2nd Amendment & *D.C. v. Heller*, 544 U.S. 570 (2008)

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Bill of Rights

- The 1st 10 amendments to the Constitution.
- Although the Constitution was written by 1787, it did not become effective until it was ratified in 1789.
- The Bill of Rights, however, did not become operational until 1791.
  - *See* https://www.archives.gov/founding-docs/constitution (accessed 11/3/18).

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2nd Amendment

- "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."
- Initially the 2nd Amendment was not thought to be applicable to the states!

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Art. I, §13, Virginia Constitution

- "That a well regulated militia, *composed of the body of the people*, trained to arms, is the proper, natural, and *safe defense of a free state*, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and in all cases the military should be under strict subordination to, and governed by, the civil power" (1776).
- www.law.lis.virgnia.gov/constitution/article1/section13/ (accessed 1/7/21).

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Art. I, §13, Virginia Constitution

- ". . . therefore, the right of the people to keep and bear arms shall not be infringed . . . ." was added in 1971 "to align the Virginia Constitution with an *individual rights* reading of the Second Amendment." 48 Univ. Rich. L. Rev. 215, 230-31 (2013).
- "[L]egislators questioning this change received assurances . . . that the added language would not impede the ability of the General Assembly to enact 'reasonable' legislation with regard to firearms . . . ." *Id.* at 231-32.

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Virginia House of Burgesses, 1757

- Militiamen required to purchase their own firearms and ammunition.
- Provisions made for those too poor to purchase arms and ammunition.
  - *For purposes of individual or collective defense?*

6

What Virginia Wanted in the U.S. Bill of Rights

- "That the people have a right to keep and bear arms: that a well regulated militia composed of the body of the people trained in arms, is the proper, natural and safe defence [*sic*] of a free State. . . . ." *Id.* at 227.

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VA. CODE ANN. § 44-1, Composition of Militia

- "The militia of the Commonwealth of Virginia shall consist of all able-bodied residents of the Commonwealth who are citizens of the United States . . . who are at least 16 years of age and . . . not more than 55 years of age. The militia shall be divided into three classes: the National Guard . . . ; the Virginia Defense Force; and the unorganized militia."
- *See, generally,* vdf.virginia.gov (accessed 1/22/21).

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Some Definitions

- Federal:
  - a system of government "formed by a compact between political units that surrender their individual sovereignty but retain residuary powers of government." *Merriam-Webster's Collegiate Dictionary,* 11th ed., 2005, p. 459.
- Republic:
  - "A government having a chief of state who is not a monarch and who in modern times is usually a president." *Id.* at 1058.
  - "A government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected officers and representatives responsible to them and governing according to law." *Id.*

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Federalist Papers

- "Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate [*i.e.,* state] governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition . . . ."
- "Notwithstanding the military establishments in the several kingdoms of Europe, . . . the governments are afraid to trust the people with arms."
- The Federalist, no. 46; James Madison.
  - http://avalon.law.yale.edu/subject_menus/fed.asp (accessed 11/3/18)

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U.S. History

- "Unlike the Irish and other subjugated peoples, the Americans were heavily armed. Not only were they nimble with firelocks, [which] were as common as kettles; they also deployed in robust militias experienced in combat against Europeans, Indians, and insurrectionist slaves."
  - *The British Are Coming[:] The War for America, Lexington to Princeton, 1775-1777;* Rick Atkinson; Henry Holt & Co.; NY, NY; 2019, p. 10.

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U.S. History Firelocks

- In the first quarter of the 14th century, the firelock was developed, a simple, smooth-bore tube of iron, closed at the breech end except for an opening called a touchhole, and set into a rounded piece of wood for holding under the arm. The tube was loaded with shot and powder and then fired by inserting a heated wire into the touchhole. Later models had a saucerlike depression, called a flashpan, in the barrel at the outer end of the touchhole; a small charge of powder was placed in the flashpan and fired by applying a so-called slow match.
  - Microsoft ® Encarta ® Reference Library 2005. © 1993-2004 Microsoft Corporation.

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Art. 1, § 8, U.S. Constitution

- "The Congress shall have Power to –
  - "provide for the common Defence [*sic*] . . ."
  - "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, *reserving to the States* respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." (Italics added).
- Note: Congress was not given the power to create a militia although it is authorized to "raise and support Armies." U.S. Const., Art. I, § 8.

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What is a "Militia?"

- "A body of citizens armed and trained, esp. by a state, for military service apart from the regular armed forces."
- "The Constitution recognizes a state's right to form a 'well-regulated militia' but also grants Congress the power to activate, organize, and govern a federal militia."
  - *Black's Law Dictionary,* 8th ed., Thompson West, 2004.

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U.S. v. Miller, 307 U.S. 174 (1939)

- Jack Miller and Frank Layton were charged with the interstate transportation of a sawed off shotgun.
- Defendants claimed the statute violated the 2nd Amendment and the District Court agreed.
- The Supreme Court reversed:
  - "In the absence of any evidence tending to show that the possession or use of a [sawed off shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." At 178.

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U.S. v. Miller, 307 U.S. 174 (1939) (cont'd)

- "Certainly it is not within judicial notice that this weapon [*i.e.,* the sawed off shotgun] is any part of the ordinary military equipment or that its use could contribute to the common defense." At 178.

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U.S. v. Miller, 307 U.S. 174 (1939) (cont'd)

- Debates during the Constitutional Convention, the history & legislation of the Colonies & the States, and commentators all -
  - "show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense."
  - "And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." At 179.

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U.S. v. Miller, 307 U.S. 174 (1939) (cont'd)

- "In all the colonies, as in England, the militia system was based on the principle of the assize in arms." At 179.
  - "The Assize of Arms of 1181 was a proclamation of King Henry II of England concerning the obligation of all freemen of England to possess and bear arms in the service of [the] king . . . ."
  - "The assize stipulated precisely the military equipment that each man should have according to his rank and wealth."
    - https://en.Wikipedia.org/wiki/Assize_of_Arms_of_1811 (accessed 11/5/18)
- "This implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defence [*sic*]."
  - At 179-180 quoting from *The American Colonies in the 17th Century*, Osgood, vol. I, ch. XIII.

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U.S. v. Miller, 307 U.S. 174 (1939) (cont'd)

- As an example, the Court noted a Massachusetts 1784 law providing for the organization and government of the State's militia:
  - "Every non-commissioned officer and private soldier of the said militia . . . being of sufficient ability . . . shall equip himself, and be constantly provided with a good fire arm." At 180.
- And a 1786 New York law:
  - Males who were State citizens or residents aged 16-44 were to be enrolled in the militia "and every Citizen so enrolled . . . shall, within three Months thereafter, provide himself, at his own expense, with a good Musket or Firelock . . . ." At. 181.

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U.S. v. Miller, 307 U.S. 174 (1939) (cont'd)

- And a 1785 Virginia law:
  - Free males between the ages of 18 – 50 "shall be inrolled [*sic*] or formed into companies" and each company is to have a "private muster . . . once in two months." This is because "the defense and safety of the commonwealth depend upon having its citizens properly armed and taught the knowledge of military duty."
  - "Every non-commissioned officer and private [shall be] armed, equipped, and accoutred [*sic*] . . . with a good, clean musket . . . ."
  - But if a soldier "is so poor that he cannot purchase the arms herein required, [the] court shall cause them to be purchased out of the money arising from delinquents." At 181-82.

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D.C. v. Heller, 544 U.S. 570 (2008) handguns

- What did D.C. law prohibit?
  - Generally forbade the possession of handguns and,
  - Lawfully owned firearms, with limited exception, had to be "unloaded and disassembled or bound by a trigger lock or similar device." At 575.
- Dick Heller, a D.C. special police officer, sought a registration certificate to keep a handgun off duty in his home but was denied whereupon he instituted a lawsuit in U.S. District Court.
- The U.S. District Court dismissed Heller's suit.
- The U.S. Court of Appeals for the D.C. Circuit reversed.

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D.C. v. Heller, 544 U.S. 570 (2008) handguns

- An opinion by Justice Scalia:
  - "The Constitution was written to be understood by the voters; its words and phrases were used in their *normal and ordinary meaning* as distinguished from technical meaning." At 576.
  - Such a meaning "excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." At 577.
  - The dissenters believe the 2nd Amendment *protects only* the *right to possess and carry a firearm in connection with militia service." Id.*
  - Heller reflects that the 2nd Amendment protects "*an individual right to possess a firearm unconnected with service in a militia and to use that arm for traditionally lawful purposes, such as self-defense within the home*." *Id.*

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D.C. v. Heller, 544 U.S. 570 (2008) handguns

- 2nd Amendment: "A well regulated Militia, being necessary to the security of a free State, **the right of the people** to keep and bear **Arms,** shall not be infringed."
- The Amendment "is naturally divided into two parts: its prefatory clause and its operative clause. The former [*i.e.*, the first] does not limit the latter grammatically, but rather announces a purpose." *Id.*
- The Constitution speaks of the "rights of the people" in the 1st, 2nd, 4th, and 9th Amendments and they all "unambiguously refer to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body" such as a militia. At 579.
- What are "arms" in the context of the 2nd Amendment?
  - "The Second Amendment extends . . . to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." At 582.

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D.C. v. Heller, 544 U.S. 570 (2008) handguns

- "The phrase 'keep arms' was not prevalent in the written documents of the founding period [but some of the examples] favor viewing the *right to 'keep Arms' as an individual right unconnected with militia service."* At 582.
- " 'Keep arms' was simply a common way of referring to possessing arms, for militiamen *and everyone else."* At 583.
- "Although [bear arms] implies that the *carrying of the weapon* is for the purpose of 'offensive or defensive action,' it in no way connotes participation in a structured military organization." At 584

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D.C. v. Heller, 544 U.S. 570 (2008) handguns

- "The Stuart Kings . . . suppress[ed] political dissidents, in part, by disarming their opponents." At 592.
- Thus, an important purpose of a Colony-level militia in the fledgling U.S. – as opposed to a standing army or a "select militia" – was seen as protection against tyranny such as that which could conceivably result from a federal/ "national" government should it become power hungry.
- Select militia: a militia loyal to the tyrants, such as those employed by the Stuart Kings Charles II and James II.
- "When the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." At 598.

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D.C. v. Heller, 544 U.S. 570 (2008) handguns

- Federalists – who supported adoption of the Constitution and who favored creation of a national government that wasn't anemic argued "that because Congress was given no power to abridge the ancient right of individuals to keep and bear arms, such a force [standing army or "select militia"] could never oppress the people." At 599.
- Even if only remotely possible, "the threat that the new Federal Government would destroy the citizens' militia by *taking away their arms* was the reason that right . . . was codified in a written Constitution [*i.e.*, in the 2nd Amendment]." *Id.*

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D.C. v. Heller, 544 U.S. 570 (2008) handguns

- After the Constitution was ratified in 1789 and up to 1820, nine states adopted 2nd Amendment analogues and four referred to the right of the people to "bear arms in defence [*sic*] of *themselves* and the State." At 602.
- The vast majority of "19th-century courts and commentators interpreted these state constitutional provisions to protect an *individual right* to use arms for *self-defense.*" At 603.
- This is "strong evidence that that is how the founding generation conceived of the right." *Id.*

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D.C. v. Heller, 544 U.S. 570 (2008) handguns

- And every late 19th century legal scholar the Supreme Court considered "interpreted the Second Amendment to secure an *individual* right *unconnected with militia service."* At 616.
- One commentator even wrote in 1891 that it was not even "necessary that the right to bear arms should be granted in the Constitution, for it had always existed." At 619.

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D.C. v. Heller, 544 U.S. 570 (2008) handguns

- "The Second Amendment ***protects only*** 'the sorts of weapons' that are (1) 'in common use' and
- (2) 'typically possessed by law-abiding citizens for lawful purposes."
  - *N.Y. State Rifle & Pistol Assn., Inc. v. Cuomo*, 804 F.3d 242, 254-55 (2d Cir. 2015), *quoting D.C. v. Heller,* 544 U.S. 570, 625 & 627 (2008).
- Thus, "the right secured by the Second Amendment is not unlimited." *Heller*, at 626.
- "The right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.*

29

D.C. v. Heller, 544 U.S. 570 (2008) 2nd Amendment - Acceptable Prohibitions

- "Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by **felons** and the **mentally ill**, or laws forbidding the carrying of firearms in *sensitive places* such as **schools** and **government buildings."** *Id.*
- Another limitation on the right to keep and carry arms is the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" At 627.

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D.C. v. Heller, 544 U.S. 570 (2008)
Problems with the DC Law

- 1) It bans the handgun, *i.e.*, an "entire class" of arms "overwhelmingly chosen by American society" for the lawful purpose of self-defense. At 628.
- 2) The ban extends to the home "where the need for defense of self, family, and property is most acute." *Id.*
- 3) Firearms in the home have to be kept inoperable. At 630.
  - *"This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." Id.*

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D.C. v. Heller, 544 U.S. 570 (2008)
DC Law Unconstitutional

- CONCLUSION: "We hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." At 635.
- JUSTICE STEVENS' DISSENT: "There is *no indication* that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution." At 637

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D.C. v. Heller, 544 U.S. 570 (2008)
Justice Stevens' Dissent (cont'd)

- "The Second Amendment's omission of any statement of purpose related to the right to use firearms for hunting or personal self-defense, is especially striking in light of the fact that the Declaration of Rights of Pennsylvania and Vermont *did* expressly protect such civilian uses at the time." At 642.
- "The contrast between those two declarations and the Second Amendment . . . confirms that the Framers' single-minded focus in crafting the constitutional guarantee 'to keep and bear arms' was on military uses of firearms, which they viewed in the context of service in state militias." At 643.
- "As used in the Second Amendment, the words 'the people' do not enlarge the right to keep and bear arms to encompass use or ownership of weapons outside the context of service in a well-regulated militia." At 646.

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D.C. v. Heller, 544 U.S. 570 (2008) Justice Stevens' Dissent (cont'd)

- "The *absence of any reference to civilian uses of weapons* tailors the text of the Amendment to the purpose identified in its preamble." At 647-48.
- "The Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia." At 651.
- The majority's "emphatic reliance on the claim 'that the Second Amendment . . . codified a *pre-existing* right,' is of course beside the point because the right to keep and bear arms for service in a state militia was also a preexisting right." At 652 (original italics).
- James Madison was the principal author of the 2nd Amendment. "It is clear that he rejected formulations [such as Pennsylvania's] that would have unambiguously protected civilian uses of firearms." At 660.
  - Pennsylvania: "That the people have a right to bear arms *for the defense of themselves* and their own state . . . ." At 659.

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D.C. v. Heller, 544 U.S. 570 (2008) Justice Stevens' Dissent (cont'd)

- The framers of the Constitution had "an *overriding concern* about the potential threat to state sovereignty that a federal **standing army** would pose, and a desire to *protect the States' militias* as the means by which to guard against that danger." At 661.
- "But state militias could not effectively check the prospect of a federal standing army so long as Congress retained the power to disarm them and *so a guarantee against such disarmament [i.e.,* 2nd Amendment*] was needed." Id.*

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Friedman v. City of Highland Park, 784 F.3d 406 (7th Cir.), *cert. denied,* 136 S. Ct. 447 (2015)

- 2013 city ordinance prohibited possession of *assault weapons* and *large capacity* magazines (> 10 rounds).
- *Assault weapon*:
  - Any semi-automatic gun that can accept a large capacity magazine + **one** of 5 other features:
    - 1) pistol grip without a stock;
    - 2) folding, telescoping, or thumbhole stock;
    - 3) a grip for the non-trigger hand;
    - 4) a barrel shroud; or
    - 5) a muzzle brake or compensator.
  - Some of the weapons were listed by name, *e.g.,* AR-15.

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Friedman v. City of Highland Park, 784 F.3d 406 (7th Cir.), *cert. denied,* 236 S. Ct. 447 (2015) (cont'd)

- What's a *muzzle brake* or *compensator?*
  - "A muzzle brake or recoil compensator is a muzzle device connected to the muzzle of a firearm . . . that redirects propellant gases to counter recoil and unwanted rising of the barrel."
    - https://en.Wikipedia.org/wiki/Muzzle_brake (accessed 11/5/18)
- What's a *barrel shroud?*
  - "A *barrel shroud* is a covering attached to the barrel of a firearm that partially or completely encircles the barrel, which prevents operators from injuring themselves on a hot barrel."
    - https://en.wikipedia.org/wiki/Barrel_shroud (accessed 11/5/18)

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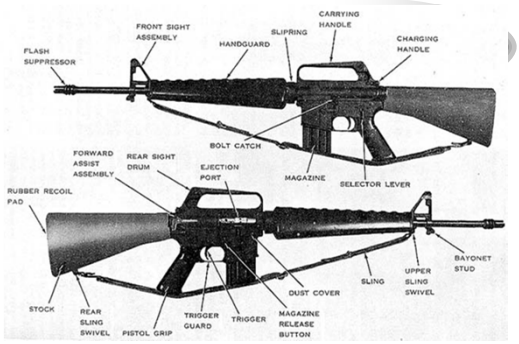
M-16



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Friedman v. City of Highland Park, 784 F.3d 406 (7th Cir.), *cert. denied,* 236 S. Ct. 447 (2015) (cont'd)

- Arie Friedman & the Illinois State Rifle Assn., citing *D.C. v. Heller,* sued claiming that the ordinance ran afoul of the 2nd Amendment but U.S. District Court refused to enjoin enforcement of the ordinance.
- *Heller* "cautioned against interpreting [it] to cast doubt on the 'longstanding prohibitions,' including the 'historical tradition of prohibiting the carrying **of 'dangerous and unusual weapons.'"** At 407-08.
- "Military-grade weapons (the sort that would be in a militia's armory), such as machine guns, and weapons especially attractive to criminals . . . are not [protected by the 2nd Amendment]." At 408.

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Friedman v. City of Highland Park, 784 F.3d 406 (7th Cir.), *cert. denied,* 236 S. Ct. 447 (2015) (cont'd)

- "The Second Amendment 'does not imperil every law regulating firearms.'" At 410.
- "Some categorical limits on the kinds of weapons that can be possess are proper, and . . . they need not mirror restrictions that were on the books in 1791." *Id.*
- "Unlike the District of Columbia's ban on handguns, Highland Park's ordinance leaves residents with many self-defense options." At 411.
- "A ban on assault weapons and large-capacity magazines might not prevent shootings in Highland Park . . . but it may reduce the carnage if a mass shooting occurs." *Id.*

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Friedman v. City of Highland Park, 784 F.3d 406 (7th Cir.), *cert. denied,* 236 S. Ct. 447 (2015) (cont'd)

- Holding: U.S. District Court ruling refusing to enjoin enforcement of the ordinance is affirmed.

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N.Y. State Rifle & Pistol Assn., Inc., et al. v. Cuomo, 804 F.3d 242 (2d Cir. 2015)

- After the 2012 Sandy Hook Elementary School mass shooting in Newtown, CT, NY and CT legislatures enacted legislation prohibiting assault weapons and large capacity magazines.
- Neither statute sunset as had the Federal assault weapon ban in 2004.
- Plaintiffs sued claiming that the laws ran afoul of the 2nd Amendment but were denied relief at the U.S. District Court level and appealed to the U.S. Court of Appeals for the 2d Circuit.

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N.Y. State Rifle & Pistol Assn., Inc., et al. v. Cuomo, 804 F.3d 242 (2d Cir. 2015)

- 2013 NY Statute: outlawed the possession, manufacture, transport, or disposal of an *assault weapon* which was defined as a firearm with any one of the following:
  - telescoping stock;
  - conspicuously protruding pistol grip;
  - thumbhole stock;
  - bayonet mount;
  - flash suppressor;
  - barrel shroud; or
  - grenade launcher.
- It also outlawed magazines that can hold > 10 rounds.

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N.Y. State Rifle & Pistol Assn., Inc., et al. v. Cuomo, 804 F.3d 242 (2d Cir. 2015)

- 2013 CT Statute: outlawed the transportation, importation, sale or possession of a semiautomatic *assault weapon* which was defined as a firearm with features similar to those enumerated in the NY Statute and including:
  - telescoping stock;
  - thumbhole stock;
  - forward pistol grip;
  - flash suppressor;
  - grenade launcher;
  - threaded barrel capable of accepting flash suppressor or a silencer.
- It also outlawed 183 specifically named firearms by make and model as well as their copies/duplicates.
- Magazines capable of holding > 10 rounds were also outlawed.

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N.Y. State Rifle & Pistol Assn., Inc., et al. v. Cuomo, 804 F.3d 242 (2d Cir. 2015)

- *"Heller* . . . endorsed the 'historical tradition of prohibiting the carrying of *dangerous and unusual weapons.'"* At 253.
- "The assault weapons and large-capacity magazines at issue are in *'common use'* as that term was used in *Heller.* At 255.
- However, "the prohibition . . . does not effectively disarm individuals or substantially affect their ability to defend themselves." At 260.
- The "net effect of these military combat features is a capability for lethality – more wounds, more serious, in more victims – far beyond that of other firearms in general, including other semiautomatic guns." At 262.

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N.Y. State Rifle & Pistol Assn., Inc., et al. v. Cuomo, 804 F.3d 242 (2d Cir. 2015)

- "We therefore conclude that [NY and CT] have adequately established a substantial relationship between the prohibition of both semiautomatic assault weapons and large-capacity magazines and the important – indeed, compelling – state interest in controlling crime," At 264.
- HELD: "The core prohibitions . . . *DO NOT* violate the Second Amendment." At 269.

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Wilson v. Cook County No. 17CV7002 (N.D. Ill. Aug. 3, 2018)

- Cook County enacted legislation that effectively banned assault weapons within its borders.
- Matthew Wilson & Troy Edhlund sued claiming the ban infringed upon their 2nd Amendment rights.
- "Because . . . the types of weapons individuals have at home for militia use might change over time, it would be circular to consider how common a weapon is at the time of a lawsuit in deciding the constitutionality of a ban on that weapon." At 4.
- "Instead, the relevant questions are : (1) whether a regulation bans weapons that were common at the time of ratification or if it bans weapons that have 'some reasonable relationship to the preservation or efficiency of a well regulated militia,' and (2) whether law-abiding citizens maintain adequate means of self-defense."

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Wilson v. Cook County No. 17CV7002 (N.D. Ill. Aug. 3, 2018)

- Since the 7th Circuit in ***Friedman*** has already "rejected the argument that the Second Amendment conferred a right to own assault weapons," the motion to dismiss the lawsuit is ***granted***.

48

What about machineguns?

- 18 U.S.C. § 922(o)(1): With two exceptions, "it shall be unlawful for any person to transfer or possess a machinegun."
- 18 U.S.C. § 924(a)(2): "Whoever knowingly violates subsection . . . (o) of section 922 shall be fined . . . Imprisoned not more than 10 years, or both.
- *What's a machinegun?*
  - 26 U.S.C. § 5845(b): "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger . . . ."

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What about bump stocks & machineguns?

- 27 C.F.R. § 479.11:
  - "The term 'machine gun' includes a bump-stock-type device, i.e., a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without any additional physical manipulation of the trigger by the shooter."
  - *Gun Owners of America, Inc. v. Garland*, No. 19-1298 (6th Cir. Mar. 25, 2021). "[W]e hold that a bump stock cannot be classified as a machine gun because a bump stock does not enable a semiautomatic firearm to fire more than one shot each time the trigger is pulled." At 37.

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What about machineguns?

- *Hollis v. Lynch,* 121 F.Supp.3d 617 (N.D. Texas 2015).
  - Jay Hollis brought suit challenging the Federal ban on the transfer and possession of machine guns asserting that, among other things, it violated the 2nd Amendment.
  - "At least *twenty-one states* have enacted restrictions on the possession, acquisition, and sale of machine guns." At 635.
  - The Supreme Court's holding in *Miller*, read in conjunction with the Court's discussion of *Miller* and M-16 rifles in *Heller,* establishes that *possessing a machine gun . . . does not fall within the scope of the Second Amendment."* At 637.
  - ***"Every federal circuit that has addressed the issue has held that there is no Second Amendment right to possess a machine gun."*** At 638.

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N.Y. State Rifle & Pistol Assn., Inc. v. City of N.Y., 883 F.3d 45 (2d Cir. 2018), *cert. granted,* (U.S. Jan. 22, 2019)(No. 18-280)

- NYC had a rule that a handgun premises licensee can only transport the weapon to and from authorized small arms ranges/shooting clubs in NYC and during transport: unloaded, in a locked container, ammunition to be carried separately.
- 7 such facilities in NYC including at least one in each of NYC's 5 boroughs.
- Plaintiffs wanted to transport to such facilities outside NYC plus one plaintiff wanted to transport to a second home outside NYC.
- Plaintiffs argued that NYC restrictions violated 2d Amendment but lost before S.D.N.Y.
- *Held:* the NYC restrictions "impose at most trivial limitations on the ability of law abiding citizens to possess and use firearms for self-defense . . . and does nothing to limit their lawful use of those weapons 'in defense of hearth and home' – the core protections of the Second Amendment, *Heller."* At 57.

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N.Y. State Rifle & Pistol Assn., Inc. v. City of N.Y., 883 F.3d 45 (2d Cir. 2018), *cert. granted,* (U.S. Jan. 22, 2019)(No. 18-280)

- As for the plaintiff who wanted to transport his weapon to his 2d NY home, nothing stops him from obtaining a handgun for that home.
- There is no substantial burden on his 2d Amendment right if an adequate alternative remains – such as buying a handgun for the 2d premises. At 57.
- 2d Circuit observed, however, that "restrictions that limit the ability of firearms owners to acquire and maintain proficiency in the use of their weapons can rise to a level that significantly burdens core Second Amendment protections." At 58.
- *But* plaintiffs "do not allege that the [NYC rules] impose any undue burden, expense, or difficulty that impedes their ability to possess a handgun for self-protection, or even their ability to engage in sufficient practice . . . ." At 59.

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N.Y. State Rifle & Pistol Assn., Inc. v. City of N.Y., 883 F.3d 45 (2d Cir. 2018), *cert. granted,* (U.S. Jan. 22, 2019)(No. 18-280)

- Further, plaintiffs *can* practice outside NYC since they can rent or borrow weapons at such locations.
- *Held:* U.S. District Court opinion is affirmed.
- *After cert. granted NYC changed its rule so that weapons could be transported to a second home or shooting range outside the city – the exact relief the plaintiffs wanted.*
- April 27, 2020: Supreme court decides that plaintiffs' claim was *moot.*

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2nd Amendment &
Duncan v. Becerra, 970 F.3d 1133 (2020)

- Calif. code banned large-capacity magazines (LCMs) holding > 10 rounds.
- This "near-categorical ban of LCMs strikes at the core of the Second Amendment – the right to armed self-defense." At 1140.
- "[H]alf of all magazines in America are now unlawful to own in California." *Id.*
- *Heller* "recognized that certain exceptions to the Second Amendment apply [such as] weapons that are 'dangerous and unusual[."] *Id.* at 1145.
- Magazines = "arms" under the 2nd Amendment because they are necessary to render firearms operable. *Id.* at 1146.
- "[A] regulation cannot permissibly ban a protected firearm's components critical to its operation." *Id.*

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2nd Amendment &
Duncan v. Becerra, 970 F.3d 1133 (2020)

- "*Heller* provides that some arms are so dangerous and unusual that they are not afforded Second Amendment protection." *Id.*
- "The record shows that firearms capable of holding more than ten rounds of ammunition have been available in the United States for well over two centuries." *Id.* at 1149. Hence, LCMs are not "unusual."
- "[W]here a 'weapon belongs to a class of arms commonly used for lawful purposes,' 'the relative dangerousness of a weapon is irrelevant." *Id.* at 1147 (citing *Heller*, 554 U.S. at 627).
- "[W]e conclude that LCMs are in fact both commonly owned and typically possessed for lawful purposes." *Id.* 1176, n.8. *But . . . .*
- *Petition for en banc filed* (Aug. 28, 2020)(No. 19-55376).

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2nd Amendment &
Young v. Hawaii, No. 12-17808 (9th Cir. Mar. 24, 2021)(en banc)

- **No** 2nd Amendment right to open carry!
  - Previous 9th Cir. case held **no** 2nd Amendment right to concealed carry, *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016)(en banc).

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2nd Amendment

The End

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