

HOW CAN YOU BAN WHAT DOESN'T EXIST? REDEFINING THE "ASSAULT WEAPON"

*Meagan Kelly**

ABSTRACT

The term "assault weapon" has become synonymous with one of the most contentious political debates of our time. As gun politics stands today, there remains little room for compromise and a narrative mired in heavy emotion and staunch traditional principles. But as the debate swirls and deadlocks, the United States continues to experience a trend of violence unique amongst all other developed democratic societies. Yet neither this characteristically American mass violence, nor the continuous political efforts to restrict or expand Second Amendment rights are recent phenomena. Our country has been deeply entrenched in the "assault weapon" debate for more than half of the twenty-first century, and as the natures of societal violence, warfare, and the firearms market at large change, the understanding of the term "assault weapon" does so as well. This Note examines those different understandings of an "assault weapon" and how those conflicting understandings have shaped legislation and, consequently, the resistance to legislation attempting to restrict the controversial weapon. Competing understandings of an "assault weapon" have led to a patchwork system of state-to-state assault weapon bans and a federal ban which not only lacked the political support to avoid expiration in 2004, but also had little overall effect during the decade it was in force. Mass shootings are a pervasive and continuous threat to the fabric of American society and the problem must be addressed explicitly. The right

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to keep and bear arms will continue to stand protected within our Constitution. But if legislators and voters alike do not recognize the necessity of balancing the interests of life and liberty against those of gun ownership, we will implicitly accept that the Second Amendment is to be protected at the expense of innocent lives. This Note proposes a legislative approach to an assault weapons ban that would consider the prevalence of semi-automatic AR-15 rifles in mass shootings as well as the mechanics of the rifle that make it particularly lethal. There is a time and place for weapons of certain qualities. Our gun laws must reflect a respect for the distinction between modern warfare and an orderly civilian society.

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INTRODUCTION

On April 17, 2013, members of the 113th Congress gathered at the U.S. Capitol for a vote on amendments to Senate Bill 649.¹ In an effort to reach bi-partisan compromise, Democratic Senator Joe Manchin partnered with Republican Senator Pat Toomey to introduce a bill intending to expand background checks to all

1. See Ted Barrett & Tom Cohen, *Senate Rejects Expanded Gun Background Checks*, CNN (Apr. 18, 2013), <https://www.cnn.com/2013/04/17/politics/senate-guns-vote/index.html>.

firearm purchases and ban a number of military style assault weapons.² To some, this was far more than just another piece of legislation. Four months before this Wednesday morning in Washington, D.C., 20-year-old Adam Lanza left his house in Newtown, Connecticut, having just killed his own mother.³ Equipped with an AR-15 and two pistols, Lanza proceeded to the nearby elementary school where in six short minutes he ended the lives of not only six educators but also twenty students, none of whom older than seven-years-old.⁴ In the four months that followed, there came an onslaught of emotional pleas for legislation to address what seemed to have become an epidemic of mass shootings. President Obama responded with emotional press conferences⁵ and executive actions.⁶ Democratic Representatives echoed a public call for legislative action and, in a familiar move, held the National Rifle Association accountable.⁷

The bill on the Senate floor that April morning was fast-tracked and bitterly partisan, despite its Republican co-sponsor. Yet, in light of the shock and pain that still lingered after the massacre of such young victims, there was a sense that Sandy Hook was the straw that would break the proverbial camel's back. Congress would finally take legislative action.⁸ But, as the

2. *Id.*

3. Amelia McDonell-Parry, *Sandy Hook Shooter: New Documents Detail Adam Lanza's 'Scorn for Humanity'*, ROLLING STONE (Dec. 10, 2018, 3:26 PM), <https://www.rollingstone.com/culture/culture-news/sandy-hook-adam-lanza-mental-state-new-documents-767031/>.

4. *Connecticut State Police, Sandy Hook After Action Report*, HARTFORD COURANT (Jan. 12, 2018), <https://www.courant.com/breaking-news/hc-read-connecticut-state-police-sandy-hook-after-action-report-20180112-htlstory.html> [hereinafter *Sandy Hook Report*].

5. Ben Mathis-Lilley, *Obama Tears Up While Describing Newtown Victims During Speech on Gun Control Plan*, SLATE (Jan. 5, 2016, 1:46 PM), <https://slate.com/news-and-politics/2016/01/obama-tears-up-over-newtown-victims-during-gun-control-speech.html>.

6. Katie Reilly, *President Obama Announces Executive Action on Gun Control*, TIME (Jan. 5, 2016, 12:52 PM), <http://time.com/4167749/obama-gun-control-remarks/>.

7. Brian Naylor, *Democrats Slam NRA's Response to School Shooting*, NPR (Dec. 22, 2012, 5:38 PM), <https://www.npr.org/2012/12/22/167833089/democrats-slam-nras-response-to-school-shooting>.

8. Meghan Kenally, *How Gun Laws Have Changed in the 5 Years Since Sandy Hook*, ABC NEWS (Dec. 12, 2017, 1:11 PM), <https://abcnews.go.com/US/gun-laws-changed-years-sandy-hook/story?id=51668726> ("Many...thought the killing of children and teachers would be a turning point in the fight for gun control.").

last vote came in on April 17, 2013, Manchin and Toomey's Senate bill fell a mere six votes shy of the 60 needed to pass the Senate,⁹ and, from the gallery above, two pained voices cried: "Shame on you!"¹⁰

Within the past decade, mass shooter events have nearly become a staple of American culture. Fifty-nine people were killed at a concert in Las Vegas;¹¹ forty-nine at the Pulse Night Club in Orlando;¹² eleven killed in a synagogue in Pittsburgh,¹³ to name only a few. While the victims, locations, and motives of these rampages have all differed, a common thread runs through them all: the AR-15.¹⁴

The term "assault weapon" means different things to different people. To those less familiar with the world of firearms—who are often more in favor of increased gun control—an assault weapon is a long, intimidating rifle, fit only for SWAT teams and military forces despite being aggressively promoted to the ordinary, untrained citizen. To many firearm enthusiasts, an "assault weapon" is a myth, a politically divisive term introduced by liberal politicians to demonize an otherwise ordinary firearm. In the world of politics, it signifies a debate fraught with misinformation, finger pointing, and little willingness to compromise. As the frequency of these horrific events has increased along with the number of victims, the political debate surrounding the legality of "assault weapons" has swelled.¹⁵

9. *Senate Vote 101 – Rejects Feinstein Proposal to Reinstate Assault Weapon Ban*, PROPUBLICA <https://projects.propublica.org/represent/votes/113/senate/1/101> (last visited Nov. 17, 2019).

10. Barrett & Cohen, *supra* note 1.

11. Andrew Blankstein et al., *Las Vegas Shooting: 59 Killed and More than 500 Hurt Near Mandalay Bay*, NBC NEWS (Oct. 2, 2017, 10:33 PM EDT), <https://www.nbcnews.com/storyline/las-vegas-shooting/las-vegas-police-investigating-shooting-mandalay-bay-n806461>.

12. Ralph Ellis et al., *Orlando Shooting: 49 Killed, Shooter Pledge ISIS Allegiance*, CNN, <https://www.cnn.com/2016/06/12/us/orlando-nightclub-shooting/index.html> (last updated June 13, 2016, 11:05 AM ET).

13. Campbell Robertson et al., *11 Killed in Synagogue Massacre; Suspect Charged With 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html>.

14. See William Cummings & Bart Jansen, *Why the AR-15 Keeps Appearing in America's Deadliest Mass Shootings*, USA TODAY, <https://www.usatoday.com/story/news/nation/2018/02/14/ar-15-mass-shootings/339519002/> (last updated Feb. 15, 2018).

15. See discussion *infra* Section I.A.

Such a debate is not new, however, and for decades prior to what seems to be a relatively recent phenomena of violence, legislation has been drafted and enacted at both the state and federal levels without bringing a satisfying conclusion to this controversy. While the federal assault weapons ban lapsed in 2004,¹⁶ many states¹⁷ have passed assault weapon bans in the wake of some of these notable massacres.¹⁸ Gun rights advocacy groups have responded by challenging these laws on constitutional grounds.¹⁹

Working without a technical definition of an assault weapon, state legislatures and Congress have seemingly failed to craft an effective and clear law that directly addresses the epidemic of mass violence.²⁰ Assuming that assault weapon bans passed at both the state and federal level aim to reduce the occurrence of mass shootings, a more effective statutory definition of an “assault weapon” should consider: (1) the intended purpose for which the AR-15 was originally designed in light of the predominate reasons why law abiding citizens purchase firearms at all; and (2) the predominate reasons mass shooters tend to use the AR-15. Such a refined definition would result in more effective laws that are easier to administer, while not violating the core protections of the Second Amendment.

Part I of this Note provides contextual background by first detailing the competing understandings of the term “assault weapon” in an attempt to demonstrate the artificial nature of

16. Marc A. Polito, *Assault on the Second Amendment: Attorney General’s Attempt to Unilaterally Ban Assault Rifles in Massachusetts*, 51 SUFFOLK U. L. REV. 133, 139–40 (2018).

17. Currently, only seven states and the District of Columbia have imposed outright bans of assault weapons. These states are California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, and New York. Both Virginia and Washington impose strict regulations on the sale and transfer of assault weapons. *Assault Weapons: State by State*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/state-law/50-state-summaries/assault-weapons-state-by-state/> (last updated Nov. 15, 2019).

18. Polito, *supra* note 16, at 141, 144–45.

19. See, e.g., *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (challenging Maryland’s Firearm Safety Act of 2013, which banned military-style rifles, including the AR-15); *New York State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015) (challenging New York’s Secure Ammunition and Firearms Enforcement Act that expanded the definition of assault weapons after assault weapons were banned in New York in 2000).

20. See discussion *infra* Section II.B.

the term and the confusion surrounding its statutory use. Next, this Note explains the inception and creation of the AR-15, and how the firearm went from a vital military asset to the most popular weapon sold in the U.S. market.²¹ Lastly, Part I provides a history of twentieth century legislation that attempted to ban or otherwise reduce the sale of “assault weapons” to civilians.

Part II addresses the problem of ineffective “assault weapon” legislation, displaying how the ambiguity of the statutory definitions of assault weapons has led to an ineffective law, as well as ample opportunities for gun manufacturers to skirt around the laws. Furthermore, Part II demonstrates how a lack of a clear, explicit legislative intent behind assault weapon legislation contributes to the problem.

Part III presents a proposed solution to these problems, suggesting that explicitly stating the intent behind assault weapon legislation will provide clearer guidance to law enforcement, gun owners, and gun manufacturers. Next, this Note proposes a statutory definition of an assault weapon that addresses the original purpose of assault weapons like the AR-15—and the reasons for the AR-15’s popularity with mass killers—while protecting law abiding citizens who wish to own firearms for constitutionally protected reasons. Finally, Part III assesses the constitutionality of the legislation proposed.

I. BACKGROUND

A. *Defining “Assault Weapon”*

The origin of the term “assault weapon” is, like most aspects of the gun conversation, highly contested. The narrative from gun-rights supporters depicts the term as a political one, used by gun-control advocates to demonize common firearms with little or no extraneous lethality when compared to other semi-

21. See Cari S. Babitzke, *How the AR-15 Became America’s Rifle*, WASH. POST, (Mar. 23, 2018, 6:00 AM), https://www.washingtonpost.com/news/made-by-history/wp/2018/03/23/how-the-ar-15-became-americas-rifle/?utm_term=.c89e78aac459.

automatic guns.²² It is conceded within the debate that the term “assault weapon” truly originated in Nazi Germany after the Sturmgewehr 44, “a lighter, rapid fire military small arm which fired a projectile smaller . . . than that of the standard battle rifle,” was introduced into World War II combat.²³ Therefore, gun enthusiasts argue that the true definition of “assault weapon” can only be understood in a military context. As Second Amendment Foundation President Joseph P. Tartaro wrote in his reaction to the Federal Assault Weapons Ban of 1994, “[a]ssault weapons are by military procurement definition ‘selective fire (full auto continuous or burst fire plus autoloading) arms of sub caliber.’”²⁴ Therefore, Tartaro asserts that *actual* “assault weapons” are strictly limited to military use.²⁵

The 1980s marked the turning point for the term. On January 17, 1989, Patrick Purdy opened fire on a Stockton, California schoolyard, killing five children and wounding thirty-two others with a semi-automatic AK-47.²⁶ At this point, the term “assault weapon,” began to circulate widely in the media and within politics as California passed the Roberti-Roos Assault Weapons Control Act of 1989.²⁷ According to Tartaro, it was around this time that anti-gun theorists began to capitalize on the public’s “inability to tell the difference between a full automatic and a semi-automatic firearm” and to use this “bafflement” to the advantage of gun-control advocates.²⁸ Fully automatic and semi-automatic firearms are distinct in one very important aspect: fully automatic machine guns are capable of

22. Allen Rostron, *Style, Substance, and the Right to Keep and Bear Assault Weapons*, 40 CAMPBELL L. REV. 301, 304 (2018).

23. Joseph P. Tartaro, *The Great Assault Weapon Hoax*, 20 DAYTON L. REV. 619, 622 (1995).

24. *Id.* at 621.

25. *Id.*

26. *Five Children Killed as Gunman Attacks a California School*, N.Y. TIMES, Jan. 18, 1989, at A1, <https://www.nytimes.com/1989/01/18/us/five-children-killed-as-gunman-attacks-a-california-school.html> [hereinafter *Five Children Killed*].

27. Kevin A. Fox & Nutan Christine Shah, *Natural Born Killers: The Assault Weapons Ban of the Crime Bill—Legitimate Exercise of Congressional Authority to Control Violent Crime or Infringement of a Constitutional Guarantee?*, 10 ST. JOHN’S J. LEGAL COMMENT. 123, 131 (1994).

28. Tartaro, *supra* note 23, at 623.

firing successively with a single pull of the trigger.²⁹ These guns will continue to fire either until the shooter releases the trigger or the gun runs out of ammunition.³⁰ A semi-automatic gun, on the other hand, fires only one bullet with each pull of the trigger but automatically loads the next round into the chamber, allowing for rapid fire.³¹ While the two classes of weapons function differently, they are often physically indistinguishable.³² Many gun enthusiasts feel that by focusing exclusively on the aesthetic similarities between military and civilian rifles, gun control proponents can effectively argue that semi-automatic “assault weapons” serve no purpose to the general public.³³

Alternatively, gun-control advocates claim the contemporary understanding of the term “assault weapon” is a direct result of a marketing strategy introduced by the firearms industry.³⁴ After assault weapons became commonplace within the military, the gun industry needed a way to sell military-style firearms to a civilian population otherwise unfamiliar with their combat-like features.³⁵ Despite the constant prevalence of guns in popular and news media, as well as occasional surges in gun sales as a reaction to proposed regulations,³⁶ the gun industry has been facing a recent trend of decline.³⁷ Noting the demand for

29. Rostron, *supra* note 22, at 305.

30. *Id.* at 305–06.

31. G. Miles, *Semi Auto vs Full Auto*, FIREARMS GUIDE, <http://www.thefirearms.guide/blog/educational/semi-auto-vs-full-auto> (last visited Nov. 17, 2019).

32. See *Semi-Automatic Firearms and the “Assault Weapon” Issue Overview*, NRA: INST. FOR LEGIS. ACTION (Feb. 15, 2013), <https://www.nra.org/articles/20130215/assault-weapons-overview> (“The weapons’ menacing looks, coupled with the public’s confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons.” (quoting VIOLENCE POLICY CTR., *ASSAULT WEAPONS AND ACCESSORIES IN AMERICA* (1988))).

33. See Erica Goode, *Even Defining ‘Assault Rifle’ is Complicated*, N.Y. TIMES (Jan. 16, 2013), <https://www.nytimes.com/2013/01/17/us-even-defining-assault-weapons-is-complicated.html>.

34. See *id.*

35. See *id.*

36. See James B. Jacobs, *Why Ban “Assault Weapons”?*, 37 CARDOZO L. REV. 681, 701 (2015).

37. Jade Moldae, *U.S. Firearms Industry Today: Facing a Softened Market, Industry Has Case for Optimism*, SHOOTING INDUSTRY, July 2017, at 25 (2017) (“We are experiencing unprecedented decline in demand for ammunition and firearms following the presidential election and softness in the retail environment.”).

firearms beginning to shrink, the gun industry has thus responded by creating a previously non-existent demand. The Violence Policy Center reported that Freedom Group, Inc., the country's largest firearms manufacturer, included in a recent filing with the Securities and Exchange Commission that, "We have [] shifted our business from a manufacturing-based 'push system' to a customer-focused 'pull system,' driven by our Chief Sales and Marketing Officers."³⁸ A "pull system," attracts and creates new customers, as opposed to the "push system" that merely met the demands of the industry's long established customer base.³⁹ This phenomenon began in the mid-1960s after the M-16, the fully automatic version of the AR-15, was introduced into the military and the ArmaLite Corporation subsequently sold the rights to the rifle to Colt.⁴⁰

Recognizing that there was an opportunity to create a niche market with semi-automatic rifles, the gun industry began to market to the patriotic.⁴¹ This "pull system" displays the gun industry's willingness to "militarize" a civilian market.⁴² In order to do so, gun advertisements and marketing campaigns appealed to the "soldier within."⁴³ Images of soldiers, special operative law enforcement, and patriotic iconography became characteristic of assault rifle advertisements.⁴⁴ Suddenly, rifles needed to be "combat proven," have "lethal firepower," or be capable of accepting silencers to accomplish "whispering

38. VIOLENCE POLICY CTR., *THE MILITARIZATION OF THE U.S. CIVILIAN FIREARMS MARKET* 7, 10 (2011) (emphasis omitted).

39. *Id.* at 10 ("[T]his admission means that the conglomerate's marketing technique is to generate demand ('pull').").

40. *Why the AR-15 is America's Most Popular Rifle*, NRA BLOG: RECREATIONAL SHOOTING (Jan. 20, 2016), <https://www.nrablog.com/articles/2016/1/why-the-ar15-is-americas-most-popular-rifle/> [hereinafter NRA BLOG].

41. *See* VIOLENCE POLICY CTR., *supra* note 38, at 21.

42. *See id.* at 21–22 (detailing the reasons for and methods by which the United States firearms industry militarized their marketing strategies and what the consequences of such strategies have been).

43. *Id.* at 11.

44. *See, e.g.*, JACK LEWIS ET AL., *THE GUN DIGEST BOOK OF ASSAULT WEAPONS*, Cover Page (Ken Ramage ed., 7th ed. 2007).

death.”⁴⁵ By appealing to gun owners’ sense of patriotism while simultaneously exploiting the American fascination with violence, the gun industry touted the term “assault weapon” and defined a new breed of tactical rifle that would become a continuous source of political fodder.⁴⁶ Consequently, the gun industry is responsible for the proliferation of weapons suited only for the battlefield.⁴⁷

Despite these competing narratives, it has become apparent that the term “assault weapon” serves the purpose of its audience. To a staunch gun-control supporter, an “assault weapon” is understood as a military weapon that, due to the recklessness, negligence, and greed of the firearms industry, has ended up in the hands of untrained, unstable, and ill-equipped civilians. To a gun-rights advocate, a true “assault weapon” is nothing more than a fully-automatic rifle used exclusively by the military while the term gets touted by politicians and liberal media as a tool in an endless effort to outlaw an otherwise legal rifle.

B. History of the AR-15 Semi-Automatic Rifle

This Note will focus on the design and development of the AR-15 rifle, originally designed for military use by the Arma-Lite Corporation then marketed for civilian purposes by Colt.⁴⁸ The reason for this approach is because the AR-15 was the first rifle of its kind and not only revolutionized military combat but also the civilian firearms market.⁴⁹ The AR-15 has become the

45. CHUCK TAYLOR ET AL., *THE COMPLETE BOOK OF ASSAULT RIFLES*, Cover Page (Harry Kane et al. eds., 1986).

46. See Ali Watkins et al., *Once Banned, Now Loved and Loathed: How the AR-15 Became ‘America’s Rifle,’* N.Y. TIMES, <https://www.nytimes.com/2018/03/03/us/politics/ar-15-americas-rifle.html> (last updated Mar. 6, 2018).

47. *Id.*

48. See James Fallows, *M-16: A Bureaucratic Horror Story*, ATLANTIC (June 1981), <https://www.theatlantic.com/magazine/archive/1981/06/m-16-a-bureaucratic-horror-story/545153/>.

49. See C.J. Chivers, *Tools of Modern Terror: How the AK-47 and the AR-15 Evolved into Rifles of Choice for Mass Shootings*, N.Y. TIMES, <https://www.nytimes.com/interactive/2016/world/ak-47-mass-shootings.html> (last visited Jan. 25, 2020) (“The Kalashnikov’s superiority to the American M-14 in jungle warfare in Vietnam spurred Robert S. McNamara . . . to push the Pentagon to hurry production of a new American assault rifle, the AR-15, which became known as the M-

standard after which many other semi-automatic rifles have been modeled.⁵⁰ In many circumstances, long semi-automatic tactical rifles will be characterized as "AR-15 style."⁵¹ In addition to its dominant and popular design, the AR-15 has become not only one of the most popular firearms on the civilian market,⁵² but also the weapon most commonly used in some of the recent and horrific mass shootings.⁵³ It would seem remiss and entirely counterproductive to a discussion of an assault weapons ban to assume the AR-15 is not the rifle that has sparked such a heated debate. Focusing on the AR-15 is an efficient and effective way to gain a broad understanding of both the mechanics and politics of semi-automatic rifles.

The development of the AR-15 came at a time when the U.S. military faced technical and tactical difficulties in combat.⁵⁴ In response to difficulties faced by U.S. soldiers in Vietnam caused by cumbersome and unreliable weaponry, the U.S. Army deduced from over three million casualty reports that "[m]arksmanship was not as important as volume."⁵⁵ Accordingly, weapons developers, private contractors, and military officials began developing a more light-weight weapon with higher ammunition capacity and more lethal force.⁵⁶ Consequently, we have the AR-15.

16. The decision would propel assault rifles to their position as standard military firearms across the world.").

50. Watkins et al., *supra* note 46 ("Billed as 'America's Rifle' by the National Rifle Association, the AR-15 is less a specific weapon than a family of them.").

51. See, e.g., *XM-15 ORC-300 Blackout*, BUSHMASTER FIREARMS, <https://www.bushmaster.com/firearms/xm-15-orc/300-blackout> (last visited Nov. 20, 2019).

52. NRA BLOG, *supra* note 40.

53. C.J. Chivers et al., *With AR-15s, Mass Shooters Attack with the Rifle Firepower Typically Used by Infantry Troops*, N.Y. TIMES (Feb. 28, 2018), <https://www.nytimes.com/interactive/2018/02/28/us/ar-15-rifle-mass-shootings.html> ("Since 2007, at least 173 people have been killed in mass shootings in the United States involving AR-15s."); NRA BLOG, *supra* note 40; see also Chivers, *supra* note 49.

54. See Fallows, *supra* note 48 ("By the middle of 1967, . . . a sufficient number of soldiers [in Vietnam] had written to their parents about their unreliable equipment and a sufficient number of parents had sent those letters to their congressmen to attract the attention of the House Armed Services Committee, which formed an investigating subcommittee.").

55. VIOLENCE POLICY CTR., *supra* note 38, at 25.

56. See Fallows, *supra* note 48.

Prior to the development of the AR-15 (and its military counterpart the M-16), the standard issue rifle for the Army was the M-14, adopted in 1957.⁵⁷ The most notable disadvantage of this rifle was its heavy weight, causing it to be “virtually uncontrollable when on fully automatic fire.”⁵⁸ Responding to this and other issues, small-arms designer Eugene Stoner developed the AR-15 while working for the ArmaLite Corporation, hoping to achieve a reliable weapon that would prove more deadly on the battlefield.⁵⁹ The AR-15 had a number of tactical advantages over the M-14, including smaller .22 caliber ammunition that allowed the rifle to be effectively controlled on automatic fire and a lighter weight that allowed a soldier to carry three times as many rounds of ammunition as with the M-14.⁶⁰ Though Stoner developed the AR-15 in the late 1950s,⁶¹ it wasn’t until 1963 that the weapon was “militarized” into the M-16.⁶² Today’s civilian AR-15, widely available to the public, is capable of semi-automatic fire only, while the M-16 is capable of both semi- and fully-automatic fire; such a dual-feature is known as “selective-fire.”⁶³ Though the two rifles differ in this important aspect, they are physically identical and include a number of functional equivalents, including high capacity detachable ammunition magazines,⁶⁴ rear pistol grips,⁶⁵ and a forward grip⁶⁶

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *See id.*; NRA BLOG, *supra* note 40.

63. Kyle Wintersteen, *9 Most Misused Gun Terms*, GUNS & AMMO (Nov. 21, 2016), <https://www.gunsandammo.com/editorial/9-misused-gun-terms/249625>.

64. A detachable magazine is a “boxy[,] rectangular” attachment that slides into the bottom of a semi-automatic firearm. *Id.* A magazine typically holds bullets “under spring pressure in preparation for feeding into the firearm’s chamber.” *Id.*

65. A rear pistol grip is defined as “[a] grip that ‘protrudes conspicuously’ below the weapon, allowing the shooter to hold the rifle or shotgun like a pistol.” Margaret Hartmann, *What Makes a Gun an Assault Weapon?*, N.Y. MAG.: INTELLIGENCER (Jan. 30, 2013), <http://nymag.com/intelligencer/2013/01/what-makes-a-gun-an-assault-weapon.html>.

66. A forward pistol is a “second grip for the non-trigger hand” located toward the front of the gun. *See id.*

(allowing for better control of the weapon).⁶⁷ Although features like detachable magazines and pistol grips are unique to military rifles and were designed for combat purposes, it is often argued that these features make the weapon no less dangerous than any other widely available semi-automatic gun.⁶⁸

The AR-15's introduction into the civilian market signified a major shift for the gun industry. Once the rifle became standard issue for the U.S. military, ArmaLite sold the AR-15 rights to Colt, which marketed it to the public en masse.⁶⁹ Initially, Colt marketed the rifle as an alternative to wooden hunting rifles.⁷⁰ However, the gun was not initially met with enthusiasm from consumers.⁷¹ Eventually law enforcement agencies began buying the rifles in bulk, and the "black rifle," as it is often affectionately called, started making appearances in film and television.⁷² At this point, the firearms industry began to capitalize on the new recognition and effectively militarized the market.⁷³ The weapon has continued to maintain its popularity in large part *because of* the mounting controversy it creates. Sales of AR-15s see the same cycle: a mass shooting occurs, Democratic politicians publicly push for stronger gun control, and, motivated by a fear they will one day be unavailable, gun owners rush to buy more rifles.⁷⁴ As the debate surrounding the lethality, utility, and legality of the AR-15 continues, it remains evident this rifle will retain its popularity.

C. *The History of Gun Legislation*

Reactionary in nature, gun laws have always seemed to struggle to define a gun in a way that effectively addresses a contemporary condition of societal violence while also providing clear

67. VIOLENCE POLICY CTR., *supra* note 38.

68. See Tartaro, *supra* note 23, at 637.

69. See Fallows, *supra* note 48.

70. Babitzke, *supra* note 21.

71. *Id.*

72. *Id.*

73. *Id.*

74. See Jacobs, *supra* note 36; see also Babitzke, *supra* note 21.

guidelines for gun manufacturers, dealers, owners, and law enforcement. Since the colonial era, dating back to before the penning of the Second Amendment, gun ownership has been subject to government oversight.⁷⁵ Every aspect of gun ownership has been restricted at one point or another, including restrictions on classes of citizens eligible for ownership, on locations and times of permissible carry, and on the sale and manufacture of certain types of weapons.⁷⁶ While the history of U.S. gun laws includes a wide variety of restrictions, the laws have consistently been passed due to prevailing interests in public safety and shifting conditions of interpersonal violence within society.⁷⁷

The National Firearms Act of 1934 was the first major gun control measure of the twentieth century.⁷⁸ In response to high-profile violence associated with organized crime and the Chicago gangsters of the prohibition era, Congress sought to strictly regulate fully automatic machine guns, which were quickly becoming known as “gangster-type weapons.”⁷⁹ These weapons are extremely powerful and extremely lethal. In order to heavily restrict access to these powerful, military weapons, the National Firearms Act imposed a \$200 transfer tax (equivalent to \$3,543.78 as of 2014)⁸⁰ and subjected purchasers to an extensive application process that included an in-depth FBI background check.⁸¹ While this law is still on the books, it is arguably moot because the federal government went even further in 1986 when it banned entirely the manufacture of fully-automatic

75. See Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 *LAW & CONTEMP. PROBS.* 55, 57 (2017) (detailing the history of gun laws in the United States and the ambiguities that have remained consistent throughout).

76. See *id.*

77. *Id.* at 68.

78. Fox & Shah, *supra* note 27, at 138.

79. Spitzer, *supra* note 77, at 67; *Prohibition-Era Gang Violence Spurred Congress to Pass First Gun Law*, NPR (June 30, 2016, 4:25 PM), <https://www.npr.org/2016/06/30/484215890/prohibition-era-gang-violence-spurred-congress-to-pass-first-gun-law>.

80. Jacobs, *supra* note 36, at 684.

81. Rostron, *supra* note 22, at 306.

machine guns for the civilian market.⁸² To this day, fully-automatic machine guns are rarely possessed by a member of the general public, if at all.⁸³

In the years leading up to the National Firearms Act of 1934, states began to take matters of gun control upon themselves.⁸⁴ State legislatures, however, faced challenges in crafting an effective statutory definition of an assault weapon. For instance, legislation seeking to ban semi-automatic weapons often uniformly defined automatic and semi-automatic guns, or at least made it hard to tell the difference.⁸⁵ South Carolina's 1934 gun-control measure, for example, sought to prohibit "machine rifles, machine guns and sub-machine guns of any caliber whatsoever, capable of automatically discharging more than eight cartridges successively without reloading, in which ammunition is fed to such gun from or by means of clips, disks, belts or other separable mechanical device."⁸⁶ This language arguably describes both automatic and semi-automatic weapons.⁸⁷ Fully automatic rifles are directly addressed by the statute's reference to "machine guns" and "sub-machine" guns.⁸⁸ Language such as a rifle "capable of automatically discharging more than eight cartridges successively without reloading" implicates semi-automatic rifles because they automatically reload cartridges.⁸⁹

82. Jacobs, *supra* note 36, at 685.

83. It is still possible to buy a fully automatic machine gun today. However, since automatic guns can no longer be manufactured, only used machine guns are available. To buy one, purchasers must go through an intensive FBI background check, including fingerprints and photo identification, and pay a \$200 transfer tax in addition to the purchase price of the weapon. A machine gun can cost up to tens of thousands of dollars. It can take up to a year to be approved for a machine gun. Out of 400 million guns in America, only 630,000 of them are machine guns. Heath Druzin, *Automatic Weapons Are Legal, but It Takes a Lot to Get One of the 630,000 in the U.S.*, BOISE ST. PUB. RADIO (Dec. 21, 2018), <https://www.boisestatepublicradio.org/post/automatic-weapons-are-legal-it-takes-lot-get-one-630000-us#stream/0>.

84. See Spitzer, *supra* note 77, at 67–68.

85. See *id.* at 68–69 (discussing the definition used by individual state laws).

86. *Id.* at 70.

87. See *id.* at 68–69.

88. *Id.*

89. *Id.* at 69.

Many states mirrored this broad and ambiguous definition in the 1920s and 1930s.⁹⁰ A further significant addition to the patchwork state-by-state legislation appearing across the country was California's Roberti-Roos Assault Weapons Control Act, passed in 1989 in response to the Stockton schoolyard shooting.⁹¹ The California law sought to identify assault weapons through a "features test," stipulating that a rifle would be subject to the ban if it could accept a detachable magazine and had any one of the following six features: (1) a pistol grip "that 'protrudes conspicuously' below the weapon;"⁹² (2) a thumbhole stock;⁹³ (3) a folding or telescoping stock;⁹⁴ (4) a grenade or flare launcher;⁹⁵ (5) a flash suppressor;⁹⁶ or (6) a forward pistol grip.⁹⁷ While seemingly more detailed, this features test was often both over inclusive by banning semi-automatic pistols not intended to be targeted and under inclusive by allowing dangerous weapons to slip through loopholes.⁹⁸

It was not until 1994 that the federal government attempted a statutory definition of "assault rifle."⁹⁹ The Violent Crime Control and Law Enforcement Act of 1994 ("the '94 Ban") was passed in the midst of rising violent crime across the country, including a number of notable mass shootings.¹⁰⁰ Prior to the

90. *See id.* at 71.

91. *Five Children Killed*, *supra* note 26; *see supra* Section I.A.

92. Hartmann, *supra* note 65.

93. A thumbhole stock is a "hole that lets the shooter put the thumb of their trigger hand through the stock." *Id.* In some states, thumbhole stocks are considered akin to pistol grips. *See id.*

94. "The stock is the part of the gun that's held against the shoulder. A folding, telescopic, or detachable stock makes the weapon shorter so it can be stored or concealed more easily, and may allow the stock to be adjusted for different users." *Id.*

95. "Attachments that allow grenades or rockets to be fired from the muzzle or a separate barrel. These can be used to fire flares, smoke rounds, or chalk rounds." *Id.*

96. A flash suppressor functions to reduce the flash of light emitted from a rifle shot, thus reducing the shooter's momentary blindness caused by the flash. ERIC C. MORGAN & DAVID B. KOPEL, U.S. DEP'T OF JUSTICE, THE "ASSAULT WEAPON" PANIC: POLITICAL CORRECTNESS TAKES AIM AT THE CONSTITUTION, 16 (1993).

97. Hartmann, *supra* note 65; Rostron, *supra* note 22, at 309.

98. *See discussion infra* Section II.A.

99. *See Babitzke*, *supra* note 21.

100. *Id.*

passage of the '94 Ban, there was no federally recognized definition of an assault weapon.¹⁰¹ Spearheaded by Senator Diane Feinstein and signed by President Clinton, the law included an extensive assault weapons ban.¹⁰² The "Feinstein Amendment" incorporated a ban on nineteen specific assault weapons as well as "copycat models."¹⁰³ The provision further banned large capacity magazines and, borrowing from California's approach, included a "features test" to identify other possible "assault rifles."¹⁰⁴ This features test prohibited the sale and manufacture of any semi-automatic weapon capable of accepting a detachable magazine and possessing *two* or more of the following distinguishing features: (1) a folding or telescopic stock;¹⁰⁵ (2) a pistol grip that "'protrudes conspicuously' below the weapon;"¹⁰⁶ (3) a bayonet mount;¹⁰⁷ (4) a flash suppressor or a "threaded barrel . . . that can accommodate a flash suppressor;"¹⁰⁸ or (5) a grenade launcher mount.¹⁰⁹ The '94 Ban, however, was careful to explicitly exempt over 650 sporting firearms from this provision.¹¹⁰ The Feinstein Amendment also included a "grandfather provision," which allowed owners of any implicated rifle purchased prior to 1994 to continue to legally own them—so long as the weapon was registered with law enforcement.¹¹¹

101. Fox & Shah, *supra* note 27, at 144.

102. *Id.* at 142–43.

103. *Id.* at 142.

104. Polito, *supra* note 16, at 140.

105. Hartmann, *supra* note 65.

106. *Id.*

107. A bayonet mount is a clip attachment, suitable for AR-15 rifles, which allows for a long knife or spear shaped weapon to be attached to the end of a rifle. See Marc Lallanilla, *What is an Assault Weapon?*, NBC NEWS (Jan. 17, 2013, 11:20 AM), http://www.nbcnews.com/id/50495212/ns/technology_and_science-science/t/what-assault-weapon/#.XKvDwlNKg_U ("In a desperate wartime situation, a bayonet gives you something somewhat more effective than a raised middle finger when you've run out of bullets.' But labeling a rifle an assault weapon because it has a metal clip where one might potentially mount a bayonet is 'circular reasoning.'" (quoting Mike Cooper of PolicyMic.com)).

108. *Id.*

109. Jacobs, *supra* note 36, at 693; see also Polito, *supra* note 16, at 140.

110. Fox & Shah, *supra* note 27, at 143.

111. John J. Phelan IV, *The Assault Weapons Ban – Politics, the Second Amendment, and the Country's Continued Willingness to Sacrifice Innocent Lives for "Freedom"*, 77 ALB. L. REV. 579, 587–99 (2014).

The '94 Ban had glaring inadequacies—inadequacies that could only be attributed to political compromises. The '94 Ban was buried within an omnibus crime control bill, which included measures more favorable to conservative legislators, such as a provision to add 100,000 police officers to forces across the country as well as a sunset provision, nearly ensuring the bill's inevitable expiration in 2004.¹¹² Similarly, the 650 specifically exempted firearms listed within the legislation reflected a concession from Democrats, a move likely done to ease opposition from an ever-powerful gun lobby. Yet, despite facing resistance within his own party and even his own administration,¹¹³ President Clinton insisted on this piece of legislation even though it came at a steep political price for the Democratic party.¹¹⁴

While these compromises may have served to get this law on the books, it also came at the cost of a truly effective piece of legislation. These costs are reflected in a number of provisions within the '94 Ban, including the "grandfather provision," the specifically exempted firearms, and, most notably, a "sunset provision" that set the bill to expire within 10 years of its passage if Congress chose not to renew it.¹¹⁵ Furthermore, the '94 Ban's generic definition of an assault weapon seemed almost intentionally crafted to allow manufacturers to find loopholes.¹¹⁶ The "two feature" test included in the bill enabled manufacturers to legally "create an assault weapon that had a detachable magazine and a pistol grip or barrel shroud and that alone could give an assault weapon the capability of controlled

112. Michael Luo & Michael Cooper, *Lessons in Politics and Fine Print in Assault Weapons Ban of '90s*, N.Y. TIMES (Dec. 19, 2012), <https://www.nytimes.com/2012/12/20/us/lessons-in-politics-and-fine-print-in-assault-weapons-ban-of-90s.html>.

113. See Russell Riley, *Bill Clinton's Costly Assault Weapons Ban*, ATLANTIC (June 25, 2016), <https://www.theatlantic.com/politics/archive/2016/06/when-bill-clinton-passed-gun-reform/488045/> (recounting the struggle Clinton's chief congressional affairs lobbyist, Patrick Griffin, faced in trying to find both Democratic and Republican support for the Assault Weapons Ban and the ultimate midterm losses that resulted for the Democratic party in Congress).

114. See *id.*

115. See *id.*; see also Phelan, *supra* note 111, at 589–92.

116. See Phelan, *supra* note 111, at 590; see also discussion *infra* Section II.B.

rapid-fire."¹¹⁷ The New York Times quoted David Yassky, then chief counsel to the House subcommittee on crime, saying, "a broader definition of assault weapons would have been safer, would have resulted in fewer highly dangerous weapons making their way through the ban—but there just were not the votes for it."¹¹⁸

In the years that followed, the '94 Ban's flaws became glaring. First, because there was no national registration system for the purchase of assault weapons in place, nor did the ban require the imposition of one,¹¹⁹ it was essentially impossible to determine the number of existing "assault weapons" in the hands of the general public.¹²⁰ Additionally, subjecting these guns to a "features test" is a strictly cosmetic standard.¹²¹ Gun manufacturers easily "rebranded" their now-outlawed products by redesigning a few key features so the weapons did not *appear* to be "assault weapons."¹²² Finally, and most unfortunate, the sunset provision's expiration date came in September of 2004 and, unsurprisingly, the ban expired without much debate or consideration.¹²³ Since its expiration, there have been a number of failed attempts to renew the ban, even before this most recent failure in 2013, following the Sandy Hook shooting.¹²⁴ And while the overall effects of the '94 Ban are difficult to discern, it is worth noting the number of mass shootings per year has doubled since its expiration in 2004.¹²⁵

117. Phelan, *supra* note 111, at 590.

118. Luo & Cooper, *supra* note 112.

119. Phelan, *supra* note 111, at 587 ("The ban did not require the registration or destruction of already existing semiautomatic assault weapons, and as a result it left countless semiautomatic assault weapons unaccounted for on the streets.").

120. Fox & Shah, *supra* note 27, at 144.

121. See Phelan, *supra* note 111, at 598.

122. See *id.*

123. *Id.* at 591.

124. See Elizabeth Hartfield, *The Assault Weapons Ban: What Was It and Did It Work?*, ABCNEWS (Dec. 18, 2012), <https://abcnews.go.com/Politics/OTUS/newtown-connecticut-shootings-assault-weapons-ban-work/story?id=18000724>.

125. *Id.* ("The study found that gun crimes involving assault weapons declined by as much as 72 percent in the localities examined after the ban went into effect. However, the authors note that these types of weapons were only used in 2 to 8 percent of the gun crimes committed prior to the ban, so the larger impact on gun violence was minimal.").

II. THE PROBLEMS TO ADDRESS

A. *Statutory Definitions of Assault Weapons*

This Note does not propose a statute that would explicitly ban AR-15 style rifles. Because the AR-15 has evolved into a “family” or “style” of rifle, such a ban could conceivably result in a similar outcome to that of the Federal Assault Weapons Ban of 1994, in which firearms manufacturers could easily redesign and rebrand an equally dangerous rifle and successfully avoid legal implications.¹²⁶ Instead, this Note proposes a revised statutory definition of an “assault weapon” that will address the specific mechanics of an AR-15 that make the weapon both particularly dangerous and particularly attractive to individuals intent on carrying out mass violence.

Assault weapon bans have been largely ineffective due to an inadequate statutory definition of “assault weapon.”¹²⁷ The crux of the inadequacies lies in a reliance on style over substance. The gun industry is vast and varying and offers a wide variety of weapons for a wide variety of purposes. Regulating the sale of a category of gun becomes increasingly difficult when the existence of that category itself is contested.¹²⁸ Firearms manufacturers do not sell “assault weapons.” When a buyer searches for what the majority of the public would understand to be an “assault weapon,” he or she will search “rifles” categorized as “hunting,” “tactical,” “competition,” or “sporting.”¹²⁹ This further evidences the artificial nature of the term “assault weapon.”¹³⁰ Law makers have been left to create a category of gun in accordance with their political mission.

The ‘94 Ban signed by President Clinton marked the first major federal assault weapons ban and thus, the first federal

126. See discussion *supra* Section I.C.

127. See Phelan, *supra* note 111, at 589–90.

128. See discussion *supra* Section I.A.

129. See BUSHMASTER FIREARMS, <https://www.bushmaster.com/> (last visited Jan. 25, 2020); see also Rifles, REMINGTON, <https://www.remington.com/rifles> (last visited Jan. 25, 2020).

130. See Phelan, *supra* note 111, at 588.

statutory definition of an assault weapon.¹³¹ The foundational principle for an “assault weapon,” consistent throughout legislation at both the state and federal level,¹³² is that the weapon must be semi-automatic and capable of accepting a detachable magazine.¹³³ A detachable magazine can allow a firearm to be equipped with up to one hundred rounds of ammunition.¹³⁴ As legislatures saw it, these two features created a lethal combination. But a “semi-automatic firearm capable of accepting a detachable magazine” can encompass too wide a breadth of firearms. For example, Bushmaster’s XM15-E2S,¹³⁵ the AR-15 style rifle used in the Sandy Hook School shooting¹³⁶—certainly a targeted firearm for an assault weapons ban—is a sixteen-inch-long rifle capable of firing semi-automatically and accepting detachable magazines that can hold up to thirty rounds.¹³⁷ At the same time, the Ruger American Pistol Compact 9mm Handgun, a style of gun commonly owned for home defense,¹³⁸ is a handgun with a three-and-a-half inch barrel that fires semi-automatically and is capable of accepting a detachable magazine with up to seventeen rounds.¹³⁹ Yet, when placed in the context of a political debate, handguns are rarely a target for this type of legislation.

131. Fox & Shah, *supra* note 27, at 137.

132. See Polito, *supra* note 16, at 139–48.

133. Phelan, *supra* note 111, at 589.

134. See, e.g., *MAG5-100: High-Capacity Magazine, 100 Round*, SUREFIRE, <https://www.surefire.com/mag5-100.html> (last visited Jan. 25, 2020).

135. When a search for the XM-15 E2S model was conducted on Bushmaster.com, the “XM-15 QRC – 16” Optics Ready was presented. It appears the E2S model is no longer available.

136. First Amended Complaint at 1, *Soto v. Bushmaster Firearms Int’l*, 202 A.3d 262 (Conn. 2019) (No. FBT-CV-15-6048103-S).

137. *XM-15 Standard – 16 Heavy Barrel Carbine A2*, BUSHMASTER FIREARMS, <https://www.bushmaster.com/firearms/xm-15-standard/16-heavy-barrel-carbine-a2> (last visited Jan. 25, 2020).

138. See Brad Fitzpatrick, *The 10 Best Defensive Guns Available Now*, GUNDIGEST (July 13, 2016), <https://gundigest.com/handguns/concealed-carry/the-10-best-defensive-guns-available-now#2>.

139. See *Ruger American Pistol Compact, Semi-Automatic, 9mm, 3.55 Barrel, Manual Safety, 12+1/17+1 Rounds*, SPORTSMAN’S GUIDE, <https://www.sportsmansguide.com/product/index/ruger-american-pistol-compact-semi-automatic-9mm-355-barrel-manual-safety-121-171-rounds?a=2095084> (last visited Jan. 25, 2020).

To narrow the pool, the '94 Ban included a "features test."¹⁴⁰ This features test focused on guns that had "military features."¹⁴¹ The targeted features included (1) a "folding" or "telescopic stock;"¹⁴² (2) a pistol grip that "protrudes conspicuously beneath the action of the weapon;"¹⁴³ (3) a "bayonet mount;"¹⁴⁴ (4) a flash suppressor or a "threaded barrel" designed to accommodate a flash suppressor;¹⁴⁵ or (5) a grenade launcher mount.¹⁴⁶ The problem with a "military style feature" standard is that it is a cosmetic one, "targeting weapons for their appearances" rather than mechanics that, for instance, allow a weapon to fire faster and with more force than most other firearms.¹⁴⁷

An argument can be made, of course, that these accessories do in fact increase a shooter's ability to reach more victims in a shorter amount of time and are therefore more than merely cosmetic. For example, a flash suppressor functions to reduce the flash of light emitted from a rifle shot, and consequently, also reduces the shooter's momentary blindness caused by the flash.¹⁴⁸ "[R]educed flash means that a person shooting at an attacker at night will less markedly reveal his own position."¹⁴⁹ If an active shooter is able to avoid momentary blindness and conceal his location then, logically, he can locate more victims in a shorter amount of time while causing mass confusion. Additionally, a folding or telescopic stock allows the gun to vary in length, allowing for maneuverability and making the weapon "easier to shoulder."¹⁵⁰ With increased maneuverability and a reduced chance of momentary blindness, these features allow

140. Jacobs, *supra* note 36, at 688–93.

141. Phelan, *supra* note 111, at 588.

142. Hartmann, *supra* note 65.

143. *Id.*

144. Lallanilla, *supra* note 107.

145. MORGAN & KOPEL, *supra* note 96.

146. Jacobs, *supra* note 36, at 693; *see also* Polito, *supra* note 16, at 140.

147. Phelan, *supra* note 111, at 588.

148. MORGAN & KOPEL, *supra* note 96.

149. *Id.*

150. MORGAN & KOPEL, *supra* note 96, at 17; E. Gregory Wallace, "Assault Weapon" Myths, 43 S. ILL. U. L.J. 193, 232 (2018).

for more tactical control of the firearm, improving a shooter's ability to use the weapon.¹⁵¹ Furthermore, gun control advocate Brian Siebel explained that pistol grips "help stabilize the weapon during rapid fire and allow the shooter to spray-fire from the hip position," while barrel shrouds "protect the shooter's hands from the heat generated by firing many rounds in rapid succession."¹⁵² And while these features may not directly increase a gun's firepower or affect other mechanics, they improve a shooter's operation of the weapon, helping a shooter reach more victims. To this extent, the features targeted by the '94 Ban serve a purpose beyond simply giving the weapon a menacing look.

These features, in and of themselves, however, have no effect on the mechanics of the gun or the rate and speed at which it fires.¹⁵³ Focusing on a cosmetic features test alone was a strategy with little impact because gun manufacturers could easily find ways around these restrictions. E. Gregory Wallace characterized this "combat features" test as a "myth" that "is reflected in 'assault weapons' statutes that define the banned firearms based not on how powerfully they strike, how fast they fire, and how accurate they shoot, but rather on having certain features."¹⁵⁴ As the accessories included in the "features test" are designed to serve a specific function, gun manufacturers could simply redesign and rename any of the listed features and they would perform virtually the same function while passing legal scrutiny.¹⁵⁵ For example, "thumbhole stocks" could replace

151. See *The Benefits of an AR15 Collapsible Stock Rifle*, MAX BLAGG, <https://www.maxblagg.net/the-benefits-of-an-ar15-collapsible-stock-rifle/> (last visited Nov. 20, 2019) [hereinafter *Benefits*].

152. Wallace, *supra* note 150, at 226 (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1262–63 (D.C. Cir. 2011)).

153. Jacobs, *supra* note 36, at 686 ("Semiautomatic rifles are labeled assault weapons because of their appearance, not their mechanics.").

154. Wallace, *supra* note 150, at 226.

155. Phelan, *supra* note 111, at 589; see also Jacobs, *supra* note 36, at 696 ("After the federal [assault weapons ban] became affective, manufacturers quickly substituted new firearms models for those banned as assault weapons, for example, by removing the bayonet and grenade launcher mounts. Critics again charged that the manufacturers were circumventing the ban because the new models were functionally identical to the prohibited firearms.").

pistol grips, serving precisely the same function of allowing the shooter to stabilize the weapon during rapid fire.¹⁵⁶ Furthermore, a flash suppressor, in addition to reducing the flash that results from firing, helps reduce “muzzle climb.”¹⁵⁷ Muzzle climb “is essentially a product of rapid-fire recoil that causes the shooter’s muzzle to climb and overshoot [the] target when firing at a high-rate.”¹⁵⁸ A muzzle brake or muzzle compensator can serve the same function as a flash suppressor and would not be subject to the ‘94 Ban.¹⁵⁹

An effective assault weapons ban must go beyond appearances. While the features relied upon in Clinton’s ‘94 Ban may serve a tactical purpose, focusing on those features alone does not address the truly dangerous nature of these guns. Attachments like a flash suppressor or folding stock do allow a shooter more ease, comfort, and maneuverability while shooting.¹⁶⁰ They do not, however, relate to the problem at hand: military-grade weapons in the hands of civilians.

B. *Lack of Clear and Explicit Legislative Intent*

Another problem plaguing the passage of an effective assault weapons ban is the lack of a clear and explicit legislative intent. When Senators Manchin and Toomey introduced the background check and assault weapons provisions in 2013, the text of the legislation briefly stated its purpose as, “to regulate assault weapons, to ensure the right to keep and bear arms is not unlimited, and for other purposes.”¹⁶¹ Such brief and all-encompassing Statements of Purpose have not been uncommon in legislation aimed at regulating assault weapons. Similarly, the ‘94 Ban, which included the first major federal assault weapons definition, stated its purpose as “[t]o control and prevent

156. Phelan, *supra* note 111, at 589.

157. *Id.*

158. *Id.*

159. *Id.* at 589–90.

160. *See Benefits*, *supra* note 151.

161. Assault Weapons Ban of 2013, S. 150, 113th Cong. (2013).

violent crime."¹⁶² With little textual guidance, the reason for these bills can be assumed from the context of the times, revealing a pattern that has tiringly repeated itself: mass shooting, public outcry, legislative action, or in the recent case, inaction.

As mentioned earlier in this Note, Manchin and Toomey's bill was introduced to Congress only four months following the Sandy Hook Massacre.¹⁶³ Likewise, less than a year before President Clinton signed the '94 Ban, a shooter opened fire at a San Francisco law firm, killing eight people and wounding six others—the worst mass killing in San Francisco's history.¹⁶⁴ This trend has remained consistent from as early as the St. Valentine's Day Massacre¹⁶⁵ to the Columbine¹⁶⁶ and Virginia Tech¹⁶⁷ shootings, to name only a few.

If we assume that Congress passes legislation in order to address contemporaneous social, economic, or political concerns of the public, then we can assume that these bills, passed in such close connection to notable events of mass violence, had the aspirations of curbing violence of that exact nature. But with little legislative guidance, the enforcement of these laws and, consequently, their effect has not seemed to stymie America's culture

162. Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103rd Cong. (1994).

163. See discussion *supra* Introduction.

164. Amy Bingham, *Shootings that Shaped Gun Control Laws*, ABC NEWS (July 27, 2012), <https://abcnews.go.com/beta-story-container/Politics/OTUS/shootings-shaped-gun-control/story?id=16863844>.

165. On February 14, 1929, four men, at the behest of infamous mobster Al Capone, broke into a rival gang's garage, lined seven men along a wall, and executed them using fully automatic submachine guns. In 1934, following this and continuous violence from the Chicago gangsters, President Franklin Roosevelt passed the National Firearms Act, imposing a significant tax on fully automatic weapons, making them extremely costly to obtain. John O'Brien, *The St. Valentine's Day Massacre*, CHI. TRIB. (Feb. 14, 2014), <https://www.chicagotribune.com/news/nation-world/politics/chi-chicagodays-valentinesmassacre-story-story.html>; see also Bingham, *supra* note 164.

166. One month after Eric Harris and Dylan Klebold killed 12 of their classmates at the Colorado high school, the Senate passed a bill which would require background checks for "all firearm sales at gun shows." Bingham, *supra* note 164.

167. In the year following the killing of 32 Virginia Tech students, President George W. Bush signed into law a bill that "expanded the federal background check database," marking the first major gun law in over a decade. *Id.*

of violence or these horrific mass shootings.¹⁶⁸ Members of Congress have even acknowledged some of these bills' ambiguous intents. In September 2004, as the expiration date for the '94 Ban approached, Senator Larry Craig characterized the piece of legislation as "a political placebo at the time,"¹⁶⁹ implying the piece of legislation did little more than appease nervous constituents and create the appearance of action on gun control. Perhaps unsurprisingly, Senator Dianne Feinstein, representing the other side of the aisle, praised the effects of that exact same piece of legislation by claiming "there is no question that gun traces to crimes committed with assault weapons have declined, and there is no question that the number of assault weapons available in gun stores . . . have also declined. Coincidentally, but I'm not saying it's attributable to this, crime has also declined."¹⁷⁰ In reality, while there was a reduction of the gun murder rate as well as the criminal use of the banned firearms in the years following the passage of the '94 Ban, a direct correlation between that drop and the legislation itself is attenuated at best.¹⁷¹ Even more notable, the ban failed entirely to reduce the number of victims per gun murder incident.¹⁷²

Meeting the '94 Ban's goal of "control[ing] and prevent[ing] violent crime" by banning assault weapons may have been misguided in the first place.¹⁷³ If, as the bill's statement of purpose claimed, this piece of legislation was supposed to reduce the incidences of gun violence at large, the bill was entirely under

168. The occurrence of mass shootings, defined as a shooting occurring in a public space where a motive "appeared to be indiscriminate killing," and where a lone shooter killed three or more people, in the past ten years has been 2.4 times greater than the previous decade. Fifty seven percent of all recorded mass shootings have happened in the past decade. OFFICE FOR VICTIMS OF CRIME, MASS CASUALTY SHOOTINGS 1 (2018).

169. Jacobs, *supra* note 36, at 697 (quoting Margaret Warner, *Interview with Senator Dianne Feinstein (D-CA) and Senator Larry Craig (R-ID)*, PBS (Sept. 4, 2004), <https://www.pbs.org/news-hour/show/federal-assault-weapons-ban-set-to-expire>).

170. *Id.* (quoting Warner, *supra* note 169).

171. See e.g., JEFFERY A. ROTH & CHRISTOPHER S. KOPER, NAT'L INST. OF JUSTICE, IMPACTS OF THE 1994 ASSAULT WEAPONS BAN: 1994-96 (1999) (reporting the market and societal effects of the 1994 Assault Weapons Ban as recorded in 1994, 1995 and 1996). The report described the ban's effect as "modest." *Id.* at 8.

172. *Id.* at 2.

173. Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103rd Cong. (1994).

inclusive. Prior to the passage of the ‘94 Ban, studies indicated that between one and eight percent of gun crimes involved assault weapons.¹⁷⁴ While these mass shootings may feel ever prevalent in our society (due likely to their unique nature when compared to other similarly-situated democratic societies)¹⁷⁵ these deaths do not actually make up even near a majority of the roughly 38,600 gun-related deaths in the U.S. each year.¹⁷⁶ This glaring statistic calls Senator Feinstein’s bluff, and rather seems to feed Senator Craig’s “political placebo” theory.¹⁷⁷ Without a refined legislative goal, assault weapon bans—generally asserted to “prevent violent crime”—are left to be interpreted in an echo chamber. Measured up against handgun crimes and within the context of crime and violence as a whole in the United States, courts are likely to see little use for assault weapon bans other than the restriction of otherwise law-abiding citizens’ right to bear arms.¹⁷⁸

III. PROPOSED SOLUTIONS

A. *The Original Purpose of an “Assault Weapon” as Seen Through the AR-15*

A new and improved assault weapons ban should acknowledge the reasons why the AR-15 was introduced into military combat in the first place. Such a statute would address why the weight, twist and ammunition caliber of assault weapons matter. Weight, of course, refers to how heavy the fully assembled firearm, with or without ammunition, will be when

174. ROTH & KOPER, *supra* note 171, at 8.

175. Kara Fox, *How US Gun Culture Compares with the World*, CNN, <https://www.cnn.com/2017/10/03/americas/us-gun-statistics/index.html> (last updated Aug. 6, 2019, 10:18 AM ET).

176. *America’s Gun Culture in Charts*, BBC (Aug. 5, 2019), <https://www.bbc.com/news/world-us-canada-41488081> (citing statistics reported by the Center for Disease Control and Prevention from data gathered from crimes recorded in 2016) [hereinafter *BBC Chart*].

177. Jacobs, *supra* note 36, at 697 (quoting Warner, *supra* note 169).

178. See Lindsay P. Gustafson, *Making the Peg Fit the Hole: A Superior Solution to the Inherent Problems of Incorporated Definitions*, 37 U. ARK. LITTLE ROCK L. REV. 363, 381 (2015) (“In practice . . . courts regularly categorize references as general or specific based not on the language of the reference, but on the court’s interpretation of *legislative intent*.” (emphasis added)).

held. Twist, refers to the number of rotations a bullet makes per one inch it travels. Lastly, ammunition caliber refers to the size of the bullet itself, specifically the diameter of the bullet measured in millimeters. This Note proposes a statutory definition of an assault weapon that would address the mechanics of a rifle with language similar to the following:

For purposes of this statute an “assault weapon” means:

1. a semi-automatic rifle with the ability to accept a detachable magazine that also:
 - a. has an overall weight of six and one half pounds, unloaded, or seven and one half pounds when fully loaded with a thirty round detachable magazine,¹⁷⁹ or less;
 - b. has a barrel twist rate at 1:10 or slower;¹⁸⁰ *and*
 - c. is capable of accepting ammunition of .22 caliber or smaller.¹⁸¹

179. The average weight of a standard AR-15 with a 16 inch barrel is 6.5 pounds when unloaded and 7.5 pounds when loaded with a 30 round detachable magazine. *How Heavy is an AR-15? Average Weight & Savings Tips*, CALIGUNNER.COM, <https://caligunner.com/how-heavy-is-an-ar-15-average-weight-savings-tips/> (last visited Jan. 25, 2020). This Note suggests that a weapon should *not* be considered an “assault weapon” if it weighs *more* than 6.5lbs when unloaded or 7.5lbs when loaded.

180. Currently, the average twist of an AR-15’s barrel ranges from 1:7 to 1:9. This means the bullet makes one rotation every seven, eight, or nine inches. *Best AR-15 Twist Rate: Does It Really Matter?*, PEW PEW TACTICAL (Sept. 20, 2018), <https://www.pewpewtactical.com/best-ar-15-rifle-twist-rate/>; Tom McHale, *AR-15 Barrel Twist Rate – What You Need to Know*, AMMOLAND (Feb. 20, 2017), <https://www.ammoland.com/2017/02/ar-15-barrel-twist-rates-you-need-to-know/#axzz5kKtfDz3m>. As a faster twist actually results in a less lethal impact, this Note suggests that a firearm should *not* be considered an “assault weapon” if it has a twist rate of 1:9 or faster. Therefore, firearms appropriate for the general public should have faster twists and the slowest acceptable twist rate should be at 1:9.

181. The average AR-15 accepts ammunition of .22 caliber. The larger the ammunition, the slower and steadier the bullet will move toward its target. Additionally, the larger the ammunition, the fewer number of rounds a gun can carry, reducing the number of possible victims a shooter could reach. *See The AR-15: America’s Modern Sporting Rifle*, AR-15 GUN OWNERS OF AM., <https://www.ar15goa.com/about/the-ar-15-rifle/> (last visited Jan. 25, 2020).

Lacking in any previously enacted legislative definition of an assault weapon is the acknowledgement that what has now become a popular "sporting" or "tactical" rifle for everyday civilian use was once specifically and exclusively designed for use on the battlefield.¹⁸² Firearms in different contexts require different functions and capabilities.¹⁸³ As members of the Armed Forces are issued their own service rifles by the military,¹⁸⁴ the civilian market can usually presume that no gun purchased by a member of the general public will need to be used in a combat context. Following this logic, guns available to the general public do not require the same tactical functions and capabilities which are required for firearms in a military context.¹⁸⁵ Therefore, legislatures should focus their attention toward the specific characteristics of the AR-15 that originally made it a strategically better option for military forces. The general public has no need to engage in "combat" scenarios. The features that make a rifle suitable for combat are not necessary for a civilian firearm available to the untrained general public.¹⁸⁶

The design of the AR-15 directly contemplated the challenges posed to soldiers in the battlefield by heavy, poorly made weapons.¹⁸⁷ Prior to the military adopting the AR-15, the standard

182. Fallows, *supra* note 48.

183. See Max Prasac, *Is a .50-Caliber Handgun Actually Good for Anything?*, GUNDIGEST (Feb. 8, 2019), <https://gundigest.com/handguns/hunting-handguns/is-a-50-caliber-handgun-actually-good-for-anything>; see also Max Prasac, *Choosing the Right Hunting Revolver*, GUNDIGEST (Jan. 9, 2017), <https://gundigest.com/shop/choosing-the-right-hunting-revolver>.

184. *About the Army: Weapons*, U.S. ARMY, <https://www.goarmy.com/about/army-vehicles-and-equipment/weapons.html> (last visited Jan. 20, 2020).

185. An argument exists that the military features characteristic of AR-15 rifles allow for customized home defense. A folding stock may allow a gun owner to comfortably maneuver the weapon in a confined space like a hallway. With that said, however, five of the eight guns listed as the best guns for home defense are handguns while two others are shotguns. See Fitzpatrick, *supra* note 138.

186. This Note does not assume it is impossible for a member of the general public to be technically equipped to operate an AR-15 without military training. There are, of course, gun safety and shooting classes available to the general public that will train an individual to operate an AR-15 safely. This note simply contemplates a balancing of individual liberties, and in doing so, assumes that, in the interests of life and liberty, gun laws would consider the constitutionally protected right to life over an individual's right to a hobby.

187. Fallows, *supra* note 48.

issue rifle for combat was the M-14.¹⁸⁸ Developed with a focus on marksmanship, the M-14 used .30 caliber bullets—ammunition much larger and heavier than the AR-15's .22 caliber bullet.¹⁸⁹ The disadvantage of larger ammunition in a combat context is that it fires at a slower, steadier rate.¹⁹⁰ Even more disadvantageous, the M-14 was a “less solidly made version of the Army's previous standard, the M-1.”¹⁹¹ “The explosive charge needed to propel the heavy bullets was so great, and the rifle itself so flimsily built . . . that the kick was ferocious.”¹⁹² Such intense power often left soldiers at a greater risk of injuring themselves from the kick back.¹⁹³

Alternatively, the design of the AR-15 represented a change in tone for the military, which determined that “[m]arksmanship was not as important as volume.”¹⁹⁴ Consequently, the AR-15 was designed to be significantly lighter in weight.¹⁹⁵ A lighter weapon allowed for the gun to carry even more ammunition.¹⁹⁶ In further contrast to the M-14, the AR-15 fires .22 caliber bullets, allowing for a higher rate of fire with the capability of “eject[ing] 600 or 700 cartridges a minute.”¹⁹⁷ After a variety of field tests, the military adopted the AR-15 technology and “militarized” the weapon into what became the M-16.¹⁹⁸ The military made two significant modifications: (1) an increased “twist” of the rifle's barrel, causing the bullet to spin faster and, ironically, more stably as it flies, maintaining a steady, even trajectory as

188. *Id.*

189. *Id.*

190. *See id.* At the time, the military saw this as an advantage: the slower and steadier the bullet moved, the more likely it was to hit the desired target because it was less sensitive to forces such as wind. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* (“A soldier who used it on automatic fire was likely to get a nosebleed.”).

194. VIOLENCE POLICY CTR., *supra* note 38, at 25 (quoting VIOLENCE POLICY CTR., BULLET HOSES—SEMI-AUTOMATIC ASSAULT WEAPONS: WHAT ARE THEY? WHAT'S SO BAD ABOUT THEM? (2003)).

195. Fallows, *supra* note 48.

196. *Id.*

197. *Id.*

198. *Id.*

it enters human flesh, actually *reducing* the lethality of the bullet wound;¹⁹⁹ and (2) a “selective fire” feature, allowing the gun to be fired in *either* semi-automatic *or* automatic mode.²⁰⁰ These two modifications are the most significant mechanical differences between the original AR-15 and the militarized M-16.²⁰¹

When considering the reasons for the military’s adoption of the AR-15 and the gun’s key distinctions from previous service rifles, legislatures should focus on the AR-15’s speed and agility when drafting a statutory definition of an “assault weapon.” As discussed above, the AR-15’s light weight and ability to fire “600 or 700 cartridges a minute”²⁰² distinguished it for combat use. As warfare began to change, the military became more concerned with volume over accuracy.²⁰³ While features included in recent assault weapons bans, such as folding stocks or flash suppressors, address the comfort and ease of firing a weapon,²⁰⁴ a more effective piece of legislation would address the mechanics of the firearm. The AR-15’s original design specifically addressed the weighty and cumbersome nature of preceding military service rifles.²⁰⁵ Requiring rifles available to the general public to be of a certain weight would prevent the rifle from carrying an excessive amount of ammunition and would thus produce a slower rate of fire.²⁰⁶

199. *Id.* This suggests that the AR-15 available to the civilian public has a *decreased* twist, causing the bullet to be less stable as it enters the body and thus *more* lethal.

200. *M-16: Assault Rifle*, MILITARY TODAY, <http://www.military-today.com/firearms/m16.htm> (last visited Jan. 25, 2020). It is important to note, however, that members of the military are rarely instructed to operate their service arm on automatic fire.

201. See Fallows, *supra* note 48; see also *Understanding the Different Types of AR 15 Rifles – M4 vs. M16 – A1, A2, A3, or A4*, AT3 TACTICAL, <https://www.at3tactical.com/blogs/news/10951661-m16-vs-m4-vs-ar15-a1-a2-a3-or-a4-understanding-the-different-types-of-ar15-rifles> (last visited Jan. 25, 2020) (“The main difference between [the M16 and the AR15] is the fire-select feature.”).

202. Fallows, *supra* note 48.

203. VIOLENCE POLICY CTR., *supra* note 38, at 25.

204. See Wallace, *supra* note 150, at 227–28 (“The remaining features—flash suppressors, barrel shrouds, adjustable stocks, pistol grips, night sights, and large-capacity magazines—do not have exclusively military uses. They reflect advances in modern firearm technology that make the rifle more ergonomic and functional . . .”).

205. See Fallows, *supra* note 48.

206. See Chivers, *supra* note 49.

Contemplating high-casualty scenarios, a future ban would incorporate a definition that also directly addresses a rifle's barrel twist. The twist of a firearm's barrel is measured by how many rotations the bullet makes per inch it travels.²⁰⁷ An effective assault weapons ban would address the twist of the rifle's barrel by requiring an increased, or faster, spin. Ironically, this would be an adjustment that would result in the weapon being *more* akin to military rifles.²⁰⁸ But an increased spin allows the bullet to maintain a steady path as it moves toward the target.²⁰⁹ The steadier the bullet, the less lethal the impact.²¹⁰ While a heavier weapon would likely be unpopular with gun enthusiasts, an increased spin would not only decrease the lethality of the rifle, but would also allow for a more precise shot,²¹¹ an advantage for hobbyists and competitive shooters.

Finally, if legislatures are to draft an effective assault weapons ban that takes into consideration the original design purpose of the weapon, the law should address the acceptable caliber size for ammunition. As explained above, the AR-15 was designed to accept .22 caliber bullets in contrast to its predecessor's .30 caliber.²¹² The .30 caliber ammunition traveled at a slower and steadier rate, a disadvantage to the military's mission to incorporate weapons with increased lethality that would reach a higher number of enemy targets.²¹³ For use by the general public, however, a slower and steadier rate would allow gun users more accuracy while simultaneously and reasonably restricting the weapon's lethal capabilities.²¹⁴ These proposed considerations would reflect a realistic distinction between firearms appropriate for legally permissible civilian use and those needed for true military combat environments.

207. McHale, *supra* note 180.

208. See Fallows, *supra* note 48.

209. *Id.*

210. *Id.*

211. *Id.* ("More twist made the bullet spin faster as it flew, and therefore made it hold a more stable path . . .").

212. See *supra* text accompanying note 189.

213. See *supra* note 190 and accompanying text.

214. See *supra* note 190 and accompanying text.

B. *The AR-15 as the Weapon of Choice for Mass Shooters*

In addition to the considerations above, a truly effective assault weapons ban should consider the weapon’s military-like physique and the reasons the weapon is so attractive to perpetrators of mass shootings. Drafting legislation that considers the design of the weapon alongside its purpose would force manufacturers to simplify the physiques of civilian firearms, creating a clear and recognizable distinction between rifles for military use and those appropriate for the public. To accomplish this, the named features included in the ‘94 Ban’s features test should not be eliminated from the statute, as they are the features by which military firearms are distinguished. Instead, the features should be included in a manner which would not make their inclusion dispositive in and of themselves. Therefore, for reasons illustrated within, a statutory definition of an assault weapon may also include a provision such as the following:

2. A semiautomatic rifle with a barrel length of at least 16 inches²¹⁵ with the ability to accept a detachable magazine; and
 - a. has a physical appearance identical or substantially similar to the standard issue military rifle, the M-4 carbine;²¹⁶ *and*
 - b. includes *any* of the following features:
 - i. a pistol grip protruding conspicuously beneath the action of the weapon;

215. An average AR-15 has a barrel length of 16 inches. See Tom McHale, *AR-15 Rifle Barrel Length – Does It Even Matter? Maybe Not*, AMMOLAND (Dec. 15, 2016), <https://www.ammoland.com/2016/12/ar-15-rifle-barrel-length/#axzz5kWzzxQHg>. This note suggests that any firearm with a barrel length of 16 inches or longer would resemble a standard issued military service rifle and would thus be subject to an assault weapons ban.

216. The M-4 carbine is the current standard issued military service rifle. See Daniel Brown, *Here Are All the Standard Issue Weapons Given to U.S. Marines*, BUS. INSIDER (June 4, 2018, 10:16 AM), <https://www.businessinsider.com/all-the-standard-issue-weapons-given-to-us-marines-2018-6>.

- ii. a thumbhole stock;
- iii. a folding or telescoping stock;
- iv. a grenade or flare launcher;
- v. a flash suppressor; or
- vi. a forward pistol grip.

If an assault weapons ban is to truly address the unique problem of mass shootings in America, a statutory definition of an assault weapon should be drafted with consideration of the fact AR-15 style rifles are the predominate weapons of choice for individuals who carry out mass shootings,²¹⁷ and the possible reasons for this phenomenon. As many of the individuals who have carried out these horrific acts ultimately take their own lives,²¹⁸ there remains a great deal of speculation as to the motives for the shootings as well as the reasons for the choice of weapon.

Notwithstanding this uncertainty, these shootings have identifiable patterns that may shed light on the reasons why so many mass shooters have chosen AR-15 rifles.²¹⁹ When Adam Lanza opened fire on elementary school students and teachers, he did so with an AR-15 rifle.²²⁰ When Stephen Paddock killed concert-goers in Las Vegas, he did so with an AR-15 rifle.²²¹ When Islamic State sympathizers shot down fourteen people in San Bernardino, California, they did so with AR-15 rifles.²²² When James Holmes attacked a movie theater in Aurora, Colorado, he did so with an AR-15 rifle.²²³ These are only a few

217. Chivers, *supra* note 49.

218. See, e.g., TREVOR ALSUP, LAS VEGAS METRO. POLICE DEP'T, PRELIMINARY INVESTIGATION REPORT: 1 OCTOBER / MASS CASUALTY SHOOTING, 49 (2018) [hereinafter LVMPD REPORT]; see also *Sandy Hook Report*, *supra* note 4, at 5.

219. Watkins et al., *supra* note 46 ("Indeed, the AR-15 is also inextricably linked to tragedy. Mass shootings are central to the gun's narrative, and its popularity.").

220. See Cummings & Jansen, *supra* note 14.

221. See LVMPD REPORT, *supra* note 221, at 45.

222. See Cummings & Jansen, *supra* note 14.

223. *Colorado Theater Shooting Fast Facts*, CNN (July 14, 2019, 2:01 PM ET), <https://www.cnn.com/2013/07/19/us/colorado-theater-shooting-fast-facts/index.html>.

notable, high-casualty shootings in the United States in which an AR-15 style rifle was involved.²²⁴ These shooters share many other similarities outside of a commonly owned firearm, however. As these tragic events have increased in frequency, criminal psychologists and investigators have been able to identify common characteristics that many of these shooters share.

First, many of these "lone wolf" shooters have exhibited a sense of resentment and frustration as a result of a perceived or actual exclusion from their social communities. Psychologist Dr. Allen Frances described the "mass murderer" as "an injustice collector who spends a great deal of time feeling resentful about real or imagined rejections and ruminating on past humiliations."²²⁵ Left feeling wronged by those around him, "he longs for power and revenge to obliterate what he cannot have."²²⁶ This grasping for power and revenge are sentiments that are easily reflected in the marketing and design of firearms. When the firearms industry began to experience a lag in sales, new marketing strategies emerged.²²⁷ The AR-15 and other semi-automatic rifles began to gain popularity in movies and television,²²⁸ sensationalizing the dominance and power that seems to accompany the characters who wield these weapons. The gun industry seized this opportunity to appeal to young men grasping for power. Hyper-masculine images have become commonplace among advertisements for AR-15 rifles.²²⁹ One ad for Bushmaster's AR-15 rifle, the same AR-15 used by

224. Other shootings involving an AR-15 style assault weapon include the 2016 Pulse Night Club, 2017 Sutherland Springs, Texas, and the 2019 Dayton, Ohio shootings. Matt Pearce, *Mass Shootings Are Getting Deadlier. And the Latest Ones All Have Something New in Common: The AR-15*, L.A. TIMES (Feb. 14, 2018, 6:00 PM), <https://www.latimes.com/nation/la-na-ar-15-story.html>; Cummings & Jansen, *supra* note 14.

225. Allen J. Frances, *The Mind of the Mass Murderer*, PSYCHOLOGY TODAY: SAVING NORMAL (May 30, 2014), <https://www.psychologytoday.com/us/blog/saving-normal/201405/the-mind-the-mass-murderer>.

226. *Id.*

227. See VIOLENCE POLICY CTR., *supra* note 38, at 10.

228. See *id.* at 29.

229. See Laura Stampler, *Sex, Safety, and Machismo: How Guns are Advertised in America*, BUS. INSIDER (Dec. 20, 2012, 3:28 PM), <https://www.businessinsider.com/heres-how-guns-are-advertised-in-america-2012-12>.

Adam Lanza in the Sandy Hook shooting, suggests that with the purchase of the rifle, a “man card” will be issued to the buyer.²³⁰ The ad went on to define a “man card”:

In a world of rapidly depleting testosterone, The Bushmaster Man Card declares and confirms that you are a Man’s Man, the last of a dying breed, *with all the rights and privileges duly afforded*. You carry it in your wallet, ready to show at a moment’s notice, *instantly ending the discussion for any who would doubt you*.²³¹

This ad directly exploits the lust for the “rights and privileges” that accompany a man of power. To the “injustice collector,” seeking revenge for “past humiliations,”²³² the power, influence, and masculinity they seek to hold over their peers seems attainable through the AR-15.

Additionally, many of these mass shooters share a common and longstanding fascination with violence and weapons.²³³ When SWAT teams and investigators were finally able to access Stephen Paddock’s Mandalay Bay Hotel suite in Las Vegas, in addition to Paddock himself, they recovered twenty-four firearms, fourteen of which were AR-15 rifles.²³⁴ Officers further recovered a combined twenty-five additional firearms from Paddock’s two Nevada residences, six of which were AR-15 rifles.²³⁵ In the days and weeks leading up to Nikolas Cruz’s massacre of seventeen high school students in Parkland, Florida, Cruz shared a number of photos on social media displaying his abundant gun collection.²³⁶ Similarly, Adam Lanza had a fascination with guns and frequently went target shooting with his

230. *Id.*

231. *Id.* (emphasis added).

232. Frances, *supra* note 225.

233. *Id.*

234. LVMPD REPORT, *supra* note 218, at 41–43.

235. *Id.* at 44–45.

236. Emily Shapiro, *Dissecting the Distinctive Profile of School Shooters: There’s Always a Trail of What They’re About to Do*, ABCNEWS (Feb. 22, 2018, 6:43 AM), <https://abcnews.go.com/US/dissecting-distinctive-profile-school-shooters-trail/story?id=53197511>.

mother.²³⁷ FBI documents released the year following the Sandy Hook massacre indicated that Lanza was “obsessed with firearms, death and mass shootings” and “meticulously documented hundreds of mass murders and killing sprees.”²³⁸ As the AR-15 is implicated in more and more instances of horrific violence, its appeal grows for those fascinated with such carnage.²³⁹ Its ability to reach a large number of victims in a short amount of time, combined with its explicit military physique, makes the AR-15—and rifles like it—a magnet for individuals intent on carrying out mass violence.²⁴⁰

For this reason, legislatures should consider the appearance of the weapon when drafting a legislative definition of an “assault weapon.” While it is true that the features included in current “features tests” and those included in the ‘94 Ban do not affect the mechanics of the rifle,²⁴¹ they do have an effect on the perceived power of the rifle in a market dominated by toxic masculinity.²⁴² When Congress debated the ‘94 Ban, John Magaw, then-director of the Bureau of Alcohol, Tobacco, and Firearms, argued that appearance matters, explaining “[t]hese weapons were intentionally designed to mirror military weapons and are used to intimidate their victims.”²⁴³ Even law-abiding gun enthusiasts recognized the effect of an AR-15 rifle’s intimidating appearance.²⁴⁴ Both proponents and opponents of the ‘94 Ban gave testimony directly addressing the intimidating appearance of the weapon.²⁴⁵ Phillip Murphy, a gun enthusiast and opponent of the legislation, “explained why that firearm’s

237. Dave Collins, *FBI Releases Documents on Newtown Shooting Investigation*, BOS. NEWS (Oct. 4, 2017), <https://www.boston.com/news/local-news/2017/10/24/fbi-releases-documents-on-newtown-shooting-investigation>.

238. *Id.*

239. Cummings & Jansen, *supra* note 14.

240. *See id.*

241. *See* discussion *supra* Section I.C.

242. Rostron, *supra* note 22, at 303.

243. *Id.* at 331.

244. *Id.* at 330.

245. *See id.* at 330–32 (providing a summary of testimony from multiple people addressing the appearance of the weapon).

appearance was an important consideration, saying that he 'brought a weapon so intimidating that I might preclude any aggressive action taken against me by its appearance alone."²⁴⁶ A statutory definition like the one proposed in this Note acknowledges the reality of our mass-shooting problem and would decrease the weapon's appeal for those fascinated with such violence.

C. Constitutionality

The Supreme Court's reluctance to review Second Amendment issues has left the landmark case of *District of Columbia v. Heller*²⁴⁷ as the guiding legal standard.²⁴⁸ *Heller* involved a challenge to a D.C. law prohibiting the possession and carry of handguns except at the issuance of a one-year license.²⁴⁹ The law further required gun owners to keep any legally owned firearm disassembled and fitted with a trigger lock while stored in one's home.²⁵⁰ The Court ultimately held that the law violated the Second Amendment,²⁵¹ solidifying for the first time in U.S. history that the Second Amendment protects an *individual* right to keep and bear arms, separate and apart from service with a militia.²⁵² This ruling was subsequently extended to the states via the Fourteenth Amendment in *McDonald v. City of Chicago*.²⁵³

While the *Heller* decision was certainly a very significant win for gun rights advocates, Justice Scalia's majority opinion did

246. *Id.* at 331.

247. 554 U.S. 570 (2008).

248. On December 2, 2019, the Supreme Court heard arguments on a Second Amendment challenge out of New York. Tucker Higgins, *Supreme Court Shows Little Appetite for Expanding Gun Rights in Arguments Over Repealed New York Regulation*, CNBC (Dec. 3, 2019 9:31 AM EST), <https://www.cnbc.com/2019/12/02/supreme-court-shows-little-appetite-for-expanding-gun-rights.html>. *New York State Rifle & Pistol Ass'n v. New York* is the first time the Supreme Court has heard a Second Amendment challenge since *Heller*. Amy Howe, *Justices to Review New York Gun Rights Case*, SCOTUSBLOG (Jan. 22, 2019, 12:28 PM), <https://www.scotusblog.com/2019/01/justices-to-review-new-york-gun-rights-case/>.

249. *Heller*, 554 U.S. at 574–76.

250. *Id.* at 575.

251. *Id.* at 635.

252. *Id.* at 593.

253. 561 U.S. 742, 750 (2010).

leave room for reasonable restrictions on gun ownership that would not conflict with the Second Amendment.²⁵⁴ The opinion's dicta sets out three important guidelines that lower courts have followed and that inform this Note's proposal. First, *Heller* makes clear that "the inherent right of self-defense" is central to the Second Amendment.²⁵⁵ The D.C. handgun ban at issue in *Heller* mandated the means by which a gun was to be stored in the home.²⁵⁶ In explaining the excessive imposition this requirement placed upon the *core* of an individual's Second Amendment right, Scalia wrote, "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' would fail constitutional muster."²⁵⁷

Second, *Heller* suggests that, because the "defense of hearth and home" is the Second Amendment's "core protection,"²⁵⁸ military-style weapons, or those akin to them, fall outside of the Second Amendment's protections.²⁵⁹ The opinion explains that the types of weapons protected by the Second Amendment are those "in common use at the time"²⁶⁰ and that such a limitation supports the prohibition of "dangerous and unusual weapons."²⁶¹ Most significantly, Scalia specifically named "M-16 rifles and the like" as a weapon "most useful in military service."²⁶² This dicta suggests that restrictions, regulations, and even outright bans of weapons "most useful in military service" would not violate the Second Amendment.²⁶³

254. S.M., *How a New Supreme Court Case Could Transform Gun Rights in America*, ECONOMIST (Jan. 30, 2019), <https://www.economist.com/democracy-in-america/2019/01/30/how-a-new-supreme-court-case-could-transform-gun-rights-in-america>.

255. *Heller*, 554 U.S. at 628.

256. *Id.*

257. *Id.* at 628–29 (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)).

258. *Id.* at 634–35.

259. *See id.*

260. *Id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

261. *Id.*

262. *Id.*

263. *Id.*

Third, *Heller* affirms Congress's authority to regulate the manufacture of guns for the commercial market.²⁶⁴ Such authority would conceivably permit legislators to require weight, rate of fire, and design standards for civilian firearms. Scalia made clear nothing in the Second Amendment mandates a completely unrestricted right and acknowledged Congress's authority to impose regulations like those proposed here:

[N]othing 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*.²⁶⁵

By implicitly acknowledging a need to balance the interests of safety against those of individual rights, Scalia carved out a Second Amendment jurisprudence that would support a "tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"²⁶⁶

While the Supreme Court has, until recently, been reluctant to revisit *Heller*'s standard, lower courts have been piecing through the opinion, giving the doctrine more shape. The Fourth Circuit, for example, recently upheld an assault weapons ban out of Maryland in *Kolbe v. Hogan*.²⁶⁷ In *Kolbe*, a Maryland citizen (supported by a number of conservative interest groups) challenged Maryland's Firearm Safety Act of 2013 ("FSA") on the grounds that the law was "facially unconstitutional" because "the assault weapons ban contravenes the Second Amendment," and "the prohibition against large-capacity magazines also violates the Second Amendment," along with

264. *Id.* at 626–27.

265. *Id.* (emphasis added).

266. *Id.* at 627.

267. 849 F.3d 114, 121 (4th Cir. 2017).

two other Fourteenth Amendment claims.²⁶⁸ In upholding the FSA, the court extracted a two-part approach from *Heller*.²⁶⁹

First, the Fourth Circuit crafted step one of the inquiry to ask “whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.”²⁷⁰ In answering this question, the Fourth Circuit focused on *Heller*’s dicta, suggesting the right to defense of “hearth and home” is the “core protection” of the Second Amendment, and because of this core protection certain weapons fall outside the scope of the Second Amendment.²⁷¹ *Kolbe*’s decision further focuses on how the *Heller* Court seemed to have “serious doubts that [assault-weapons and large capacity magazines] are commonly possessed for...self-defense in the home.”²⁷² In light of these doubts, the Fourth Circuit concluded that “[b]ecause the banned assault weapons and large-capacity magazines are ‘like’ ‘M-16 rifles’ — ‘weapons that are most useful in military service’ — they are among those arms that the Second Amendment does not shield.”²⁷³ As the two-part test is constructed, the court could end the inquiry here. However, the court indulges step two, *arguendo*.

Kolbe’s step two requires “apply[ing] an appropriate form of means-end scrutiny.”²⁷⁴ The court concluded that the FSA would be entitled to intermediate scrutiny because the law does not “severely burden the core protection of the Second Amendment.”²⁷⁵ In drawing this conclusion, and in light of *Heller*’s conclusion that the handgun is “the quintessential self-defense weapon,”²⁷⁶ the *Kolbe* court noted that the FSA still allows citizens to protect themselves with a “plethora of other firearms

268. *Id.* at 123.

269. *Id.* at 132.

270. *Id.* at 133 (quoting *U.S. v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010)).

271. *Id.* at 131 (quoting *Heller*, 554 U.S. at 634–35).

272. *Id.* at 134.

273. *Id.* at 135 (quoting *Heller*, 554 U.S. at 627).

274. *Id.* at 133 (quoting *Chester*, 628 F.3d at 680).

275. *Id.* at 138.

276. *Id.* at 132 (quoting *Heller*, 554 U.S. at 629).

and ammunition.”²⁷⁷ The court further pointed out that the record before it failed to establish the weapons subject to the FSA are used, or even appropriate, for self and home defense.²⁷⁸ In looking to see whether the FSA is “reasonably adapted to a substantial governmental interest,”²⁷⁹ the Fourth Circuit concluded Maryland’s interest in protecting the public and preventing mass shootings is not merely substantial, but “compelling.”²⁸⁰ Maryland stated the FSA’s purpose as: “to reduce the availability of assault long guns and large-capacity magazines so that when a criminal acts, he does so with a less dangerous weapon and less severe consequences.”²⁸¹ The Fourth Circuit ultimately determined that the FSA reflects “reasonable inferences based on substantial evidence”²⁸² and therefore upheld Maryland’s assault-weapons ban.

In light of *Heller* and the standard employed by the Fourth Circuit, the legislative and statutory recommendations this Note proposes would not violate the Second Amendment. As explained above, the design, function, and purpose of many semi-automatic rifles like the AR-15 directly contemplate use in warfare. The “inherent right of self-defense” that is “central to the Second Amendment”²⁸³ does not necessitate an unwieldy semi-automatic rifle, capable of mass carnage. As Scalia acknowledged in *Heller*, “the American people have considered the handgun to be the quintessential self-defense weapon.”²⁸⁴ To that extent, prohibiting the sale of certain firearms with military-like capabilities that are often used in mass shootings and provide no particular advantage in home defense²⁸⁵ would be

277. *Id.* at 138.

278. *Id.* at 138.

279. *Id.* at 139 (quoting *U.S. v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011)).

280. *Id.*

281. *Id.* at 140 (quoting Brief of Appellees at 42).

282. *Id.* (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994)).

283. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

284. *Id.* at 629.

285. See Justin Peters, *NRA Claims the AR-15 Is Useful for Hunting and Home Defense. Not Exactly*, SLATE (June 12, 2016, 11:05 AM), <https://slate.com/news-and-politics/2016/06/gun-control-ar-15-rifle-the-nra-claims-the-ar-15-rifle-is-for-hunting-and-home-defense-not-exactly.html>.

consistent with the standard set forth in *Heller*. Furthermore, the original purpose for the creation of the AR-15 indicates that it was never a weapon intended to be used by the general public, and therefore provides an opportunity for the Court to consider assault weapons as "dangerous and unusual."²⁸⁶

Certainly, the predominance and popularity of the AR-15 will pose a challenge to any consideration of the weapon as "unusual." The National Shooting Sports Foundation, an industry trade association, estimated 1.3 million AR-15 style rifles are sold each year.²⁸⁷ In this context, AR-15s can hardly be considered "unusual." To this extent, assault weapon bans like the one proposed here may face an uphill battle in the courts. *Heller* made clear that the Second Amendment was intended to protect firearms "in common use at the time."²⁸⁸ Courts have come to understand "common use" to account for the contemporary moment.²⁸⁹ Therefore, when considering the widespread popularity of the AR-15, these could reasonably be considered "in common use." But *Kolbe* addressed these concerns by stating that challenges to legislation such as Maryland's FSA merely require the answer to a simple dispositive question: "[a]re the banned assault weapons . . . 'like' 'M-16 rifles,' i.e., 'weapons that are most useful in military services,' and thus outside the ambit of the Second Amendment?"²⁹⁰ Some have criticized this formulation of *Heller* as an "artful attempt to side-step an analytical framework."²⁹¹ The "military usefulness test," however, allows courts to preclude any argument asserting that the widespread commercial circulation of a weapon in and of itself

286. *Heller*, 554 U.S. at 627.

287. Marc Fisher, *The AR-15: 'America's Rifle' or Illegitimate Killing Machine?*, WASH. POST (Feb. 15, 2018, 6:25 PM), https://www.washingtonpost.com/politics/the-ar-15-americas-rifle-or-illegitimate-killing-machine/2018/02/15/743e66ca-1266-11e8-9065-e55346f6de81_story.html?utm_term=.42e80630c927.

288. *Heller*, 554 U.S. at 627 (quoting *U.S. v. Miller*, 307 U.S. 174, 179 (1939)).

289. *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406, 415 (7th Cir. 2015) (Manion, J., dissenting) ("The 'common use' test . . . asks whether a particular weapon is commonly used by law-abiding citizens for lawful purposes.").

290. *Kolbe v. Hogan*, 849 F.3d 114, 136 (4th Cir. 2017) (quoting *Heller*, 554 U.S. at 627).

291. Philip Casey Grove, *Common Use Under Fire: Kolbe v. Hogan and the Urgent Need for Clarity in the Mass-Shooting Era*, 59 ARIZ. L. REV. 773, 796 (2017).

constitutes “common use” requiring protection under the Second Amendment.²⁹²

In light of *Kolbe*'s holding and *Heller*'s dicta, this Note urges legislators and courts to consider the AR-15's origins, see its mass proliferation as a result of reckless industry practices, and take particular note of the attraction the weapon draws from individuals who seek to commit mass murder. With these considerations, the AR-15 and weapons like it certainly have an “unusual” place in our society.

CONCLUSION

Within our representative democracy, we look to elected officials to address the most pressing concerns of society. Our country has faced decades of violence, threatening our sense of safety and security in the most valued of public spaces. This particular brand of violence is a unique and defining characteristic of the United States.²⁹³ The time to address the problem of mass shootings has presented itself time and again, and as the “mass shooting generation” comes of age, inaction will not be tolerated for much longer.²⁹⁴

In order to address this particular kind of violence, it must be looked at separate and apart from other instances of interpersonal violence. Legislators must look at the shortcomings of the previous federal assault weapons ban and acknowledge the deficiencies of the “features test” as it stands on its own. Firearms should be classified as “assault weapons” and consequently banned if they function in a way that reflects technology designed for military use. Rather than addressing *only* the military-like appearance of firearms, legislation should also account for technology that contributes to the lethality of the gun, including weight, barrel twist, and ammunition caliber.

292. *Id.* at 795 (“[T]he en banc *Kolbe* court attacked any conception of *common use* that would grant a dangerous weapon Second Amendment protection simply because that weapon was widely circulated throughout the United States.”).

293. See *BBC Chart*, *supra* note 176.

294. See Audra D. S. Burch et al., *A ‘Mass Shooting Generation’ Cries Out for Change*, N.Y. TIMES (Feb. 17, 2018), <https://www.nytimes.com/2018/02/16/us/columbine-mass-shootings.html>.

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Appearance should not be forgotten, of course. Legislators must force the firearms industry to recognize its contribution to the problem. Simplifying the designs of certain rifles may guide the industry toward new marketing strategies, ones which do not exploit "the worst instincts and urges of some."²⁹⁵ Letting this epidemic fade quietly out of conversation until the next school, church, or concert shooting is no longer sustainable. Every American citizen's right to life and liberty is put at risk when we continue to allow the existence of a society that prioritizes profit and fire power over human life. Should inaction, stagnation, and political bickering continue, the American people along with their representatives should always remember the words of the women overlooking the 113th Congress that April afternoon: shame on you.²⁹⁶

295. Rostron, *supra* note 22, at 329.

296. Barrett & Cohen, *supra* note 1.