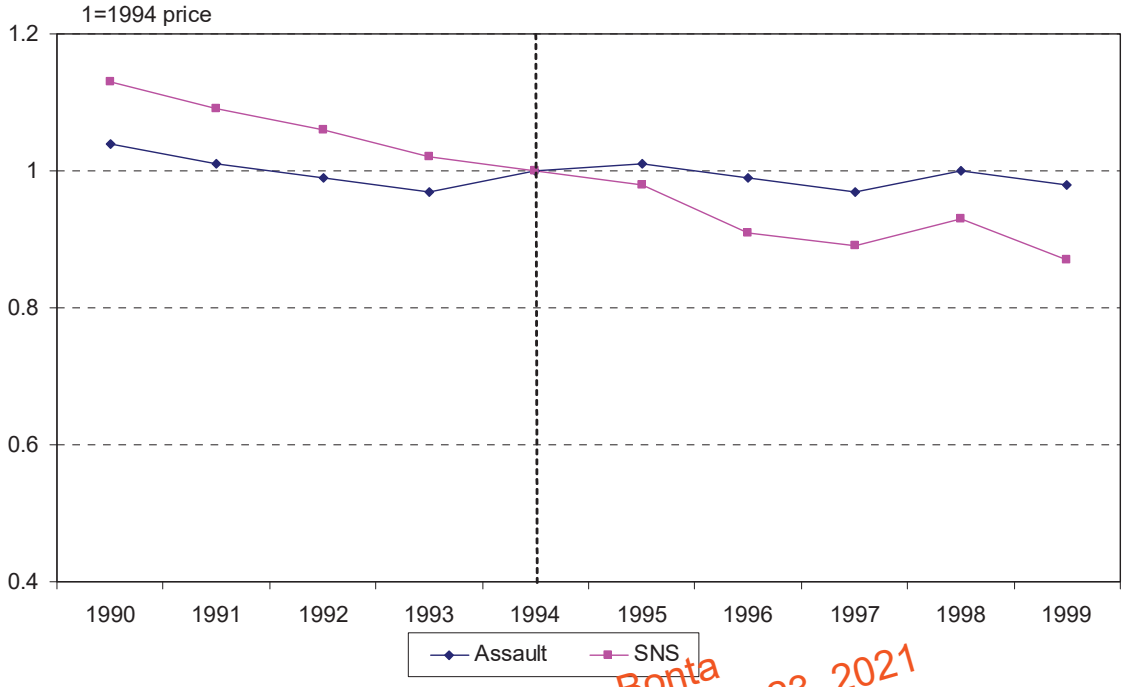
[29] Although the earlier analysis of AP prices focused on the greatest variations observed in semi-annual prices, the results also provide indications that longer-term trends were more stable. Prices in 1993, for example, averaged roughly 73% of the peak prices reached at the time the ban was implemented (i.e., late 1994), while prices in early 1994 and late 1995 averaged about 83% and 79% of the peak prices, respectively. Hence, price variation was much more modest after removing the peak periods around the time of the ban‘s implementation (i.e., late 1994 and early 1995). The wider range of APs used in the current study may also be responsible for some of the differences between the results of this analysis and the prior study.

Table 5-1. Regression of Assault Pistol and Comparison Handgun Prices on Annual Time Indicators, 1990-1999, Controlling for Gun Model

	Assault Pistols (n=40)		Comparison Handguns (n=38)	
	Estimate	**T Value**	**Estimate**	**T Value**
Constant	1.56	26.94***	-0.21	-6.81***
1990	0.04	1.07	0.12	2.07**
1991	0.01	0.30	0.09	1.79*
1992	-0.01	-0.32	0.05	1.30
1993	-0.03	-1.09	0.02	0.48
1995	0.01	0.22	-0.02	-0.48
1996	-0.01	-0.45	-0.09	-2.69***
1997	-0.03	-1.13	-0.11	-3.26***
1998	0.00	-0.10	-0.07	-1.99*
1999	-0.02	-0.58	-0.14	-4.02***
Tec-9	-0.67	-11.95***		
Tec-22	-0.89	-15.59***		
SWD	-0.64	-11.49***		
Davis P32			0.09	3.63***
Davis P380			0.20	8.20***
Lorcin L380			0.29	11.35***
F value	27.79		16.24	
(p value)	<.01		<.01	
Adj. R-square	0.89		0.83	

Time indicators are interpreted relative to 1994. Assault pistol model indicators are interpreted relative to Calico 9mm. Comparison handgun models are interpreted relative to Lorcin .25 caliber.
* Statistically significant at p<=.10.
** Statistically significant at p<=.05.
*** Statistically significant at p<=.01.

Figure 5-1. Annual Price Trends for Assault Pistols and SNS Handguns, 1990-1999



Assault pistol prices basd on TEC9, TEC22, SWD M11/9, and Calico M950. SNS prices based on Davis P32 and P380 and Lorcin L25 and L380.

5.1.2. Comparison Handgun Prices

For comparison, Table 5-1 and Figure 5-1 illustrate price trends for a number of non-banned, cheaply priced, and readily concealable semiautomatic handgun models: the Davis P32 and P380 and the Lorcin L25 and L380. Such guns are often referred to as Saturday night specials (SNS). By a number of accounts, SNS-type guns, and Davis and Lorcin models in particular, are among the guns most frequently used in crime (ATF, 1995; 1997; Kennedy et al., 1996; Wintemute, 1994). Although the differences between APs and SNS handguns (particularly the fact that most SNS handguns do not have LCMs) suggest they are likely to be used by gun consumers with different levels of firearms experience and sophistication, the SNS guns are arguably a good comparison group for APs because both groups of guns are particularly sensitive to criminal demand. Like AP buyers, SNS buyers are more likely than other gun buyers to have criminal histories and to be charged with new offenses, particularly violent or firearm offenses, subsequent to their purchases (Wintemute et al., 1998b).

Prices of SNS handguns dropped notably throughout the 1990s. Prices for SNS handguns were 13% higher in 1990 than in 1994. Prices then dropped another 13% from 1994 to 1999. This suggests that although AP prices remained generally stable throughout the 1990s, they increased relative to prices of other guns commonly used in crime. We say more about this below.

5.1.3. Assault Rifle Prices

To assess trends in prices of ARs, we examined prices for several Colt and Olympic rifle models in the AR-15 class, as well as Calico models M900 and M951 and Feather models AT9 and AT22.[30] Because rifle production data are not disaggregated by weapon type (semiautomatic, bolt action, etc.), caliber, or model, the regressions could only be weighted using overall rifle production counts for each company. For this reason, we calculated the average price of the ARs made by each company for each year and modeled the trends in these average prices over time, weighting by each company's total rifle production.[31]

Results shown in Table 5-2 and Figure 5-2 demonstrate that AR prices rose significantly during 1994 and 1995 before falling back to pre-ban levels in 1996 and remaining there through 1999. Prices rose 16% from 1993 to 1994 and then increased another 13% in 1995 (representing an increase of nearly one third over the 1993 level). Yet by 1996, prices had fallen to levels virtually identical to those before 1994. These patterns are consistent with those we found earlier for the 1992-1996 period (Roth and Koper, 1997, Chapter 4), though the annual price fluctuations shown here were not as dramatic as the quarterly changes shown in the earlier study.

Note, however, that these patterns were not uniform across all of the AR categories. The results of the model were driven largely by the patterns for Colt rifles, which are much more numerous than the other brands. Olympic rifles increased in price throughout the time period, while prices for most Calico and Feather rifles tended to fall throughout the 1990s without necessarily exhibiting spikes around the time of the ban.

[30] Specifically, we tracked prices for the Match Target Lightweight (R6530), Target Government Model (R6551), Competition H-Bar (R6700), and Match Target H-Bar (R6601) models by Colt and the Ultramatch, Service Match, Multimatch M1-1, AR15, and CAR15 models by Olympic Arms. Each of these models has a modified, post-ban version. We utilized prices for the pre-ban configurations during post-ban years.

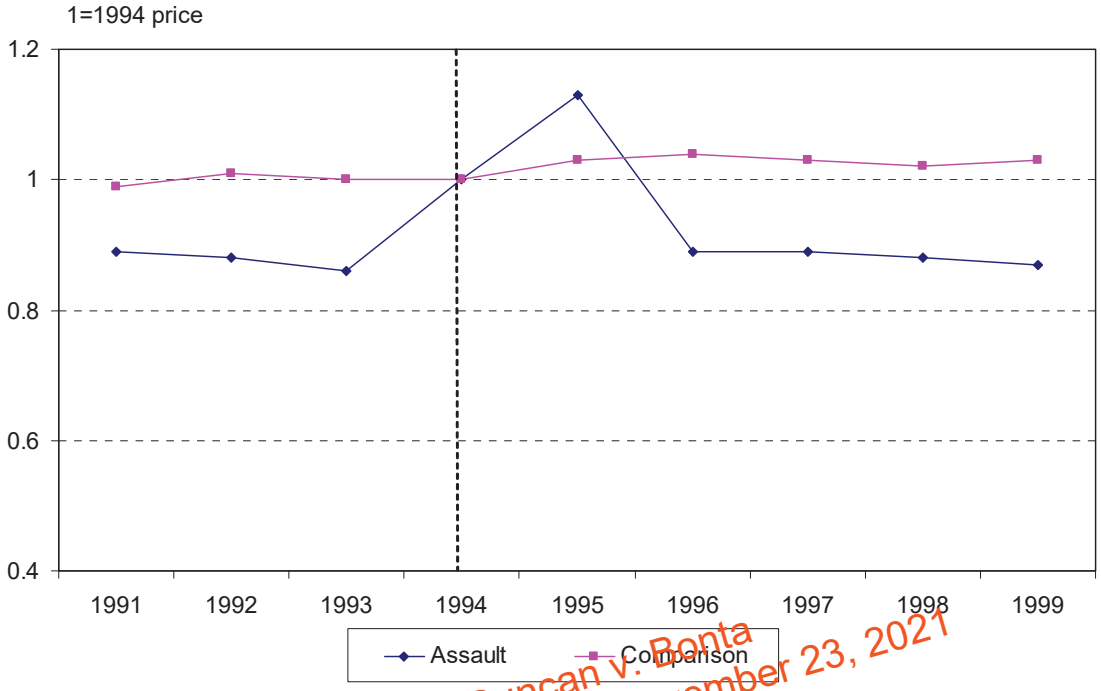
[31] Prices for the different models made by a given manufacturer tended to follow comparable trends, thus strengthening the argument for averaging prices.

Table 5-2. Regression of Assault Rifle and Comparison Semiautomatic Rifle Prices on Annual Time Indicators, 1991-1999, Controlling for Gun Make

	Assault Rifles (n=36)		Comparison Rifles (n=27)	
	Estimate	**T value**	**Estimate**	**T value**
Constant	1.31	21.15***	1.40	76.75***
1991	-0.12	-1.98*	-0.01	-0.21
1992	-0.13	-2.26**	0.01	0.30
1993	-0.15	-2.78**	0	-0.13
1995	0.12	2.47**	0.03	1.08
1996	-0.11	-2.27**	0.04	1.69
1997	-0.11	-2.23**	0.03	1.46
1998	-0.12	-2.47**	0.02	0.91
1999	-0.14	-2.71**	0.03	1.21
Colt (AR-15 type)	1.07	19.93***		
Olympic (AR-15 type)	1.14	16.08***		
Calico	0.43	5.53***		
Ruger			0.26	20.07***
Remington			0.29	21.69***
F statistic	50.52			63.62
(p value)	<.01			<.01
Adj. R-square	0.94			0.96

Time indicators interpreted relative to 1994. Assault rifle makes interpreted relative to Feather.
Comparison rifle makes interpreted relative to Marlin.
* Statistically significant at p<=.10.
** Statistically significant at p<=.05.
*** Statistically significant at p<=.01.

Figure 5-2. Annual Price Trends for Assault Rifles and Comparison Semiautomatic Rifles, 1991-1999



Assault rifle prices based on Colt and Olympic AR-type, Calico, and Feather models. Comparison rifle prices based on selected Remington, Marlin, and Sturm Ruger models.

5.1.4. Comparison Semiautomatic Rifles.

The analysis of comparison rifle prices includes the Remington 7400, Marlin Model 9, and Sturm Ruger Mini-14 and Mini-30 models (the Ruger model prices were averaged for each year). The AW legislation exempted each of these semiautomatic rifles by name, though the exemption does not apply to Mini-14 models with folding stocks (a feature included in the ban's features test). The Ruger models are of particular interest since they are among only four exempted guns that can accept LCMs made for military rifles (U.S. Department of the Treasury, 1998, p. 23), though Ruger produced LCMs only for the Mini-14 model and substituted a 5-round magazine for this gun in 1989 (Fjestad, 2002, pp. 1361-1362). The Marlin model was also manufactured with an LCM prior to 1990 (Fjestad, 2002, p. 917). The Remington model is manufactured with a detachable 4-round magazine.

Prices for these guns remained steady throughout the decade (see Table 5-2 and Figure 5-2). The largest change was a 4% increase (non-significant) in prices in 1996 relative to prices in 1994. Therefore, the rifle price spikes in 1994 and 1995 were specific to assault rifles. However, the steady annual price trends may mask short-term fluctuations that we found

previously (Roth and Koper, 1997, Chapter 4) for some non-banned semiautomatic rifles (including the Ruger Mini-14) during 1994 and early 1995.[32]

5.2. Production Trends for Assault Weapons and Other Firearms

To more fully assess the ban's effects on gun markets, examination of pre and post-ban trends in production of AWs and legal AW substitutes is a useful complement to studying price trends. Our earlier work revealed a spike in AW production during 1994 as the ban was being debated. Post-ban production of legal AW substitutes should reveal additional information about the reaction of gun markets to the ban. If production of these models has fallen off dramatically, it may suggest that the market for AWs has been temporarily saturated and/or that consumers of AWs favor the original AW models that have more military-style features. Stable or rising production levels, on the other hand, may indicate substantial consumer demand for AW substitutes, which would suggest that consumers consider the legal substitute models to be as desirable as the banned models.

5.2.1. Production of Assault Pistols and Other Handguns

Figure 5-3 presents production trends for a number of domestic AP manufacturers from 1985 through 2001 (the most recent year available for data on individual manufacturers).[33] After rising in the early 1990s and surging notably to a peak in 1994, production by these companies dropped off dramatically, falling 80% from 1993-1994 to 1996-1997 and falling another 35% by 1999-2000 (Table 5-3).[34] Makers of Intratec and SWD-type APs continued manufacturing modified versions of their APs for at least a few years following the ban, but at much lower volumes than that at which they produced APs just prior to the ban. Companies like AA Arms and Calico produced very few or no AP-type pistols from 1995 onward, and Intratec – producers of the APs most frequently used in crime – went out of business after 1999.

However, the pattern of rising and then falling production was not entirely unique to APs. Table 5-3 shows that production of all handguns and production of SNS-type pistols both declined sharply in the mid to late 1990s following a peak in 1993. Nonetheless, the trends –

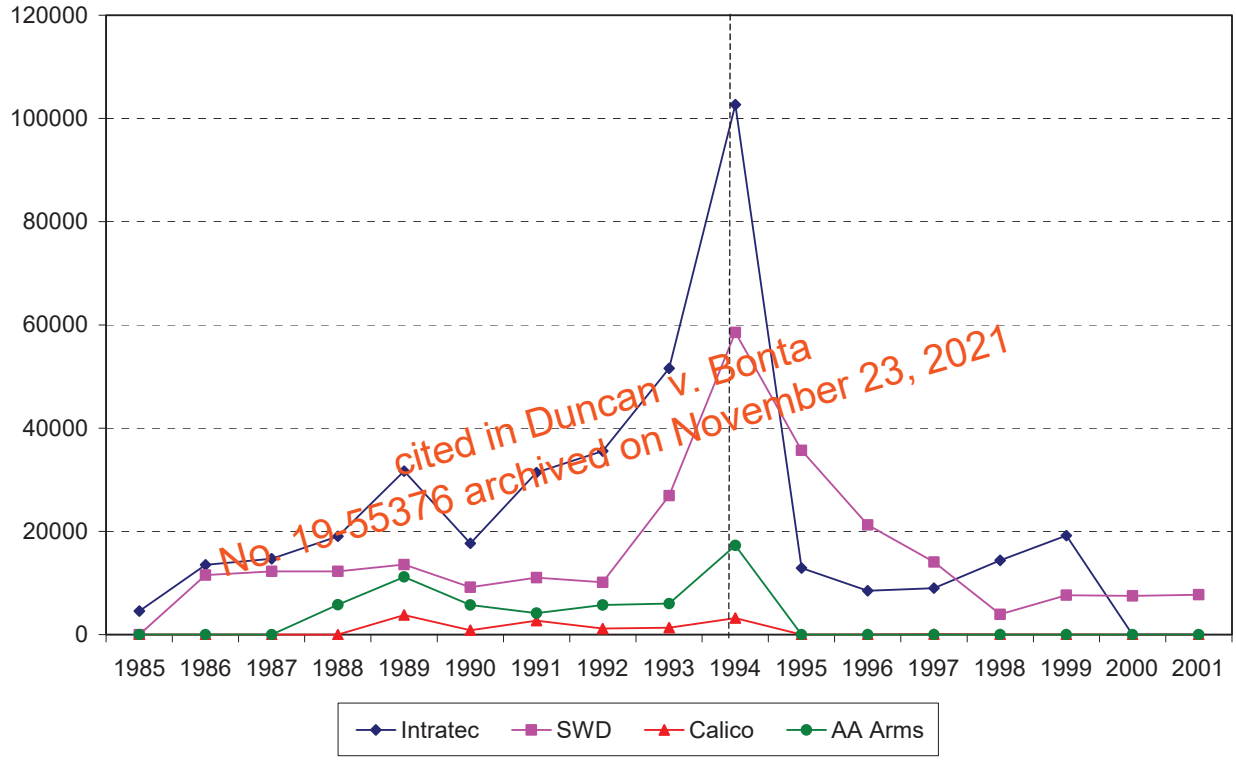
[32] We attributed those short-term fluctuations to pre-ban uncertainty regarding which semiautomatic rifles would be prohibited by the ban. Also note that the prior findings were based on a different set of comparison semiautomatic rifles that included a number of foreign rifles. We concentrated on domestically produced rifles for this updated analysis in order to make more explicit links between rifle price and production trends (data for the latter are available only for domestic firearms).

[33] Production figures for individual manufacturers through 2000 have been compiled by the Violence Policy Center (2002). Year 2001 data are available from ATF via the Internet (see www.atf.treas.gov). National gun production totals through 1998 are also available from ATF (2000, p. A-3).

[34] The assault pistol production figures used here and in the price analysis include 9mm and .22 caliber pistols made by Intratec, 9mm pistols manufactured by AA Arms, all non-.22 caliber pistols manufactured by S.W. Daniels, Wayne Daniels, and Military Armaments Corporation (which together constitute the SWD group), and .22 and 9mm pistols manufactured by Calico. Intratec produces a few non-AW models in .22 and 9mm calibers, so the Intratec figures will overstate production of assault pistols and their legal substitutes to some degree. The comparison, SNS production figures are based on all handguns produced by Lorcin Engineering and Davis Industries.

both peak and decline – were more dramatic for APs than for other handguns. Production of APs rose 69% from 1990-1991 to 1993-1994, while SNS production and overall handgun production each increased 47%. From 1993-1994 to 1996-1997, production of AP-type handguns, SNS models, and all handguns declined 80%, 66%, and 47%, respectively. Further, production of AP-type handguns continued to decline at a faster rate than that of other handguns through the end of the decade.[35]

Figure 5-3. Assault Pistol Production, 1985-2001



[35] Lorcin, a prominent SNS brand that we examined for the price and production analyses, went out of business after 1998. Unlike the situation in the AP market (where, to our knowledge, former AP makers have not been replaced on any large scale), the SNS market appears to have compensated somewhat to offset the loss of Lorcin. The SNS change from 1996-1997 to 1999-2000 is based on examination of a larger group of SNS-type makers, including Lorcin, Davis, Bryco, Phoenix Arms, and Hi-Point. Production among this group declined by 22% from 1996-1997 to 1999-2000, a decline greater than that for total handgun production but less than that for AP-type production.

Table 5-3. Production Trends for Assault Weapons and Other Firearms, 1990-2000*

Firearm Category	% Change 1990/91 to 1993/94	% Change 1993/94 to 1996/97	% Change 1996/97 to 1999/2000
Total Handguns	47%	-47%	-10%
Assault Pistols (or Post-Ban Models)	69%	-80%	-35%
SNS Handguns	47%	-66%	-22%
Total Rifles	22%	8%	18%
Assault Rifles (or Post-Ban Models)	81%	-51%	156%
Comparison Rifles	15%	13%	-16%

* Total handgun and rifle figures include all production by U.S. manufacturers. Assault pistols include Intratec group, SWD group, and Calico models. SNS figures are based on Lorcin Engineering and Davis Industries for changes up through 1996-1997. Because Lorcin went out of business after 1998, the SNS change from 1996-1997 to 1999-2000 is based on a larger group of SNS makers including Lorcin, Davis, Bryco, Phoenix Arms, and Hi-Point. Assault rifles include AR-15 type models by Colt and others. Comparison rifles include Sturm Ruger, Remington, and Marlin.

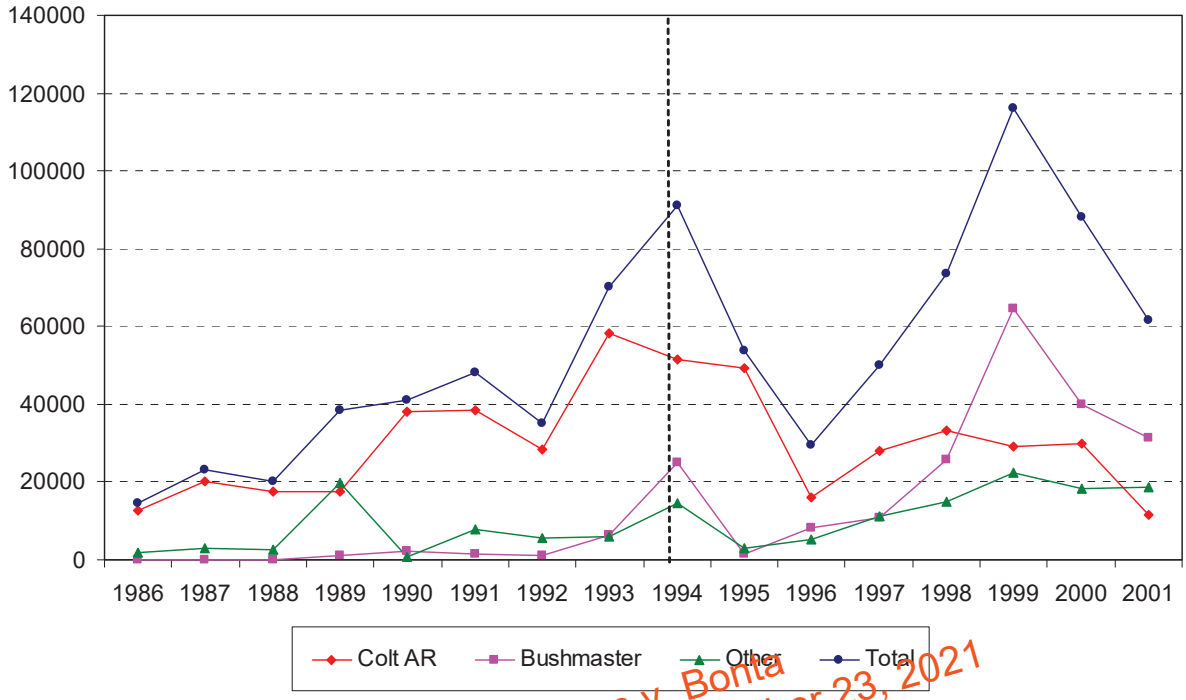
5.2.2. Production of Assault Rifles and Other Rifles

As shown in Figure 5-4, production of AR-15 type rifles surged during the early 1990s, reaching a peak in 1994.[36] AR production during the early 1990s rose almost 4 times faster than total rifle production and over 5 times faster than production of the comparison rifles examined in the price analysis (Table 5-3). Yet, by 1996 and 1997, production of legalized AR-type rifles had fallen by 51%, as production of other rifles continued increasing. AR production trends reversed again during the late 1990s, however, rising over 150%.[37] Total rifle production increased much more modestly during this time (18%), while production of the comparison rifles declined.

[36] Note again that the AR and legalized AR production figures are approximations based on all rifles produced by the companies in question (rifle production data are not available by type, caliber, or model), but it appears that most rifles made by these companies during the study period were AR-type rifles. Also, the figures for the comparison rifle companies (Ruger, Marlin, and Remington) are based on all rifles produced by these companies (the price analysis focused on selected semiautomatic models).

[37] There was also a notable shift in market shares among AR makers, as Bushmaster overtook Colt as the leading producer of AR-15 type rifles (Figure 5-4).

Figure 5-4. Assault Rifle Production, 1986-2001 (AR-15 Type)



Other: Olympic, Eagle/Armalite, DPMS, Essential Arms, Sendra

5.3. Summary and Interpretations

Below, we offer some interpretations of the patterns found in the price and production analyses, keeping in mind that these analyses were largely descriptive, so causal inferences must be made cautiously. As documented in our earlier study, Congressional debate over the AW-LCM ban triggered speculative price increases for AWs in the months leading up to the ban's enactment. This study's examination of longer-term, annual price trends suggests that this speculative effect was very brief (and perhaps quite variable across jurisdictions) for APs but persisted through 1995 for ARs. This implies that speculators and sophisticated gun collectors (who we suspect played a large role in driving price trends) have more interest in ARs, which tend to be higher in quality and price than APs.

Responding to the speculative price growth, AW manufacturers boosted their production of AWs in 1994. Although total handgun and rifle production were increasing during the early 1990s, the rise in AW production was steeper, and there was a production peak unique to AWs in 1994 (production of other handguns peaked in 1993). It seems that this boost in the supply of grandfathered AWs was sufficient to satisfy speculative demand, thereby restoring national average AP prices to pre-ban levels within a year of the ban and doing the same for AR prices by 1996. AW prices remained stable through the late 1990s, and production of legalized AW-type weapons dropped off

substantially, at least through 1998. This suggests that the supply of grandfathered AWs was sufficient to meet demand through the late 1990s.

However, prices of APs rose relative to other handguns commonly used in crime during the 1990s. Handgun prices and production declined in general during the late 1990s, implying a decrease in demand for APs and other handguns that probably stemmed from the nation's declining crime rates.[38] But the AW ban's restriction of the AP supply, combined with the interest of speculators and collectors in these guns, may have prevented AP prices from falling as did prices for other handguns. The market patterns also suggest that consumers of APs are not as easily satisfied by legalized APs with fewer military-style features; despite the increasing value of APs (in relative terms), post-ban production of legalized APs declined faster than did production of other handguns, and some AP makers went out of business.

Prices of ARs, on the other hand, remained steady during the late 1990s (after the speculative price bubble of 1994-1995) both in absolute terms and relative to other rifles. The failure of AR prices to rise in at least relative terms, as occurred for APs, and the temporary drop in production of AR-type rifles after the ban may signify that the AR market was saturated relative to the AP market for a least a number of years following the ban. However, demand for AR-type rifles later rebounded, as evidenced by the resurgence in production of legalized, AR-type rifles in the late 1990s. In fact, more of these guns were produced in 1999 than in 1994. Unlike AP users, therefore, rifle users appear to be readily substituting the legalized AR-type rifles for the banned ARs, which may be another factor that has kept prices of the later rifles from rising. All of this suggests that rifle owners, who have a lower prevalence of criminal users than do handgun owners, can more easily substitute rifles with fewer or no military features for the hunting and other sporting purposes that predominate among rifle consumers.

Another relevant factor may have been a surge in the supply of foreign semiautomatic rifles that can accept LCMs for military weapons (the LCMM rifles discussed in Chapter 2) during the early 1990s. Examples of LCMM rifles include legalized versions of banned AK-47, FN-FAL, and Uzi rifles. Importation of LCMM rifles rose from 19,147 in 1991 to 191, 341 in 1993, a nine-fold increase (Department of the Treasury, 1998, p. 34). Due to an embargo on the importation of firearms from China (where many legalized AK-type rifles are produced), imports of LCMM rifles dropped

[38] It seems likely that the rise and fall of handgun production was linked to the rising crime rates of the late 1980s and early 1990s and the falling crime rates of the mid and late 1990s. Self-defense and fear of crime are important motivations for handgun ownership among the general population (e.g., Cook and Ludwig, 1996; McDowall and Loftin, 1983), and the concealability and price of handguns make them the firearms of choice for criminal offenders. It is likely that the peak in 1993 was also linked to the Congressional debate and passage of the Brady Act, which established a background check system for gun purchases from retail dealers. It is widely recognized in the gun industry that the consideration of new gun control legislation tends to increase gun sales.

The decline in production was more pronounced for SNS handguns, whose sales are likely to be particularly sensitive to crime trends. Criminal offenders make disproportionate use of these guns. We can also speculate that they are prominent among guns purchased by low-income citizens desiring guns for protection. In contrast, the poor quality and reliability of these guns make them less popular among more knowledgeable and affluent gun buyers.

back down to 21,261 in 1994. Importation of all foreign LCMM rifles was ended by federal executive order in 1998.

ATF has reported that criminal use of LCMM rifles increased more quickly during the early 1990s than did that of other military-style rifles (U.S. Department of the Treasury, 1998, p. 33; also see Chapter 6). Accordingly, it is possible that the availability of LCMM rifles also helped to depress the prices of domestic ARs and discourage the production of legalized ARs during the 1990s, particularly if criminal users of rifles place a premium on the ability to accept LCMs. It is noteworthy, moreover, that the rebound in domestic production of legalized ARs came on the heels of the 1998 ban on LCMM rifles, perhaps suggesting the LCMM ban increased demand for domestic rifles accepting LCMs.

In sum, this examination of the AW ban's impact on gun prices and production suggests that there has likely been a sustained reduction in criminal use of APs since the ban but not necessarily ARs. Since most AWs used in crime are APs, this should result in an overall decline in AW use. In the following chapter, we examine the accuracy of this prediction.

6. CRIMINAL USE OF ASSAULT WEAPONS AFTER THE BAN

6.1. Measuring Criminal Use of Assault Weapons: A Methodological Note

In this chapter, we examine trends in the use of AWs using a number of national and local data sources on guns recovered by law enforcement agencies (we focus on the domestic AW models discussed at the beginning of the previous chapter). Such data provide the best available indicator of changes over time in the types (and especially the specific makes and models) of guns used in violent crime and possessed and/or carried by criminal and otherwise deviant or high-risk persons. The majority of firearms recovered by police are tied to weapon possession and carrying offenses, while the remainder are linked primarily to violent crimes and narcotics offenses (e.g., see ATF, 1976; 1977; 1997; Brill, 1977). In general, up to a quarter of guns confiscated by police are associated with violent offenses or shots fired incidents (calculated from ATF, 1977, pp. 96-98; 1997; Brill, 1977, pp. 24,71; Shaw, 1994, pp. 63, 65; also see data presented later in this chapter). Other confiscated guns may be found by officers, turned in voluntarily by citizens, or seized by officers for temporary safekeeping in situations that have the potential for violence (e.g., domestic disputes).

Because not all recovered guns are linked to violent crime investigations, we present analyses based on all gun recoveries and gun recoveries linked to violent crimes where appropriate (some of the data sources are based exclusively, or nearly so, on guns linked to violent crimes). However, the fact that a seized gun is not clearly linked to a violent crime does not rule out the possibility that it had been or would have been used in a violent crime. Many offenders carry firearms on a regular basis for protection and to be prepared for criminal opportunities (Sheley and Wright, 1993a; Wright and Rossi, 1986). In addition, many confiscated guns are taken from persons involved in drugs, a group involved disproportionately in violence and illegal gun trafficking (National Institute of Justice, 1995; Sheley and Wright, 1993a). In some instances, criminal users, including those fleeing crime scenes, may have even possessed discarded guns found by patrol officers. For all these reasons, guns recovered by police should serve as a good approximation of the types of guns used in violent crime, even though many are not clearly linked to such crimes.

Two additional caveats should be noted with respect to tracking the use of AWs. First, we can only identify AWs based on banned makes and models. The databases do not contain information about the specific features of firearms, thus precluding any assessment of non-banned gun models that were altered after purchase in ways making them illegal. In this respect, our numbers may understate the use of AWs, but we know of no data source with which to evaluate the commonality of such alterations. Second, one cannot always distinguish pre-ban versions of AWs from post-ban, legalized versions of the same weapons based on weapon make and model information (this occurs when the post-ban version of an AW has the same name as the pre-ban version), a factor which may have caused us to overstate the use of AWs after the ban. This was more of a problem for our assessment of ARs, as will be discussed below.

Finally, we generally emphasize trends in the percentage of crime guns that are AWs in order to control for overall trends in gun violence and gun recoveries. Because gun violence was declining throughout the 1990s, we expected the number of AW recoveries to drop independently of the ban's impact.

6.2. National Analysis of Guns Reported By Police to the Federal Bureau of Alcohol, Tobacco, and Firearms

6.2.1. An Introduction to Gun Tracing Data

In this section, we examine national trends in AW use based on firearm trace requests submitted to ATF by federal, state, and local law enforcement personnel throughout the nation. A gun trace is an investigation that typically tracks a gun from its manufacture to its first point of sale by a licensed dealer. Upon request, ATF traces guns seized by law enforcement as a service to federal, state, and local agencies. In order to initiate a trace on a firearm, the requesting law enforcement agency provides information about the firearm, such as make, model, and serial number.

Although ATF tracing data provide the only available national sample of the types of guns used in crime and otherwise possessed or carried by criminal and high-risk groups, they do have limitations for research purposes. Gun tracing is voluntary, and police in most jurisdictions do not submit trace requests for all, or in some cases any, guns they seize. Crime and tracing data for 1994, for example, suggest that law enforcement agencies requested traces for 27% of gun homicides but only 1% of gun robberies and gun assaults known to police during that year (calculated from ATF, 1995 and Federal Bureau of Investigation, 1995, pp. 13, 18, 26, 29, 31, 32).

The processes by which state and local law enforcement agencies decide to submit guns for tracing are largely unknown, and there are undoubtedly important sources of variation between agencies in different states and localities. For example, agencies may be less likely to submit trace requests in states that maintain their own registers of gun dealers' sales. Knowledge of ATF's tracing capabilities and procedures,[39] as well as participation in federal/state/local law enforcement task forces, are some of the other factors that may affect an agency's tracing practices. Further, these factors are likely to vary over time, a point that is reinforced below.

Therefore, firearms submitted to ATF for tracing may not be representative of the

[39] To illustrate, ATF cannot (or does not) trace military surplus weapons, imported guns without the importer name (generally, pre-1968 guns), stolen guns, or guns without a legible serial number (Zawitz 1995). Tracing guns manufactured before 1968 is also difficult because licensed dealers were not required to keep records of their transactions prior to that time. Throughout much of the 1990s, ATF did not generally trace guns older than 5-10 years without special investigative reasons (Kennedy et al., 1996, p. 171). Our data are based on trace requests rather than successful traces, but knowledge of the preceding operational guidelines might have influenced which guns law enforcement agencies chose to trace in some instances.

types of firearms typically seized by police. In general, not much is known about the nature of potential bias in tracing data. In prior studies, however, AWs tended to be more common in tracing data than in more representative samples of guns confiscated by police (Kleck, 1997, pp. 112, 141). This suggests that police have been more likely historically to initiate traces for seized AWs than for other seized guns. Although comparisons across studies are complicated by varying definitions of AWs used in different analyses, studies of guns confiscated by police or used in particular types of crimes generally suggest that AWs accounted for up to 6% of crime guns and about 2% on average prior to the federal AW ban (see Chapter 3 and Kleck, 1997, p. 141), whereas studies of pre-ban tracing data indicated that 8% of traced guns, and sometimes as many as 11%, were AWs (Cox Newspapers, 1989; Lenett, 1995; Zawitz, 1995).

Changes over time in the tracing practices of law enforcement agencies present additional complexities in analyzing tracing data. Due to improvements in the tracing process, ATF promotional efforts, and special initiatives like the Youth Crime Gun Interdiction Initiative (see ATF, 1997; 1999 and more recent reports available via the Internet at www.atf.treas.gov),[40] the utilization of tracing grew substantially throughout the 1990s in jurisdictions that chose to participate (also see ATF, 2000; Roth and Koper, 1997). To illustrate, trace requests to ATF rose from roughly 42,300 in 1991 to 229,500 in 2002 (see Table 6-1 in the next section), an increase of 443%. This growth reflects changes in tracing practices (i.e., changes in the number of agencies submitting trace requests and/or changes in the percentage of recovered guns for which participating agencies requested traces) rather than changes in gun crime; gun homicides, for example, were falling throughout the 1990s (see Table 6-1 in the next section) and were a third lower in 2002 than in 1991.

Therefore, an increase in trace requests for AWs does not necessarily signal a real increase in the use of AWs. Further, examining trends in the percentage of trace requests associated with AWs is also problematic. Because law enforcement agencies were more likely to request traces for AWs than for other guns in years past, we can expect the growth rate in tracing for non-AWs to exceed the growth rate in traces for AWs as gun tracing becomes more comprehensive. Consequently, AWs are likely to decline over time as a share of trace requests due simply to reporting effects, except perhaps during periods when AWs figure prominently in public discourse on crime.[41]

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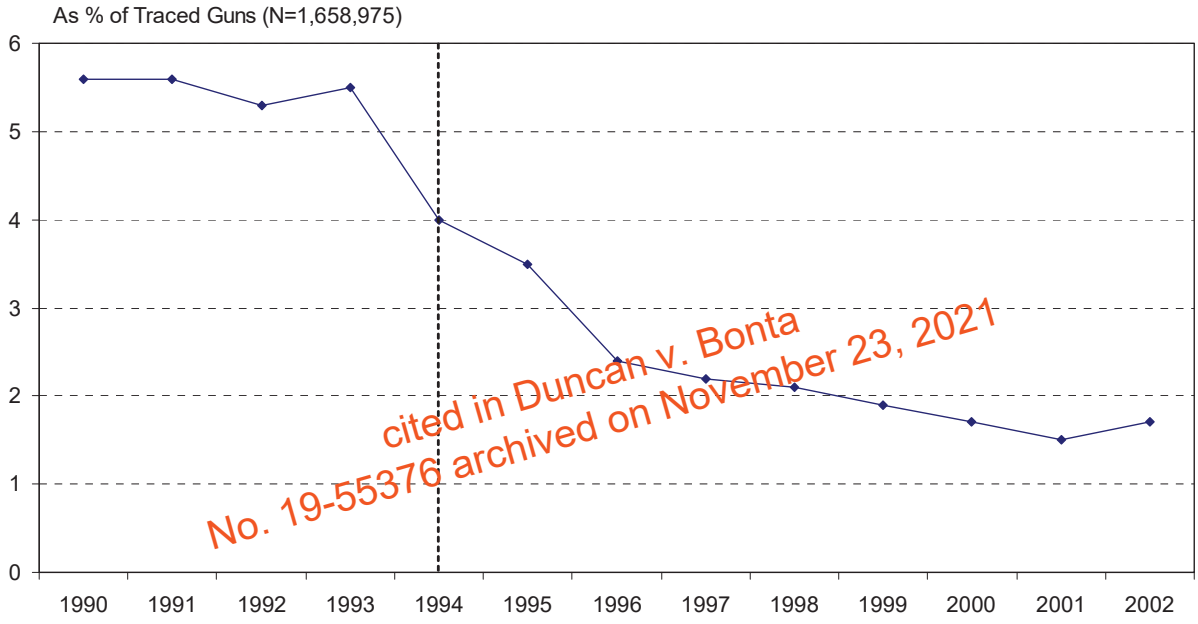
[40] As part of this initiative, police in a few dozen large cities are submitting trace requests to ATF for all guns that they confiscate. The initiative began with 17 cities in 1996 and has since spread to 55 major urban jurisdictions.

[41] To illustrate, assume that a hypothetical police agency recovers 100 guns a year, 2 of which are AWs, and that the agency has a selective tracing policy that results in the submission of trace requests for 20 of the guns, including 1 of the recovered AWs. Under this scenario, the department would be almost three times as likely to request traces for AWs as for other guns. If the department adopted a policy to request traces on all guns (and again recovered 2 AWs and 98 other guns), AW traces would double and traces of other guns would increase by more than 400%. Moreover, AWs would decline from 5% of traced guns to 2% of traced guns due simply to the change in tracing policy.

6.2.2. Traces of Assault Weapons, 1990-2002

Figure 6-1 illustrates the share of all traces that were for AWs from 1990 through 2002. A more detailed assessment of annual changes in traces for AWs and other guns is presented in Table 6-1. Changes in gun murders are also shown in Table 6-1 to emphasize the differences in trends for tracing and gun crime. Below, we summarize key points from the analysis. Due to the instrumentation problems inherent in tracing data, statistical tests are not presented.[42]

Figure 6-1. Police Recoveries of Assault Weapons Reported to ATF (National), 1990-2002



Includes Intratec group, SWD group, AR-15 group, and selected Calico and Feather models.

[42] Nearly 30% of the tracing records lack specific gun model designations (the crucial elements for conducting a trace are the gun make and serial number). For the makes and types of guns likely to be AWs, however, the missing model rate was slightly under 10%. Further, we were able to identity some of the latter weapons as AWs with reasonable confidence based on the makes, types, and calibers alone. Nevertheless, we conducted a supplemental analysis using only those records for which the gun model was identified. The results of that analysis were substantively very similar to those presented below.

Table 6-1. Annual Percentage Changes in Gun Murders and Police Requests to ATF for Traces of Assault Weapons and Other Firearms, 1991-2002 (Number of Traces in Parentheses)

Year	Gun Murders (1)	All Traces (2)	AW Traces* (3)	AP Traces (4)	AR Traces (5)	AW and AW Substitute Traces (6)	Violent Crime Traces (7)	AW Violent Crime Traces (8)	LCMM Rifle Traces** (9)
1991	9%	14% (42281)	14% (2378)	24% (1775)	-6% (603)	14% (2378)	19% (6394)	20% (344)	--
1992	-1%	6% (44992)	1% (2398)	4% (1838)	-7% (560)	1% (2398)	3% (6558)	7% (367)	--
1993	5%	20% (54189)	25% (2994)	20% (2199)	42% (795)	25% (2994)	26% (8248)	41% (516)	252% (183)
1994	-4%	53% (82791)	11% (3337)	23% (2706)	-21% (631)	11% (3337)	22% (10083)	-18% (424)	223% (592)
1995	-10%	-6% (77503)	-19% (2730)	-24% (2051)	8% (679)	-18% (2747)	23% (12439)	-15% (362)	-10% (530)
1996	-9%	66% (128653)	12% (3059)	13% (2309)	10% (750)	17% (3214)	67% (20816)	27% (459)	40% (743)
1997	-7%	42% (183225)	31% (4019)	31% (3017)	34% (1002)	36% (4362)	11% (23147)	13% (519)	24% (925)
1998	-11%	5% (192115)	0% (4014)	-9% (2751)	26% (1263)	7% (4681)	3% (23844)	-22% (404)	33% (1227)
1999	-8%	-2% (188296)	-11% (3581)	-12% (2414)	-8% (1167)	-6% (4406)	3% (24663)	0% (404)	-18% (1003)
2000	1%	-3% (182961)	-11% (3196)	-16% (2027)	0% (1169)	-6% (4143)	-13% (21465)	-25% (305)	-14% (859)
2001	-1%	18% (215282)	1% (3238)	5% (2138)	-6% (1100)	3% (4273)	20% (25822)	6% (322)	-3% (833)
2002	6%	7% (229525)	19% (3839)	4% (2214)	48% (1625)	12% (4765)	20% (30985)	65% (531)	4% (865)

* Based on Intratec group, SWD group, AR-15 group, and Calico and Feather models.
** Foreign semiautomatic rifles accepting large capacity military magazines (banned by executive order in 1998). (Data are not shown for 1991 and 1992 because very few of these guns were traced in those years.)

6.2.2.1. Assault Weapons as a Percentage of Crime Gun Traces

As shown in Figure 6-1, AWs declined from 5.4% of crime gun traces in 1992-1993 to 1.6% in 2001-2002, a decline of 70%. Although this downward trend could be attributable in large part to changes in tracing practices, it is noteworthy that it did not begin until 1994 (the year of the ban); during the pre-ban years, 1990 to 1993, AWs accounted for a steady share of traces despite a 46% increase in total tracing volume. It is also remarkable that about 3,200 AWs were traced in both 2000 and 2001, which is virtually identical to the average number traced during 1993 and 1994 (3,166) even though total traces increased more than 190% during the same period (Table 6-1, columns 2 and 3).[43]

6.2.2.2. Annual Changes in Traces for Assault Weapons and Other Guns

Throughout most of the post-ban period (particularly 1995 to 2001), AW traces either increased less or declined more than total traces (Table 6-1, columns 2 and 3), a pattern that is also consistent with a decline in the use of AWs relative to other guns, though it too may be distorted by changes in tracing practices. This pattern was largely consistent whether analyzing all traces or only traces associated with violent crimes (columns 7 and 8).[44]

The years when total traces declined or were relatively flat are arguably the most informative in the series because they appear to have been less affected by changes in tracing practices. For example, there was a 6% decline in total trace requests from 1994 to 1995 (the years featured in our earlier study) that coincided with a 10% drop in gun murders (Table 6-1, column 1). Therefore, it seems tracing practices were relatively stable (or, conversely, reporting effects were relatively small) from 1994 to 1995. The 19% reduction in AW traces during this same period implies that AW use was declining faster than that of other guns. Furthermore, there were fewer AW traces in 1995 than in 1993, the year prior to the ban. The fact that this occurred during a period when the AW issue was very prominent (and hence police might have been expected to trace more of the AWs they recovered) arguably strengthens the causal inference of a ban effect.[45]

Total traces also declined slightly (2%-3%) in 1999 and 2000. In each of those years, the decline was greater for AWs (11%). Thus, in years when tracing declined overall, AW traces fell 3 to 6 times faster than did total traces. Put another way, AWs fell between 9% and 13% as a percentage of all traces in each of these years.

The general pattern of AW traces increasing less or declining more than those of

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[43] These general findings are consistent with those of other tracing analyses conducted by ATF (2003 Congressional Q&A memo provided to the author) and the Brady Center to Prevent Gun Violence (2004).

[44] A caveat is that requests without specific crime type information are often grouped with weapons offenses (ATF, 1999). Therefore, traces associated with violent crimes are likely understated to some degree.

[45] This inference is also supported by our earlier finding that trace requests for AWs declined by only 8% in states that had their own AW bans prior to the federal ban (Roth and Koper, 1997, Chapter 5).

other crime guns was clearly apparent for APs but less consistent for ARs (Table 6-1, columns 4 and 5). For example, AR traces went up 26% in 1998 while total traces went up only 5% and AP traces declined 9%. In 2000, total and AP traces fell 3% and 16%, respectively, but AR traces remained flat. This is consistent with predictions derived from the price and production analyses described above. But note that the post-ban AR counts could be overstated because the data do not distinguish pre-ban from post-ban versions of some popular AR-15 type rifles like the Colt Sporter and Bushmaster XM-15. (Also note that the percentage of traces for ARs did fall from 1.4% in 1992-1993 to 0.6% in 2001-2002.)

More generally, the use of post-ban AW-type weapons (including both legalized APs and ARs) has not been widespread enough to completely offset the apparent decline in the use of banned AWs. Combined traces for banned AWs and AW substitutes (Table 6-1, column 6) also followed the pattern of increasing less or declining more than did total traces throughout most of the period, though the differences were not as pronounced as those between AWs and total traces. In 1999 and 2000, for example, AWs traces dropped 11%, while combined traces for AWs and legal substitutes declined only 6%. Still, the latter figure was greater than the 2%-3% drop for total traces.

Finally, traces of the LCMM rifles banned by executive order in 1998 were generally rising to that point, reaching levels as high as those for AR-15 type rifles (Table 6-1, column 9). Since 1998, however, the number of traces for LCMM rifles has fallen substantially. Despite a 4% increase from 2001 to 2002, the number of LCMM traces in 2002 (865) was 30% lower than the peak number traced in 1998 (1,227). Tentatively, this suggests that the 1998 extension of the ban has been effective in curtailing weapons that offenders may have been substituting for the ARs banned in 1994.

6.2.2.3. Did Use of Assault Weapons Rebound in 2002?

In 2002, tracing volume increased 7%, which closely matched the 6% increase in gun murders for that year. In contrast to the general pattern, AW traces increased by 19%, suggesting a possible rebound in AW use independent of changes in tracing practices, a development that we have predicted elsewhere (Roth and Koper, 1997) based on the boom in AW production leading up to the ban. The disproportionate growth in AW traces was due to ARs, however, so it could partially reflect increasing use of post-ban AR-type rifles (see the discussion above).

Moreover, this pattern could be illusory. With data from the most recent years, it was possible to run a supplementary analysis screening out traces of older weapons (not shown). Focusing on just those guns recovered and traced in the same year for 2000 through 2002 revealed that recoveries of AWs declined in 2001, more so for ARs (16%) than for APs (9%), while total traces increased 1%.[46] Traces for APs and ARs then

[46] The tracing database indicates when guns were recovered and when they were traced. However, the recovery dates were missing for 30% of the records overall and were particularly problematic for years prior to 1998. For this reason, the main analysis is based on request dates. The auxiliary analysis for 2000-

increased in 2002 (1% and 6%, respectively) but by less than total traces (8%). Therefore, the disproportionate growth in AR traces in 2002 shown in Table 6-1 may have been due to tracing of older AWs by newly participating police agencies.

6.2.2.4. Summary of the ATF Gun Tracing Analysis

Complexities arising from recent changes in the use of gun tracing by law enforcement warrant caution in the interpretation of ATF gun tracing data. Notwithstanding, the data suggest that use of AWs in crime, though relatively rare from the start, has been declining. The percentage of gun traces that were for AWs plummeted 70% between 1992-1993 and 2001-2002 (from 5.4% to 1.6%), and this trend did not begin until the year of the AW ban. On a year-to-year basis, AW traces generally increased less or declined by more than other gun traces. Moreover, in years when tracing volume declined – that is, years when changes in reporting practices were least likely to distort the data – traces of AWs fell 3 to 6 times faster than gun traces in general. The drop in AW use seemed most apparent for APs and LCMM rifles (banned in 1998). Inferences were less clear for domestic ARs, but assessment of those guns is complicated by the possible substitution of post-ban legal variations.

6.3. Local Analyses of Guns Recovered By Police

Due to concerns over the validity of national ATF tracing data for investigating the types of guns used in crime, we sought to confirm the preceding findings using local data on guns recovered by police. To this end, we examined data from half a dozen localities and time periods.

- All guns recovered by the Baltimore Police Department from 1992 to 2000 (N=33,933)
- All guns recovered by the Metro-Dade Police Department (Miami and Dade County, Florida) from 1990 to 2000 (N=39,456)
- All guns recovered by the St. Louis Police Department from 1992 to 2003 (N=34,143)
- All guns recovered by the Boston Police Department (as approximated by trace requests submitted by the Department to ATF) from 1991 to 1993 and 2000 to 2002 (N=4,617)[47]

2002 focuses on guns both recovered and traced in the same year because it is likely that some guns recovered in 2002 had not yet been traced by the spring of 2003 when this database was created. Using only guns recovered and traced in the same year should mitigate this bias.

[47] The Boston Police Department has been tracing guns comprehensively since 1991 (Kennedy et al., 1996). However, we encountered difficulties in identifying Boston Police Department traces for several years in the mid-1990s. For this reason, we chose to contrast the 1991 to 1993 period with the 2000 to 2002 period.

- Guns recovered during murder investigations in Milwaukee County from 1991 to 1998 (N=592)[48]
- Guns linked to serious crimes in Anchorage and other parts of Alaska and submitted to state firearm examiners for evidentiary testing from 1987 to 2000 (N=900)[49]

The selection of these particular locations and samples reflects data availability.[50] The locations were not selected randomly, and some of the samples are small for conducting trend analysis of relatively rare events (i.e., AW recoveries). Accordingly, we must use caution in generalizing the results to other places. However, the data sources reflect a wide geographic range and cover post-ban periods extending through at least the latter 1990s (and typically through the year 2000 or beyond). To the extent that the results are similar across these jurisdictions, therefore, we can have more confidence that they reflect national patterns.

In each jurisdiction, we examined pre-post changes in recoveries of AWs (focusing on the domestic AW group defined earlier) and substitution of post-ban AW models for the banned models. Where possible, we conducted separate analyses of all AW recoveries and those linked specifically to violent crimes.[51] We also differentiated between AP and AR trends using the larger databases from Baltimore, Miami, and St. Louis. But since most of these databases do not extend more than two years beyond 1998, we do not present analyses specifically for LCMM rifles.

Key summary results are summarized in Table 6-2, while more detailed results from each site appear at the end of the chapter in Tables 6-3 through 6-6 and Figures 6-2 through 6-6.[52] The number of AW recoveries declined by 28% to 82% across these

[48] The data are described in reports from the Medical College of Wisconsin (Hargarten et al., 1996; 2000) and include guns used in the murders and other guns recovered at the crime scenes. Guns are recovered in approximately one-third of Milwaukee homicide cases.

[49] The data include guns submitted by federal, state, and local agencies throughout the state. Roughly half come from the Anchorage area. Guns submitted by police to the state lab are most typically guns that were used in major crimes against persons (e.g. murder, attempted murder, assault, robbery).

[50] We contacted at least 20 police departments and crime labs in the course of our data search, focusing much of our attention on police departments participating in ATF's Youth Crime Gun Interdiction Initiative (YCGII) (ATF, 1997; 1999). Departments participating in the YCGII submit data to ATF on all guns that they recover. Though the YCGII did not begin until 1996 (well after the implementation of the AW ban), we suspected that these departments would be among those most likely to have electronically-stored gun data potentially extending back in time to before the ban. Unfortunately, most of these departments either did not have their gun data in electronic format or could not provide data for other reasons (e.g., resource constraints). In the course of our first AW study (Roth and Koper, 1997), we contacted many other police departments that also did not have adequate data for the study.

[51] All of the Milwaukee and Anchorage analyses were limited to guns involved in murders or other serious crimes. Despite evidence of a decline, AW recoveries linked to violence were too rare in Boston to conduct valid test statistics.

[52] We omitted guns recovered in 1994 from both the pre and post-ban counts because the speculative price increases for AWs that occurred in 1994 (see previous section and Roth and Koper, 1997, Chapter 4) raise questions about the precise timing of the ban's impact on AW use during that year, thereby clouding the designation of the intervention point. This is particularly a concern for the Baltimore analysis due to a

locations and time periods, but the discussion below focuses on changes in AWs as a share of crime guns in order to control for general trends in gun crime and gun seizures. Prior to the ban, AWs ranged from about 1% of guns linked to violent crimes in St. Louis to nearly 6% of guns recovered in Milwaukee murder cases.[53]

AWs dropped as share of crime guns in all jurisdictions after the ban. Reductions ranged from a low of 17% in Milwaukee (based on guns linked to homicides) to a high of 72% in Boston (based on all crime guns) but were generally between 32% and 40%.[54, 55] A decline in the use of AWs relative to other guns was generally apparent whether examining all AW recoveries or just those linked to violent crimes.[56] An exception was in St. Louis, where

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state AP ban that took effect a few months prior to the federal AW ban.

[53] These figures should be treated as approximations of the prevalence of AWs. On the one hand, the numbers may understate the prevalence of AWs to a small degree because they are based on only the domestic AW group defined earlier. Based on analysis of national ATF gun tracing data, we estimated previously that the domestic AW group accounts for 82% of AWs used in crime (Roth and Koper, 1997, Chapter 5). To further test the reliability of this assessment, we investigated the prevalence of all banned AW models among guns recovered in Baltimore using an ATF list of all guns defined as AWs under the 1994 Crime Act criteria (118 model and caliber combinations). We chose the Baltimore database because it provides a complete inventory of guns recovered by police in that city during the study period and, having been maintained by crime lab personnel, is particularly thorough with regard to make and model identifications. Though there was some ambiguity in classifying a small number of AK-type semiautomatic rifles (there are many civilian variations of the AK-47 rifle, some of which were legal under the 1994 legislation), our examination suggested that the domestic AW group accounted for approximately 90% of the AWs recovered in Baltimore. (In addition, including all AWs had virtually no effect on the pre-post changes in AW use in Baltimore.) But as discussed previously, the counts could also overstate AW use to some degree because imprecision in the identification of gun models in some data sources may have resulted in some legalized firearms being counted as banned AWs.

[54] The AW counts for Miami also include Interdynamics KG9 and KG99 models. These models were produced during the early 1980s and were forerunners to the Intratec models (ATF restricted the KG9 during the early 1980s because it could be converted too easily to fully automatic fire). These weapons were very rare or non-existent in most of the local data sources, but they were more common in Miami, where Interdynamics was formerly based. Including these guns increased the AW count in Miami by about 9% but did not affect pre-post changes in AW recoveries.

[55] State AW legislation passed in Maryland and Massachusetts could have had some impact on AW trends in Baltimore and Boston, respectively. Maryland implemented an AP ban, similar in coverage to the federal AW ban, in June 1994 (Maryland has also required background checks for retail sales of a broader list of state-defined AWs since 1989), and Massachusetts implemented additional legislation on federally-defined AWs in late 1998. The timing and scope of these laws make them largely redundant with the federal ban, so they should not unduly complicate inferences from the analysis. However, Maryland forbids additional transfers of grandfathered APs, and Massachusetts has imposed additional requirements for possession and transfer of LCMs and guns accepting LCMs. Both states also have enhanced penalties for certain crimes involving APs, LCMs, and/or guns accepting LCMs. Hence, the ban on AWs was arguably strengthened in Baltimore and Boston, relative to the other jurisdictions under study. This does not appear to have affected trends in AW use in Baltimore, which were very similar to those found in the other study sites. However, use of AWs and combined use of AWs and post-ban AW substitutes declined more in Boston than in any other study site. Although the trends in Boston could reflect ongoing, post-2000 reductions in use of AWs and similar weapons (Boston was one of the only study sites from which we obtained post-2000 data), it is possible that the Massachusetts legislation was also a contributing factor.

[56] There may be some inconsistency across jurisdictions in the identification of guns associated with violent crimes. In Miami, for example, 28% of the guns had an offense code equal to "other/not listed," and this percentage was notably higher for the later years of the data series.

Table 6-2. Pre-Post Changes in Assault Weapons As a Share of Recovered Crime Guns For Selected Localities and Time Periods: Summary Results (Total Number of Assault Weapons for Pre and Post Periods in Parentheses) [a]

Locality and Time Period	AWs	AWs (Linked to Violence)	APs	ARs	AWs and Post-Ban Substitutes
Baltimore (all recoveries) pre=1992-1993, post=1995-2000	-34%*** (425)	-41%** (75)	-35%*** (383)	-24% (42)	-29%*** (444)
Miami-Dade (all recoveries) pre=1990-1993, post=1995-2000	-32%*** (733)	-39%*** (101)	-40%*** (611)	37%* (115)	-30%*** (746)
St. Louis (all recoveries) pre=1992-1993, post=1995-2003	-32%*** (306)	1% (28)	-34%*** (274)	10% (32)	-24%** (328)
Boston (all recoveries) pre=1991-1993, post=2000-2002	-72%*** (71)	N/A	N/A	N/A	-60%*** (76)
Milwaukee (recoveries in murder cases) pre=1991-1993, post=1995-1998	N/A	-17% (28)	N/A	N/A	2% (31)
Anchorage, AK (recoveries in serious crimes) pre=1987-1993, post=1995-2000	N/A	-40% (24)	N/A	N/A	-40% (24)

a. Based on Intratec group, SWD group, AR-15 group, and Calico and Feather models. See the text for additional details about each sample and Tables 6-3 through 6-6 for more detailed results from each locality.
* Statistically significant change at chi-square p level < .1
** Statistically significant change at chi-square p level < .05
*** Statistically significant change at chi-square p level < .01

AWs declined as share of all guns but not of guns linked to violent crimes, though the latter test was based on rather small samples.

These reductions were not due to any obvious pre-ban trends (see Figures 6-2 through 6-6 at the end of the chapter). On the contrary, AW recoveries reached a peak in most of these jurisdictions during 1993 or 1994 (Boston, which is not shown in the graphs due to missing years, was an exception). We tested changes in AW prevalence using simple chi-square tests since there were no observable pre-existing time trends in the data. Due to the small number of AWs in some of these samples, these changes were not all statistically significant. Nonetheless, the uniformity of the results is highly suggestive, especially when one considers the consistency of these results with those found in the national ATF tracing analysis.

The changes in Tables 6-2 through 6-6 reflect the average decline in recoveries of AWs during the post-ban period in each locality. However, some of these figures may understate reductions to date. In several of the localities, the prevalence of AWs among crime guns was at, or close to, its lowest mark during the most recent year analyzed (see Figures 6-2 through 6-6 at the end of the chapter), suggesting that AW use continues to decline. In Miami, for example, AWs accounted for 1.7% of crime guns for the whole 1995 to 2000 period but had fallen to 1% by 2000. Further, the largest AW decline was recorded in Boston, one of two cities for which data extended beyond the year 2000 (however, this was not the case in St. Louis, the other locality with post-2000 data).

Breakouts of APs and ARs in Baltimore, Miami, and St. Louis show that the decline in AW recoveries was due largely to APs, which accounted for the majority of AWs in these and almost all of the other localities (the exception was Anchorage, where crimes with rifles were more common, as a share of gun crimes, than in the other sites). Pre-post changes in recoveries of the domestic AR group weapons, which accounted for less than 1% of crime guns in Baltimore, Miami, and St. Louis, were inconsistent. AR recoveries declined after the ban in Baltimore but increased in St. Louis and Miami. As discussed previously, however, the AR figures may partly reflect the substitution of post-ban, legalized versions of these rifles, thus overstating post-ban use of the banned configurations. Further, trends for these particular rifles may not be indicative of those for the full range of banned rifles, including the various foreign rifles banned by the 1994 law and the import restrictions of 1989 and 1998 (e.g., see the ATF gun tracing analysis of LCMM rifles).[57]

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[57] As discussed in the last chapter, our research design focused on common AWs that were likely to be most affected by the 1994 ban as opposed to earlier regulations (namely, the 1989 import ban) or other events (e.g., company closings or model discontinuations prior to 1994). However, an auxiliary analysis with the Baltimore data revealed a statistically meaningful drop in recoveries of all ARs covered by the 1994 legislation (not including the LCMM rifles) that was larger than that found for just the domestic group ARs discussed in the text. Similarly, an expanded AR analysis in Miami showed that total AR recoveries declined after the ban, in contrast to the increase found for the domestic group ARs. (Even after expanding the analysis, ARs still accounted for no more than 0.64% of crime guns before the ban in both locations. As with the domestic AR group, there are complexities in identifying banned versus non-banned versions of some of the other ARs, so these numbers are approximations.) Consequently, a more nuanced view of AR trends may be that AR use is declining overall, but this decline may be due largely to the 1989 import

Finally, the overall decline in AW use was only partially offset by substitution of the post-ban legalized models. Even if the post-ban models are counted as AWs, the share of crime guns that were AWs still fell 24% to 60% across most jurisdictions. The exception was Milwaukee where recoveries of a few post-ban models negated the drop in banned models in a small sample of guns recovered during murder investigations.[58]

6.4. Summary

Consistent with predictions derived from the analysis of market indicators in Chapter 5, analyses of national ATF gun tracing data and local databases on guns recovered by police in several localities have been largely consistent in showing that criminal use of AWs, while accounting for no more than 6% of gun crimes even before the ban, declined after 1994, independently of trends in gun crime. In various places and times from the late 1990s through 2003, AWs typically fell by one-third or more as a share of guns used in crime.[59, 60] Some of the most recent, post-2000 data suggest

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restrictions that predated the AW ban. It is not yet clear that there has been a decline in the most common ARs prohibited exclusively by the 1994 ban.

[58] This was not true when focusing on just those guns that were used in the incident as opposed to all guns recovered during the investigations. However, the samples of AWs identified as murder weapons were too small for valid statistical tests of pre-post changes.

[59] These findings are also supported by prior research in which we found that reported thefts of AWs declined 7% in absolute terms and 14% as a fraction of stolen guns in the early period following the ban (i.e., late 1994 through early 1996) (Koper and Roth, 2002a, p. 21). We conducted that analysis to account for the possibility that an increase in thefts of AWs might have offset the effect of rising AW prices on the availability of AWs to criminals. Because crimes with AWs appear to have declined after the ban, the theft analysis is not as central to the arguments in this paper.

[60] National surveys of state prisoners conducted by the federal Bureau of Justice Statistics show an increase from 1991 to 1997 in the percentage of prisoners who reported having used an AW (Beck et al., 1993; Harlow, 2001). The 1991 survey (discussed in Chapter 3) found that 2% of violent gun offenders had carried or used an AW in the offense for which they were sentenced (calculated from Beck et al. 1993, pp. 18,33). The comparable figure from the 1997 survey was nearly 7% (Harlow, 2001, pp.3, 7).

Although these figures appear contrary to the patterns shown by gun recovery data, there are ambiguities in the survey findings that warrant caution in such an interpretation. First, the definition of an AW (and most likely the respondents' interpretation of this term) was broader in the 1997 survey. For the 1991 survey, respondents were asked about prior ownership and use of a "…military-type weapon, such as an Uzi, AK-47, AR-15, or M-16" (Beck et al., 1993, p. 18), all of which are ARs or have AR variations. The 1997 survey project defined AWs to "…include the Uzi, TEC-9, and the MAC-10 for handguns, the AR-15 and AK-47 for rifles, and the 'Street Sweeper' for shotguns" (Harlow, 2001, p. 2). (Survey codebooks available from the Inter-University Consortium for Political and Social Research also show that the 1997 survey provided more detail and elaboration about AWs and their features than did the 1991 survey, including separate definitions of APs, ARs, and assault shotguns.)

A second consideration is that many of the respondents in the 1997 survey were probably reporting criminal activity prior to or just around the time of the ban. Violent offenders participating in the survey, for example, had been incarcerated nearly six years on average at the time they were interviewed (Bureau of Justice Statistics, 2000, p. 55). Consequently, the increase in reported AW use may reflect an upward trend in the use of AWs from the 1980s through the early to mid 1990s, as well as a growing recognition of these weapons (and a greater tendency to report owning or using them) stemming from publicity about the AW issue during the early 1990s.

Finally, we might view the 1997 estimate skeptically because it is somewhat higher than that from most other sources. Nevertheless, it is within the range of estimates discussed earlier and could reflect a

reductions as high as 70%.[61] This trend has been driven primarily by a decline in the use of APs, which account for a majority of AWs used in crime. AR trends have been more varied and complicated by the substitution of post-ban guns that are very similar to some banned ARs. More generally, however, the substitution of post-ban AW-type models with fewer military features has only partially offset the decline in banned AWs.

These findings raise questions as to the whereabouts of surplus AWs, particularly APs, produced just prior to the ban. Presumably, many are in the hands of collectors and speculators holding them for their novelty and value.[62] Even criminal possessors may be more sensitive to the value of their AWs and less likely to use them for risk of losing them to police.

Finally, it is worth noting the ban has not completely eliminated the use of AWs, and, despite large relative reductions, the share of gun crimes involving AWs is similar to that before the ban. Based on year 2000 or more recent data, the most common AWs continue to be used in up to 1.7% of gun crimes.

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somewhat higher use of AWs among the subset of offenders who are most active and/or dangerous; recall that the highest estimate of AW use among the sources examined in this chapter came from a sample of guns recovered during murder investigations in Milwaukee (also see the discussion of offender surveys and AWs in Chapter 3).

[61] Developing a national estimate of the number of AW crimes prevented by the ban is complicated by the range of estimates of AW use and changes therein derived from different data sources. Tentatively, nonetheless, it appears the ban prevents a few thousand crimes with AWs annually. For example, using 2% as the best estimate of the share of gun crimes involving AWs prior to the ban (see Chapter 3) and 40% as a reasonable estimate of the post-ban drop in this figure implies that almost 2,900 murders, robberies, and assaults with AWs were prevented in 2002 (this assumes that 1.2% of the roughly 358,000 gun murders, gun robberies, and gun assaults reported to police in 2002 [see the *Uniform Crime Reports*] involved AWs but that 2% would have involved AWs had the ban not been in effect). Even if this estimate is accurate, however, it does not mean the ban prevented 2,900 gun crimes in 2002; indeed, the preceding calculation assumes that offenders prevented from using AWs committed their crimes using other guns. Whether forcing such weapon substitution can reduce the number of persons wounded or killed in gun crimes is considered in more detail in Chapter 9.

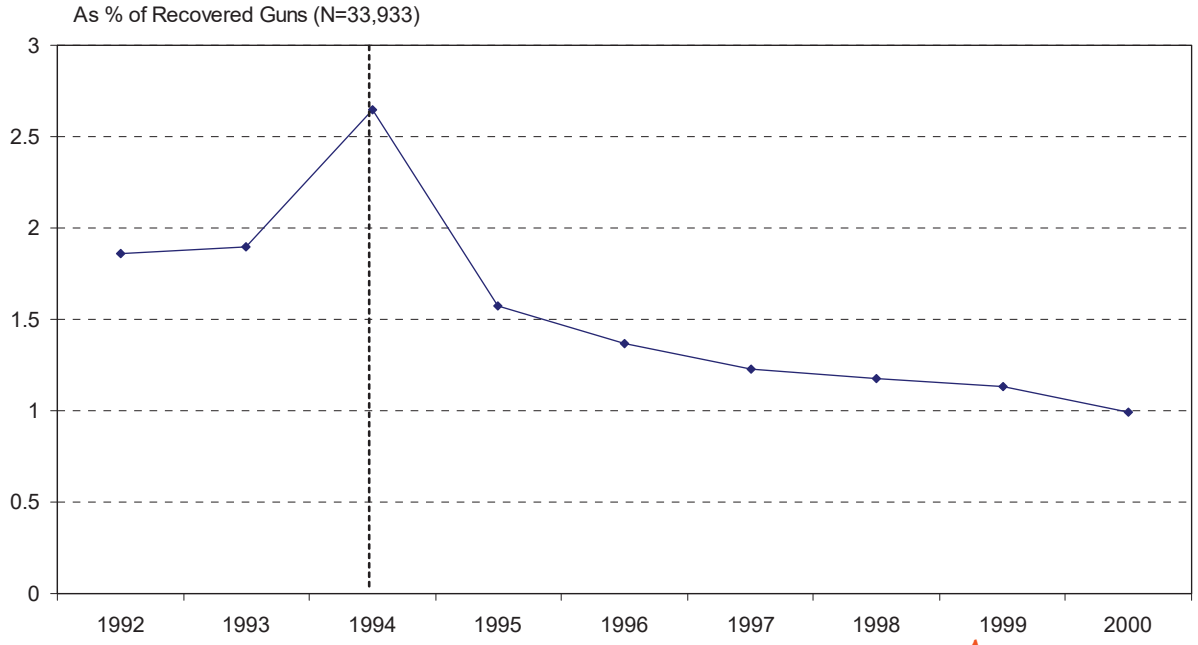
[62] The 1997 national survey of state prisoners discussed in footnote 60 found that nearly 49% of AW offenders obtained their gun from a "street" or illegal source, in contrast to 36% to 42% for other gun users (Harlow, 2001, p. 9). This could be another sign that AWs have become harder to acquire since the ban, but the data cannot be used to make an assessment over time.

Table 6-3. Trends in Police Recoveries of Domestic Assault Weapons in Baltimore, 1992-2000 [a]

	Pre-Ban Period	Post-Ban Period	Change
A. All Recoveries	Jan. 1992-Dec. 1993	Jan. 1995-Dec. 2000	
Total AWs	135	290	
Annual Mean	67.5	48.33	-28%
AW's as % of Guns	1.88%	1.25%	-34%**
APs	123	260	
Annual Mean	61.5	43.33	-30%
APs as % of Guns	1.71%	1.12%	-35%**
ARs	12	30	
Annual Mean	6	5	-17%
ARs as % of Guns	0.17%	0.13%	-24%
Total AWs and Substitutes	135	309	
Annual Mean	67.5	51.5	-24%
AWs/Subs as % of Guns	1.88%	1.33%	-29%**
B. Recoveries Linked to Violent Crimes [b]			
Total AWs	28	47	
Annual Mean	14	7.83	-44%
AWs as % of Violent Crime Guns	2.1%	1.24%	-41%*

a. Domestic assault weapons include Intratec group, SWD group, AR-15 group, and Calico and Feather models.
b. Murders, assaults, and robberies
* Chi-square p level < .05 (changes in percentages of guns that were AWs/APs/ARs/AW-subs were tested for statistical significance).
** Chi-square p level < .01 (changes in percentages of guns that were AWs/APs/ARs/AW-subs were tested for statistical significance).

Figure 6-2. Police Recoveries of Assault Weapons in Baltimore, 1992-2000



Includes Intratec group, SWD group, AR-15 group, and selected Calico and Feather models.

Table 6-4. Trends in Police Recoveries of Domestic Assault Weapons in Miami (Metro-Dade), 1990-2000 [a]

	Pre-Ban Period	Post-Ban Period	Change
A. All Recoveries	Jan. 1990-Dec. 1993	Jan. 1995-Dec. 2000	
Total AWs	403	330	
Annual Mean	100.75	55	-45%
AW's as % of Guns	2.53%	1.71%	-32%***
APs	355	256	
Annual Mean	88.75	42.67	-52%
APs as % of Guns	2.23%	1.33%	-40%***
ARs	43	72	
Annual Mean	10.75	12	12%
ARs as % of Guns	0.27%	0.37%	37%*
Total AWs and Substitutes	403	343	
Annual Mean	100.75	57.17	-43%
AWs/Subs as % of Guns	2.53%	1.78%	-30%***
B. Recoveries Linked to Violent Crimes [b]			
Total AWs	69	32	
Annual Mean	17.25	5.33	-69%
AWs as % of Violent Crime Guns	2.28%	1.39%	-39%**

a. Domestic assault weapons include Intratec group, SWD group, AR-15 group, and Calico and Feather models.
b. Murders, assaults, and robberies
* Chi-square p level < .1 (changes in percentages of guns that were AWs/APs/ARs/AW-subs were tested for statistical significance)
** Chi-square p level < .05 (changes in percentages of guns that were AWs/APs/ARs/AW-subs were tested for statistical significance)
*** Chi-square p level <.01 (changes in percentages of guns that were AWs/APs/ARs/AW-subs were tested for statistical significance)

Figure 6-3. Police Recoveries of Assault Weapons in Miami (Metro-Dade), 1990-2000

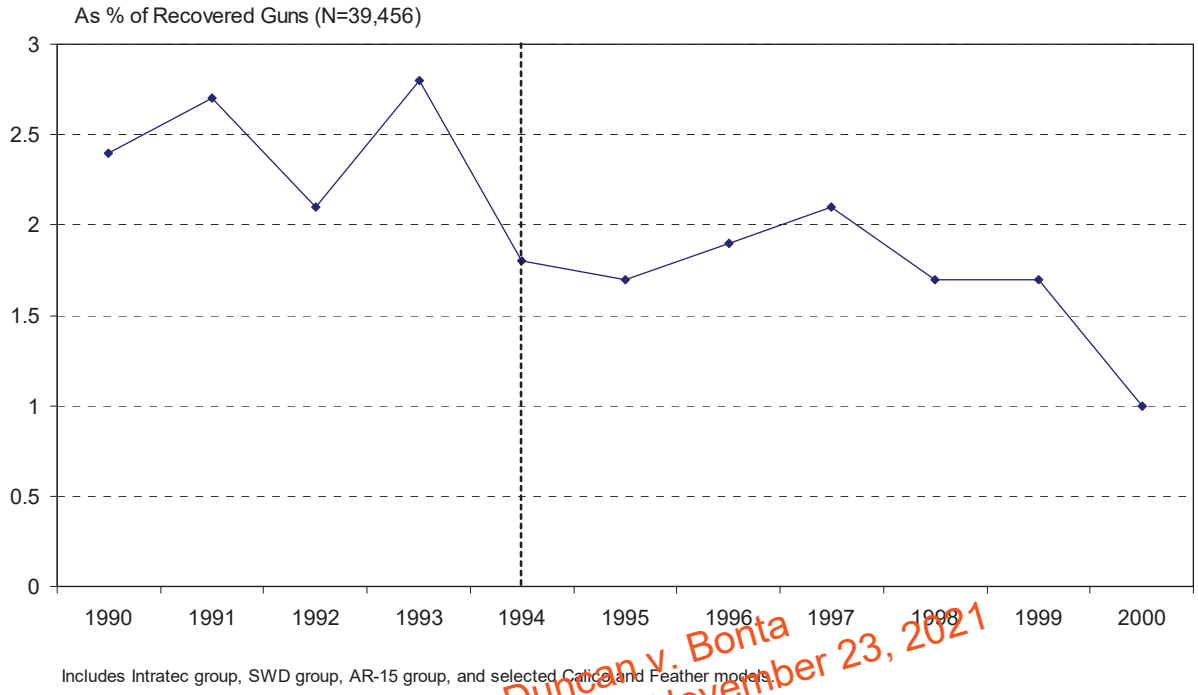
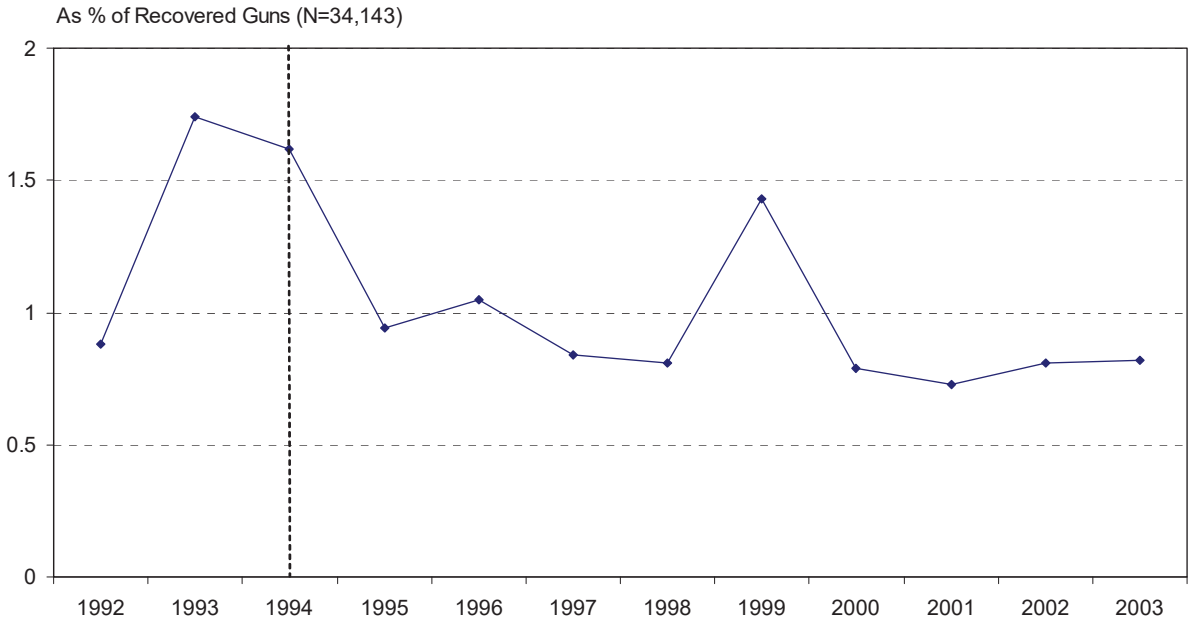


Table 6-5. Trends in Police Recoveries of Domestic Assault Weapons in St. Louis, 1992-2003 [a]

	Pre-Ban Period	Post-Ban Period	Change
A. All Recoveries	Jan. 1992-Dec. 1993	Jan. 1995-Dec. 2003	
Total AWs	94	212	
Annual Mean	47	23.56	-50%
AW's as % of Guns	1.33%	0.91%	-32%**
APs	87	187	
Annual Mean	43.5	20.78	-52%
APs as % of Guns	1.23%	0.81%	-34%**
ARs	7	25	
Annual Mean	3.5	2.78	-21%
ARs as % of Guns	0.1%	0.11%	10%
Total AWs and Substitutes	94	234	
Annual Mean	47	26	-45%
AWs/Subs as % of Guns	1.33%	1.01%	-24%*
B. Recoveries Linked to Violent Crimes [b]			
Total AWs	8	20	
Annual Mean	4	2.2	-45%
AWs as % of Violent Crime Guns	0.8%	0.81%	1%

a. Domestic assault weapons include Intratec group, SWD group, AR-15 group, and Calico and Feather models.
b. Murders, assaults, and robberies
* Chi-square p level < .05 (changes in percentages of guns that were AWs/APs/ARs/AW-subs were tested for statistical significance)
** Chi-square p level <.01 (changes in percentages of guns that were AWs/APs/ARs/AW-subs were tested for statistical significance)

Figure 6-4. Police Recoveries of Assault Weapons in St. Louis, 1992-2003



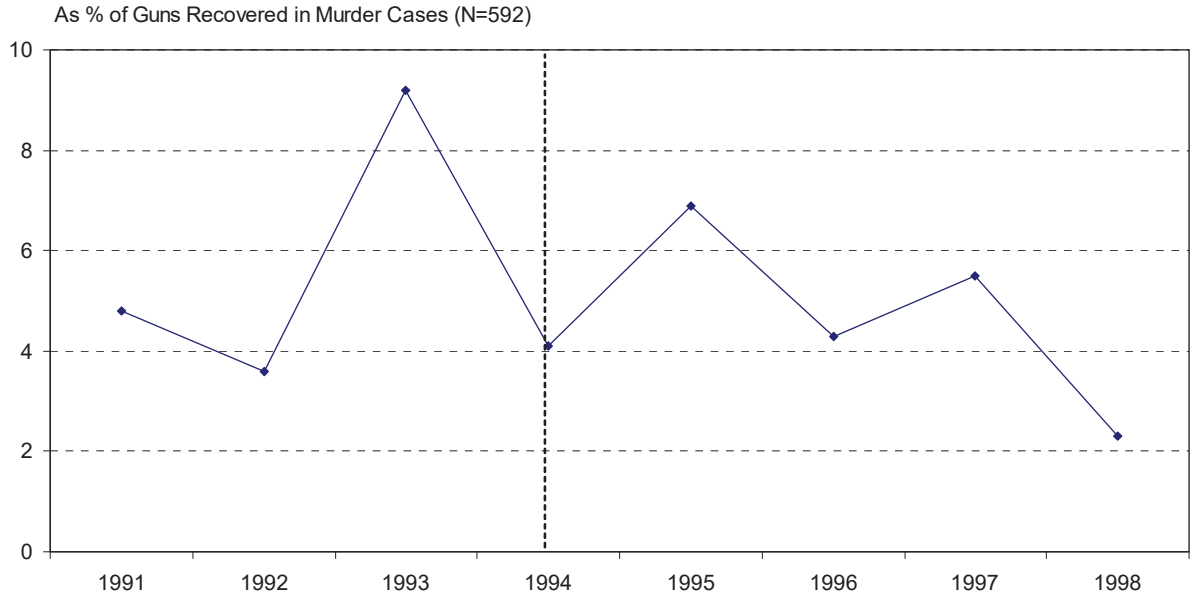
Includes Intratec group, SWD group, AR-15 group, and selected Calico and Feather models.

Table 6-6. Trends in Police Recoveries of Domestic Assault Weapons in Boston, Milwaukee, and Anchorage (Alaska) [a]

	Pre-Ban Period	Post-Ban Period	Change
Boston	Jan. 1991-Dec. 1993	Jan. 2000-Dec. 2002	
(All Gun Traces)			
AWs	60	11	
Annual Mean	20	3.7	-82%
AWs as % of Guns	2.16%	0.6%	-72%*
AWs and Substitutes	60	16	
Annual Mean	20	5.3	-74%
AWs/Subs as % of Guns	2.16%	0.87%	-60%*
Milwaukee	Jan. 1991-Dec. 1993	Jan. 1995-Dec. 1998	
(Guns Recovered in Murder Cases)			
AWs	15	13	
Annual Mean	5	3.25	-35%
AWs as % of Guns	5.91%	4.91%	-17%
AWs and Substitutes	15	16	
Annual Mean	5	4	-20%
AWs/Subs as % of Guns	5.91%	6.04%	2%
Anchorage	Jan. 1987-Dec. 1993	Jan. 1995-Dec. 2000	
(Guns Tested for Evidence)			
AWs	16	8	
Annual Mean	2.29	1.33	-42%
AW's as % of Guns	3.57%	2.13%	-40%
AWs and Substitutes	N/A	N/A	

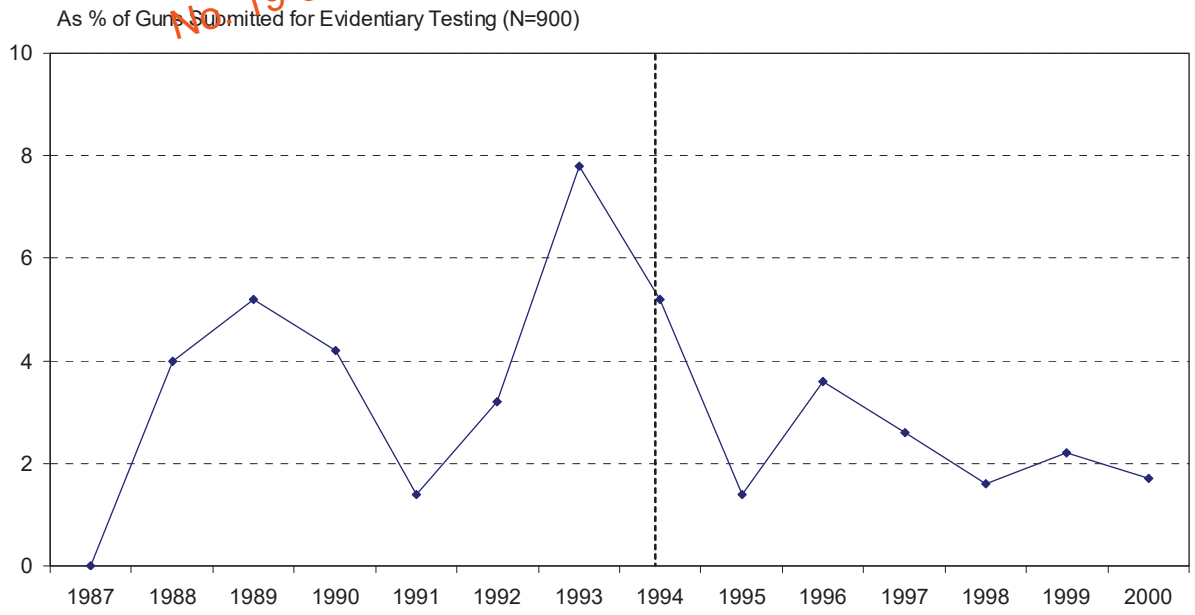
a. Domestic assault weapons include Intratec group, SWD group, AR-15 group, and Calico and Feather models.
* Chi-square p level < .01 (changes in percentages of guns that were AWs/AW-subs were tested for statistical significance)

Figure 6-5. Assault Weapons Recovered in Milwaukee County Murder Cases, 1991-1998



Includes Intratec group, SWD group, AR-15 group, and selected Calico and Feather models.

Figure 6-6. Police Recoveries of Assault Weapons in Anchorage (Alaska), 1987-2000



Includes Intratec group, SWD group, AR-15 group, and selected Calico and Feather models.

7. MARKET INDICATORS FOR LARGE CAPACITY MAGAZINES: PRICES AND IMPORTATION

The previous chapters examined the AW-LCM ban's impact on the availability and criminal use of AWs. In this chapter and the next, we consider the impact of the ban's much broader prohibition on LCMs made for numerous banned and non-banned firearms. We begin by studying market indicators. Our earlier study of LCM prices for a few gun models revealed that prices rose substantially during 1994 and into 1995 (Roth and Koper, 1997, Chapter 4). Prices of some LCMs remained high into 1996, while others returned to pre-ban levels or oscillated more unpredictably. The price increases may have reduced LCM use at least temporarily in the short-term aftermath of the ban, but we could not confirm this in our prior investigation.

7.1. Price Trends for Large Capacity Magazines

For this study, we sought to approximate longer term trends in the prices at which users could purchase banned LCMs throughout the country. To that end, we analyzed quarterly data on the prices of LCMs advertised by eleven gun and magazine distributors in *Shotgun News*, a national gun industry publication, from April 1992 to December 1998.[63] Those prices are available to any gun dealer, and primary market retailers generally re-sell within 15% of the distributors' prices.[64] The distributors were chosen during the course of the first AW study (Roth and Koper, 1997) based on the frequency with which they advertised during the April 1992 to June 1996 period. For each quarterly period, project staff coded prices for one issue from a randomly selected month. We generally used the first issue of each selected month based on a preliminary, informal assessment suggesting that the selected distributors advertised more frequently in those issues. In a few instances, first-of-month issues were unavailable to us or provided too few observations, so we substituted other issues.[65] Also, we were unable to obtain *Shotgun News* issues for the last two quarters of 1996. However, we aggregated the data annually to study price trends, and the omission of those quarters did not appear to affect the results (this is explained further below).

We ascertained trends in LCM prices by conducting hedonic price analyses,

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[63] The *Blue Book of Gun Values*, which served as the data source for the AW price analysis, does not contain ammunition magazine prices.

[64] According to gun market experts, retail prices track wholesale prices quite closely (Cook et al., 1995, p. 71). Retail prices to eligible purchasers generally exceed wholesale (or original-purchase) prices by 3% to 5% in the large chain stores, by about 15% in independent dealerships, and by about 10% at gun shows (where overhead costs are lower).

[65] The decision to focus on first-of-month issues was made prior to data collection for price analysis update. For the earlier study (Roth and Koper, 1997), project staff coded data for one or more randomly selected issues of every month of the April 1992 to June 1996 period. For this analysis, we utilized data from only the first-of-month issues selected at random during the prior study. If multiple first-of-month issues were available for a given quarter, we selected one at random or based on the number of recorded advertisements. If no first-of-month issue was available for a given quarter, we selected another issue at random from among those coded during the first study.

similar to those described in the AW price analysis (Chapter 5), in which we regressed inflation-adjusted LCM prices (logged) on several predictors: magazine capacity (logged), gun make (for which the LCM was made), year of the advertisement, and distributor. We cannot account fully for the meaning of significant distributor effects. They may represent unmeasured quality differentials in the merchandise of different distributors, or they may represent other differences in stock volume or selling or service practices between the distributors.[66] We included the distributor indicators when they proved to be significant predictors of advertised price. In addition, we focused on LCMs made for several of the most common LCM-compatible handguns and rifles, rather than try to model the differences in LCM prices between the several hundred miscellaneous makes and models of firearms that were captured in the data. Finally, for both the handgun and rifle models, we created and tested seasonal indicator variables to determine if their incorporation would affect the coefficient for 1996 (the year with winter/spring data only), but they proved to be statistically insignificant and are not shown in the results below.[67]

7.1.1. Large Capacity Magazines for Handguns

The handgun LCM analysis tracks the prices of LCMs made for Intratec and Cobray (i.e., SWD) APs and non-banned semiautomatic pistols made by Smith and Wesson, Glock, Sturm Ruger, Sig-Sauer, Taurus, and Beretta (each of the manufacturers in the former group produces numerous models capable of accepting LCMs). In general, LCMs with greater magazine capacities commanded higher prices, and there were significant price differentials between LCMs made for different guns and sold by different distributors (see Table 7-1). Not surprisingly, LCMs made for Glock handguns were most expensive, followed by those made for Beretta and Sig-Sauer firearms.

Turning to the time trend indicators (see Table 7-1 and Figure 7-1), prices for these magazines increased nearly 50% from 1993 to 1994, and they rose another 56% in 1995. Prices declined somewhat, though not steadily, from 1996 to 1998. Nevertheless, prices in 1998 remained 22% higher than prices in 1994 and nearly 80% higher than those in 1993.

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[66] For example, one possible difference between the distributors may have been the extent to which they sold magazines made of different materials (e.g., steel, aluminum, etc.) or generic magazines manufactured by companies other than the companies manufacturing the firearms for which the magazines were made. For example, there were indications in the data that 3% of the handgun LCMs and 10% of the AR-15 and Mini-14 rifle LCMs used in the analyses (described below) were generic magazines. We did not control for these characteristic, however, because such information was often unclear from the advertisements and was not recorded consistently by coders.

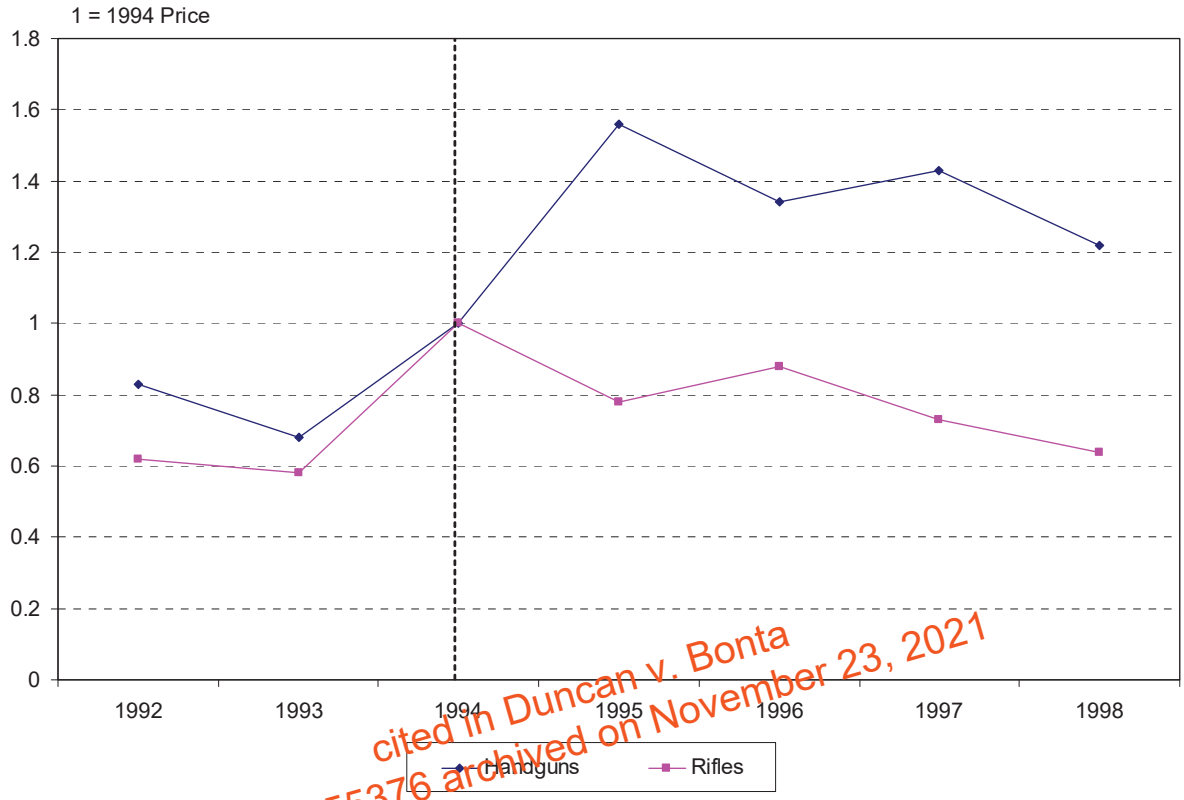
[67] Project staff coded all LCM advertisements by the selected distributors. Therefore, the data are inherently weighted. However, the weights are based on the frequency with which the different LCMs were advertised (i.e., the LCMs that were advertised most frequently have the greatest weight in the models) rather than by production volume.

Table 7-1. Regression of Handgun and Rifle Large Capacity Magazine Prices on Annual Time Indicators, 1992-1998, Controlling for Gun Makes/Models and Distributors

	Handgun LCMs (n=1,277)		Rifle LCMs (n=674)	
	Estimate	T value	Estimate	T value
Constant	-1.79	-12.74***	-4.10	-19.12***
1992	-0.19	-2.11**	-0.48	-4.20***
1993	-0.38	-6.00***	-0.55	-6.14***
1995	0.44	6.88***	-0.25	-2.64***
1996	0.29	4.05***	-0.12	-0.93
1997	0.36	6.33***	-0.31	-3.68***
1998	0.20	3.51***	-0.44	-5.19***
Rounds (logged)	0.26	5.73***	0.84	15.08***
Cobray	-0.36	-4.15***		
Glock	0.41	8.15***		
Intratec	-0.40	-4.18***		
Ruger	-0.42	-7.79***		
Smith&Wesson	-0.08	-1.71*		
Sig-Sauer	0	-0.09		
Taurus	-0.31	-6.10***		
AK-type			-0.25	-3.15***
Colt AR-15			0.14	1.68*
Ruger Mini-14			-0.08	-0.92
Distributor 1	-0.72	-16.38***	-0.35	-5.15***
Distributor 2	-0.15	-0.97	-0.83	-5.24***
Distributor 3	-0.16	-3.93***	0.19	2.69***
Distributor 4	-0.55	-5.72***	0.16	0.80
Distributor 5	-0.07	-1.79*	-0.18	-2.65***
Distributor 6	-0.53	-1.23	-0.12	-0.32
Distributor 7	-1.59	-3.70***	-0.10	-0.91
Distributor 8			0.14	0.70
Distributor 9	-0.91	-12.52***	-0.48	-4.00***
F statistic	58.76		21.22	
(p value)	<.0001		<.0001	
Adj. R-square	0.51		0.38	

Year indicators are interpreted relative to 1994, and distributors are interpreted relative to distributor 10. Handgun makes are relative to Beretta and rifle models are relative to SKS.
* Statistically significant at p<=.10.
** Statistically significant at p<=.05.
*** Statistically significant at p<=.01.

Figure 7-1. Annual Price Trends for Large Capacity Magazines, 1992-1998



Based on 1,277 sampled ads for LCMs fitting models of 8 handgun makers and 674 sampled ads for LCMs fitting 4 rifle model groups.

7.1.2. Large Capacity Magazines for Rifles

We approximated trends in the prices of LCMs for rifles by modeling the prices of LCMs manufactured for AR-15, Mini-14, SKS,[68] and AK-type rifle models (including various non-banned AK-type models). As in the handgun LCM model, larger LCMs drew higher prices, and there were several significant model and distributor effects. AR-15 magazines tended to have the highest prices, and magazines for AK-type models had the lowest prices (Table 7-1).

Like their handgun counterparts, prices for rifle LCMs increased over 40% from 1993 to 1994, as the ban was debated and implemented (see Table 7-1 and Figure 7-1). However, prices declined over 20% in 1995. Following a rebound in 1996, prices moved downward again during 1997 and 1998. Prices in 1998 were over one third lower than the peak prices of 1994 and were comparable to pre-ban prices in 1992 and 1993.

[68] The SKS is a very popular imported rifle (there are Russian and Chinese versions) that was not covered by either the 1989 AR import ban or the 1994 AW ban. However, importation of SKS rifles from China was discontinued in 1994 due to trade restrictions.

7.2. Post-Ban Importation of Large Capacity Magazines

ATF does not collect (or at least does not publicize) statistics on production of LCMs. Therefore, we cannot clearly document pre-ban production trends. Nevertheless, it seems likely that gun and magazine manufacturers boosted their production of LCMs during the debate over the ban, just as AW makers increased production of AWs. Regardless, gun industry sources estimated that there were 25 million LCMs available as of 1995 (including aftermarket items for repairing magazines or converting them to LCMs) (Gun Tests, 1995, p. 30).

Moreover, the supply of LCMs continued to grow even after the ban due to importation of foreign LCMs that were manufactured prior to the ban (and thus grandfathered by the LCM legislation), according to ATF importation data.[69] As shown in Table 7-2, nearly 4.8 million LCMs were imported for commercial sale (as opposed to law enforcement uses) from 1994 through 2000, with the largest number (nearly 3.7 million) arriving in 1999.[70] During this period, furthermore, importers received permission to import a total of 47.2 million LCMs; consequently, an additional 42 million LCMs may have arrived after 2000 or still be on the way, based on just those approved through 2000.[71, 72]

To put this in perspective, gun owners in the U.S. possessed 25 million firearms that were equipped with magazines holding 10 or more rounds as of 1994 (Cook and Ludwig, 1996, p. 17). Therefore, the 4.7 million LCMs imported in the U.S. from 1994 through 2000 could conceivably replenish 19% of the LCMs that were owned at the time of the ban. The 47.2 million approved during this period could supply nearly 2 additional LCMs for all guns that were so equipped as of 1994.

7.3. Summary and Interpretations

Prices of LCMs for handguns rose significantly around the time of the ban and, despite some decline from their peak levels in 1995, remained significantly higher than pre-ban prices through at least 1998. The increase in LCM prices for rifles proved to be more temporary, with prices returning to roughly pre-ban levels by 1998.[73]

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[69] To import LCMs into the country, importers must certify that the magazines were made prior to the ban. (The law requires companies to mark post-ban LCMs with serial numbers.) As a practical matter, however, it is hard for U.S. authorities to know for certain whether imported LCMs were produced prior to the ban.

[70] The data do not distinguish between handgun and rifle magazines or the specific models for which the LCMs were made. But note that roughly two-thirds of the LCMs imported from 1994 through 2000 had capacities between 11 and 19 rounds, a range that covers almost all handgun LCMs as well as many rifle LCMs. It seems most likely that the remaining LCMs (those with capacities of 20 or more rounds) were primarily for rifles.

[71] The statistics in Table 7-2 do not include belt devices used for machine guns.

[72] A caveat to the number of approved LCMs is that importers may overstate the number of LCMs they have available to give themselves leeway to import additional LCMs, should they become available.

[73] A caveat is that we did not examine prices of smaller magazines, so the price trends described here may not have been entirely unique to LCMs. Yet it seems likely that these trends reflect the unique impact of the ban on the market for LCMs.

Table 7-2. Large Capacity Magazines Imported into the United States or Approved For Importation for Commercial Sale, 1994-2000

Year	Imported	Approved
1994	67,063	77,666
1995	3,776	2,066,228
1996	280,425	2,795,173
1997	99,972	1,889,773
1998	337,172	20,814,574
1999	3,663,619	13,291,593
2000	346,416	6,272,876
Total	*4,798,443*	*47,207,883*

Source: Firearms and Explosives Imports Branch, Bureau of Alcohol, Tobacco, Firearms, and Explosives. Counts do not include "links" (belt devices) or imports for law enforcement purposes.

The drop in rifle LCM prices between 1994 and 1998 may have due to the simultaneous importation of approximately 788,400 grandfathered LCMs, most of which appear to have been rifle magazines (based on the fact that nearly two-thirds had capacities over 19 rounds), as well as the availability of U.S. military surplus LCMs that fit rifles like the AR-15 and Mini-14. We can also speculate that demand for LCMs is not as great among rifle consumers, who are less likely to acquire their guns for defensive or criminal purposes.

The pre-ban supply of handgun LCMs may have been more constricted than the supply of rifle LCMs for at least a few years following the ban, based on prices from 1994 to 1998. Although there were an estimated 25 million LCMs available in the U.S. as of 1995, some major handgun manufacturers (including Ruger, Sig Sauer, and Glock) had or were close to running out of new LCMs by that time (Gun Tests, 1995, p. 30). Yet the frequency of advertisements for handgun LCMs during 1997 and 1998, as well as the drop in prices from their 1995 peak, suggests that the supply had not become particularly low. In 1998, for example, the selected distributors posted a combined total of 92 LCM ads per issue (some of which may have been for the same make, model, and capacity combinations) for just the handguns that we incorporated into our model.[74] Perhaps the

[74] Project staff found substantially more advertisements per issue for 1997 and 1998 than for earlier years. For the LCMs studied in the handgun analysis, staff recorded an average of 412 LCM advertisements per year (103 per issue) during 1997 and 1998. For 1992-1996, staff recorded an average of about 100 ads per year (25 per issue) for the same LCMs. A similar but smaller differential existed in the volume of ads for the LCMs used in the rifle analysis. The increase in LCM ads over time may reflect changes in supply and

demand for enhanced firepower among handgun consumers, who are more likely to acquire guns for crime or defense against crime, was also a factor (and perhaps a large one) putting a premium on handgun LCMs.

Although we might hypothesize that high prices depressed use of handguns with LCMs for at least a few years after the ban, a qualification to this prediction is that LCM use may be less sensitive to prices than is use of AWs because LCMs are much less expensive than the firearms they complement and therefore account for a smaller fraction of users' income (e.g., see Friedman, 1962). To illustrate, TEC-9 APs typically cost $260 at retail during 1992 and 1993, while LCMs for the TEC-9, ranging in capacity from 30 to 36 rounds, averaged $16.50 in *Shotgun News* advertisements (and probably $19 or less at retail) during the same period. So, for example, a doubling of both gun and LCM prices would likely have a much greater impact on purchases of TEC-9 pistols than purchases of LCMs for the TEC-9. Users willing and able to pay for a gun that accepts an LCM are most likely willing and able to pay for an LCM to use with the gun.

Moreover, the LCM supply was enhanced considerably by a surge in LCM imports that occurred after the period of our price analysis. During 1999 and 2000, an additional 4 million grandfathered LCMs were imported into the U.S., over two-thirds of which had capacities of 11-19 rounds, a range that covers almost all handgun LCMs (as well as many rifle LCMs). This may have driven prices down further after 1998.

In sum, market indicators yield conflicting signs on the availability of LCMs. It is perhaps too early to expect a reduction in crimes with LCMs, considering that tens of millions of grandfathered LCMs were available at the time of the ban, an additional 4.8 million – enough to replenish one-fifth of those owned by civilians – were imported from 1994 through 2000, and that the elasticity of demand for LCMs may be more limited than that of firearms. And if the additional 42 million foreign LCMs approved for importation become available, there may not be a reduction in crimes with LCMs anytime in the near future.

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demand for LCMs during the study period, as well as product shifts by distributors and perhaps changes in ad formats (e.g., ads during the early period may have been more likely to list magazines by handgun model without listing the exact capacity of each magazine, in which case coders would have been more likely to miss some LCMs during the early period). Because the data collection effort for the early period was part of a larger effort that involved coding prices in *Shotgun News* for LCMs and numerous banned and non-banned firearms, it is also possible that coders were more likely to miss LCM ads during that period due to random factors like fatigue or time constraints.

8. CRIMINAL USE OF LARGE CAPACITY MAGAZINES AFTER THE BAN

Assessing trends in criminal use of LCMs is difficult. There is no national data source on crime guns equipped with LCMs (ATF national tracing data do not include information about magazines recovered with traced firearms), and, based on our contacts with numerous police departments over the course of this study and the first AW study, it seems that even those police departments that maintain electronic databases on recovered firearms do not typically record the capacity of the magazines with which the guns are equipped.[75,76] Indeed, we were unable to acquire sufficient data to examine LCM use for the first AW study (Roth and Koper, 1997).

For the current study, we obtained four data sources with which to investigate trends in criminal use of LCMs. Three of the databases utilized in the AW analysis – those from Baltimore, Milwaukee, and Anchorage – contained information about the magazines recovered with the guns (see the descriptions of these databases in Chapter 6). Using updated versions of these databases, we examined all LCM recoveries in Baltimore from 1993 through 2003, recoveries of LCMs in Milwaukee murder cases from 1991 to 2001, and recoveries of LCMs linked to serious crimes in Anchorage (and other parts of Alaska) from 1992 through 2002.[77] In addition, we studied records of guns and magazines submitted to the Jefferson Regional Forensics Lab in Louisville, Kentucky from 1996 through 2000. This lab of the Kentucky State Police services law enforcement agencies throughout roughly half of Kentucky, but most guns submitted to the lab are from the Louisville area. Guns examined at the lab are most typically those associated with serious crimes such as murders, robberies, and assaults.

The LCM analyses and findings were not as uniform across locations as were those for AWs. Therefore, we discuss each site separately. As in the AW analysis, we emphasize changes in the percentage of guns equipped with LCMs to control for overall trends in gun crime and gun recoveries. Because gun crime was falling during the latter 1990s, we anticipated that the number of guns recovered with LCMs might decline independently of the ban's impact. (Hereafter, we refer to guns equipped with LCMs as LCM guns.)

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[75] For the pre-ban period, one can usually infer magazine capacity based on the firearm model. For post-ban recoveries, this is more problematic because gun models capable of accepting LCMs may have been equipped with grandfathered LCMs or with post-ban magazines designed to fit the same gun but holding fewer rounds.

[76] As for the AW analysis in Chapter 6, we utilize police data to examine trends in criminal use of LCMs. The reader is referred to the general discussion of police gun seizure data in Chapter 6.

[77] Findings presented in our 2002 interim report (Koper and Roth, 2002b) indicated that LCM use had not declined as of the late 1990s. Therefore, we sought to update the LCM analyses where possible for this version of the report.

8.1. Baltimore

In Baltimore, about 14% of guns recovered by police were LCM guns in 1993. This figure remained relatively stable for a few years after the ban but had dropped notably by 2002 and 2003 (Figure 8-1). For the entire post-ban period (1995-2003), recoveries of LCM guns were down 8% relative to those of guns with smaller magazines (Table 8-1, panel A), a change of borderline statistical significance. Focusing on the most recent years, however, LCM gun recoveries were 24% lower in 2002 and 2003 than during the year prior to the ban, a difference that was clearly significant (Table 8-1, panel B).[78,79,80] This change was attributable to a 36% drop in LCM handguns (Table 8-1, panel C). LCM rifles actually increased 36% as a share of crime guns, although they still accounted for no more than 3% in 2002 and 2003 (Table 8-1, panel D).[81]

Yet there was no decline in recoveries of LCM guns used in violent crimes (i.e., murders, shootings, robberies, and other assaults). After the ban, the percentage of violent crime guns with LCMs generally oscillated in a range consistent with the pre-ban level (14%) and hit peaks of roughly 16% to 17% in 1996 and 2003 (Figure 8-1).[82] Whether comparing the pre-ban period to the entire post-ban period (1995-2003) or the most recent years (2002-2003), there was no meaningful decline in LCM recoveries linked to violent crimes (Table 8-2, panels A and B).[83] Neither violent uses of LCM

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[78] Data on handgun magazines were also available for 1992. An auxiliary analysis of those data did not change the substantive inferences described in the text.

[79] The Maryland AP ban enacted in June 1994 also prohibited ammunition magazines holding over 20 rounds and did not permit additional sales or transfers of such magazines manufactured prior to the ban. This ban, as well as the Maryland and federal bans on AWs that account for many of the guns with magazines over 20 rounds, may have contributed to the downward trend in LCMs in Baltimore, but only 2% of the guns recovered in Baltimore from 1993 to 2000 were equipped with such magazines.

[80] All comparisons of 1993 to 2002-2003 in the Baltimore data are based on information from the months of January through November of each year. At the time we received these data, information was not yet available for December 2003, and preliminary analysis revealed that guns with LCMs were somewhat less likely to be recovered in December than in other months for years prior to 2003. Nevertheless, utilizing the December data for 1993 and 2002 did not change the substantive inferences. We did not remove December data from the comparisons of 1993 and the full post-ban period because those comparisons seemed less likely to be influenced by the absence of one month of data.

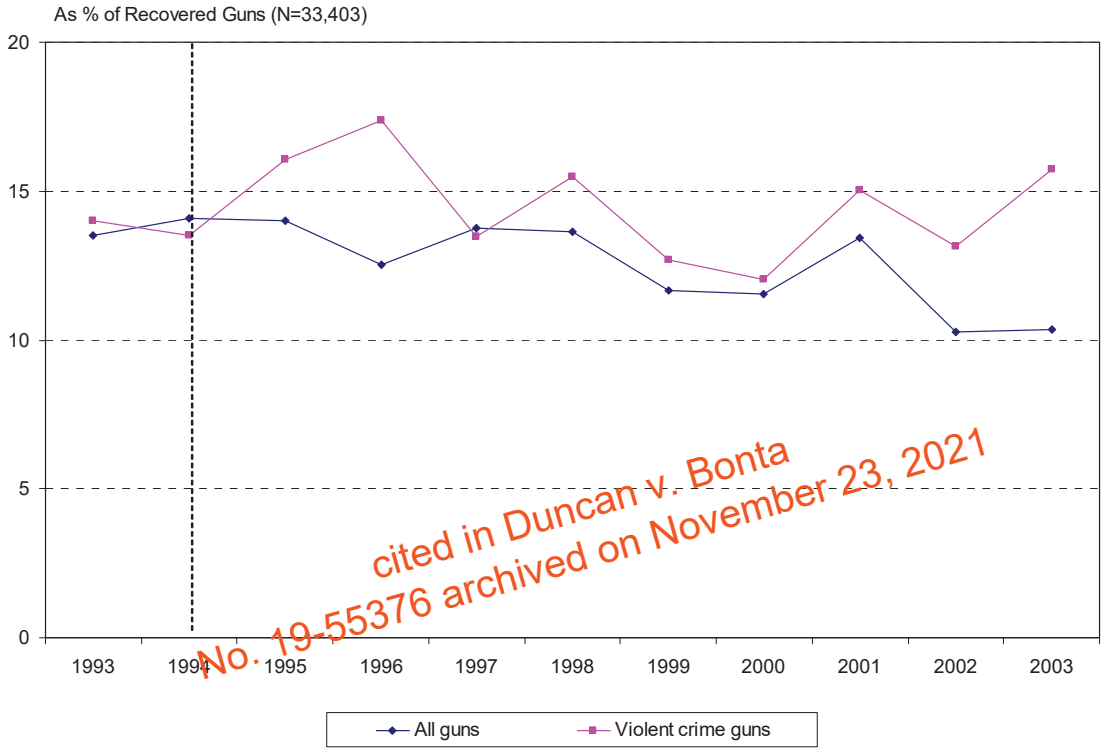
[81] This increase may have been due largely to a general increase in rifle seizures. LCM rifles actually dropped as a percentage of all rifle recoveries from 1993 to 2002-2003, suggesting that recoveries of LCM rifles were increasing less than recoveries of other rifles.

[82] For 1996, 45% of all records and 24% of those linked to violent crimes had missing data for magazine capacity (due to temporary changes in operational procedures in the Baltimore crime lab). For other years, missing data rates were no more than 6%. Based on those cases for which data were available, the share of guns with LCMs in 1996 was comparable to that in other years, particularly when examining all gun recoveries. At any rate, the analyses focusing on 1993, 2002, and 2003 reinforce the findings of those that include the 1996 data.

[83] The ammunition capacity code in the Baltimore data usually reflected the full capacity of the magazine and weapon, but sometimes reflected the capacity of the magazine only. (For instance, a semiautomatic with a 10-round magazine and the ability to accept one additional round in the chamber might have been coded as having a capacity of 10 or 11.) Informal assessment suggested that capacity was more likely to reflect the exact capacity of the magazine in the early years of the database and more likely to reflect the full capacity of the gun and magazine in later years. For the main runs presented in the text and tables, guns were counted as having LCMs if the coded capacity was greater than 11 rounds. This ensured that LCMs were not overestimated, but it potentially understated LCM prevalence, particularly for the earlier

handguns or LCM rifles had declined appreciably by 2002-2003 (Table 8-2, panels C and D). Hence, the general decline in LCM recoveries may reflect differences in the availability and use of LCMs among less serious offenders, changes in police practices,[84] or other factors.

Figure 8-1. Police Recoveries of Guns Equipped With Large Capacity Magazines in Baltimore, 1993-2003



years. However, coding the guns as LCM weapons based on a threshold of 10 (i.e., a coded capacity over 10 rounds) in 1993 and a threshold of 11 (i.e., a coded capacity over 11 rounds) for 2002-2003 did not change the inferences of the violent crime analysis. Further, this coding increased the pre-ban prevalence of LCMs by very little (about 4% in relative terms).

[84] During the late 1990s, for example, Baltimore police put greater emphasis on detecting illegal gun carrying (this statement is based on prior research and interviews the author has done in Baltimore as well as the discussion in Center to Prevent Handgun Violence, 1998). One can hypothesize that this effort reduced the fraction of recovered guns with LCMs because illegal gun carriers are probably more likely to carry smaller, more concealable handguns that are less likely to have LCMs.

Table 8-1. Trends in All Police Recoveries of Firearms Equipped With Large Capacity Magazines, Baltimore, 1993-2003

	Pre-Ban Period	Post-Ban Period	Change
A. All LCM Guns	Jan.-Dec. 1993	Jan. 1995-Nov. 2003	
Total	473	3703	
Annual Mean	473	445.86 [a]	-6%
LCM Guns as % of All Guns	13.51%	12.38%	-8%*
B. All LCM Guns	Jan.-Nov. 1993	Jan.-Nov. 2002-2003	
Total	430	626	
Annual Mean	430	313	-27%
LCM Guns as % of All Guns	13.47%	10.3%	-24%***
C. LCM Handguns	Jan.-Nov. 1993	Jan.-Nov. 2002-2003	
Total	359	440	
Annual Mean	359	220	-39%
LCM Handguns as % of All Guns	11.25%	7.24%	-36%***
D. LCM Rifles	Jan.-Nov. 1993	Jan.-Nov. 2002-2003	
LCM Rifles	71	183	
Annual Mean	71	91.5	29%
LCM Rifles as % of All Guns	2.22%	3.01%	36%**

a. Annual average calculated without 1996 and 2003 (to correct for missing months or missing magazine data).
* Chi-square p level < .10 (changes in percentages of guns equipped with LCMs were tested for statistical significance)
** Chi-square p level <.05 (changes in percentages of guns equipped with LCMs were tested for statistical significance)
** Chi-square p level < .01 (changes in percentages of guns equipped with LCMs were tested for statistical significance)

Table 8-2. Trends in Police Recoveries of Firearms Equipped With Large Capacity Magazines in Violent Crime Cases, Baltimore, 1993-2003

	Pre-Ban Period	Post-Ban Period	Change [a]
A. All LCM Guns	Jan.-Dec. 1993	Jan. 1995-Nov. 2003	
Total	87	711	
Annual Mean	87	81.86 [b]	-6%
LCM Guns as % of All Guns	14.01%	14.44%	3%
B. All LCM Guns	Jan.-Nov. 1993	Jan.-Nov. 2002-2003	
Total	79	104	
Annual Mean	79	52	-34%
LCM Guns as % of All Guns	13.96%	13.65%	-2%
C. LCM Handguns	Jan.-Nov. 1993	Jan.-Nov. 2002-2003	
Total	62	81	
Annual Mean	62	40.5	-35%
LCM Handguns as % of All Guns	10.95%	10.63%	-3%
D. LCM Rifles	Jan.-Nov. 1993	Jan.-Nov. 2002-2003	
LCM Rifles	17	23	
Annual Mean	17	11.5	-32%
LCM Rifles as % of All Guns	3%	3.02%	1%

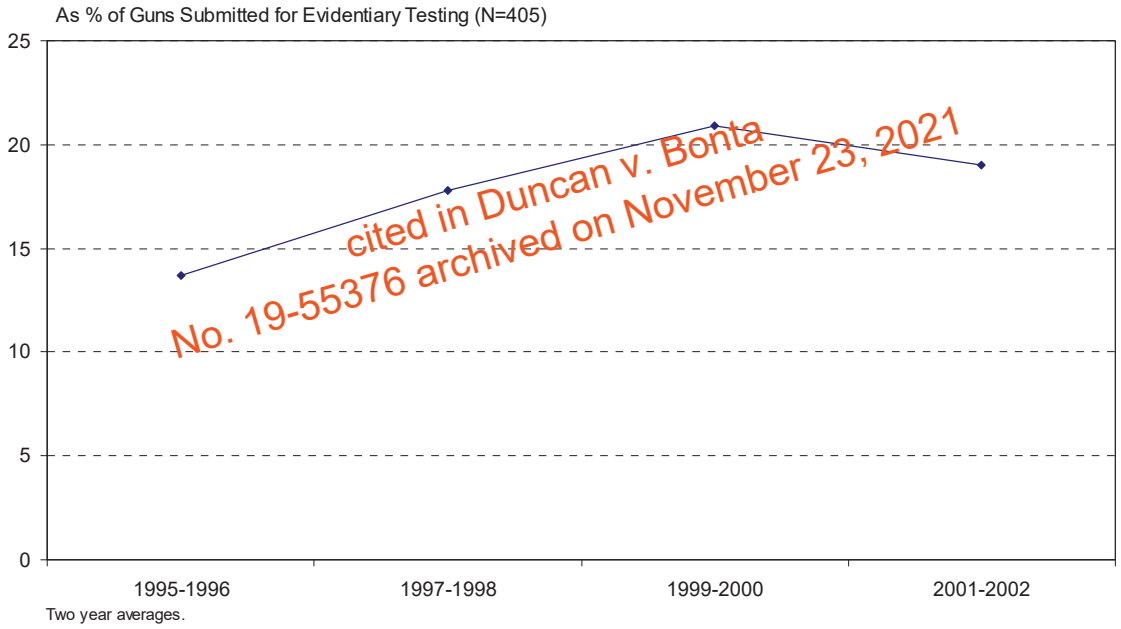
a. Changes in the percentages of guns with LCMs were statistically insignificant in chi-square tests.
b. Annual average calculated without 1996 and 2003 (to correct for missing months or missing magazine data).

8.2. Anchorage

In the Alaska database, magazine capacity was recorded only for guns recovered during the post-ban years, 1995 through 2002. However, we estimated pre-ban use of LCM handguns by identifying handgun models inspected during 1992 and 1993 that were manufactured with LCMs prior to the ban.[85] This permitted an assessment of pre-post changes in the use of LCM handguns.

As shown in Figure 8-2 (also see Table 8-3, panel A), LCM guns rose from 14.5% of crime guns in 1995-1996 to 24% in 2000-2001 (we present two-year averages because the sample are relatively small, particularly for the most recent years) and averaged about 20% for the entire post-ban period. LCM handguns drove much of this trend, but LCM rifles also increased from about 3% of crime guns in 1995-96 to 11% in 2000-2001.

Figure 8-2. Police Recoveries of Guns Equipped With Large Capacity Magazines in Anchorage (Alaska), 1995-2002



[85] To make these determinations, we consulted gun catalogs such as the *Blue Book of Gun Values* and *Guns Illustrated*.

Table 8-3. Trends in Police Recoveries of Firearms Equipped With Large Capacity Magazines in Violent Crime Cases, Anchorage (Alaska), 1992-2002 [a]

	Pre-Ban Period	Post-Ban Period	Change [b]
A. All LCM Guns	N/A	Jan. 1995-Dec. 2002	
Total		80	
Annual Mean		10	N/A
LCM Guns as % of All Guns		19.75%	N/A
B. LCM Handguns	Jan. 1992-Dec. 1993	Jan. 1995-Dec. 2002	
Total	17	57	
Annual Mean	8.5	7.13	-16%
LCM Handguns as % All Handguns	26.15%	22.35%	-15%
C. LCM Handguns	Jan. 1992-Dec. 1993	Jan. 2001-Dec. 2002	
Total	17	10	
Annual Mean	8.5	5	-41%
LCM Handguns as % of All Handguns	26.15%	19.23%	-26%

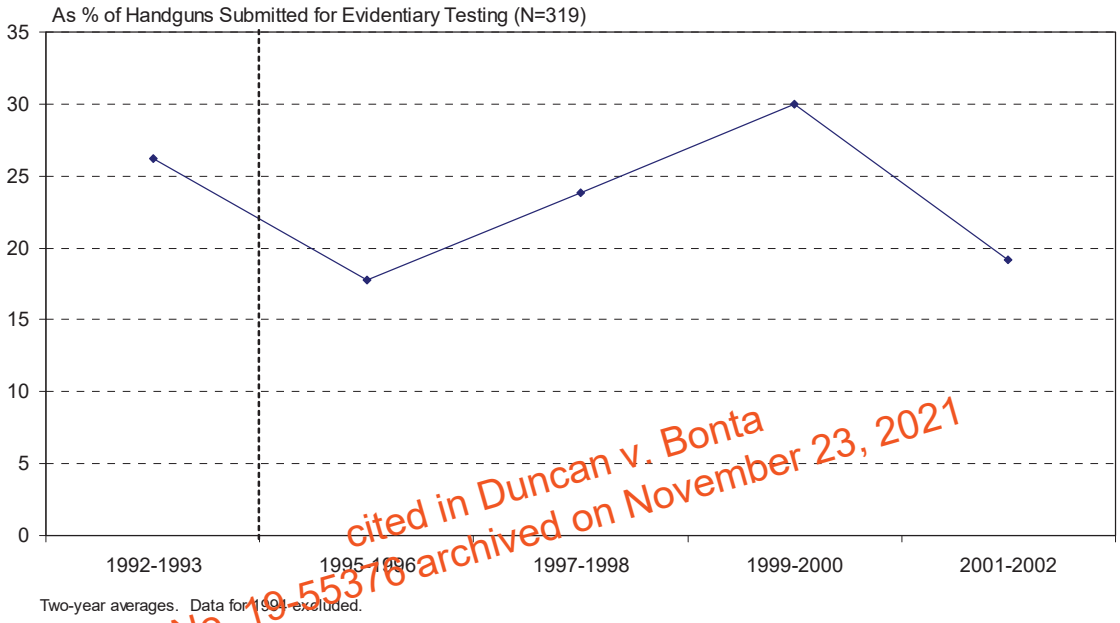
a. Based on guns submitted to State Police for evidentiary testing.
b. Changes in the percentages of guns equipped with LCMs were statistically insignificant in chi-square tests.

Investigation of pre-post changes for handguns revealed an inconsistent pattern (Figure 8-3). LCM handguns dropped initially after the ban, declining from 26% of handguns in 1992-1993 to 18% in 1995-1996. However, they rebounded after 1996, reaching a peak of 30% of handguns in 1999-2000 before declining to 19% in 2001-2002.

For the entire post-ban period, the share of handguns with LCMs was about 15% lower than in the pre-ban period (Table 8-3, panel B). By the two most recent post-ban years (2001-2002), LCM use had dropped 26% from the pre-ban years (Table 8-3, panel C). These changes were not statistically significant, but the samples of LCM handguns were rather small for rigorous statistical testing. Even so, it seems premature to conclude

that there has been a lasting reduction in LCM use in Alaska. LCM use in 2001-2002 was somewhat higher than that immediately following the ban in 1995-1996, after which there was a substantial rebound. Considering the inconsistency of post-ban patterns, further follow-up seems warranted before making definitive conclusions about LCM use in Alaska.

Figure 8-3. Police Recoveries of Handguns Equipped With Large Capacity Magazines in Anchorage (Alaska), 1992-2002



8.3. Milwaukee

LCM guns accounted for 21% of guns recovered in Milwaukee murder investigations from 1991 to 1993 (Table 8-4, panel A). Following the ban, this figure rose until reaching a plateau of over 36% in 1997 and 1998 (Figure 8-4). On average, the share of guns with LCMs grew 55% from 1991-1993 to 1995-1998, a trend that was driven by LCM handguns (Table 8-4, panels A and B).[86] LCM rifles held steady at between 4% and 5% of the guns (Table 8-4, panel C).

We also analyzed a preliminary database on 48 guns used in murders during 2000 and 2001 (unlike the 1991-1998 database, this database did not include information on other guns recovered during the murder investigations). About 11% of these guns were LCM guns, as compared to 19% of guns used in murders from 1991 to 1993 (analyses not shown). However, nearly a quarter of the 2000-2001 records were missing information on magazine capacity.[87] Examination of the types and models of guns with

[86] LCM guns also increased as share of guns that were used in the murders (the full sample results discussed in the text include all guns recovered during the investigations).
[87] Magazine capacity was missing for less than 4% of the records in earlier years.

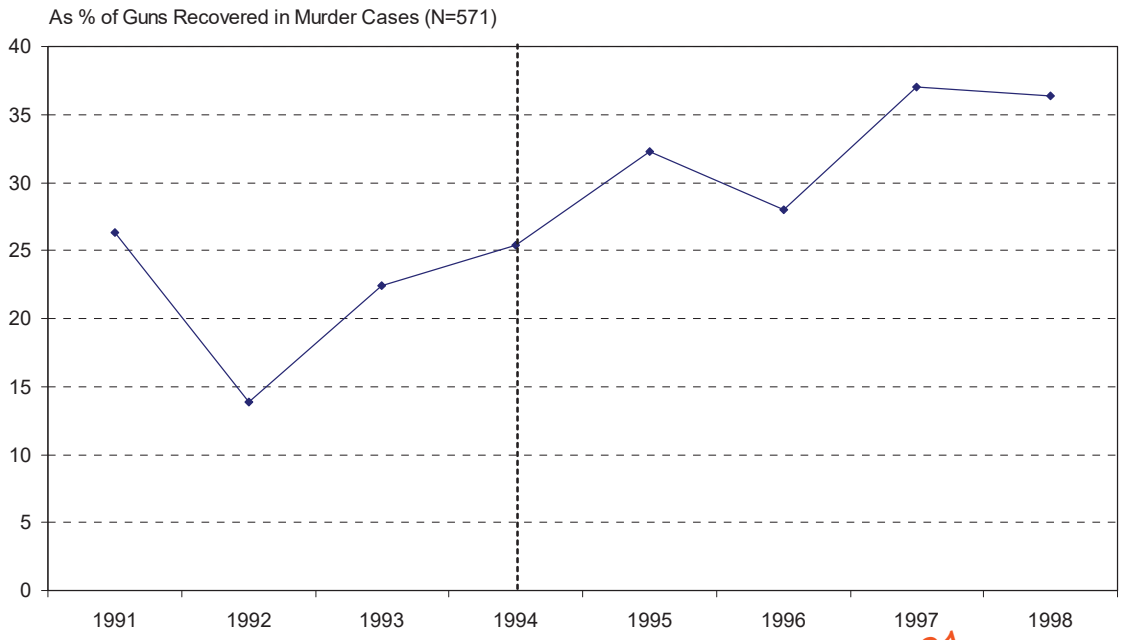
unidentified magazines suggested that as many as 17% of guns used in murders during 2000 and 2001 may have been LCM guns (based on all those that either had LCMs, were models sold with LCMs prior to the ban, or were unidentified semiautomatics). While this still suggests a drop in LCM use from the peak levels of the late 1990s (26% of guns used in murders from 1995 to 1998 had LCMs), it is not clear that LCM use has declined significantly below pre-ban levels.

Table 8-4. Trends in Police Recoveries of Firearms Equipped With Large Capacity Magazines in Murder Cases, Milwaukee County, 1991-1998

	Pre-Ban Period	Post-Ban Period	Change
A. All LCM Guns	Jan. 1991-Dec. 1993	Jan. 1995-Dec. 1998	
Total	51	83	
Annual Mean	17	20.75	22%
LCM Guns as % of All Guns	20.9%	32.42%	55%*
B. LCM Handguns	Jan. 1991-Dec. 1993	Jan. 1995-Dec. 1998	
Total	40	71	
Annual Mean	13.33	17.75	33%
LCM Handguns as % of All Guns	16.39%	27.73%	69%*
C. LCM Rifles	Jan. 1991-Dec. 1993	Jan. 1995-Dec. 1998	
Total	11	12	
Annual Mean	3.67	3	-18%
LCM Rifles as % of All Guns	4.51%	4.69%	4%

* Chi-square p level < .01 (changes in percentages of guns equipped with LCMs were tested for statistical significance)

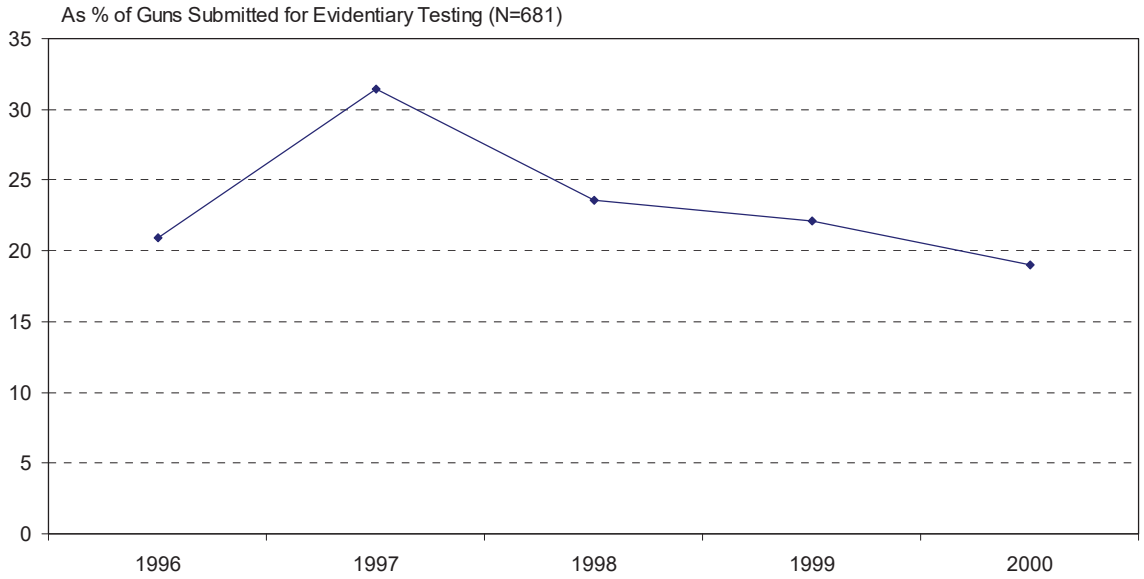
Figure 8-4. Recoveries of Guns Equipped With Large Capacity Magazines in Milwaukee County Murder Cases, 1991-1998



8.4. Louisville

The Louisville LCM data are all post-ban (1996-2000), so we cannot make pre-post comparisons. Nonetheless, the share of crime guns with LCMs in Louisville (24%) was within the range of that observed in the other cities during this period. And similar to post-ban trends in the other sites, LCM recoveries peaked in 1997 before leveling off and remaining steady through the year 2000 (Figure 8-5). LCM rifles dropped 21% as a share of crime guns between 1996 and 2000 (analyses not shown), but there were few in the database, and they never accounted for more than 6.2% of guns in any year.

Figure 8-5. Police Recoveries of Guns Equipped With Large Capacity Magazines in Louisville (Kentucky), 1996-2000



Year 2000 data are not for the full year.

8.5. Summary

Despite a doubling of handgun LCM prices between 1993 and 1995 and a 40% increase in rifle LCM prices from 1993 to 1994, criminal use of LCMs was rising or steady through at least the latter 1990s, based on police recovery data from four jurisdictions studied in this chapter. These findings are also consistent with an earlier study finding no decline in seizures of LCM guns from juveniles in Washington, DC in the year after the ban (Koper, 2001).[88] Post-2000 data, though more limited and inconsistent, suggest that LCM use may be dropping from peak levels of the late 1990s but provide no definitive evidence of a drop below pre-ban levels.[89] These trends have been driven primarily by LCM handguns, which are used in crime roughly three times as

[88] From 1991 to 1993, 16.4% of guns recovered from juveniles in Washington, DC had LCMs (14.2% had LCMs in 1993). In 1995, this percentage increased to 17.1%. We did not present these findings in this chapter because the data were limited to guns recovered from juveniles, the post-ban data series was very short, and the gun markets supplying DC and Baltimore are likely to have much overlap (Maryland is a leading supplier of guns to DC – see ATF, 1997; 1999).

[89] We reran selected key analyses with the Baltimore, Milwaukee, and Louisville data after excluding .22 caliber guns, some of which could have been equipped with attached tubular magazines that are exempted from the LCM ban, and obtained results consistent with those reported in the text. It was possible to identify these exempted magazines in the Anchorage data. When they were removed from Anchorage's LCM count, the general pattern in use of banned LCMs was similar to that presented in the main 1995-2002 analysis: guns with banned LCMs rose, reaching a peak of 21% of crime guns in 1999-2000, before declining slightly to 19% in 2001-2002.

often as LCM rifles. Nonetheless, there has been no consistent reduction in the use of LCM rifles either.

The observed patterns are likely due to several factors: a hangover from pre-ban growth in the production and marketing of LCM guns (Cook and Ludwig, 1997, pp. 5-6; Wintemute, 1996);[90] the low cost of LCMs relative to the firearms they complement, which seems to make LCM use less sensitive to prices than is firearm use;[91] the utility that gun users, particularly handgun users, attach to LCMs; a plentiful supply of grandfathered LCMs, likely enhanced by a pre-ban surge in production (though this has not been documented) and the importation of millions of foreign LCMs since the ban;[92] thefts of LCM firearms (see Roth and Koper, 1997, Chapter 4); or some combination of these factors.[93] However, it is worth noting that our analysis did not reveal an upswing in use of LCM guns following the surge of LCM importation in 1999 (see the previous chapter). It remains to be seen whether recent imports will have a demonstrable effect on patterns of LCM use.

Finally, we must be cautious in generalizing these results to the nation because they are based on a small number of non-randomly selected jurisdictions. Nonetheless, the consistent failure to find clear evidence of a pre-post drop in LCM use across these geographically diverse locations strengthens the inference that the findings are indicative of a national pattern.

[90] To illustrate this trend, 38% of handguns acquired by gun owners during 1993 and 1994 were equipped with magazines holding 10 or more rounds, whereas only 14% of handguns acquired before 1993 were so equipped (Cook and Ludwig, 1997, pp. 5-6).

[91] Although elevated post-ban prices did not suppress use of LCMs, a more subtle point is that LCM use rose in most of these locations between 1995 and 1998, as LCM prices were falling from their peak levels of 1994-1995. Therefore, LCM use may have some sensitivity to price trends.

[92] However, we do not have the necessary data to determine if LCMs used in crime after the ban were acquired before or after the ban.

[93] In light of these considerations, it is conceivable that the ban slowed the rate of growth in LCM use, accelerated it temporarily (due to a pre-ban production boom), or had no effect. We do not have the data necessary to examine this issue rigorously. Moreover, the issue might be regarded as somewhat superfluous; the more critical point would seem to be that nearly a decade after the ban, LCM use has still not declined demonstrably below pre-ban levels.

9. THE CONSEQUENCES OF CRIMES WITH ASSAULT WEAPONS AND LARGE CAPACITY MAGAZINES

One of the primary considerations motivating passage of the ban on AWs and LCMs was a concern over the perceived dangerousness of these guns and magazines. In principal, semiautomatic weapons with LCMs enable offenders to fire high numbers of shots rapidly, thereby potentially increasing both the number of person wounded per gunfire incident (including both intended targets and innocent bystanders) and the number of gunshot victims suffering multiple wounds, both of which would increase deaths and injuries from gun violence. Ban advocates also argued that the banned AWs possessed additional features conducive to criminal applications.

The findings of the previous chapters suggest that it is premature to make definitive assessments of the ban's impact on gun violence. Although criminal use of AWs has declined since the ban, this reduction was offset through at least the late 1990s by steady or rising use of other guns equipped with LCMs. As argued previously, the LCM ban has greater potential for reducing gun deaths and injuries than does the AW ban. Guns with LCMs – of which AWs are only a subset – were used in up to 25% of gun crimes before the ban, whereas AWs were used in no more than 8% (Chapter 3). Furthermore, an LCM is arguably the most important feature of an AW. Hence, use of guns with LCMs is probably more consequential than use of guns with other military-style features, such as flash hiders, folding rifle stocks, threaded barrels for attaching a silencers, and so on.[94]

This is not to say that reducing use of AWs will have no effect on gun crime; a decline in the use of AWs does imply fewer crimes with guns having particularly large magazines (20 or more rounds) and other military-style features that could facilitate some crimes. However, it seems that any such effects would be outweighed, or at least

[94] While it is conceivable that changing features of AWs other than their magazines might prevent some gunshot victimizations, available data provide little if any empirical basis for judging the likely size of such effects. Speculatively, some of the most beneficial weapon redesigns may be the removal of folding stocks and pistol grips from rifles. It is plausible that some offenders who cannot obtain rifles with folding stocks (which make the guns more concealable) might switch to handguns, which are more concealable but generally cause less severe wounds (e.g. see DiMaio, 1985). However, such substitution patterns cannot be predicted with certainty. Police gun databases rarely have information sufficiently detailed to make assessments of changes over time in the use of weapons with specific features like folding stocks. Based on informal assessments, there was no consistent pattern in post-ban use of rifles (as a share of crime guns) in the local databases examined in the prior chapters (also see the specific comments on LCM rifles in the previous chapters).

Pistol grips enhance the ability of shooters to maintain control of a rifle during rapid, "spray and pray" firing (e.g., see Violence Policy Center, 2003). (Heat shrouds and forward handgrips on APs serve the same function.) While this feature may prove useful in military contexts (e.g., firefights among groups at 100 meters or less – see data of the U.S. Army's Operations Research Office as cited in Violence Policy Center, 2003), it is unknown whether civilian attacks with semiautomatic rifles having pistol grips claim more victims per attack than do those with other semiautomatic rifles. At any rate, most post-ban AR-type rifles still have pistol grips. Further, the ban does not count a stock thumbhole grip, which serves the same function as a pistol grip (e.g., see the illustration of LCMM rifles in Chapter 2), as an AR feature.

obscured, by the wider effects of LCM use, which themselves are likely to be small at best, as we argue below.[95]

Because offenders can substitute non-banned guns and small magazines for banned AWs and LCMs, there is not a clear rationale for expecting the ban to reduce assaults and robberies with guns.[96] But by forcing AW and LCM offenders to substitute non-AWs with small magazines, the ban might reduce the number of shots fired per gun attack, thereby reducing both victims shot per gunfire incident and gunshot victims sustaining multiple wounds. In the following sections, we consider the evidence linking high-capacity semiautomatics and AWs to gun violence and briefly examine recent trends in lethal and injurious gun violence.

9.1. The Spread of Semiautomatic Weaponry and Trends in Lethal and Injurious Gun Violence Prior to the Ban

Nationally, semiautomatic handguns grew from 28% of handgun production in 1973 to 80% in 1993 (Zawitz, 1995, p. 3). Most of this growth occurred from the late 1980s onward, during which time the gun industry also increased marketing and production of semiautomatics with LCMs (Wintemute, 1996). Likewise, semiautomatics grew as a percentage of crime guns (Koper, 1995; 1997), implying an increase in the average firing rate and ammunition capacity of guns used in crime.[97]

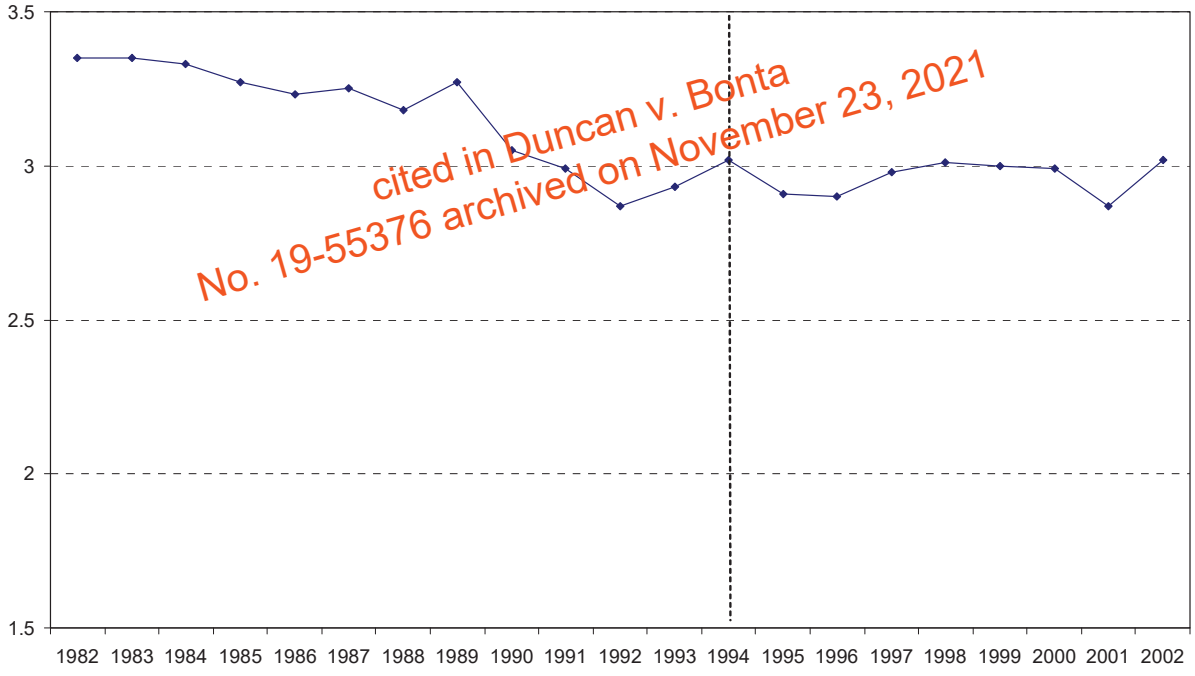
[95] On a related note, a few studies suggest that state-level AW bans have not reduced crime (Koper and Roth, 2001a; Lott, 2003). This could be construed as evidence that the federal AW ban will not reduce gunshot victimizations without reducing LCM use because the state bans tested in those studies, as written at the time, either lacked LCM bans or had LCM provisions that were less restrictive than that of the federal ban. (New Jersey's 1990 AW ban prohibited magazines holding more than 15 rounds. AP bans passed by Maryland and Hawaii prohibited magazines holding more than 20 rounds and pistol magazines holding more than 10 rounds, respectively, but these provisions did not take effect until just a few months prior to the federal ban.) However, it is hard to draw definitive conclusions from these studies for a number of reasons, perhaps the most salient of which are the following: there is little evidence on how state AW bans affect the availability and use of AWs (the impact of these laws is likely undermined to some degree by the influx of AWs from other states, a problem that was probably more pronounced prior to the federal ban when the state laws were most relevant); studies have not always examined the effects of these laws on gun homicides and shootings, the crimes that are arguably most likely to be affected by AW bans (see discussion in the main text); and the state AW bans that were passed prior to the federal ban (those in California, New Jersey, Hawaii, Connecticut, and Maryland) were in effect for only three months to five years (two years or less in most cases) before the imposition of the federal ban, after which they became largely redundant with the federal legislation and their effects more difficult to predict and estimate.

[96] One might hypothesize that the firepower provided by AWs and other semiautomatics with LCMs emboldens some offenders to engage in aggressive behaviors that prompt more shooting incidents. On the other hand, these weapons might also prevent some acts of violence by intimidating adversaries, thus discouraging attacks or resistance. We suspect that firepower does influence perceptions, considering that many police departments have upgraded their weaponry in recent years – often adopting semiautomatics with LCMs – because their officers felt outgunned by offenders. However, hypotheses about gun types and offender behavior are very speculative, and, pending additional research on such issues, it seems prudent to focus on indicators with stronger theoretical and empirical foundations.

[97] Revolvers, the most common type of non-semiautomatic handgun, typically hold only 5 or 6 rounds (and sometimes up to 9). Semiautomatic pistols, in contrast, hold ammunition in detachable magazines that, prior to the ban, typically held 5 to 17 bullets and sometimes upwards of 30 (Murtz et al., 1994).

The impact of this trend is debatable. Although the gun homicide rate rose considerably during the late 1980s and early 1990s (Bureau of Justice Statistics, 1994, p. 13), the percentage of violent gun crimes resulting in death was declining (see Figure 9-1 and the related discussion in section 9.3). Similarly, the percentage of victims killed or wounded in handgun discharge incidents declined from 27% during the 1979-1987 period to 25% for the 1987-1992 period (calculated from Rand, 1990, p. 5; 1994, p. 2) as semiautomatics were becoming more common crime weapons.[98] On the other hand, an increasing percentage of gunshot victims died from 1992 to 1995 according to hospital data (Cherry et al., 1998), a trend that could have been caused in part by a higher number of gunshot victims with multiple wounds (also see McGonigal et al., 1993). Most notably, the case fatality rate for assaultive gunshot cases involving 15 to 24-year-old males rose from 15.9% in late 1993 to 17.5% in early 1995 (p. 56).

Figure 9-1. Percentage of Violent Gun Crimes Resulting in Death (National), 1982-2002



Based on gun homicides, gun robberies, and gun assaults reported in the Uniform Crime Reports and Supplemental Homicide Reports.

[98] A related point is that there was a general upward trend in the average number of shots fired by offenders in gunfights with New York City police from the late 1980s through 1992 (calculated from Goehl, 1993, p. 51). However, the average was no higher during this time than during many years of the early 1980s and 1970s.

Some researchers have inferred links between the growing use of semiautomatics in crime and the rise of both gun homicides and bystander shootings in a number of cities during the late 1980s and early 1990s (Block and Block, 1993; McGonigal et al., 1993; Sherman et al., 1989; Webster et al., 1992). A study in Washington, DC, for example, reported increases in wounds per gunshot victim and gunshot patient mortality during the 1980s that coincided with a reported increase in the percentage of crime guns that were semiautomatics (Webster et al., 1992).

Nevertheless, changes in offender behavior, coupled with other changes in crime guns (e.g., growing use of large caliber handguns – see Caruso et al., 1999; Koper, 1995; 1997; Wintemute, 1996), may have been key factors driving such trends. Washington, DC, for example, was experiencing an exploding crack epidemic at the time of the aforementioned study, and this may have raised the percentage of gun attacks in which offenders had a clear intention to injure or kill their victims. Moreover, studies that attempted to make more explicit links between the use of semiautomatic firearms and trends in lethal gun violence via time series analysis failed to produce convincing evidence of such links (Koper, 1995; 1997). However, none of the preceding research related specific trends in the use of AWs or LCMs to trends in lethal gun violence.

9.2. Shots Fired in Gun Attacks and the Effects of Weaponry on Attack Outcomes

The evidence most directly relevant to the potential of the AW-LCM ban to reduce gun deaths and injuries comes from studies examining shots fired in gun attacks and/or the outcomes of attacks involving different types of guns. Unfortunately, such evidence is very sparse.

As a general point, the faster firing rate and larger ammunition capacities of semiautomatics, especially those equipped with LCMs, have the potential to affect the outcomes of many gun attacks because gun offenders are not particularly good shooters. Offenders wounded their victims in no more than 29% of gunfire incidents according to national, pre-ban estimates (computed from Rand, 1994, p. 2; also see estimates presented later in this chapter). Similarly, a study of handgun assaults in one city revealed a 31% hit rate per shot, based on the sum totals of all shots fired and wounds inflicted (Reedy and Koper, 2003, p. 154). Other studies have yielded hit rates per shot ranging from 8% in gunfights with police (Goehl, 1993, p. 8) to 50% in mass murders (Kleck, 1997, p. 144). Even police officers, who are presumably certified and regularly re-certified as proficient marksman and who are almost certainly better shooters than are average gun offenders, hit their targets with only 22% to 39% of their shots (Kleck, 1991, p. 163; Goehl, 1993). Therefore, the ability to deliver more shots rapidly should raise the likelihood that offenders hit their targets, not to mention innocent bystanders.[99]

[99] However, some argue that this capability is offset to some degree by the effects of recoil on shooter aim, the limited number of shots fired in most criminal attacks (see below), and the fact that criminals using non-semiautomatics or semiautomatics with small magazines usually have the time and ability to deliver multiple shots if desired (Kleck, 1991, pp. 78-79).

A few studies have compared attacks with semiautomatics, sometimes specifically those with LCMs (including AWs), to other gun assaults in terms of shots fired, persons hit, and wounds inflicted (see Tables 9-1 and 9-2). The most comprehensive of these studies examined police reports of attacks with semiautomatic pistols and revolvers in Jersey City, New Jersey from 1992 through 1996 (Reedy and Koper, 2003), finding that use of pistols resulted in more shots fired and higher numbers of gunshot victims (Table 9-1), though not more gunshot wounds per victim (Table 9-2).[100] Results implied there would have been 9.4% fewer gunshot victims overall had semiautomatics not been used in any of the attacks. Similarly, studies of gun murders in Philadelphia (see McGonigal et al., 1993 in Table 9-1) and a number of smaller cities in Pennsylvania, Ohio, and Iowa (see Richmond et al., 2003 in Table 9-2) found that attacks with semiautomatics resulted in more shots fired and gunshot wounds per victim. An exception is that the differential in shots fired between pistol and revolver cases in Philadelphia during 1990 did not exist for cases that occurred in 1985, when semiautomatics and revolvers had been fired an average of 1.6 and 1.9 times, respectively. It is not clear whether the increase in shots fired for pistol cases from 1985 to 1990 was due to changes in offender behavior, changes in the design or quality of pistols (especially an increase in the use of models with LCMs – see Wintemute, 1996), the larger sample for 1990, or other factors.

[100] But unlike other studies that have examined wounds per victim (see Table 9-2), this study relied on police reports of wounds inflicted rather than medical reports, which are likely to be more accurate.

Table 9-1. Shots Fired and Victims Hit in Gunfire Attacks By Type of Gun and Magazine

Data Source	Measure	Outcome
Gun attacks with semiautomatic pistols and revolvers, Jersey City, 1992-1996 [a]	Shots Fired	Avg. = 3.2 – 3.7 (n=165 pistol cases) * Avg. = 2.3 – 2.6 (n=71 revolver cases) *
Gun homicides with semiautomatic pistols and revolvers, Philadelphia, 1985 and 1990 [b]	Shots Fired	Avg. = 1.6 (n=21 pistol cases, 1985) Avg. = 1.9 (n=57 revolver cases, 1985) Avg. = 2.7 (n=95 pistol cases, 1990) Avg. = 2.1 (n=108 revolver cases, 1990)
Gun attacks with semiautomatic pistols and revolvers, Jersey City, 1992-1996 [a]	Victims Hit	Avg. = 1.15 (n=95 pistol cases) * Avg. = 1.0 (n=40 revolver cases) *
Mass shootings with AWs, semiautomatics having LCMs, or other guns, 6+ dead or 12+ shot, United States, 1984-1993 [c]	Victims Hit	Avg. = 29 (n=6 AW/LCM cases) Avg. = 13 (n=9 non-AW/LCM cases)
Self-reported gunfire attacks by state prisoners with AWs, other semiautomatics, and non-semiautomatic firearms, United States, 1997 or earlier [d]	% of Attacks With Victims Hit	19.5% (n=72 AW or machine gun cases) 22.3% (n=419 non-AW, semiautomatic cases) 23.3% (n=608 non-AW, non-semiautomatic cases)

a. Reedy and Koper (2003)
b. McGonigal et al. (1993)
c. Figures calculated by Koper and Roth (2001a) based on data presented by Kleck (1997, p. 144)
d. Calculated from Harlow (2001, p. 11). (Sample sizes are based on unpublished information provided by the author of the survey report.)
* Pistol/revolver differences statistically significant at $p<.05$ (only Reedy and Koper [2003] and Harlow [2001] tested for statistically significant differences). The shots fired ranges in Reedy and Koper are based on minimum and maximum estimates.

Table 9-2. Gunshot Wounds Per Victim By Type of Gun and Magazine

Data Source	Measure	Outcome
Gun attacks with semiautomatic pistols and revolvers, Jersey City, 1992-1996 [a]	Gunshot Wounds	Avg. = 1.4 (n=107 pistol victims) Avg. = 1.5 (n=40 revolver victims)
Gun homicides with semiautomatic pistols and revolvers, Iowa City (IA), Youngstown (OH), and Bethlehem (PA), 1994-1998 [b]	Gunshot Wounds	Avg. = 4.5 total (n=212 pistol victims)* Avg. = 2.9 entry Avg. = 2.0 total (n=63 revolver victims)* Avg. = 1.5 entry
Gun homicides with assault weapons (AWs), guns having large capacity magazines (LCMs), and other firearms, Milwaukee, 1992-1995 [c]	Gunshot Wounds	Avg. = 3.23 (n=30 LCM victims) ** Avg. = 3.14 (n=7 AW victims) Avg. = 2.08 (n=102 non-AW/LCM victims)**

a. Reedy and Koper (2003)
b. Richmond et al. (2003)
c. Roth and Koper (1997, Chapter 6)
* Pistol/revolver differences statistically significant at p<.01.
** The basic comparison between LCM victims and non-AW/LCM victims was moderately significant (p<.10) with a one-tailed test. Regression results (with a slightly modified sample) revealed a difference significant at p=.05 (two-tailed test). Note that the non-LCM group included a few cases involving non-banned LCMs (.22 caliber attached tubular devices).

Also, a national survey of state prisoners found that, contrary to expectations, offenders who reported firing on victims with AWs and other semiautomatics were no more likely to report having killed or injured victims than were other gun offenders who reported firing on victims (Table 9-1). However, the measurement of guns used and attack outcomes were arguably less precise in this study, which was based on offender self-reports, than in other studies utilizing police and medical reports.[101]

Attacks with AWs or other guns with LCMs may be particularly lethal and injurious, based on very limited evidence. In mass shooting incidents (defined as those in which at least 6 persons were killed or at least 12 were wounded) that occurred during the decade preceding the ban, offenders using AWs and other semiautomatics with LCMs (sometimes in addition to other guns) claimed an average of 29 victims in comparison to an average of 13 victims for other cases (Table 9-1). (But also see the study discussed in the preceding paragraph in regards to victims hit in AW cases.)

Further, a study of Milwaukee homicide victims from 1992 through 1995 revealed that those killed with AWs were shot 3.14 times on average, while those killed with any

[101] See the discussion of self-reports and AW use in Chapter 3.

gun having an LCM were shot 3.23 times on average (Table 9-2). In contrast, victims shot with guns having small magazines had only 2.1 wounds on average. If such a wound differential can be generalized to other gun attacks – if, that is, both fatal and non-fatal LCM gunshot victims are generally hit one or more extra times – then LCM use could have a considerable effect on the number of gunshot victims who die. To illustrate, the fatality rate among gunshot victims in Jersey City during the 1990s was 63% higher for those shot twice than for those shot once (26% to 16%) (Koper and Roth, 2001a; 2001b). Likewise, fatality rates are 61% higher for patients with multiple chest wounds than for patients with a single chest wound (49% to 30.5%), based on a Washington, DC study (Webster et al., 1992, p. 696).

Similar conclusions can also be inferred indirectly from the types of crimes involving LCM guns. To illustrate, handguns associated with gunshot victimizations in Baltimore (see the description of the Baltimore gun and magazine data in the preceding chapter) are 20% to 50% more likely to have LCMs than are handguns associated with other violent crimes, controlling for weapon caliber (Table 9-3). This difference may be due to higher numbers of shots and hits in crimes committed with LCMs, although it is also possible that offenders using LCMs are more likely to fire on victims. But controlling for gunfire, guns used in shootings are 17% to 26% more likely to have LCMs than guns used in gunfire cases resulting in no wounded victims (perhaps reflecting higher numbers of shots fired and victims hit in LCM cases), and guns linked to murders are 8% to 17% more likely to have LCMs than guns linked to non-fatal gunshot victimizations (perhaps indicating higher numbers of shots fired and wounds per victim in LCM cases).[102] These differences are not all statistically significant, but the pattern is consistent. And as discussed in Chapter 3, AWs account for a larger share of guns used in mass murders and murders of police, crimes for which weapons with greater firepower would seem particularly useful.

[102] Cases with and without gunfire and gunshot victims were approximated based on offense codes contained in the gun seizure data (some gunfire cases not resulting in wounded victims may not have been identified as such, and it is possible that some homicides were not committed with the guns recovered during the investigations). In order to control for caliber effects, we focused on 9mm and .38 caliber handguns. Over 80% of the LCM handguns linked to violent crimes were 9mm handguns. Since all (or virtually all) 9mm handguns are semiautomatics, we also selected .38 caliber guns, which are close to 9mm in size and consist almost entirely of revolvers and derringers.

The disproportionate involvement of LCM handguns in injury and death cases is greatest in the comparisons including both 9mm and .38 caliber handguns. This may reflect a greater differential in average ammunition capacity between LCM handguns and revolvers/derringers than between LCM handguns and other semiautomatics. The differential in fatal and non-fatal gunshot victims may also be due to caliber effects; 9mm is generally a more powerful caliber than .38 based on measures like kinetic energy or relative stopping power (e.g., see DiMaio, 1985, p. 140; Warner 1995, p. 223; Wintemute, 1996, p. 1751).

Table 9-3. Probabilities That Handguns Associated With Murders, Non-Fatal Shootings, and Other Violent Crimes Were Equipped With Large Capacity Magazines in Baltimore, 1993-2000

Handgun Sample	% With LCM	% Difference (#2 Relative to #1)
A. Handguns Used in Violent Crimes With and Without Gunshot Injury		
1) 9mm and .38: violence, no gunshot victims	23.21%	
2) 9mm and .38: violence with gunshot victims	34.87%	50%*
1) 9mm: violence, no gunshot victims	52.92%	
2) 9mm: violence with gunshot victims	63.24%	20%*
B. Handguns Used in Gunfire Cases With and Without Gunshot Injury		
1) 9mm and .38: gunfire, no gunshot victims	27.66%	
2) 9mm and .38: gunfire with gunshot victims	34.87%	26%
1) 9mm: gunfire, no gunshot victims	54.17%	
2) 9mm: gunfire with gunshot victims	63.24%	17%
C. Handguns Used in Fatal Versus Non-Fatal Gunshot Victimizations		
1) 9mm and .38: non-fatal gunshot victims	32.58%	
2) 9mm and .38: homicides	38.18%	17%
1) 9mm: non-fatal gunshot victims	61.14%	
2) 9mm: homicides	66.04%	8%

* Statistically significant difference at p<.01 (chi-square).

The findings of the preceding studies are subject to numerous caveats. There were few if any attempts to control for characteristics of the actors or situations that might have influenced weapon choices and/or attack outcomes.[103] Weapons data were typically missing for substantial percentages of cases. Further, many of the comparisons in the tables were not tested for statistical significance (see the notes to Tables 9-1 and 9-2).[104]

Tentatively, nonetheless, the evidence suggests more often than not that attacks with semiautomatics, particularly those equipped with LCMs, result in more shots fired, leading to both more injuries and injuries of greater severity. Perhaps the faster firing rate and larger ammunition capacities afforded by these weapons prompt some offenders to fire more frequently (i.e., encouraging what some police and military persons refer to as a "spray and pray" mentality). But this still begs the question of whether a 10-round limit on magazine capacity will affect the outcomes of enough gun attacks to measurably reduce gun injuries and deaths.

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[103] In terms of offender characteristics, recall from Chapter 3 that AP buyers are more likely than other gun buyers to have criminal histories and commit subsequent crimes. This does not seem to apply, however, to the broader class of semiautomatic users: handgun buyers with and without criminal histories tend to buy pistols in virtually the same proportions (Wintemute et al., 1998b), and youthful gun offenders using pistols and revolvers have very comparable criminal histories (Sheley and Wright, 1993b, p. 381). Further, semiautomatic users, including many of those using AWs, show no greater propensity to shoot at victims than do other gun offenders (Harlow, 2001, p. 11; Reedy and Koper, 2003). Other potential confounders to the comparisons in Tables 9-1 and 9-2 might include shooter age and skill, the nature of the circumstances (e.g., whether the shooting was an execution-style shooting), the health of the victim(s), the type of location (e.g., indoor or outdoor location), the distance between the shooter and intended victim(s), the presence of multiple persons who could have been shot intentionally or accidentally (as bystanders), and (in the mass shooting incidents) the use of multiple firearms.

[104] Tables 9-1 and 9-2 present the strongest evidence from the available studies. However, there are additional findings from these studies and others that, while weaker, are relevant. Based on gun model information available for a subset of cases in the Jersey City study, there were 12 gunfire cases involving guns manufactured with LCMs before the ban (7 of which resulted in wounded victims) and 94 gunfire cases involving revolvers or semiautomatic models without LCMs. Comparisons of these cases produced results similar to those of the main analysis: shot fired estimates ranged from 2.83 to 3.25 for the LCM cases and 2.22 to 2.6 for the non-LCM cases; 1.14 victims were wounded on average in the LCM gunshot cases and 1.06 in the non-LCM gunshot cases; and LCM gunshot victims had 1.14 wound on average, which, contrary to expectations, was less than the 1.47 average for other gunshot victims.

The compilation of mass shooting incidents cited in Table 9-1 had tentative shots fired estimates for 3 of the AW-LCM cases and 4 of the other cases. The AW-LCM cases averaged 93 shots per incident, a figure two and a half times greater than the 36.5 shot average for the other cases.

Finally, another study of firearm mass murders found that the average number of victims killed (tallies did not include others wounded) was 6 in AW cases and 4.5 in other cases (Roth and Koper, 1997, Appendix A). Only 2 of the 52 cases studied clearly involved AWs (or very similar guns). However, the make and model of the firearm were available for only eight cases, so additional incidents may have involved LCMs; in fact, at least 35% of the cases involved unidentified semiautomatics. (For those cases in which at least the gun type and firing action were known, semiautomatics outnumbered non-semiautomatics by 6 to 1, perhaps suggesting that semiautomatics are used disproportionately in mass murders.)

9.2.1. Will a 10-Round Magazine Limit Reduce Gunshot Victimizations?

Specific data on shots fired in gun attacks are quite fragmentary and often inferred indirectly, but they suggest that relatively few attacks involve more than 10 shots fired.[105] Based on national data compiled by the FBI, for example, there were only about 19 gun murder incidents a year involving four or more victims from 1976 through 1995 (for a total of 375) (Fox and Levin, 1998, p. 435) and only about one a year involving six or more victims from 1976 through 1992 (for a total of 17) (Kleck, 1997, p. 126). Similarly, gun murder victims are shot two to three times on average according to a number of sources (see Table 9-2 and Koper and Roth, 2001a), and a study at a Washington, DC trauma center reported that only 8% of all gunshot victims treated from 1988 through 1990 had five or more wounds (Webster et al., 1992, p. 696).

However, counts of victims hit or wounds inflicted provide only a lower bound estimate of the number of shots fired in an attack, which could be considerably higher in light of the low hit rates in gunfire incidents (see above).[106] The few available studies on shots fired show that assailants fire less than four shots on average (see sources in Table 9-1 and Goehl, 1993), a number well within the 10-round magazine limit imposed by the AW-LCM ban, but these studies have not usually presented the full distribution of shots fired for all cases, so it is usually unclear how many cases, if any, involved more than 10 shots.

An exception is the aforementioned study of handgun murders and assaults in Jersey City (Reedy and Koper, 2003). Focusing on cases for which at least the type of handgun (semiautomatic, revolver, derringer) could be determined, 2.5% of the gunfire cases involved more than 10 shots.[107] These incidents – all of which involved pistols – had a 100% injury rate and accounted for 4.7% of all gunshot victims in the sample (see Figure 9-2). Offenders fired a total of 83 shots in these cases, wounding 7 victims, only 1 of whom was wounded more than once. Overall, therefore, attackers fired over 8 shots

[105] Although the focus of the discussion is on attacks with more than 10 shots fired, a gun user with a post-ban 10-round magazine can attain a firing capacity of 11 shots with many semiautomatics by loading one bullet into the chamber before loading the magazine.

[106] As a dramatic example, consider the heavily publicized case of Amadou Diallo, who was shot to death by four New York City police officers just a few years ago. The officers in this case fired upon Diallo 41 times but hit him with only 19 shots (a 46% hit rate), despite his being confined in a vestibule. Two of the officers reportedly fired until they had emptied their 16-round magazines, a reaction that may not be uncommon in such high-stress situations. In official statistics, this case will appear as having only one victim.

[107] The shots fired estimates were based on reported gunshot injuries, physical evidence (for example, shell casings found at the scene), and the accounts of witnesses and actors. The 2.5% figure is based on minimum estimates of shots fired. Using maximum estimates, 3% of the gunfire incidents involved more than 10 shots (Reedy and Koper, 2003, p. 154).

A caveat to these figures is that the federal LCM ban was in effect for much of the study period (which spanned January 1992 to November 1996), and a New Jersey ban on magazines with more than 15 rounds predated the study period. It is thus conceivable that these laws reduced attacks with LCM guns and attacks with more than 10 shots fired, though it seems unlikely that the federal ban had any such effect (see the analyses of LCM use presented in the previous chapter). Approximately 1% of the gunfire incidents involved more than 15 shots.

for every wound inflicted, suggesting that perhaps fewer persons would have been wounded had the offenders not been able to fire as often.[108]

Figure 9-2. Attacks With More Than 10 Shots Fired

Jersey City Handgun Attacks, 1992-1996

- **2.5% - 3% of gunfire incidents involved 11+ shots**
  - **3.6% - 4.2% of semiauto pistol attacks**
- **100% injury rate**
- **Produced 4.7% of all gunshot wound victims**
- **8.3 shots per gunshot wound**

Based on data reported by Reedy and Koper (2003). Injury statistics based on the 2.5% of cases involving 11+ shots by minimum estimate.

Caution is warranted in generalizing from these results because they are based on a very small number of incidents (6) from one sample in one city. Further, it is not known if the offenders in these cases had LCMs (gun model and magazine information was very limited); they may have emptied small magazines, reloaded, and continued firing. But subject to these caveats, the findings suggest that the ability to deliver more than 10 shots without reloading may be instrumental in a small but non-trivial percentage of gunshot victimizations.

On the other hand, the Jersey City study also implies that eliminating AWs and LCMs might only reduce gunshot victimizations by up to 5%. And even this estimate is probably overly optimistic because the LCM ban cannot be expected to prevent all incidents with more than 10 shots. Consequently, any effects from the ban (should it be extended) are likely to be smaller and perhaps quite difficult to detect with standard statistical methods (see Koper and Roth, 2001a), especially in the near future, if recent patterns of LCM use continue.

9.3. Post-Ban Trends in Lethal and Injurious Gun Violence

Having established some basis for believing the AW-LCM ban could have at least a small effect on lethal and injurious gun violence, is there any evidence of such an effect to date? Gun homicides plummeted from approximately 16,300 in 1994 to 10,100 in 1999, a reduction of about 38% (see the Federal Bureau of Investigation's *Uniform Crime*

[108] These figures are based on a supplemental analysis not contained in the published study. We thank Darin Reedy for this analysis.

Reports). Likewise, non-fatal, assaultive gunshot injuries treated in hospitals nationwide declined one-third, from about 68,400 to under 46,400, between 1994 and 1998 (Gotsch et al., 2001, pp. 23-24). Experts believe numerous factors contributed to the recent drop in these and other crimes, including changing drug markets, a strong economy, better policing, and higher incarceration rates, among others (Blumstein and Wallman, 2000). Attributing the decline in gun murders and shootings to the AW-LCM ban is problematic, however, considering that crimes with LCMs appear to have been steady or rising since the ban. For this reason, we do not undertake a rigorous investigation of the ban's effects on gun violence.[109]

But a more casual assessment shows that gun crimes since the ban have been no less likely to cause death or injury than those before the ban, contrary to what we might expect if crimes with AWs and LCMs had both declined. For instance, the percentage of violent gun crimes resulting in death has been very stable since 1990 according to national statistics on crimes reported to police (see Figure 9-1 in section 9.1).[110] In fact, the percentage of gun crimes resulting in death during 2001 and 2002 (2.94%) was slightly higher than that during 1992 and 1993 (2.9%).

Similarly, neither medical nor criminological data sources have shown any post-ban reduction in the percentage of crime-related gunshot victims who die. If anything, this percentage has been higher since the ban, a pattern that could be linked in part to more multiple wound victimizations stemming from elevated levels of LCM use. According to medical examiners' reports and hospitalization estimates, about 20% of gunshot victims died nationwide in 1993 (Gotsch et al., 2001). This figure rose to 23% in 1996, before declining to 21% in 1998 (Figure 9-3).[111] Estimates derived from the Uniform Crime Reports and the Bureau of Justice Statistics' annual National Crime Victimization Survey follow a similar pattern from 1992 to 1999 (although the ratio of fatal to non-fatal cases is much higher in these data than that in the medical data) and also show a considerable increase in the percentage of gunshot victims who died in 2000 and 2001 (Figure 9-3).[112] Of course, changes in offender behavior or other changes in crime

[109] In our prior study (Koper and Roth 2001a; Roth and Koper, 1997, Chapter 6), we estimated that gun murders were about 7% lower than expected in 1995 (the first year after the ban), adjusting for pre-existing trends. However, the very limited post-ban data available for that study precluded a definitive judgment as to whether this drop was statistically meaningful (see especially Koper and Roth, 2001a). Furthermore, that analysis was based on the assumption that crimes with both AWs and LCMs had dropped in the short-term aftermath of the ban, an assumption called into question by the findings of this study. It is now more difficult to credit the ban with any of the drop in gun murders in 1995 or anytime since. We did not update the gun murder analysis because interpreting the results would be unavoidably ambiguous. Such an investigation will be more productive after demonstrating that the ban has reduced crimes with both AWs and LCMs.

[110] The decline in this figure during the 1980s was likely due in part to changes in police reporting of aggravated assaults in recent decades (Blumstein, 2000). The ratio of gun murders to gun robberies rose during the 1980s, then declined and remained relatively flat during the 1990s.

[111] Combining homicide data from 1999 with non-fatal gunshot estimates for 2000 suggests that about 20% of gunshot victimizations resulted in death during 1999 and 2000 (Simon et al., 2002).

[112] The SHR/NCVS estimates should be interpreted cautiously because the NCVS appears to undercount non-fatal gunshot wound cases by as much as two-thirds relative to police data, most likely because it fails to represent adequately the types of people most likely to be victims of serious crime (i.e., young urban males who engage in deviant lifestyles) (Cook, 1985). Indeed, the rate of death among gunshot victims

weaponry (such as an increase in shootings with large caliber handguns) may have influenced these trends. Yet is worth noting that multiple wound shootings were elevated over pre-ban levels during 1995 and 1996 in four of five localities examined during our first AW study, though most of the differences were not statistically significant (Table 9-4, panels B through E).

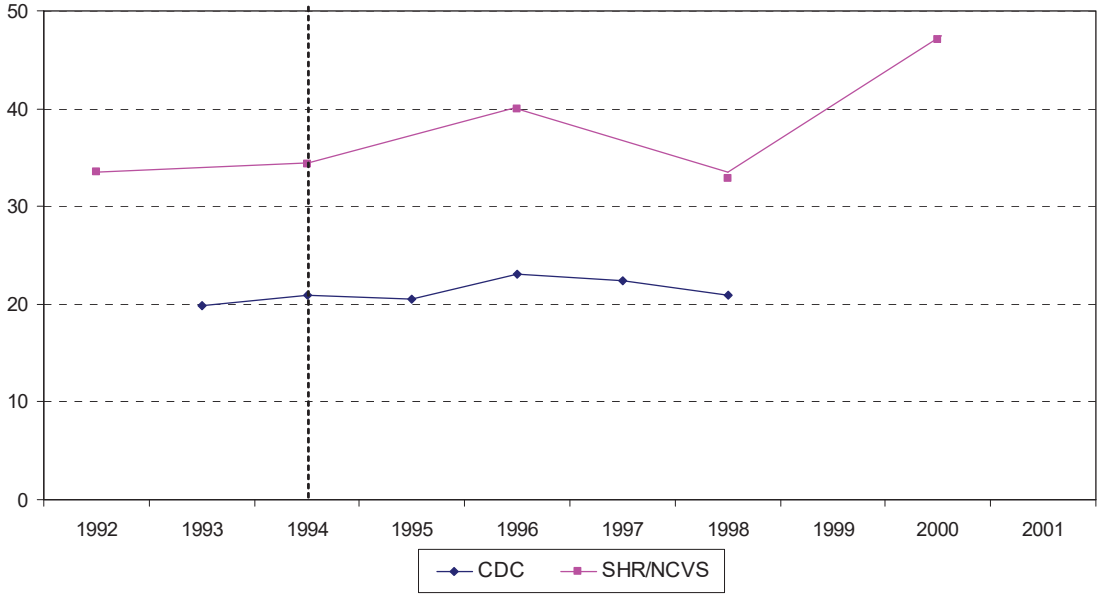
Another potential indicator of ban effects is the percentage of gunfire incidents resulting in fatal or non-fatal gunshot victimizations. If attacks with AWs and LCMs result in more shots fired and victims hit than attacks with other guns and magazines, we might expect a decline in crimes with AWs and LCMs to reduce the share of gunfire incidents resulting in victims wounded or killed. Measured nationally with UCR and NCVS data, this indicator was relatively stable at around 30% from 1992 to 1997, before rising to about 40% from 1998 through 2000 (Figure 9-4).[113] Along similar lines, multiple victim gun homicides remained at relatively high levels through at least 1998, based on the national average of victims killed per gun murder incident (Table 9-4, panel A).[114]

appears much higher in the SHR/NCVS series than in data compiled from medical examiners and hospitals (see the CDC series in Figure 9-3). But if these biases are relatively consistent over time, the data may still provide useful insights into trends over time.

[113] The NCVS estimates are based on a compilation of 1992-2002 data recently produced by the Inter-University Consortium for Political and Social Research (ICPSR study 3691). In 2002, only 9% of non-fatal gunfire incidents resulted in gunshot victimizations. This implies a hit rate for 2002 that was below pre-ban levels, even after incorporating gun homicide cases into the estimate. However, the 2002 NCVS estimate deviates quite substantially from earlier years, for which the average hit rate in non-fatal gunfire incidents was 24% (and the estimate for 2001 was 20%). Therefore, we did not include the 2002 data in our analysis. We used two-year averages in Figures 9-3 and 9-4 because the annual NCVS estimates are based on very small samples of gunfire incidents. The 2002 sample was especially small, so it seems prudent to wait for more data to become available before drawing conclusions about hit rates since 2001.

[114] We thank David Huffer for this analysis.

Figure 9-3. Percentage of Gunshot Victimizations Resulting in Death (National), 1992-2001



SHR/NCVS series based on two-year averages from the Supplemental Homicide Reports and National Crime Victimization Survey. CDC series based on homicide and hospitalization data from the Centers for Disease Control (reported by Gotsch et al. 2001).

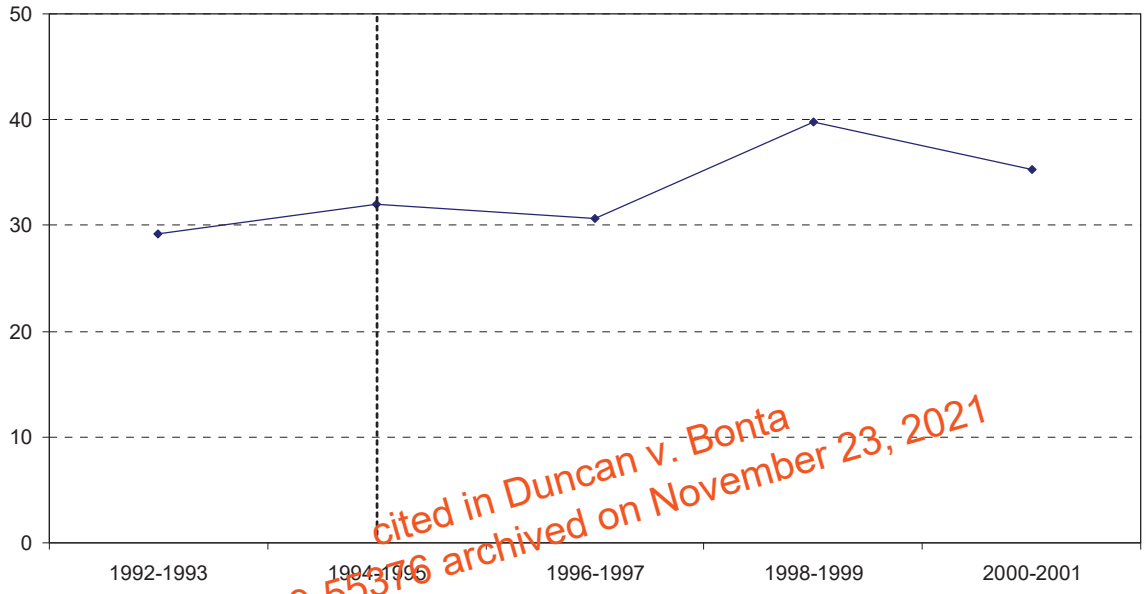
Table 9-4. Short-Term, Post-Ban Changes in the Lethality and Injuriousness of Gun Violence: National and Local Indicators, 1994-1998 [a]

Measure and Location	Pre-Ban Period	Post-Ban Period	Change
A. Victims Per Gun Homicide Incident (National)	Jan. 1986-Sept. 1994 1.05 (N=106,668)	Oct. 1994-Dec. 1998 1.06 (N=47,511)	1%**
B. Wounds per Gun Homicide Victim: Milwaukee County	Jan. 1992-Aug. 1994 2.28 (N=282)	Sept. 1994-Dec. 1995 2.52 (N=136)	11%
C. Wounds Per Gun Homicide Victim: Seattle (King County)	Jan. 1992-Aug. 1994 2.08 (N=184)	Sept. 1994-Jun. 1996 2.46 (N=91)	18%
D. Wounds Per Gunshot Victim: Jersey City (NJ)	Jan. 1992-Aug. 94 1.42 (N=125)	Sept. 1994-Jun. 1996 1.39 (N=137)	-2%
E. % of Gun Homicide Victims With Multiple Wounds: San Diego County	Jan. 1992-Aug. 1994 41% (N=445)	Sept. 1994-Jun. 1996 43% (N=223)	5%
F. % of Non-Fatal Gunshot Victims With Multiple Wounds: Boston	Jan. 1992-Aug. 1994 18% (N=584)	Sept. 1994-Dec. 1995 24% (N=244)	33%*

a. National victims per incident figures based on unpublished update of analysis reported in Roth and Koper (1997, Chapter 5). Gunshot wound data are taken from Roth and Koper (1997, Chapter 6) and Koper and Roth (2001a). Wound data are based on medical examiners' reports (Milwaukee, Seattle, San Diego), hospitalization data (Boston), and police reports (Jersey City).
* Chi-square p level < .1.
** T-test p level < .01.

If anything, therefore, gun attacks appear to have been more lethal and injurious since the ban. Perhaps elevated LCM use has contributed to this pattern. But if this is true, then the reverse would also be true – a reduction in crimes with LCMs, should the ban be extended, would reduce injuries and deaths from gun violence.

Figure 9-4. Percentage of Gunfire Cases Resulting in Gunshot Victimizations (National), 1992-2001



Based on two-year averages from the Supplemental Homicide Reports and National Crime Victimization Survey.

9.4. Summary

Although the ban has been successful in reducing crimes with AWs, any benefits from this reduction are likely to have been outweighed by steady or rising use of non-banned semiautomatics with LCMs, which are used in crime much more frequently than AWs. Therefore, we cannot clearly credit the ban with any of the nation's recent drop in gun violence. And, indeed, there has been no discernible reduction in the lethality and injuriousness of gun violence, based on indicators like the percentage of gun crimes resulting in death or the share of gunfire incidents resulting in injury, as we might have expected had the ban reduced crimes with both AWs and LCMs.

However, the grandfathering provision of the AW-LCM ban guaranteed that the effects of this law would occur only gradually over time. Those effects are still unfolding and may not be fully felt for several years into the future, particularly if foreign, pre-ban LCMs continue to be imported into the U.S. in large numbers. It is thus premature to make definitive assessments of the ban's impact on gun violence.

Having said this, the ban's impact on gun violence is likely to be small at best, and perhaps too small for reliable measurement. AWs were used in no more than 8% of gun crimes even before the ban. Guns with LCMs are used in up to a quarter of gun crimes, but it is not clear how often the outcomes of gun attacks depend on the ability to fire more than 10 shots (the current limit on magazine capacity) without reloading.

Nonetheless, reducing crimes with AWs and especially LCMs could have non-trivial effects on gunshot victimizations. As a general matter, hit rates tend to be low in gunfire incidents, so having more shots to fire rapidly can increase the likelihood that offenders hit their targets, and perhaps bystanders as well. While not entirely consistent, the few available studies contrasting attacks with different types of guns and magazines generally suggest that attacks with semiautomatics – including AWs and other semiautomatics with LCMs – result in more shots fired, persons wounded, and wounds per victim than do other gun attacks. Further, a study of handgun attacks in one city found that about 3% of gunfire incidents involved more than 10 shots fired, and those cases accounted for nearly 5% of gunshot victims. However, the evidence on these matters is too limited (both in volume and quality) to make firm projections of the ban's impact, should it be reauthorized.

10. LOOKING TO THE FUTURE: RESEARCH RECOMMENDATIONS AND SPECULATION ABOUT THE CONSEQUENCES OF REAUTHORIZING, MODIFYING, OR LIFTING THE ASSAULT WEAPONS BAN

In this chapter, we discuss future lines of inquiry that would be informative whether or not the AW-LCM ban is renewed in September 2004. We then offer some brief thoughts about the possible consequences of reauthorizing the ban, modifying it, or allowing it to expire.

10.1. Research Recommendations and Data Requirements

10.1.1. An Agenda for Assault Weapons Research and Recommendations for Data Collection by Law Enforcement

The effects of the AW-LCM ban have yet to be fully realized; therefore, we recommend continued study of trends in the availability and criminal use of AWs and LCMs. Even if the ban is lifted, longer-term study of crimes with AWs and LCMs will inform future assessment of the consequences of these policy shifts and improve understanding of the responses of gun markets to gun legislation more generally.[115]

Developing better data on crimes with LCMs is especially important. To this end, we urge police departments and their affiliated crime labs to record information about magazines recovered with crime guns. Further, we recommend that ATF integrate ammunition magazine data into its national gun tracing system and encourage reporting of magazine data by police departments that trace firearms.

As better data on LCM use become available, more research is warranted on the impacts of AW and LCM trends (which may go up or down depending on the ban's fate) on gun murders and shootings, as well as levels of death and injury per gun crime. Indicators of the latter, such as victims per gunfire incident and wounds per gunshot victim, are useful complementary outcome measures because they reflect the mechanisms through which use of AWs and LCMs is hypothesized to affect gun deaths and injuries.[116] Other potentially promising lines of inquiry might relate AW and LCM use to mass murders and murders of police, crimes that are very rare but appear more likely to involve AWs (and perhaps LCMs) and to disproportionately affect public perceptions.[117]

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[115] Establishing time series data on primary and secondary market prices and production or importation of various guns and magazines of policy interest could provide benefits for policy researchers. Like similar statistical series maintained for illegal drugs, such price and production series would be valuable instruments for monitoring effects of policy changes and other influences on markets for various weapons.

[116] However, more research is needed on the full range of factors that cause variation in these indicators over time and between places.

[117] Studying these crimes poses a number of challenges, including modeling of rare events, establishing the reliability and validity of methods for measuring the frequency and characteristics of mass murders (such as through media searchers; see Duwe, 2000, Roth and Koper, 1997, Appendix A), and controlling for factors like the use of bullet-proof vests by police.

Finally, statistical studies relating AW and LCM use to trends in gun violence should include statistical power analysis to ensure that estimated models have sufficient ability to detect small effects, an issue that has been problematic in some of our prior time series research on the ban (Koper and Roth, 2001a) and is applicable more generally to the study of modest, incremental policy changes.

Research on aggregate trends should be complemented by more incident-based studies that contrast the dynamics and outcomes of attacks with different types of guns and magazines, while controlling for relevant characteristics of the actors and situations. Such studies would refine predictions of the change in gun deaths and injuries that would follow reductions in attacks with AWs and LCMs. For instance, how many homicides and injuries involving AWs and LCMs could be prevented if offenders were forced to substitute other guns and magazines? In what percentage of gun attacks does the ability to fire more than ten rounds without reloading affect the number of wounded victims or determine the difference between a fatal and non-fatal attack? Do other AW features (such as flash hiders and pistol grips on rifles) have demonstrable effects on the outcomes of gun attacks? Studies of gun attacks could draw upon police incident reports, forensic examinations of recovered guns and magazines, and medical and law enforcement data on wounded victims.

10.1.2. Studying the Implementation and Market Impacts of Gun Control

More broadly, this study reiterates the importance of examining the implementation of gun policies and the workings of gun markets, considerations that have been largely absent from prior research on gun control. Typical methods of evaluating gun policies involve statistical comparisons of total or gun crime rates between places and/or time periods with and without different gun control provisions. Without complimentary implementation and market measures, such studies have a "black box" quality and may lead to misleading conclusions. For example, a time series study of gun murder rates before and after the AW-LCM ban might find that the ban has not reduced gun murders. Yet the interpretation of such a finding would be ambiguous, absent market or implementation measures. Reducing attacks with AWs and LCMs may in fact have no more than a trivial impact on gun deaths and injuries, but any such impact cannot be realized or adequately assessed until the availability and use of the banned guns and magazines decline appreciably. Additionally, it may take many years for the effects of modest, incremental policy changes to be fully felt, a reality that both researchers and policy makers should heed. Similar implementation concerns apply to the evaluation of various gun control policies, ranging from gun bans to enhanced sentences for gun offenders.

Our studies of the AW ban have shown that the reaction of manufacturers, dealers, and consumers to gun control policies can have substantial effects on demand and supply for affected weapons both before and after a law's implementation. It is important to study these factors because they affect the timing and form of a law's impact

on the availability of weapons to criminals and, by extension, the law's impact on gun violence.

10.2. Potential Consequences of Reauthorizing, Modifying, or Lifting the Assault Weapons Ban

10.2.1. Potential Consequences of Reauthorizing the Ban As Is

Should it be renewed, the ban might reduce gunshot victimizations. This effect is likely to be small at best and possibly too small for reliable measurement. A 5% reduction in gunshot victimizations is perhaps a reasonable upper bound estimate of the ban's potential impact (based on the only available estimate of gunshot victimizations resulting from attacks in which more than 10 shots were fired), but the actual impact is likely to be smaller and may not be fully realized for many years into the future, particularly if pre-ban LCMs continue to be imported into the U.S. from abroad. Just as the restrictions imposed by the ban are modest – they are essentially limits on weapon accessories like LCMs, flash hiders, threaded barrels, and the like – so too are the potential benefits.[118] In time, the ban may be seen as an effective prevention measure that stopped further spread of weaponry considered to be particularly dangerous (in a manner similar to federal restrictions on fully automatic weapons). But that conclusion will be contingent on further research validating the dangers of AWs and LCMs.

10.2.2. Potential Consequences of Modifying the Ban

We have not examined the specifics of legislative proposals to modify the AW ban. However, we offer a few general comments about the possible consequences of such efforts, particularly as they relate to expanding the range of the ban as some have advocated (Halstead, 2003, pp. 11-12).

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[118] But note that although the ban's impact on gunshot victimizations would be small in percentage terms and unlikely to have much effect on the public's fear of crime, it could conceivably prevent hundreds of gunshot victimizations annually and produce notable cost savings in medical care alone. To help place this in perspective, there were about 10,200 gun homicides and 48,600 non-fatal, assault-related shootings in 2000 (see the FBI's *Uniform Crime Reports* for the gun homicide estimate and Simon et al. [2002] for the estimate of non-fatal shootings). Reducing these crimes by 1% would have thus prevented 588 gunshot victimizations in 2000 (we assume the ban did not actually produce such benefits because the reduction in AW use as of 2000 was outweighed by steady or rising levels of LCM use). This may seem insubstantial compared to the 342,000 murders, assaults, and robberies committed with guns in 2000 (see the *Uniform Crime Reports*). Yet, gunshot victimizations are particularly costly crimes. Setting aside the less tangible costs of lost lives and human suffering, the lifetime medical costs of assault-related gunshot injuries (fatal and non-fatal) were estimated to be about $18,600 per injury in 1994 (Cook et al., 1999). Therefore, the lifetime costs of 588 gun homicides and shootings would be nearly $11 million in 1994 dollars (the net medical costs could be lower for reasons discussed by Cook and Ludwig [2000] but, on the other hand, this estimate does not consider other governmental and private costs that Cook and Ludwig attribute to gun violence). This implies that small reductions in gunshot victimizations sustained over many years could produce considerable long-term savings for society. We do not wish to push this point too far, however, considering the uncertainty regarding the ban's potential impact.

Gun markets react strongly merely to debates over gun legislation. Indeed, debate over the AW ban's original passage triggered spikes upwards of 50% in gun distributors' advertised AW prices (Roth and Koper, 1997, Chapter 4). In turn, this prompted a surge in AW production in 1994 (Chapter 5). Therefore, it seems likely that discussion of broadening the AW ban to additional firearms would raise prices and production of the weapons under discussion. (Such market reactions may already be underway in response to existing proposals to expand the ban, but we have not investigated this issue.) Heightened production levels could saturate the market for the weapons in question, depressing prices and delaying desired reductions in crimes with the weapons, as appears to have happened with banned ARs.

Mandating further design changes in the outward features of semiautomatic weapons (e.g., banning weapons having any military-style features) may not produce benefits beyond those of the current ban. As noted throughout this report, the most important feature of military-style weapons may be their ability to accept LCMs, and this feature has been addressed by the LCM ban and the LCMM rifle ban. Whether changing other features of military-style firearms will produce measurable benefits is unknown.

Finally, curbing importation of pre-ban LCMs should help reduce crimes with LCMs and possibly gunshot victimizations. Crimes with LCMs may not decline substantially for quite some time if millions of LCMs continue to be imported into the U.S.

10.2.3. Potential Consequences of Lifting the Ban

If the ban is lifted, it is likely that gun and magazine manufacturers will reintroduce AW models and LCMs, perhaps in substantial numbers.[119] In addition, AWs grandfathered under the 1994 law may lose value and novelty, prompting some of their lawful owners to sell them in secondary markets, where they may reach criminal users. Any resulting increase in crimes with AWs and LCMs might increase gunshot victimizations, though this effect could be difficult to discern statistically.

It is also possible, and perhaps probable, that new AWs and LCMs will eventually be used to commit mass murder. Mass murders garner much media attention, particularly when they involve AWs (Duwe, 2000). The notoriety likely to accompany mass murders if committed with AWs and LCMs, especially after these guns and magazines have been deregulated, could have a considerable negative impact on public perceptions, an effect that would almost certainly be intensified if such crimes were committed by terrorists operating in the U.S.

[119] Note, however, that foreign semiautomatic rifles with military features, including the LCMM rifles and several rifles prohibited by the 1994 ban, would still be restricted by executive orders passed in 1989 and 1998. Those orders stem from the sporting purposes test of the Gun Control Act of 1968.

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United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

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