2.1

Constitutional Restrictions: Assault Weapons

SHOULD POSSESSION OF ASSAULT WEAPONS BE PROHIBITED, OR ARE THESE WEAPONS PROTECTED BY THE SECOND AMENDMENT TO THE U.S. CONSTITUTION?

Learning Objectives

1. Understand the two competing interpretations of the Second Amendment.
2. Know the holdings in *District of Columbia v. Heller, McDonald v. Chicago,* and *Caetano v. Massachusetts.*
3. Understand the legal issues involved in regulating firearms.
4. Comprehend the basic characteristics of an assault weapon.
5. Know the arguments for and against prohibiting possession of assault weapons.

OPPOSE ASSAULT WEAPONS

Judge Robert B. King, dissenting, *Kolbe v. Hogan*, 813 F.3d 160
Judge Frank Easterbrook, majority opinion, *Friedman v. Highland Park,* 784 F.3d 406 (7th Cir. 2015)

SUPPORT ASSAULT WEAPONS

Judge Frank Manion, dissenting, *Friedman v. Highland Park,* 784 F.3d 406 (7th Cir. 2015)
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Introduction

The Second Amendment to the U.S. Constitution provides that "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."

The interpretation of the Second Amendment has been the subject of considerable debate and disagreement. In the past, the general consensus among constitutional scholars was that the Second

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Amendment protected the rights of states to possess militia, such as the National Guard. The Second Amendment in this view was intended to protect states against the military dominance of the federal government. Gun activists argued that this was an overly narrow reading of the Second Amendment and that the Founding Fathers intended to protect the right of individuals to possess weapons. An armed citizenry was thought to be the best guarantee that the government would not impinge on civil and political liberties.

In 2008, in *District of Columbia v. Heller,* 554 U.S. 570, the U.S. Supreme Court reversed existing precedent and endorsed the view of gun activists that the Second Amendment protected the right of individuals to possess firearms. *Heller* although a historic milestone in America's approach to regulating firearms only applied to the federal enclave of the District of Columbia and did not limit state regulation of guns. In 2010, in *McDonald v. Chicago,* 561 U.S. 742, the Supreme Court held for the first time that the right to possess arms in the home for purposes of the Second Amendment was a liberty interest protected under the Fourteenth Amendment Due Process Clause. *McDonald* established that the right of individuals to possess arms was applicable to the states as well as to the federal government. Justice Samuel Alito wrote that the right to keep and bear arms for purposes of self-defense is "among the fundamental rights necessary to our system of ordered liberty," which is "deeply rooted in this Nation's history and tradition." In other words, the right to possess a firearm now was established as a fundamental constitutional right much like the First Amendment freedom of expression.

In 2016, in a third Supreme Court case, *Caetano v. Massachusetts,* 577 U.S. __, the Court held that the Second Amendment extends to "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." The Court affirmed that "the Second Amendment right is fully applicable to the States" and stressed that the right to bear arms is not restricted to "those weapons useful in warfare."

The Supreme Court has recognized that Second Amendment rights are not absolute and has advised that nothing in the Court's opinions should "cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." Individuals and organizations concerned about protecting Second Amendment rights have brought legal challenges against a number of state and local laws regulating firearms. Courts, for example, have struck down lengthy waiting periods to purchase firearms as well as laws prohibiting the selling or transferring of guns within city limits. On the other hand, courts have upheld various categories of restrictions on gun possession. Federal courts, for example, have upheld laws prohibiting possession of firearms by undocumented individuals and by felons and individuals convicted of domestic violence.

Federal courts are divided on whether states and local municipalities may legally ban assault weapons. The Federal Assault Weapons Ban (AWB), officially titled the Public Safety and Recreational Firearms Use Protection Act, was part of the federal Violent Crime Control and Law Enforcement Act of 1994. The AWB prohibited the manufacture, transfer, and possession of all semiautomatic assault weapons after the enactment of the law. The act was signed by President Bill Clinton in 1994 and expired ten years later. The bill was a response to a series of shootings involving assault weapons, including a 1989 attack on thirty-four children and a teacher in Stockton, California, that resulted in the death of five children. An effort to reinstate the ban in 2013 following the Sandy Hook Elementary School killings in Newtown, Connecticut, was defeated in the U.S. Senate.

The AWB named nineteen specific models of assault weapons and copies of those weapons that were prohibited, as well as semiautomatic rifles, pistols, and shotguns with at least two characteristics from a list of features. The federal ban also prohibited newly manufactured, large-capacity magazines (LCMs). Weapons banned under the AWB now are legal unless prohibited by state or local law.

At the present, eight states and the District of Columbia and a number of counties, towns, and cities have assault weapons bans. Cook County, Illinois, for example, prohibits the manufacture, sale, transfer, or possession of assault weapons or LCMs.

Federal circuit courts of appeals are divided on whether states and localities under the Second Amendment may prohibit the sale and possession of assault weapons because of their potentially lethal and destructive character or whether the possession of assault weapons as weapons of self-defense is protected under the Second Amendment.

Friedman v. Highland Park involved an unsuccessful challenge to a Highland Park, Illinois, ordinance prohibiting the possession of assault weapons as well as LCMs. The ordinance defines an assault weapon as any semiautomatic gun that can accept an LCM of ten or more rounds and has at least one of five other features: a pistol grip without a stock; a folding, telescoping, or thumbhole stock; a grip for the nontrigger hand; a barrel shroud; or a muzzle brake or compensator. The ordinance explicitly prohibits AR-15s and AK-47s.

In contrast, the Fourth Circuit Court of Appeals overturned a ban on assault weapons in *Kolbe v. Hogan.* The Maryland Firearm Safety Act (FSA) declared that it was a crime after October 1, 2013, to "possess, sell, offer to sell, transfer, purchase, or receive" or to transport into Maryland any firearm designated as an "assault weapon." Under the FSA, the term *assault weapon* included "assault long gun[s]," "assault pistol[s]," and "copycat weapon[s]." The plaintiffs' challenge in *Kolbe* was limited to the ban on assault long guns. An assault long gun was defined under Maryland law as any one of the more than sixty semiautomatic rifle or shotgun models specifically listed in the Maryland Public Safety Code. The list of prohibited weapons included the semiautomatic rifle models most popular among U.S. citizens: the AR-15 "and all imitations" and the semiautomatic AK-47 "in all forms." Anyone who possessed a prohibited semiautomatic rifle was "guilty of a misdemeanor" and was subject to a prison term of up to three years. The FSA also declared it unlawful to "manufacture, sell, offer for sale, purchase, receive, or transfer a detachable magazine that has a capacity of more than 10 rounds of ammunition for a firearm." Various categories of individuals were authorized to possess semiautomatic rifles or LCMs.

In the excerpts from the two federal court of appeals decisions below, judges debate whether possession of assault weapons may be prohibited or whether the possession of these weapons is protected by the Second Amendment.

DEBATING ASSAULT WEAPONS

OPPOSE ASSAULT WEAPONS

Judge Robert B. King, dissenting, Kolbe v. Hogan, *813 F.3d 160 (4th Cir. 2016)*

Judge King was appointed to the Fourth Circuit Court of Appeals by President Bill Clinton in 1998.

The AR-15 and other banned assault weapons, like their military counterparts, "are firearms designed for the battlefield, for the soldier to be able to shoot a large number of rounds across a battlefield at a high rate of speed." The military-style features of those weapons include folding or telescoping stocks, pistol grips, flash suppressors, grenade launchers, night sights, and the ability to accept detachable magazines and bayonets. Their design results in "a capability for lethality"—more wounds, more serious, in more victims—far beyond that of other firearms in general, including other semiautomatic guns.

The sole difference between the M16 and the AR-15 is that the M16 is capable of automatic fire while the AR-15 is semiautomatic. That difference is slight, in that automatic firing of all the ammunition in a thirty-round magazine takes two seconds, whereas a semiautomatic rifle can empty the same magazine in about five seconds. Moreover, soldiers and police officers are often advised to choose semiautomatic fire, because it is more accurate and lethal than automatic fire in many combat and law enforcement situations.

The banned assault rifles and shotguns constitute no more than 3% of the civilian gun stock, and ownership of such weapons is concentrated in less than 1% of the U.S. population. At the same time, assault weapons are used disproportionately to their ownership in mass shootings and the murders of police officers, and they cause more fatalities and injuries than other firearms.

Maryland was inspired to enact the ban by the December 14, 2012 mass shooting at Sandy Hook Elementary School in Newtown, Connecticut, where the gunman used an AR-15-style assault rifle to shoot his way into the locked building and then murder twenty first-graders and six educators in less than eleven minutes. That horrific event was preceded and has been followed by mass shootings across the nation.

Criminals armed with the banned assault weapons possess a "military-style advantage" in firefights with law enforcement, as such weapons "allow criminals to effectively engage law enforcement officers from great distances (far beyond distances usually involved in civilian self-defense scenarios)," "are more effective than handguns against soft body armor," and "offer the capacity to fire dozens of highly-lethal rounds without having to change magazines."

The banned assault weapons also can be more dangerous to civilians than other firearms. For example, "rounds from assault weapons have the ability to easily penetrate most materials used in standard home construction, car doors, and similar materials," and, when they do so, are more effective than rounds fired from handguns. Additionally, untrained users of assault weapons tend to fire more rounds than necessary, increasing the risk to bystanders.

Although self-defense is a conceivable use of the banned assault weapons, most people choose to keep other firearms for self-defense, and assault-weapon owners generally cite reasons other than self-defense for owning assault weapons. There is no known incident of anyone in Maryland using an assault weapon for self-defense.

We are impeding Maryland's and others' reasonable efforts to prevent the next Newtown—or Virginia Tech, or Binghamton, or Fort Hood, or Tucson, or Aurora, or Oak Creek, or San Bernardino. In my view, any burden imposed . . . on the Second Amendment is far from severe. On the other hand, the State's paramount interest in the protection of its citizenry and the public safety is profound indeed. Unfortunately, however, I find myself outvoted today.

Judge Frank Easterbrook, majority opinion, Friedman v. Highland Park, *784 F.3d 406 (7th Cir. 2015)*

Judge Easterbrook was appointed to the Seventh Circuit Court of Appeals by President Ronald Reagan in 1985.

Plaintiffs argue that the ordinance [prohibiting assault weapons] substantially restricts their options for armed self-defense. But that contention is undermined by their argument, in the same breath, that the ordinance serves no purpose, because (they say) criminals will just substitute permitted firearms functionally identical to the banned guns. If criminals can find substitutes for banned assault weapons, then so can law-abiding homeowners. Unlike the District of Columbia's ban on handguns in *Heller,* Highland Park's ordinance leaves residents with many self-defense options.

True enough, assault weapons can be beneficial for self-defense because they are lighter than many rifles and less dangerous per shot than large-caliber pistols or revolvers. Householders too frightened or infirm to aim carefully may be able to wield them more effectively than the pistols James Bond preferred. But assault weapons with large-capacity magazines can fire more shots, faster, and thus can be more dangerous in aggregate. Why else are they the weapons of choice in mass shootings? A ban on assault weapons and large-capacity magazines might not prevent shootings in Highland Park (where they are already rare), but it may reduce the carnage if a mass shooting occurs.

That laws similar to Highland Park's reduce the share of gun crimes involving assault weapons is established by data. There is also some evidence linking the availability of assault weapons to gun-related homicides.

Plaintiffs nonetheless contend that the ordinance will have no effect on gun violence because the sort of firearms banned in Highland Park are available elsewhere in Illinois and in adjacent states. But, local crimes are most likely to be committed by local residents, who are less likely to have access to firearms banned by a local ordinance. A ban on assault weapons won't eliminate gun violence in Highland Park, but it may reduce the overall dangerousness of crime that does occur. Plaintiffs' argument proves far too much: it would imply that no jurisdiction other than the United States as a whole can regulate firearms. But that's not what *Heller* concluded, and not what we have held for local bans on other substances.

If it has no other effect, Highland Park's ordinance may increase the public's sense of safety. Mass shootings are rare, but they are highly salient, and people tend to overestimate the likelihood of salient events. If a ban on semiautomatic guns and large-capacity magazines reduces the perceived risk from a mass shooting, and makes the public feel safer as a result, that's a substantial benefit.

The Constitution establishes a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national uniformity. *McDonald* circumscribes the scope of permissible experimentation by state and local governments, but it does not foreclose all possibility of experimentation.

SUPPORT ASSAULT WEAPONS

Judge Frank Manion, dissenting, Friedman v. Highland Park, *784 F.3d 406 (7th Cir. 2015)*

Judge Manion was appointed to the Seventh Circuit Court of Appeals by President Ronald Reagan in 1986.

To be sure, assault rifles and large capacity magazines are dangerous. But their ability to project large amounts of force accurately is exactly why they are an attractive means of self-defense. While most persons

do not require extraordinary means to defend their homes, the fact remains that some do. Ultimately, it is up to the lawful gun owner and not the government to decide these matters. To limit self-defense to only those methods acceptable to the government is to effect an enormous transfer of authority from the citizens of this country to the government—a result directly contrary to our constitution and to our political tradition.

A statistically significant amount of gun owners . . . use semiautomatic weapons . . . for . . . self-defense. . . . [W]hether or how people might use these weapons for illegal purposes provides a basis for a state to regulate them, but it has no bearing on whether the Second Amendment covers them.

Highland Park's ordinance . . . prohibits any form of possession of these weapons. It is immaterial to this inquiry that the regulations targeted different classes of weapons than *Heller* (handguns versus assault rifles and large-capacity magazines) because the issue . . . involves the scope of the protected activity—the right to keep arms for self-defense. . . . [T]he right to keep arms in the home for the purpose of self-defense obtains the broadest protections under the Second Amendment. . . . [T]here is no historical tradition supporting wholesale prohibitions of entire classes of weapon.

Judge William Traxler, majority opinion, Kolbe v. Hogan, *813 F.3d 160 (4th Cir. 2016)*

Judge Traxler was appointed as a federal district court judge by President George H. W. Bush in 1991. He was appointed to the Fourth Circuit Court of Appeals in 1998 by President Bill Clinton.

Law-abiding citizens commonly possess semi-automatic rifles such as the AR-15. Between 1990 and 2012, more than 8 million AR- and AK-platform semi-automatic rifles alone were manufactured in or imported into the United States. In 2012, semi-automatic sporting rifles accounted for twenty percent of all retail firearms sales. For perspective, we note that in 2012, the number of AR- and AK-style weapons manufactured and imported into the United States was more than double the number of Ford F-150 trucks sold, the most commonly sold vehicle in the United States. . . . In fact, semi-automatic firearms have been in use by the civilian population for more than a century. . . . In 1905, Winchester produced a semi-automatic rifle, equipped with either a five- or ten-round detachable magazine. And, in 1963, Colt produced the SP-1 semi-automatic rifle with a 20-round detachable magazine, later known as the AR-15, a semi-automatic counterpart to the fully automatic M-16. There is no record evidence or historical documentation that these weapons were at all prohibited until relatively recently.

Nothing . . . suggests that courts considering a Second Amendment challenge must decide whether a weapon is "unusually dangerous." . . . How is a court to determine which weapons are too dangerous to implicate the Second Amendment? The [argument is] that semi-automatic rifles . . . are too dangerous based on evidence that they unleash greater destructive force than other firearms and appear to be disproportionately connected to mass shootings. But if the proper judicial standard is to go by total murders committed, then handguns should be considered far more dangerous than semi-automatic rifles.

There are legitimate reasons for citizens to favor a semi-automatic rifle over handguns in defending themselves and their families at home. The record contains evidence suggesting that "handguns are inherently less accurate than long guns" as they "are more difficult to steady" and "absorb less of the recoil . . . , reducing accuracy." This might be an important consideration for a typical homeowner, who "under the extreme duress of an armed and advancing attacker is likely to fire at, but miss, his or her target." . . . These factors could also affect an individual's ability to reload a firearm quickly during a home invasion.

The right to self-defense is largely meaningless if it does not include the right to choose the most effective means of defending oneself. "[T]he ultimate decision for what constitutes the most effective means of

defending one's home, family, and property resides in individual citizens and not the government. . . . The extent of danger—real or imagined—that a citizen faces at home is a matter only that person can assess in full." . . .

We therefore struggle to see how Maryland's law would not substantially burden the core Second Amendment right to defend oneself and one's family in the home with a firearm that is commonly possessed by law-abiding citizens for such lawful purposes. Moreover, the Maryland law reaches every instance where an AR-15 platform semi-automatic rifle . . . might be preferable to handguns or bolt-action rifles—for example hunting, recreational shooting, or competitive marksmanship events, all of which are lawful purposes protected by the Constitution.

SUMMARY OF THE ARGUMENTS

Judge Robert B. King argues that the assault weapons banned in Maryland are battlefield weapons with a high lethal capacity. Although these weapons make up a small percentage of all firearms, they result in a disproportionate number of fatalities, provide criminals with a dangerous capacity when used against the police and public, and are strongly associated with mass murder. The overturning of Maryland's ban on assault weapons places the public at risk.

Judge Frank Easterbrook, in upholding Highland Park's ban on assault weapons, notes that individual homeowners have access to safer weapons for self-defense. The statistical evidence indicates that prohibiting assault weapons reduces crime and enhances the community's sense of safety. As for the argument that criminals will purchase assault weapons outside of Highland Park and use them to commit crimes in the community, Judge Easterbrook argues that most crime is committed with weapons obtained in the same town and that local criminals are unlikely to use assault weapons purchased in neighboring communities.

In defense of assault weapons, Judge Frank Manion argues that individuals have a Second Amendment right to possess assault weapons for self-defense and that the government may not preclude individuals from selecting the firearms that they want to use in defending themselves. Although the government may regulate the unlawful use of assault weapons, there is no historical precedent for prohibiting an entire class of weapons.

Judge William Traxler notes that millions of Americans purchase and possess semiautomatic weapons and that there is a long history of possession of these weapons for self-defense and for other purposes. There is no sound basis for prohibiting assault weapons based on their alleged dangerousness and their use in mass killings when more fatalities result from the use of handguns. The ultimate decision on which weapon best protects an individual and his or her home is a determination for the homeowner and not the government. In any event, there are good reasons to rely on assault weapons in self-defense. The Maryland law is overly broad because it reaches "every instance where an AR-15 platform semi-automatic rifle . . . might be preferable to handguns or bolt-action rifles—for example hunting, recreational shooting, or competitive marksmanship events, all of which are lawful purposes protected by the Constitution."

All the judges generally agree that assault weapons might be employed by some individuals as weapons of self-defense. Judges King and Easterbrook, however, note that these weapons generally are not employed in self-defense and express concern about the use of these powerful weapons by untrained individuals within the home and by criminals outside the home. Judges Manion and Traxler counter that assault weapons are weapons that customarily are employed in self-defense and for other lawful purposes. They both concede that other weapons are available for self-defense although they argue that individuals may not be legally required to rely on these alternatives rather than on assault weapons. All the judges agree that the unlawful possession or use of these weapons should be prohibited and punished.

QUESTIONS FOR DISCUSSION

1. In 2015, the U.S. Supreme Court decided against reviewing the judgment in *Friedman v. Highland Park*. Justice Clarence Thomas along with Justice Antonin Scalia dissented from the Court's vote not to review the lower court decision. Justice Thomas wrote the following. Do you agree?

   > The Seventh Circuit ultimately upheld a ban on many common semiautomatic firearms based on speculation about the law's potential policy benefits. The court conceded that handguns—not "assault weapons"—"are responsible for the vast majority of gun violence in the United States." Still, the court concluded, the ordinance "may increase the public's sense of safety," which alone is "a substantial benefit." *Heller,* however, forbids subjecting the Second Amendment's "core protection . . . to a freestanding interest-balancing approach." This case illustrates why. If a broad ban on firearms can be upheld based on conjecture that the public might *feel s*afer (while being no safer at all), then the Second Amendment guarantees nothing. (*Friedman v. Highland Park,* ___ U.S. ___ [2015]).

2. Are most assault weapons used for self-defense or for other purposes? According to Judge Traxler, should this be an important consideration in deciding whether individuals possess a right to possess these types of weapons? What of the argument that these weapons also are used for other lawful purposes?

3. Will a prohibition on assault weapons reduce gun violence, attacks on the police, and mass killings?

4. Do you believe that Highland Park's banning of assault weapons will prevent the use of these weapons by criminals within Highland Park?

5. The judges disagree on the number of gun owners who possess assault weapons. Should this be an important consideration in determining whether individuals should be prohibited in possessing these weapons?

6. Why do Judges Manion and Traxler argue that assault weapons are weapons that are useful in self-defense? Do Judges King and Easterbrook dispute that assault weapons may be employed in self-defense? What of the concern that individuals who lack training in the weapons may place themselves and others at risk?

7. Why does Judge Traxler mention the historical ownership of assault weapons in the United States?

8. May the government restrict the type of weapons that an individual may possess for self-defense? Are there weapons that are too dangerous for an individual to possess? What of the interest in preventing the use of assault weapons by terrorists and in preventing mass atrocities?

9. What are the main points of disagreement between the judges on whether assault weapons may be prohibited? Where do you stand on the banning of assault weapons?

2.1 You Decide

Three individuals between eighteen and twenty-one years of age along with the National Rifle Association (NRA) and various commercial gun dealers filed suit in district court against the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATFE), ATFE's acting director, and the Attorney General of the United States, challenging the constitutionality of 18 U.S.C. §§ 922(b)(1) and (c)(1) and regulations implementing these statutes. The challenged provisions prohibit licensed dealers—that is, federal firearms licensees (FFLs)—from selling handguns to persons under the age of twenty-one. Appellants bringing the legal action asserted that the federal laws are unconstitutional because they infringe on the right of eighteen- to twenty-year-old adults to keep and bear arms under the Second

Amendment. Keep in mind that under the law eighteen- to twenty-year-olds may possess and use handguns and that parents or guardians may gift handguns to them. Those individuals not "engaged in the business" of selling firearms—that is, non-FFLs—may sell handguns to eighteen- to twenty-year-olds. In other words, eighteen- to twenty-year-olds may acquire handguns through gifts and through unlicensed, private sales. Eighteen- to twenty-year-olds in addition may possess and use "long-guns," and may purchase "long-guns" from FFLs (or from non-FFLs). The point of contention is whether eighteen- to twenty-year-olds may purchase handguns from FFLs. The law prohibiting these sales is directed against the trafficking of guns to young individuals, who statistics indicate commit a disproportionate percentage of violent gun crimes. What is your view on whether FFLs may sell firearms to eighteen- to twenty-year-olds? Would you prohibit the sale of handguns by non-FFLs? See *National Rifle Association v. Bureau of Alcohol,* 700 F.3d 185 (7th Cir. 2012).

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